asae & the center for association leadership

present

Proactive Strategies for Minimizing HR and Other Legal Risks in Mergers and Joint Ventures

May 6, 2010
11:45 a.m.

Content Leaders:

Jeff Tenenbaum, Partner, Venable LLP
David Warner, Partner, Venable LLP

2010 Finance & Business Operations Symposium
Washington, DC

VENABLE LLP
575 7th Street, NW
Washington, DC 20004-1601
Telephone 202-344-4000
Facsimile 202-344-8300
www.venable.com

WHITE PAPER

COMBINATIONS AND ALLIANCES AMONG NONPROFIT ASSOCIATIONS

JANUARY 2010

I. <u>Merger and Consolidation</u>

A. General

Nonprofit corporations may integrate their programs, functions, and membership by merging or consolidating. When two nonprofit entities *merge*, one entity legally becomes part of the surviving entity and dissolves. The surviving corporation takes title to all of the assets, and assumes all of the liabilities, of the non-surviving entity.

Unlike a merger, a *consolidation* of nonprofit entities involves the dissolution of each of the organizations involved, and the creation of an entirely new nonprofit corporation that takes on the programs, resources and membership of the former entities. Although the net effect of a merger and consolidation are the same – one surviving entity with all the assets and liabilities of the two previous groups – many associations prefer consolidation over merger because it tends to lend the perception that no organization has an advantage over the other. There is a new corporation which houses the activities of the two and each is dissolved pursuant to the consolidation.

B. Benefits of Merger or Consolidation

Merger or consolidation of entities with similar exempt purposes may offer a number of benefits to the participating organizations and their members. By merging or consolidating, associations may combine their assets, reduce costs by eliminating redundant administrative processes, and provide broader services and resources to their members. Furthermore, members who paid dues and fees to participate in the formerly separate associations are often able to reduce their membership dues and the costs and time demands of association participation by joining a single, combined organization. Finally, merger or consolidation may allow associations participating within the same field or industry to offer a wider array of educational programming, publications, advocacy and other services to a larger constituency in the public arena.

C. The Divisional Approach

The fact that two organizations have become a unified legal entity does not prohibit them from continuing with some measure of autonomy within the new corporation. Councils or divisions could be established to promote and protect the unique interests of the industry sub-sets. A prominent example of this organizational structure is the American Forest & Paper Association which has a separate Wood Products Council and other councils that represent pulp and paper and other interests. Under this approach, the Articles or Bylaws can cede certain distinct areas of authority to these subordinate bodies. Balancing these levels of authority, finances and management can be challenging, but the model is frequently used.

D. Other Considerations

The law imposes stringent fiduciary responsibilities on the members of an organization's governing body to ensure that any merger or consolidation is warranted and in the best interests of the organization. Directors and officers may be held personally and individually liable if they fail to act prudently and with due diligence. Due diligence generally requires an organization's governing body to ascertain the financial and legal condition of the organization with which the entity will be merged or consolidated. This includes examination of the other entity's books and records, governing documents, meeting minutes, pending claims, employment practices, contracts, leases, and insurance policies, and investigation into potentially significant financial obligations, such as the funding of retirement programs, binding commitments to suppliers, and the security of investment vehicles. Boards of directors often utilize accountants and attorneys to conduct due diligence reviews. The opinions of such experts may be relied upon when evaluating a plan of merger, provided that the board of directors establishes a full and accurate financial and legal profile of the other organization before approving the merger or consolidation.

In addition to conducting routine due diligence reviews, an organization's board of directors should have legal counsel review the impact of a proposed merger or consolidation on competition within the industry. Federal antitrust laws prohibit mergers or consolidations that may substantially lessen competition in any line of commerce. The Department of Justice and the Federal Trade Commission may scrutinize any transaction that could lead to price fixing, bid rigging, customer allocation, boycotts, or other anticompetitive practices. That said, mergers and consolidations of nonprofit organizations typically do not pose an anticompetitive threat. If it can be shown that the joining of the two organizations will actually promote competition, there will be very little antitrust risk overall.

As described in more detail below, merger and consolidation are complex processes, which require the approval of the boards of directors and membership, if any, of each organization. As a practical matter, it can be difficult to combine and coordinate the governing bodies, staffs and operations of two or more existing organizations. Additionally, the institutional loyalties of members, officers, and professional staffs often come into play, particularly when the organizations considering merger or consolidation are unequal in size and resources.

E. Procedural Requirements

To merge or consolidate with another organization, each organization must follow the procedures mandated under the nonprofit corporation law of its state of incorporation, as well as any specific procedures in its governing documents, provided such procedures are consistent with the nonprofit corporation statute.

While nonprofit corporation statutes differ by state, the laws governing merger and consolidation of nonprofits typically set forth certain core procedures. The board of directors of each precursor organization must develop and approve a plan of merger or consolidation according to the requirements set forth in the nonprofit corporation statute of the state, or states, where the organizations are incorporated. Typically, the details of the deal between the two organizations are set forth in a "Merger Agreement" that is not required to be filed. This document usually covers items such as integration of the staff and voluntary leadership, corporate governance changes, and programmatic consolidation. It often is quite detailed.

The plan of merger or consolidation also must be submitted to the voting members, if any, of each organization for their approval. While the conditions for member approval vary from state to state, statutes generally require a vote of two-thirds to effectuate the plan merger or consolidation —a number that can be difficult to reach for practical and political reasons. Assuming the members of *both* organizations approve the board's plan, "articles of merger" must be filed in the state where the new entity will be formally incorporated.

Where merging nonprofits are each tax-exempt under different tax classifications (*e.g.*, a 501(c)(3) and a 501(c)(6)), the resulting merged entity will generally need to file a new application for federal tax exemption with the Internal Revenue Service ("IRS"). Likewise, a new, consolidated entity must apply to the IRS for recognition of tax-exempt status. On the other hand, where merging entities share the same tax-exempt classification, the tax-exempt status of the surviving organization is typically not affected. Instead, following the merger, all parties to the transaction must notify the IRS of the merger and provide supporting legal documentation. If the newly merged entity will carry out substantially the same activities as its predecessors, the IRS will typically grant expedited approval on a *pro forma* basis and there will be no lapse in the tax-exempt status.

II. <u>Acquisition of a Dissolving Corporation's Assets</u>

A. General

Another legal mechanism for "absorption" is the *dissolution and distribution of assets* of a target association. This statutory procedure generally involves the adoption of a plan of dissolution and distribution of assets, satisfaction of outstanding liabilities, transfer of any remaining assets to another nonprofit entity, and dissolution. Where the dissolving nonprofit is exempt under Code Section 501(c)(3), the Treasury Regulations require the organization to distribute its assets for one or more exempt purposes under Code Section 501(c)(3).[1]

[1] *See* Treas. Reg. 1.501(c)(3)-1(a)(2). Thus, for example, if an entity were to acquire the assets of a dissolving Code Section 501(c)(3) organization, it would have to dedicate such assets exclusively for Code Section 501(c)(3) purposes.

B. Benefits and Other Considerations

While the dissolving entity must adhere to specific statutory procedures, a dissolution and transfer of assets is much less onerous on the entity that acquires the dissolving entity's assets (the "successor" entity) than a merger or consolidation. Because the successor entity is merely absorbing the assets of another organization, a vote of the membership and accompanying state filings are typically not required for that corporation. Furthermore, receipt of a dissolving nonprofit corporation's assets typically does not affect an organization's tax-exempt status. However, just as with merger or consolidation, a tax-exempt organization must be cautious when taking on programs or activities to ensure that they support its stated tax-exempt purposes.

Asset transfer and dissolution may be strategically preferable for combining organizations when one organization is of a much smaller size than the other. In addition, this type of transaction is particularly useful when an organization wishes to acquire the assets of another organization with significant future contingent liabilities, because the successor organization does not, by operation of law, assume the liabilities of the dissolving corporation. Further, the successor organization may seek to limit the liabilities it will assume in a written agreement, as discussed below.

While a successor organization is typically shielded from its predecessor's debts and liabilities, an asset transfer always poses some risk of *successor liability*, particularly if adequate provision has not been made for pre-existing liabilities. A court may determine that an organization that acquired the assets of a dissolved corporation impliedly agreed to assume the dissolved corporation's liabilities. Alternatively, a court may find that the successor corporation serves as a "mere continuation" of the dissolved corporation, that the asset transfer amounts to a *de facto* merger, or that the transaction was actually a fraudulent attempt to escape liability. It is also often problematic to extinguish liabilities, such as employee benefit programs, rather than assuming them.

C. Procedural Requirements

Like a merger or consolidation, an asset transfer and dissolution must follow the applicable state nonprofit corporation laws and each entity's governing documents. The procedure for dissolution and asset distribution is fairly simple for the successor entity, as it will simply be entering into a transaction—albeit a significant one—to acquire assets and absorb members, if any. Member approval for such a transaction is typically unnecessary unless the organization's bylaws require otherwise. The due diligence requirements imposed on the successor entity are also less stringent. Nevertheless, the governing body of the successor corporation should conduct a due diligence review of the dissolving corporation as a matter of course, particularly if the acquisition of the dissolving organization's assets will significantly alter the nature of the successor organization's operations.

The process is more complicated, however, for the dissolving entity. In most instances, the nonprofit corporation statute of the dissolving entity's state of incorporation imposes the following requirements to effectuate a transfer and dissolution:

- The governing body of the dissolving corporation is obligated to exercise the same level of due diligence as in a proposed merger or consolidation, as discussed above.

- After the governing body of the dissolving corporation has determined that dissolution and transfer of its assets are in the best interests of the organization, it must develop and approve a "plan of dissolution" (or "plan of distribution" according to some states). The number of directors that must vote to accept the plan varies by state.

- If the dissolving corporation has members, it must obtain member approval of the dissolution plan. Again, the requisite margin of member approval varies from state to state; most states require a two-thirds majority.

- The dissolving corporation must file "articles of dissolution" with the state in which it is incorporated. States typically accept articles of dissolution only after all remaining debts and liabilities of the dissolving entity are satisfied or provisions for satisfying such debts have been made.

- As part of the plan of dissolution, the dissolving corporation will transfer all of its remaining assets to a designated corporation.

- Once the plan of dissolution is executed, the dissolving entity is generally prohibited from carrying on any further business activity, except as is necessary to wind up its affairs or respond to civil, criminal, or administrative investigation.

As part of the asset distribution process, the parties typically execute a written agreement detailing their understanding of the transfer of the dissolving corporation's assets. The parties may utilize such an agreement where they wish to obtain warranties regarding the absence of liabilities to be assumed by the successor corporation; account for any outstanding contractual obligations of the dissolving entity; provide for third-party consents where necessary to transfer any contractual obligations to the successor organization; or detail terms for the integration of the dissolving entity's members. Note that in the event of any breach of warranties by the dissolving corporation, it generally will not be possible for the successor corporation to obtain redress unless the agreement specifically obligates some third party to indemnify the successor corporation, as the dissolving corporation will not longer exist.

III. Federation

A. General

A federation is generally an association of associations. Federations are most often structured along regional lines (*e.g.*, a national association whose members are state or local associations). In some cases, a federation consists of special interest groups that represent discrete segments of the industry represented by the" umbrella" association. The national or umbrella association's relationship with its affiliated associations is governed by formal affiliation agreements.

An affiliation agreement is a binding contract that sets forth the nature of the relationship between the parties. Most affiliation agreements include provisions that address the following: term and termination of the relationship; use of the association's intellectual property; the provision of management services; treatment of confidential information; coordinated activities; and tax and/or financial issues, among other provisions. Where an affiliated association fails to adhere to the terms of its affiliation agreement with the national association, the affiliate could lose privileges (*e.g.,* loss of ability to use the association's intellectual property), become disaffiliated, or suffer some other penalty. Similarly, where a national association violates the terms of an affiliation agreement with its affiliate, it may be liable for such breach.

B. Benefits and Other Considerations

In the federation context, the national association is, for tax and liability purposes, a separate legal entity from its affiliated associations. There are instances, however, in which the separateness between two entities (even though each entity may have separate corporate and tax statuses) will be disregarded by a court or the IRS, thus creating exposure to potential legal and tax liability to both entities. Specifically, the separateness can be disregarded where the national association so controls the affairs of its affiliates, rendering it a "merely an instrumentality" of the national association.

There are two primary areas of concern for national associations that are governed by a federated structure. First and foremost, because the national association is primarily (if not completely) comprised of other associations, the income and membership of the national is generally controlled by its affiliates. Without control over these two vital areas, the national association could be susceptible to secession by an affiliate (resulting in attendant loss of income), or have its power and authority undermined by an affiliate. Second, the federated structure could cause legal or policy problems if factionalism among affiliated associations arose. Additionally, the federated structure lends itself to diluted membership loyalty toward the national association.

C. Procedural Requirements

Preliminarily, all steps must be taken to form the national association in accordance with applicable state nonprofit corporation (or association) laws. Generally, this requires a minimum of filing articles of incorporation, selecting an initial board of directors, and developing bylaws for the association. Once the association is formed, it must apply to the IRS for recognition of tax-exempt status.

After formation, the national association must execute detailed affiliation agreements with each of its affiliated associations. There are generally no statutory requirements mandating the exercise of due diligence by any entity that chooses to enter into an affiliation agreement. Rather, the relationship is generally governed by the terms of the affiliation agreement and the general principles of contract law.

IV. Management Company Model

Associations with similar interests can affiliate through a common management structure, whereby the groups would realize the efficiencies of coordinated "back office" operations such as accounting, meeting management, IT, human resources and other supportive functions, possibly through the ownership of the non-profits by a for-profit umbrella organization. Although there are mechanisms that could be used to effect the coordinated operations that you envisioned, the idea of for-profit corporate "ownership" is problematic for several reasons, most notably tax law inhibitions on private inurement from a tax exempt entity and state corporate law restrictions.

This model (without the ownership feature) has been used in the past by a number of associations, particularly in the chemical industry, in which a nonprofit association provides management and staffing for another nonprofit corporate association which is within the scope of its exempt purposes. A historic example is the management by the Synthetic Organic Chemical Society of the Formaldehyde Institute in the 1980's and 1990's. SOCMA provided staff and management support for FI as well as a number of other chemical-specific, separate associations. This was done on a fee for service basis.

Some for-profit entities – association management companies ("AMC's") – manage the day-to-day business of numerous trade associations. The models vary depending on the resources and needs of the associations, but in almost all settings the AMC's provide the accounting, meeting planning, correspondence, communications, staffing and office requirements. In some cases, the association will have separate office identity including signage and limited access, while in others there will be common "association offices" with shared employees. There is a symbiotic relationship with respect to employees. Employees are formally employed by the AMC, but essentially report to the boards of the associations.

One critical aspect of this organizational model is that the AMC does not have an ownership interest in the nonprofit trade associations. They operate under management agreements that typically can be terminated with relatively short notice or at the conclusion of a stated term. The contractual arrangements are based on arm's length compensation, depending on the services provided.

The advantage of this model is the professionalism that an AMC or "managing association" can provide, particularly to associations that have limited means. On the other hand, there is a lack of permanency. One association could easily terminate its management company agreement and move on to a different AMC or in-house management arrangement, without the consent of the other associations. The AMC or managing association and the client association can also differ from time to time on a variety of staff or policy issues, as could two associations under this common management. In contrast, a merged or consolidated group has the solemnity of a corporate transformation which cannot be easily unraveled.

V. <u>Other Types of Strategic Alliances</u>

Merger, consolidation, acquisitions, and the creation of a federation involve a substantial level of commitment—but associations need not go so far in order to engage in alliances with one another. Nonprofit corporations may enter into other strategic alliances that are temporary or permanent, and allow both entities to "test the waters" before binding themselves to a more involved or permanent arrangement.[2]

A. Partial Asset Purchase or Transfer

A lesser alternative to dissolution and transfer of all of a nonprofits assets is a limited asset purchase or transfer from one entity to another. In general, an asset purchase may be advantageous where one nonprofit entity wishes to acquire a discrete property, activity, program, or business unit of another. The directors of both organizations owe their members a significant level of due diligence prior to finalizing the deal, but, unless required under the organization's governing documents, partial asset transfers typically do not require the approval of an organization's membership. The transfer is executed pursuant to a written asset purchase agreement between the parties.

This approach has an obvious negative for the ceding organization in terms of prestige and justification for the hand-off.

[2] In addition to the potential alliances discussed herein, a common approach – often used on an ad hoc basis – is for one association to enter into a limited written funding agreement with another.

B. Joint Venture

In a joint venture, two or more associations lend their efforts, assets, and expertise in order to carry out a common purpose. The associations involved may develop a new entity (such as a limited liability company or a partnership) to carry out the endeavor. Such new entity may receive tax exempt status if it is organized and operated for exempt purposes. Generally, however, associations commit certain resources to a joint venture without forming a new entity. A well-structured joint venture is codified in a written agreement that details the precise obligations and allocation of risk between the associations involved. Joint ventures can be permanent, set to expire on a given date or after the accomplishment of a certain goal, or structured with an increasingly overlapping set of commitments and an eye towards an eventual merger. Although the bylaws of an organization might specify otherwise, joint ventures do not usually require the approval of the general membership.

In a *whole joint venture*, one or more of the partnering entities contribute <u>all</u> of their assets to the enterprise. Associations commonly engage in *ancillary joint ventures* with other organizations. Ancillary joint ventures are essentially small-scale joint ventures—enterprises that do not become the primary purpose of the organizations involved which are often for a limited duration. Tax-exempt organizations seeking additional sources of revenue may also enter into ancillary joint ventures with for-profit corporations, provided that the joint venture furthers the tax-exempt organization's purposes, and the tax-exempt organization retains ultimate control over, at a minimum, the exempt purposes of the joint undertaking.

C. Joint Membership Programs

Joint membership programs generally allow individuals to join two associations for a reduced fee. These initiatives allow the members of one organization to become more familiar with another, and are typically conducted in the context of other jointly run programs and activities. Programs in this vein are designed to bring associations closer together, often as a precursor to a more formal alliance, but allow the entities to modify the arrangement or disengage altogether if circumstances or expectations change.

VI. <u>General Tax Issues</u>

Tax-exempt associations that choose to become affiliated with other taxable or tax-exempt entities must be mindful of certain legal requirements in order to ensure that the affiliation does not jeopardize the association's tax-exempt status. This section discusses three key tax-related concepts that associations must consider prior to affiliating with another entity: unrelated business income tax, control by the tax-exempt organization, and private inurement.

A. *Unrelated Business Income Tax*

In general, tax-exempt organizations are exempt from federal taxes on income derived from activities that are substantially related to their exempt purposes. Nevertheless, a tax-exempt organization may still be subject to unrelated business income tax ("UBIT") on income received from the conduct of a trade or business that is regularly carried on, but is not substantially related to the organization's exempt purposes.

For the purposes of determining UBIT, an activity is considered a "trade or business" if it is carried on for the production of income from the sale of goods or performance of services. Income from a passive activity—*e.g.*, an activity in which the exempt organization allows another entity to use its assets, for which the organization receives some payment—is not considered a business. The Code specifically excludes certain types of passive income—dividends, interest, annuities, royalties, certain capital gains, and rents from non-debt financed real property. UBIT also does not include income generated from volunteer labor, qualified corporate sponsorship payments, or qualified convention or trade show income.

An activity that is substantially related to an organization's tax-exempt purposes will not be subject to UBIT. A "substantially related" activity contributes directly to the accomplishment of one or more exempt purposes. Alone, the need to generate income so that the organization can accomplish other goals is not a legitimate tax-exempt purpose.

In the context of trade and professional associations, an activity is "substantially related" if it is directed toward the improvement of its members' overall business conditions. The receipt of income from particular services performed to benefit individual members, although often helpful to their individual businesses, usually results in UBIT to the association where those services do not improve the business conditions of the industry overall.

An organization jeopardizes its tax-exempt status if the gross revenue, net income, and/or staff time devoted to unrelated business activities is "substantial" in relation to the organization's tax-exempt purposes. Although the "substantial" criterion has not been defined by statute or by the IRS, commentators generally agree that a level of 25-30% gives rise to concern.[3] In an effort to prevent loss of exempt status, many tax-exempt organizations choose to create one or more taxable subsidiaries in which they house unrelated business activities. Taxable subsidiaries are separate but affiliated organizations. Generally, a taxable subsidiary can enter into partnerships and involve itself in for-profit activities without risking the tax-exempt status of its parent. Moreover, the taxable subsidiary can remit the after-tax profits to its parent as tax-free dividends. It is also beneficial in some situations to immunize the association from potential liability, by putting certain commercial activities in a separate subsidiary corporation.

[3] There are several occasions, however, where the IRS has not challenged the tax exemption of nonprofits with significantly higher levels of UBIT.

B. Control

Where a nonprofit organization partners with another entity, it will continue to qualify for tax exemption only to the extent that (1) its participation furthers its exempt purposes, and (2) the arrangement permits the organization to act exclusively in furtherance of its exempt purposes. If a tax-exempt entity cedes "control" of partnership[4] activities to a for-profit entity, the IRS will consider the partnership to serve private aims, not public interests.

In any arrangement with a for-profit entity that involves *all or substantially all* of a tax-exempt organization's assets, the IRS requires the tax-exempt organization to retain majority control over the entire undertaking —*e.g.*, majority voting control. However, where the arrangement involves only an insubstantial portion of the tax-exempt organization's assets, the IRS has approved a structure in which the for-profit and tax-exempt organizations shared management responsibilities, but left the exempt organization in control of the exempt aspects of the arrangement.

Associations frequently enter into short-term partnerships with for-profit corporations in order to conduct a particular activity. These ventures should not jeopardize an association's tax-exempt status in most cases—even if the association does not maintain operational control over the venture—as such activities generally are not substantial activities of the association.

C. Private Inurement

In general, organizations recognized as tax-exempt under Code Sections 501(c)(3) and 501(c)(6) are prohibited from entering into any transaction that results in "private inurement." Private inurement occurs where a transaction between a tax-exempt organization and an "insider"—*i.e.*, someone with a close relationship with or an ability to exert substantial influence over the tax-exempt organization—results in a benefit to the insider that is greater than fair market value. An association's affiliate or partner may be considered an insider. The IRS closely scrutinizes arrangements between tax-exempt organizations and taxable entities to determine whether the activities contravene the prohibition on private inurement. Thus, an arrangement with a for-profit entity, such as a management company, must be entered at arm's-length and carefully reviewed to ensure that any benefits to insiders are at or below fair market value.

---

[4] As used in this section, the term "partnership" will be used as an umbrella term to refer to all combinations and strategic alliances entered by an association with another entity.

VII. Conclusion

There is an array of possible mechanisms for combinations and alliances that organizations can enter into with one another. The selection of an appropriate structure is heavily dependent on fully identifying the goals of the transaction and the potential ramifications for both entities.

VENABLE LLP

AUTHORS

Brock R. Landry
Lisa M. Hix

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2010 2006 2002
2009 2005 2001
2008 2004 2000
2007 2003

Articles

January 26, 2010

The Building Blocks for a Successful Nonprofit Merger

Related Topic Area(s): Corporate Governance, Miscellaneous

Financial imperatives, contractions in membership bases, and consolidation in industries have led to an unprecedented period of growth in interest in nonprofit mergers. As a result, many nonprofits are eyeing current competitors as potential partners. However, mergers can easily fail when organizations mistake a central fact: mergers occur between people, not organizations. Mergers can fall apart for a variety of reasons: unexpected discoveries in the due diligence process, intractable issues that have been ignored, and differences in organizational cultures, among others. The following is a list of "lessons learned" from two association attorneys who have handled a broad range of association mergers.

Establish a Core Group of Merger Stewards. Establishing a group of volunteer and staff leaders to act as stewards of the merger is critical to success. The merger stewards will have two roles: 1) to come to an understanding of the merger plan, and to communicate this plan to the association's stakeholders, including the boards, staff and membership; and 2) to work through the inevitable issues that will arise in the due diligence process and/or as the groups integrate.

Ask the Hard Question Early: Which Organization Survives? Strength of negotiation posture can be measured by financial assets, membership base, industry contacts, and depth of operational expertise. Deciding how, and whether, to acknowledge this power disparity can be key to success in the long run. Early on, the organizations should agree on whether one organization should be viewed as the "surviving" entity, or whether both organizations will combine as equals. Although most mergers are described as the marriage of equals, rarely is this, in fact, the case.

Ask the Harder Question: What Are the Roles of the Respective Staff and Officers? A clear understanding of future roles and authority is central to a successful integration.

Jointly Develop a Merger Plan. The merger stewards from each organization should jointly develop a merger plan. This plan should include an outline of the combined governance structure, mission, core activities, membership categories and dues, and a broad staffing plan. A critical component of this plan is identifying board appointment procedures and the key leaders of the combined organization. The merger plan should include sufficient detail on the hard issues, but should be broad enough to allow for revision and elaboration based on stakeholder input.

Understand Approval Requirements and Dynamics. Once the core elements of the merger plan are in place, each organization should undertake a careful analysis of its respective board and member approval requirements. These requirements will be outlined in the state corporate code provisions of the organization's state of incorporation, as well as each organization's governing documents, such as bylaws. Where high approval requirements exist, early and active communication to the board and members is essential, as is a thorough understanding of permissible voting mechanisms.

Coordinate Internal and External Communication. In organizations with overlapping membership, having a coordinated "sell" document for the staff, board and members of each organization is critical. Release of information should be carefully coordinated between the organizations and each party should agree to give the other notice before making any announcements to the public. Nothing kills a merger faster than being blindsided by an unauthorized communication.

Agree on Coordinated Due Diligence. Merger timelines must allow for thorough due diligence. Associations considering mergers face a multitude of legal, governance, financial, and administrative issues that must be carefully explored and coordinated. To facilitate this process, the parties should agree upon a scope of due diligence and a diligence timeframe.

Culture Matters. Finally, while it may make good business sense to merge, key stakeholders – including members, staff, and volunteer leaders – will not shift allegiances if the combined organization fails to bridge the cultures of both entities. Mergers work only when associations take the necessary steps to build teamwork and a shared vision of the future.

* * * * * *

Brock Landry and Lisa Hix have handled a variety of mergers, including the American Bankers Association/America's Community Bankers merger and the American Electronics Association/Information Technology Association of America merger. For more information, please contact or Mr. Landry at ***brlandry@Venable.com*** *or Ms. Hix at* ***lmhix@Venable.com****.*

VENABLE LLP

AUTHORS

Jessica R. Lubar

RELATED PRACTICES

Tax-Exempt Organizations

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2010 2006 2002
2009 2005 2001
2008 2004 2000
2007 2003

Articles

February 3, 2010

The IRS' New Employment Tax Initiative: What Does It Mean for Nonprofits?

Related Topic Area(s): Employment Law, Tax and Employee Benefits

This article was featured in the March/April 2010 issue of *Nonprofit World*.

The IRS will soon begin a three-year research project on employment tax compliance issues (the "NRP"). The project will entail employment tax audits of at least 6000 employers over the term of the project, including nonprofit organizations. Although nonprofits may be exempt from income tax under Internal Revenue Code Section 501(a), they are not exempt from employment taxes, such as FICA and income tax withholding requirements. Therefore, failing to comply with the employment tax rules could lead to the imposition of interest and penalties on underreported amounts. In addition, nonprofit employers have certain issues that are unique compared to for-profit employers, which also may arise in an employment tax audit.

IRS National Research Program

Overview

The IRS NRP begins in Feb. 2010 and will be the first employment tax project conducted by the IRS since 1984. The purpose of the project is to collect data that will allow the IRS to understand the compliance characteristics of employment tax filers. Theoretically, the IRS should be able to use the information gathered in the NRP to target non-complying taxpayers for audits in the future. However, for the NRP, employers will be chosen randomly for examinations. The NRP will include employers from all industries in order to be comprehensive. According to John Tuzynski, chief of employment tax operations in the Small Business/Self-Employed Division, the scope of review will be greater in these examinations than normal. [1]

The Tax Exempt and Government Entities Division will participate in the NRP and expects to do full examinations of 500 organizations in 2010[2]

Areas of Focus

Examiners will focus primarily on three employment tax areas: (1) Worker Classification (independent contractor, common-law employee, statutory employee, statutory non-employee); (2) Fringe Benefits; and (3) Officer's Compensation. Tax-exempt employers also have unique employment related tax issues that may arise in an examination. For tax-exempt employers – particularly those that are tax-exempt under Sections 501(c)(3) or 501(c)(4) – issues that arise in an employment tax audit could affect reasonable compensation determinations that had been made for purposes of the IRS' "intermediate sanctions" rules (located in Code Section 4958).

Worker Classification

The proper classification of a service provider as either an employee or an independent contractor is a frequent area of contention between the IRS and employers. A worker is considered an employee if the employer exercises the requisite amount of control over the employee under common-law principles. Over the years, the courts and the IRS have articulated certain factors that are considered in making that determination. The IRS organized the factors that are considered into three categories: (1) Behavioral Control – whether the business has a right to direct and control how the worker does the task for which the worker is hired; (2) Financial Control – whether the business has a right to control the business aspects of the worker's job; and (3) Type of Relationship.

Due to the factual nature of any worker classification determination and the consequences of being wrong, Congress provided relief from employment tax liability for certain employers who misclassified workers as independent contractors using the common-law facts and circumstances standards. The relief was enacted as Section 530 of the 1978 Revenue Code (as amended) and is known as "Section 530 Relief." In order to be entitled to Section 530 Relief, a taxpayer must meet three requirements:

1. *The Substantive Consistency Requirement:* The taxpayer has not treated the individual as an employee for any period and has not treated any other individual holding a substantially similar position as an employee (for purposes of employment tax) for any period.

2. *The Reporting Consistency Requirement:* All federal returns (including information returns) that are required to be filed by the taxpayer with respect to the worker for such periods are filed on a basis consistent with the taxpayer's treatment of the individual as an independent contractor.

3. *The Reasonable Basis Requirement:* The taxpayer had a reasonable basis for not treating the worker as an employee. A reasonable basis only exists if it is supported by judicial precedent, IRS rulings, a past IRS audit, or a long-standing practice of a significant segment of the relevant industry.

Misclassifying a worker as an independent contractor, whether deliberate or inadvertent, has the same consequences to a tax-exempt employer as a taxable employer. Therefore, it is critical that any employer review its relationships with its service providers to determine how they should be classified. If the proper classification is not clear, an employer may ask the IRS to determine the proper classification by filing a request for a worker classification determination on Form SS-8. A Form SS-8 may be filed by either a service provider or a service recipient, however, historically service recipients have not filed many requests for a classification determination. Practitioners differ on whether employers should make such a request.
In all events, any nonprofit that is receiving services should at the very least ensure that individuals that it treats as independent contractors would satisfy the requirements for Section 530 Relief so as to avoid the consequences of misclassification.

Fringe Benefits

The fringe benefit area is frequently overlooked by employers, both nonprofit and for-profit. It often comes as a surprise to employers (and employees) that certain of the "perks" they provide should be included in an employee's income as taxable compensation, even if no cash is paid. Perks provided by employers may be either taxable or tax-free fringe benefits. If an employer incorrectly treats a fringe benefit as tax-free, it is treated as if the employer did not report the full amount of compensation paid. The result of such an error by a tax-exempt entity has potentially significant consequences in addition to the typical employment tax consequences.

If the employee's compensation was the subject of a reasonable compensation analysis, failure to treat a fringe benefit as taxable could invalidate the reasonable compensation determination. A taxable fringe benefit increases an employee's compensation by the value of the fringe benefit. If the fringe benefit had not been treated as taxable by the employer, it would not have been included in the amount of the employee's compensation that was approved pursuant to the reasonable compensation determination process. Therefore, depending on what the "perk" was, the value could be significant and affect whether the compensation qualifies for the rebuttable presumption under the intermediate sanctions rules.

Further, if a 501(c)(3) or 501(c)(4) organization does not have any contemporaneous documentation showing that the fringe benefit was provided to the employee as compensation, the perk will be considered an excess benefit resulting in penalties under Code Section 4958. Under Code Section 4958, penalties could be imposed both on the recipient of the fringe benefit and any organization manager who participated in providing the fringe benefit. For the recipient, in addition to requiring the individual to repay the excessive value of the benefit, the penalty amount is automatically 25% of the excess benefit, but it could go up to 200%.

In past initiatives with respect to tax-exempt organizations, the IRS has found fringe benefits that were not considered and reported as compensation, such as the personal free use of a car or apartment, personal components of business travel, holiday gifts, etc. Fringe benefit issues also come up when employer's pay for relocation travel and expenses or education expenses for the employee, among other instances.

Employee reimbursements are also part of the fringe benefit review. Reimbursed expenses, even employment-related expenses, must be made in accordance with a written reimbursement plan or otherwise qualify as a tax-free fringe benefit to be excluded from an employee's income. For employment related reimbursements to be tax-free under a written reimbursement plan, the plan must require employees to adequately account for the expenses and to pay back any excess payments received (such plans are known as accountable plans). In past initiatives, the IRS has identified the following reimbursements that sometimes fall through the cracks: expense reimbursements outside corporate policies, spouse travel expenses, tax gross-ups, non-accountable expense allowances, club memberships, etc.

In contrast to most employers' perception of fringe benefits, the value of any benefit or "perk" provided to an employee needs to be included in compensation unless an exception applies. Common exceptions to income inclusion are the working condition fringe benefit and the *de minimis* fringe benefit. Even if the value of the fringe benefit that is provided is relatively small on an individual basis, if the benefit is provided to many employees, interest and penalties for failing to report it as taxable could be significant. Interest and penalties on employment taxes would apply to all unreported taxable fringe benefits, not just those paid to disqualified persons under Section 4958.

Officer Compensation

The third area of focus of the NRP – officer compensation – has different significance to nonprofit employers than for-profit employers. The primary issue for nonprofits with respect to officer compensation is the applicability of the intermediate sanction rules to compensation paid to disqualified persons. The rules under Section 4958 of the Internal Revenue Code are referred to as the intermediate sanctions rules because it provides for penalties that are less severe than revoking an organization's tax-exempt status. Section 4958 allows the IRS to impose significant excise taxes on the insiders, such as executive officers and board members, of section 501(c)(3) and (c)(4) organizations who benefit excessively in transactions with a tax-exempt organization. In the event that the IRS determines that an insider received an excessive benefit from his relationship with an exempt organization, the IRS can impose intermediate sanctions, requiring that individual to repay the excessive amount to the organization and pay an excise tax up to 200% of the excess benefit. Under Section 4958, penalties imposed on the recipient of an excess benefit may be limited to 25% of the value of the benefit if the excess benefit transaction is "corrected" before an assessment is made by the IRS.

The IRS has recently begun vigorously enforcing this section of the Code. In fact, during the last year, we have seen the IRS impose intermediate sanctions with an unprecedented frequency. It is also important to note that the IRS may impose penalties on certain organization managers as well under Section 4958.

Other Issues

Among other issues, examiners conducting NRP reviews also will be looking at whether an employer is not filing required tax returns and whether the employer is backup withholding on payments to independent contractors, if necessary. Backup withholding is when a taxpayer is required to withhold 30% from payments that it makes to independent contractors under certain circumstances. Backup withholding is required if the contractor does not provide its taxpayer identification number to the payor, the payor is notified by the IRS that the taxpayer identification number is not correct, or if the IRS notifies the payor that backup withholding is required. Any Form 1099 that is submitted by an employer without a taxpayer identification number should have had backup withholding done on the payment.

Additional Initiatives Affecting Tax-Exempt Organizations

The IRS' concern regarding employment tax compliance by nonprofits is not new. Although the current NRP is not limited to tax-exempt organizations, the IRS has in the past conducted programs focusing on compensation issues of tax-exempt organizations. The Exempt Organizations Executive Compensation Compliance Project that started in 2004 looked at executive compensation issues. While final reports were issued in March 2007 with respect to two parts of the project, the third part has not been completed. One of the areas of concern that was uncovered by the IRS during the project involved substantial loans to insiders and undocumented loans. As a result, a new phase of the project began in March 2006 that was dedicated solely to loans.

In addition, the final Report on Parts I & II of the Project noted the following compensation related recommendations: (1) future initiatives should focus on the correlation between satisfaction of the rebuttable presumption by an organization and the reasonableness of compensation paid to its disqualified persons by such an organization; (2) the relatively small percentage of corrections made by disqualified persons before contact by EO illustrates the need for a continued enforcement presence in this area; and (3) EO should continue to review compensation issues in more focused projects and should pursue baselining general compliance with the compensation rules.

<u>What Can Nonprofits Do?</u>

The existence of the NRP and the statements made regarding tax-exempt organizations demonstrate that employment tax compliance is an area that the IRS will be focusing on for some time. Even if an employer is not subject to an examination under the NRP, employment tax is an issue that is likely to arise in future examinations of the employer. Nonprofits should take this opportunity to review their current compliance status and, if necessary, address any issues that arise before a visit from the IRS.

There are certain steps that a nonprofit employer should take:

Review existing service relationships

- Are worker's appropriately classified?
- Are any corrections necessary?
- If a worker is being treated as an independent contractor, is the documentation consistent?
- Look at the Section 530 requirements.
    - Would the organization qualify for relief if the IRS determines that the worker was misclassified?
    - Not sure? Consider a request pursuant to Form SS-8
        - Quantify the risk: FICA, income tax withholding, interest, penalties, state reclassification, DOL

Review exisitng benefit arrangements

- Have all benefits/perks been accounted for correctly? If not, how can they be corrected?
- Review your benefit plans to ensure that they exclude persons that you, as the plan sponsor, classify as independent contractors (so that any retroactive reclassification of such persons as employees will not result in unintended plan coverage).
- Do you have a written reimbursement plan that qualifies as an accountable plan?

Examine any loans with insiders/disqualified persons

- Are they properly documented and consistent with the excess benefit transaction rules?
- Are there any loans to employees, in general? Evaluate the application of the employment-related below-market loan rules.

Confirm that compensation arrangements satisfy the rebuttable presumption for reasonable compensation

- Is there contemporaneous support that any taxable fringe benefits that were not included in income were provided as compensation?
- If any portion of compensation paid, including taxable fringe benefits, would be an "excess benefit," determine what steps are necessary to correct the excess benefit.

Determine whether any Form 1099s have been filed that do not have the payee's taxpayer identification number and whether backup withholding was done

* * * * * *

Jessica Lubar is Of Counsel in Venable's Baltimore Office. She is a member of the firm's Nonprofit Organizations and Tax practice groups, and advises clients on a broad array of tax, estate and business matters at the state, federal and international levels, For information, contact Ms. Lubar at 410-244-7736 or ***jrlubar@venable.com****.*

---

[1] NRP Employment Tax Audit Program To Examine 6,000 U.S. Companies, 182 DTR G-1 (Sept. 23, 2009).

[2] National Research Program to Randomly Select 500 Exempts for Examination, 10 DTR S-32 (January 19, 2010) (quoting Sarah Hall Ingram, commissioner of the TE/GE Division).

VENABLE® LLP

Publications

September 8, 2009

Preventing Embezzlement in Your Nonprofit Organization

AUTHORS

William H. Devaney

Jeffrey S. Tenenbaum

RELATED PRACTICES

Corporate Governance and Investigations

SEC Investigations and White Collar Defense

RELATED INDUSTRIES

Nonprofit Organizations and Associations

Related Topic Area(s): Corporate Governance, Miscellaneous

Sadly, nonprofit organizations are not immune from employee embezzlement. Because many nonprofits tend to be more trusting of their employees and have less stringent financial controls than their for-profit counterparts, they fall prey to embezzlement and other forms of employee fraud at an alarming rate. By way of recent example:

- On September 17, 2009, the former CFO of the Association of Fish and Wildlife Agencies, an international conservation group based in Washington, D.C., is to be sentenced in federal court after her plea of guilty to wire fraud. A 10-year employee of the organization who worked her way up to CFO, she used the organization's credit card to charge approximately $184,000 in personal expenses, including hair and make-up expenses and casino charges.
- On September 4, 2009, the former Executive Director of the Oklahoma CASA Association, an advocacy agency for abused and neglected children, received a 15-year prison sentence after her plea of guilty to embezzling $549,024. Another 10-year employee of the organization, she also used the organization's credit cards for personal expenses such as foreign vacations, cosmetic surgery, and college tuition. During the investigation, it was reported she told law enforcement officers, "I was very good at cooking the books."
- On August 31, 2009, a former bookkeeper and office manager at the House of Ruth, a California organization that provides shelter to homeless women and children, was sentenced to a year in prison. The former bookkeeper and office manager had pleaded guilty earlier in the year to federal charges of misappropriating $138,370 in federal funds and embezzling $238,000 from the organization's bank accounts.

Nonprofits are not defenseless, however, and there are several proactive steps organizations can take to prevent and detect employee embezzlement.

Double Signatures, Authorizations and Back-up Documentation

Multiple layers of approval will make it far more difficult for embezzlers to steal from the organization. For expenditures over a predetermined amount, require two signatures on every check and two authorizations on every cash disbursement. Where the professional staff of an organization is too small to effectively implement a double authorization policy, consider having a (volunteer) officer or director be the second signatory or authorization required (generally, an officer will be preferable to a director). Similarly, all check and cash disbursements should be accompanied by an invoice or other document showing that the payment or disbursement is appropriate. If the size of your organization allows it, the invoice or disbursement request should be authorized by a manager who will not be signing the check. Never pre-sign checks. With credit cards, require prior written approval for costs estimated to exceed a certain amount. Again, the person using the card cannot be the same person authorizing its use.

Segregation of Duties

Hand in hand with multiple authorizations goes the segregation of duties. At a minimum, different employees should be responsible for authorizing payments, disbursing funds, and reconciling bank statements and reviewing credit card statements. If the organization does not have enough professional staff to effectively segregate duties, a (volunteer) officer or director should be tasked with reconciling the bank statement and reviewing credit card statements. Because embezzlement also can occur when funds are coming into an organization, no single individual should be responsible for receiving, depositing, recording, and reconciling the receipt of funds. By the same token, all contracts should be approved by a manager uninvolved and personally uninterested in the transaction (*i.e.*, it will not impact his or her bonus or salary) and, wherever possible, contracts should be the product of competitive and transparent bidding.

Fixed Asset Inventories

At least yearly, the organization should perform a fixed asset inventory to ensure that no equipment or other goods are missing.

Background Checks

Background checks on new employees and volunteer leaders can unearth things such as undisclosed criminal records, prior instances of fraud and heavy debt loads that can make it more likely that an employee or volunteer leader might succumb to fraud.

Audits and Board Level Oversight

The control measures discussed above only work if someone is checking. In addition to management, who should be ensuring that the measures discussed above are followed, organizations should also undertake regular external audits to ensure that these measures are effective. Organizations also should establish audit committees on their board of directors, containing at least one person expert in accounting, that would serve as the primary monitor of these anti-fraud measures. In lieu of an audit committee, smaller organizations should consider putting a CPA or other financially-knowledgeable person on the board of directors to serve a similar function.

* * * * * *

While there will always be instances where a determined thief manages to beat an organization's controls, the steps suggested above will go a long way toward deterring embezzlement and other types of fraud, and will make it easier to expose dishonest employees.

William Devaney is a partner at Venable LLP, resident in its New York City office. A former federal prosecutor, he frequently conducts internal investigations for nonprofit organizations and represents them in government investigations.

Jeffrey Tenenbaum is a partner at Venable LLP, resident in its Washington, DC office. He chairs Venable's Nonprofit Organizations Practice Group.

This article appeared in the September 11, 2009 issue of *Association Trends,* the December 2009 issue of *Exempt Magazine,* and the November/December issue of *Association Impact*.

Page 437
192 F.3d 437 (4th Cir. 1999)
MONTE J. HUKILL, Plaintiff-Appellee,
v.
AUTO CARE, INCORPORATED; MCGILLICUDDY & ASSOCIATES; WILLIAM MCGILLICUDDY, Defendants-Appellants.
No. 98-1969 (CA-97-1567-A).
UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.
Argued: April 8, 1999.
Decided: September 22, 1999.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.

Leonie M. Brinkema, District Judge.

Page 438

COUNSEL ARGUED: John Michael Bredehoft, VENABLE, BAETJER & HOWARD, L.L.P., McLean, Virginia, for Appellants. Michaele Snyder Battles, KIBLAN & BATTLES, McLean, Virginia, for Appellee. ON BRIEF: Garald M. Bowen, GERALD M. BOWEN LAW OFFICES, McLean, Virginia, for Appellants.

Before ERVIN,* HAMILTON, and LUTTIG, Circuit Judges.

Vacated and remanded with instructions by published opinion. Judge Hamilton wrote the opinion, in which Judge Ervin and Judge Luttig joined.

OPINION

HAMILTON, Circuit Judge:

Monte Hukill (Hukill) brought this action against the defendants, William McGillicuddy (McGillicuddy), McGillicuddy Associates, Inc. (MAI), and Auto Care, Inc. (ACI), alleging that the defendants violated the Family and Medical Leave Act (FMLA), see 29 U.S.C. §§ 2601-2654, when the defendants refused to reinstate him in his former position with MAI upon his return from a leave of absence for a surgical procedure. Prior to trial, the district court held that, even though the defendants, individually or collectively, employed less than fifty employees during the period relevant to Hukill's FMLA claims, it had subject matter jurisdiction over Hukill's FMLA claims because the defendants and several corporations constituted an "integrated employer," 29 C.F.R. § 825.104(c)(2), and, therefore, the defendants were employers under the FMLA. Following a jury trial, the jury found in Hukill's favor. Judgment was entered in favor of Hukill in the amount of $17,825 on his FMLA claims, and the district court also awarded costs and attorney's fees in the amount of $56,545.97. On appeal, the defendants principally contend that the district court lacked subject matter jurisdiction over Hukill's FMLA claims. We agree. Accordingly, we vacate the district

Page 439

court's judgment and remand with instructions to dismiss the case for lack of subject matter jurisdiction.

I

A

MAI, a Virginia corporation, owns and operates an automotive service station in Burke, Virginia. McGillicuddy owns 100% of MAI's stock.

McGillicuddy also owns 50% percent of the stock in seven other Virginia corporations.1 Three of these corporations, King's Park Auto Care, Inc. (KPAC), Willston Center Auto Care, Inc. (WCAC), and Vienna Auto Care, Inc. (VAC), operate automobile service stations. Three others, Arlington Auto Care, Inc. (AAC), West Springfield Automotive, Inc. (WSA), and Burke Center Goodyear, Inc. (BCG), operate Goodyear tire centers. The seventh corporation, ACI, provides contract administrative services to MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG. More specifically, ACI provides the following services to these corporations: (1) payroll services, with each payroll account being maintained separately; (2) bookkeeping services, with each set of books being maintained separately; (3) the administration of a health care plan, with individual accounts for each corporation being maintained separately; (4) issuance of various policy statements (e.g., substance abuse policy) applicable to each corporation; and (5) a secure site for the maintenance of personnel records.

McGillicuddy is president of ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG, and functions on a day-to-day basis as the chief executive officer of these corporations. His office is at ACI, which is located in Arlington, Virginia. McGillicuddy is also a director of these corporations. Edmonds is the other director of these corporations, except MAI. Kathy McGillicuddy, McGillicuddy's wife, is a director of MAI. Jon Olson (Olson), comptroller for ACI, is the secretary-treasurer of ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG, although he is not a director of or shareholder in any of these corporations. According to Hukill, during the period relevant to this appeal, ACI had five employees, MAI had eight, KPAC had ten, WCAC had six, and VAC, AAC, WSA, and BCG each had twelve. See Appellee's Brief at 4 n.2.

ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG each operates at separate locations in Northern Virginia; files separate tax returns; holds separate shareholder and Board of Directors' meetings; conducts separate banking operations; with minor exceptions, purchases goods separately; enters into separate lease agreements; and does not share office space.2

For each corporation, in his capacity as president and chief executive officer, McGillicuddy establishes wage and benefit guidelines. For each automobile service station and tire center, in his capacity as president and chief executive officer, McGillicuddy hires a manager who is responsible for managing the automobile service station or tire center's day-to-day operations.3 Each manager is responsible for hiring employees and negotiating the salary of the new employee using the guidelines established by McGillicuddy. In general, McGillicuddy, as president and chief executive officer of each automobile service station and tire center, does not get involved in the operational and employment matters of each station unless requested

Page 440

by an individual manager. Olson, as secretary-treasurer of each automobile service station and tire center, does not get involved in employment matters, but does have to approve large expenditures. Finally, ACI has no role in MAI, KPAC, WCAC, VAC, AAC, WSA, or BCG's labor relations; no power to hire, fire, or supervise employees at its clients' companies; and no power to control the work schedules of the employees of its clients. Furthermore, there is no evidence that MAI has any control over the labor relations of KPAC, WCAC, VAC, AAC, WSA, or BCG, or vice versa.

However, there is some evidence in the record suggesting that ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG's operations are interrelated. For example, aside from the obvious commonality of officers and directors, ACI made some bulk purchases of equipment on behalf of MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG; on occasion, some employees were transferred from one automobile service station to another; the manager of BCG ran an advertisement in a newspaper implying an affiliation between BCG, ACI, MAI, AAC, and WSA; and ACI's letterhead contained the business listings of MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG.

B

Hukill began working at MAI's automobile service station as an automotive inspector in early 1994. On October 4, 1996, Hukill left work for six weeks in order to undergo surgery for a chronic health condition. After Hukill went on leave, MAI hired a replacement automotive inspector. On November 14, 1996, when Hukill attempted to return to work at MAI's automobile service station, he was informed by his manager, Hugh Walser, "There's no work for you." (J.A. 118). Approximately two weeks later, McGillicuddy offered Hukill a position as an automotive inspector at the automobile service station owned and operated by WCAC, but Hukill declined to accept the offered position.

Hukill then pursued his administrative remedies with the United States Department of Labor (DOL). During discussions with the DOL, in April 1997, McGillicuddy offered Hukill his former position at MAI's automobile service station. After concluding that ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG constituted an"integrated employer," 29 C.F.R. § 825.104 (c)(2), for purposes of the FMLA, the DOL calculated Hukill's damages to be $3,256. This amount represented the difference in the salary Hukill would have earned at MAI's automobile service station and the salary Hukill would have earned at WCAC's automobile service station for the period covering the time Hukill was offered the position at WCAC's automobile service station until the time Hukill was offered reinstatement to his former position at MAI's automobile service station.4

On October 2, 1997, Hukill commenced this action by filing a complaint in the United States District Court for the Eastern District of Virginia. The complaint named ACI, MAI, and McGillicuddy as defendants. The complaint alleged that the defendants violated the FMLA when they refused to reinstate Hukill in his former position with MAI upon his return from a leave of absence for a surgical procedure. Hukill sought unpaid back wages, commissions, employment benefits, front pay, prejudgment and postjudgment interest, liquidated damages, attorney's fees, and costs.

Prior to trial, the district court held that, even though the defendants, individually or collectively, employed less than fifty employees during the period relevant to Hukill's FMLA claims, it had subject matter jurisdiction over Hukill's FMLA claims

Page 441

because the defendants and KPAC, WCAC, VAC, AAC, WSA, and BCG constituted an "integrated employer," 29 C.F.R. § 825.104(c)(2), and, therefore, the defendants were employers under the FMLA.

Following a jury trial, the jury found in Hukill's favor. Judgment was entered in favor of Hukill in the amount of $17,825 on his FMLA claims, and the district court also awarded costs and attorney's fees in the amount of $56,545.97. The defendants noted a timely appeal.

II

The defendants' principal contention on appeal is that the district court lacked subject matter jurisdiction over Hukill's FMLA claims. According to the defendants, because ACI and MAI, individually or collectively, employed less than fifty employees during the period relevant to Hukill's FMLA claims, the district court lacked subject matter jurisdiction over those claims. The district court held that it had subject matter jurisdiction over Hukill's FMLA claims because, even though ACI and MAI, individually or collectively, employed less than fifty employees during the relevant period, the defendants were "employers" for purposes of the FMLA because the defendants were part of a larger "integrated employer," id., that included KPAC, WCAC, VAC, AAC, WSA, and BCG.5

We review a district court's subject matter jurisdiction determination de novo. See Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999).

The purpose of the FMLA is to balance the demands of the workplace with the needs of employees to take leave for eligible medical conditions and compelling family reasons. See 29 U.S.C. § 2601(b). In addition to providing eligible employees with up to twelve weeks of unpaid leave to handle qualifying medical and family problems, see 29 U.S.C. § 2612(a)(1), the FMLA ensures that those who take such leave will be restored to their former position or an equivalent position upon returning to work, see 29 U.S.C. § 2614(a)(1). Employers who violate the FMLA are liable to the injured employee for compensatory damages, back pay, and equitable relief. See 29 U.S.C. § 2617(a)(1).

The FMLA defines an "employer" as, inter alia,

(i) . . . any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year;

(ii) includ[ing]any person who acts, directly or indirectly, in the interest of the employer to any of the employees of such employer . . . . 29 U.S.C. § 2611(4)(A)(i) and (ii). Under the FMLA, the "term `person' has the same meaning given such term in [the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219]." 29 U.S.C. § 2611(8). The FLSA defines "person" as any "individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." 29 U.S.C. § 203(a).

A district court lacks subject matter jurisdiction over an FMLA claim if the defendant is not an employer as that term is defined in the FMLA. Cf. Woodward v. Virginia Bd. of Bar Examiners, 598 F.2d 1345, 1346 (4th Cir. 1979) (affirming dismissal of Title VII claim for lack of subject matter jurisdiction because defendant was neither an "employer," an "employment agency," nor a "labor organization" as

Page 442

those terms are defined in Title VII); see also Scarfo v. Ginsberg, 175 F.3d 957, 961 (11th Cir. 1999) (holding that whether defendants constituted "an `employer'" within Title VII is a question of subject matter jurisdiction); Armbruster v. Quinn, 711 F.2d 1332, 1335 (6th Cir. 1983) (same); but see Sharpe v. Jefferson Distrib. Co., 148 F.3d 676, 677-78 (7th Cir. 1998) (holding that question of whether employer has more than fifteen employees so as to be subject to Title VII is not jurisdictional, but merits related), abrogated on other grounds by Papa v. Katy Indus., Inc., 166 F.3d 937, 939-40 (7th Cir. 1999); EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 623-24 (D.C. Cir. 1997) (holding that question of whether defendant was a covered entity under ADA is not jurisdictional, but merits related).

Although a direct employment relationship provides the usual basis for liability under the civil rights statutes, the ambiguity of the term employer in the civil rights statutes has driven courts to fashion a variety of tests by which a defendant that does not directly employ the plaintiff may still be considered an employer under those statutes. See Papa, 166 F.3d at 939-43; Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 & n.2 (10th Cir. 1993); Johnson v. Flowers Indus., Inc., 814 F.2d 978, 980-82 (4th Cir. 1987). Hukill advocates the use of one of these tests, the "integrated employer" test.

Under the "integrated employer" test, several companies may be considered so interrelated that they constitute a single employer. See Armbruster, 711 F.2d at 1337-38 (Title VII); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) (ADEA). The "integrated employer" test initially was developed in the labor relations context, see Radio & Television Broad. Technicians Local 1264 v. Broadcast Serv. of Mobile, Inc., 380

U.S. 255 (1965) (per curiam), and subsequently was imported into the civil rights context, see Armbruster, 711 F.2d at 1336-37 (Title VII). Pursuant to its authority to promulgate regulations "necessary to carry out" the FMLA, see 29 U.S.C. § 2654, the DOL has adopted the "integrated employer" test. See 29 C.F.R. § 825.104(c)(2).

In determining whether to treat corporate entities as an "integrated employer," according to the DOL regulations, the factors we should consider include: (1) common management; (2) interrelation between operations; (3) centralized control of labor relations; and (4) degree of common ownership/financial control. See id.6 However, no single factor is conclusive. Id. Nevertheless, control of labor operations is the most critical factor. See Schweitzer v. Advanced Telemarketing Corp., 104 F.3d 761, 764 (5th Cir. 1997) (recognizing that control of labor relations prong has traditionally been the most important).7

Page 443

This court need not address whether 29 C.F.R. § 825.104(c)(2) is entitled to full Chevron deference, see Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984) (noting that an agency's interpretation of a statute with which it has been charged with administering and which has been reduced to a regulation is to be fully accepted by a court as long as Congress has not directly spoken as to the precise question at issue and the interpretation proffered by the agency is a permissible one), because even applying the "integrated employer" test in this case does not yield the conclusion that MAI was part of a larger integrated employer that included ACI, let alone KPAC, WCAC, VAC, AAC, WSA, and BCG.

With respect to common management, each automobile service station and tire center has its own manager, who controls the day-to-day operations of the service station or tire center and has the authority to hire and fire employees. For a short time, Doug Hinken, while employed by ACI, was the general manager of all of the automobile service stations. However, in this capacity, Hinken did not manage the day-to-day operations of each automobile service station and had no power to hire or fire individual employees. In general, McGillicuddy, as president of each automobile service station and tire center, does not get involved in operational and employment matters unless requested by an individual manager. Also, Olson, the secretary-treasurer of each corporation, does not get involved in employment matters, but does have to approve large expenditures. In light of this evidence, this prong favors neither party. Cf. McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933-34 (11th Cir. 1987) (common management found where common president controlled personnel management of both corporations); Baker v. Stuart Broadcast. Co., 560 F.2d 389, 392 (8th Cir. 1977) (common management found where the same individual was president of both corporations and where that individual had day-to-day control of both operations and had issued strict policy manuals regimenting daily operations for the managers).

With respect to the interrelation of operations, the operations of ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG were interrelated to some degree. For example, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG purchase administrative services from ACI, and ACI selects the towing companies for MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG. There is also evidence in the record demonstrating that ACI made some bulk purchases of equipment on behalf of MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG; on occasion, some employees were transferred from one automobile service station to another; the manager of BCG ran an advertisement in a newspaper implying an affiliation between BCG, ACI, MAI, AAC, and WSA; and ACI's letterhead contained the business listings of MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG. Although this evidence does demonstrate some interrelationship of operations, on balance, this evidence is pale in comparison to the evidence indicating that each company operates separately and distinctly. Each company operates at separate locations, files separate tax returns, holds separate shareholder and Board of Directors' meetings, conducts separate banking operations, is not undercapitalized, in general, purchases goods separately, enters into separate lease agreements, is not managed day-to-day by the same person, and does not share office space.

Hukill makes much of the fact that MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG purchase administrative services from ACI. However, this practice is not unusual in today's business climate and is of no consequence. As the court in Papa noted:

Firms too tiny to achieve the realizable economies of scale or scope in their industry

Page 444

will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership. The choice between the two modes of integration is unrelated to the exception. Take contractual integration first. A firm too small to have its own pension plan will join in a multiemployer pension plan or will in effect pool with other employers by buying an insurance policy. . . . It will consult an outside law firm, representing many business firms, rather than having a staff of in-house lawyers. It will hire an accounting firm to do its payroll rather than having its own payroll department. It may ask the Small Business Administration for advice on how to maximize its profits by pruning its least profitable operations. None of these forms of contractual integration would subject tiny employers to the antidiscrimination laws, because the integration is not of affiliated firms. Why should it make a difference if the integration takes the form of common ownership, so that the tiny employer gets his pension plan, his legal and financial advice, and his payroll function from his parent corporation without contractual formalities, rather than from independent contractors?

166 F.3d at 942.

With respect to labor operations, there is little evidence, if any, that the control of labor operations was centralized. ACI had no role in MAI, KPAC, WCAC, VAC, AAC, WSA, or BCG's labor relations; no power to hire, fire, or supervise employees at its clients' companies; and no power to control the work schedules of the employees of its clients. Furthermore, there is no evidence that MAI had any control over the labor relations of KPAC, WCAC, VAC, AAC, WSA, or BCG, or vice versa. In light of this evidence, we conclude this prong weighs heavily against Hukill. Cf. Frank , 3 F.3d at 1363 ("To satisfy the control prong, a parent must control day-to-day employment decisions of subsidiary.").

With respect to common ownership, although Hukill has made a showing of common, though not identical, ownership (100% of MAI's stock is owned by McGillicuddy, 50% of ACI, KPAC, WCAC, VAC, AAC, WSA, and BCG's stock is owned by McGillicuddy), such a showing is not enough, even when coupled with the other factors, to establish that ACI, MAI, KPAC, WCAC, VAC, AAC, WSA, and BCG are an "integrated employer." Cf. Johnson, 814 F.2d at 982 ("One-hundred percent ownership and identity of directors and officers are, even together, an insufficient basis for applying an alter ego theory to pierce the corporate veil." (citation and internal quotation marks omitted)).

It has been said that the "integrated employer" test instructs a court to determine "[w]hat entity made the final decisions regarding employment matters related to the person claiming discrimination." Trevino v. Celanese Corp., 701 F.2d 397, 404 (5th Cir. 1983) (citation and internal quotation marks omitted). In this case, the record suggests that no entity other than MAI made the final decision regarding Hukill's employment status. Accordingly, because MAI employs less than fifty employees, the district court erred when it concluded that it had subject matter jurisdiction over Hukill's FMLA claim against MAI. Because ACI was not Hukill's employer, the district court erred when it concluded that it had subject matter jurisdiction over Hukill's FMLA claim against ACI. Because MAI and ACI were not subject to liability, the district court necessarily lacked jurisdiction over Hukill's FMLA claim against McGillicuddy in his individual capacity. See 29 U.S.C. § 2611(4)(A)(i) and (ii).

III

For the reasons stated herein, we vacate the district court's judgment and remand with instructions to enter an order dismissing

Page 445

the case for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS

Notes:

*.Judge Ervin participated in the consideration of this case but died prior to the time the decision was filed. The decision is filed by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

1. With respect to these corporations, Jimmy Edmonds (Edmonds) owns the other 50% of the stock.

2. ACI and AAC have offices in the same building, but they are maintained in different office suites on non-contiguous floors.

3. For a short time, Doug Hinken, while employed by ACI, was the general manager of all of the automobile service stations. However, in this capacity, Hinken did not manage the day-to-day operations of each automobile service station and had no power to hire or fire individual employees.

4. In April 1997, MAI paid Hukill an amount that represented Hukill's salary for the period (two weeks in November 1996) covering the time Hukill was not reinstated in his position at MAI's automobile service station and the time he was offered the position at WCAC's automobile service station.

5. The district court did not squarely address whether McGillicuddy was subject to individual liability under the FMLA. We note that this court has not addressed this issue and need not address it today because Hukill's claim of individual liability against McGillicuddy necessarily fails if he (Hukill) cannot establish that MAI or ACI is his employer as that term is defined in the FMLA. See 29 U.S.C. § 2611(4)(A)(i) and (ii).

6. These factors are identical to those applied in cases involving other civil rights statutes. See, e.g., Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993-94 (6th Cir. 1997) (ADEA and ADA).

7. In Johnson, an ADEA case, we recognized that other courts have applied the "integrated employer" test, but declined to adopt it. See 814 F.2d at n.*. We stated that "[w]e need not adopt such a mechanical test in every instance; the factors all point to the ultimate inquiry of parent domination. The four factors simply express relevant evidentiary inquiries whose importance will vary with the individual case." Id. Interestingly, the "integrated employer" test was rejected recently by the Seventh Circuit in Papa, a case involving the ADEA and the ADA. In that case, the court criticized the vagueness of three of the four factors (all but"common ownership" and it, as we shall see, is useless); because, being unweighted, the four factors do not yield a decision when, as in the two cases before us, they point in opposite directions; and because the test was not custom-designed for answering exemption questions under the antidiscrimination laws, but instead was copied verbatim from the test used by the National Labor Relations Board to resolve issues of affiliate liability under the laws administered by the Board. 166 F.3d at 940.

Page 761
357 F.Supp.2d 761
Sandra WOODELL, Plaintiff,
v.
UNITED WAY OF DUTCHESS COUNTY, United Way of America and James G. Williamson, Defendants.
No. 04CIV.0256WCC.
United States District Court, S.D. New York.
March 2, 2005.
Page 762

Thompson Wigdor & Gilly, LLP, Attorneys for Plaintiff, New York, NY, Douglas H. Wigdor, Esq., Of Counsel.

Wilson, Elser, Moskowitz, Edelman & Dickler, LLP, Attorneys for Defendants, New York, NY, Ricki E. Roer, Esq., Mary T. Hart, Esq., Of Counsel.

Seyfarth Shaw, LLP, Attorneys for Defendant, United Way of America, New York, NY, Lorie Almon, Esq., Devjani Mishra, Esq., Of Counsel.

OPINION AND ORDER

WILLIAM C. CONNER, Senior District Judge.

Plaintiff Sandra Woodell brings this action against the United Way of Dutchess County (the "UWDC"), James G. Williamson (collectively, the "UWDC defendants"), and the United Way of America (the "UWA") alleging discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII") under the Pregnancy Discrimination Act amendment (the "PDA") and the New York State Human Rights Law, new York Executive Law §§ 290 et seq. (the "NYSHRL"). Plaintiff also alleges violations of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681 et seq. (the "FCRA").1 The UWA and the UWDC defendants each move pursuant to FED. R. CIV. P. 56 for summary judgment. For the reasons stated hereinafter, the UWA's motion for summary judgment is granted and the UWDC defendants' motion for summary judgment is granted in part and denied in part.

BACKGROUND

The following factual information is uncontroverted unless otherwise noted. The UWDC is a non-profit corporation located in Dutchess County, New York. (UWDC Defs. Rule 56.1 Stmt. ¶ 1.) The UWA is a non-profit corporation located in Virginia. (UWA Rule 56.1 Stmt. ¶ 2.) The UWDC is one of the UWA's many member organizations. As a member organization, the UWDC is licensed by the UWA to use the United Way logo and trade name and is obligated to pay annual dues and to comply with certain ethical and fiscal standards. (Id. ¶¶ 7-8.) The UWDC is independently

Page 763

governed by its own Board of Governors and is operated according to its own bylaws and procedures. (Id. ¶¶ 9-11.) Williamson was the President and CEO of the UWDC for approximately eight years and held that position at all times relevant to this action. (UWDC Defs. Rule 56.1 Stmt. ¶ 2.) Gretchen Moore Simmons, a non-party, was the UWDC's Vice President of Resource Development at all times relevant to this action. (Id. ¶ 3.) Mary Kennett, also a non-party, was an employee at the UWDC at all times relevant to this action. (Id. ¶ 16.)

Plaintiff was employed at the UWDC as an executive assistant from April 1, 2003 through May 9, 2003. (Id. ¶ 4.) Plaintiff applied for the position in March of 2003 by sending a resume and letter of inquiry to the UWDC. (Woodell Dep. at 58.) Plaintiff was interviewed twice by Williamson and Simmons. (Id. at 59-61.) The first interview took place over the telephone and the second interview took place in person at the UWDC office. (Id.)

The parties dispute the substance of what was discussed during plaintiff's interviews. According to the UWDC defendants, plaintiff indicated on her resume and during her interviews that she was presently employed by a company called Ayco, but that she had been on leave to care for her ill mother since December 6, 2002. (UWDC Defs. Rule 56.1 Stmt. ¶ 6.) However, plaintiff maintains that during her first interview she was asked about her job responsibilities at Ayco but not her current employment status. (Woodell Dep. at 59-60.) Plaintiff also maintains that during her second interview, when Williams asked about her employment status at Ayco, she explained that she had taken a leave of absence to care for her mother. (Id. at 62.) According to plaintiff, she explained that she was unsure of her current employment status with Ayco because she had resigned via e-mail on January 24, 2003, but did not know whether Ayco had received her resignation because they had assured her that when she returned from her leave of absence her job would be available to her. (Id. at 71; Pl. Rule 56.1 Stmt., UWDC Defs. Stmts. Denied ¶ 5.)

According to plaintiff, she told Williamson that he could not contact her supervisor at Ayco for a reference because he was upset with her for not contacting him before she spoke to the office manager about taking a leave of absence. (Woodell Dep. at 73.) Plaintiff maintains that Williamson indicated that he understood plaintiff's predicament with Ayco and that he was not bothered by the lack of reference because he had already received her performance summaries from plaintiff's supervisor at Ayco and was very pleased with what they showed. (Id.; Williamson Dep. at 214-15.) Williamson then told plaintiff that they would waive the reference requirement as a condition to her employment. (Williamson Dep. at 215.) The UWDC defendants claim that during the interview process plaintiff was emphatic that the UWDC not contact her supervisor at Ayco because they had a policy of summarily terminating employees who were seeking other employment. (UWDC Defs. Rule 56.1 Stmt. ¶ 9.)

During plaintiff's second interview, Williamson advised her that the UWDC would need to obtain a report on her personal credit as part of the interview process. (Pl. Rule 56.1 Stmt. ¶ 23.) Plaintiff maintains that she requested a copy of the report at that time. (Id.) Plaintiff received an offer of employment at the UWDC from Williamson via telephone. (Id. ¶ 29.) According to plaintiff, during their phone conversation she warned Williamson that her credit report would not be good because of her divorce, but Williamson told her not to worry so long as she had never

Page 764

been convicted of a felony or misdemeanor. (Id. ¶ 30.) Plaintiff states that during their phone conversation she requested a copy of her credit report for a second time. (Id. ¶ 31.) According to the UWDC defendants, Williamson "has no specific recollection" of plaintiff's request for a copy of her credit report. (Williamson Dep. at 219.)

On March 28, 2003, Williamson sent plaintiff an offer letter which stated that her offer of employment at the UWDC was "contingent upon the conduct of a formal pre-employment screening report by Fidelifacts/Metropolitan New York, Inc., and the successful completion of our calls to your references, including those at your present employer, AYCO." (UWDC Defs. Rule 56.1 Stmt. ¶ 10.) Plaintiff countersigned the offer letter attesting, "I have reviewed the terms and find them acceptable." (Id.) However, as noted above, despite the language contained in the letter, plaintiff maintains that the reference requirement had been waived. (Williamson Dep. at 215.) Plaintiff signed the releases required for the credit screening report on March 31, 2003. (UWDC Defs. Rule 56.1 Stmt. ¶ 12.) With respect to her employment at Ayco, plaintiff listed January 2003 as her termination date on the Fidelifacts form.2 (Pl. Rule 56.1 Stmt., UWDC Defs. Stmts. Denied ¶ 13.)

Plaintiff began working at the UWDC on April 1, 2003. (UWDC Defs. Rule 56.1 Stmt. ¶ 14.) On her first day of work, plaintiff signed the UWDC's ethics statement, which directs employees to conduct themselves with the highest level of moral and ethical professionalism and specifically forbids "[f]ossifying reports or organizational records." (Id. ¶ 8; UWDC Defs. Mem. Supp. Summ. J., Ex. K.) Plaintiff performed her job duties well and received compliments from Williamson, Simmons and others at the UWDC. (Pl. Rule 56.1 Stmt. ¶ 40.) Plaintiff did not receive any negative feedback regarding her job performance while she was employed at the UWDC. (Id. ¶ 43.)3

On or about April 8, 2003, plaintiff advised the UWDC that she was pregnant. (UWDC Defs. Rule 56.1 Stmt. ¶ 32.) In late April she advised the UWDC defendants that she would need to take some time off for tests and doctor's visits because she had been diagnosed with a high-risk pregnancy-related condition known as toxoplasmosis. (Id.) According to plaintiff, after she informed Williamson and Kennett that she was pregnant she felt tension from them and noticed that they were "curt with her and short with her." (Pl. Rule 56.1 Stmt. ¶ 46.) Plaintiff claims that neither Williamson nor Kennett displayed sympathy or concern for her following her toxoplasmosis diagnosis. (Id.) Plaintiff also claims that Williamson was particularly cold to her and that he was not as responsive or as available for meetings as he had been in the past. (Id.) The UWDC defendants maintain that they were continually supportive and considerate regarding plaintiff's pregnancy, that all of her requests for time off due to her pregnancy, including doctor's visits, were granted without exception and that Williamson told her to take whatever time she needed. (UWDC Defs. Rule 56.1 Stmt. ¶ 34.) Plaintiff denies that the UWDC defendants were supportive regarding her pregnancy, but admits that she was able to take time off for her doctor's appointments. (Pl. Rule 56.1 Stmt., UWDC Defs. Stmts. Denied ¶ 34.) The UWDC defendants note

Page 765

that on or about April 23, 2003, after plaintiff announced that she was pregnant, Williamson and Simmons gave her a greeting card for Administrative Assistants Day indicating that she was doing a good job and that they were pleased to have her working at the UWDC. (Id. ¶ 35.) However, Kennett wrote Williamson an e-mail dated April 25, 2003, wherein she stated that she felt plaintiff had been "less than forthcoming when hired about her pregnancy." (Pl. Rule 56.1 Stmt. ¶¶ 48-49; Williamson Dep. at 226-27.) Williamson admits receiving Kennett's e-mail and also that shortly thereafter they had a conversation about its contents. (Williamson Dep. at 226-27.)

In the meantime, after plaintiff had announced her pregnancy, Kennett undertook to verify plaintiff's employment history. (UWDC Defs. Rule 56.1 Stmt. ¶ 16.) On May 7, 2003, Kennett sent a fax to Ayco requesting verification of plaintiff's dates of employment. (Wigdor Aff., Ex. 23.) On May 8, 2003, Kennett received a letter from Ayco indicating that plaintiff was employed from August 31, 1998 through January 24, 2003, and was therefore not employed at Ayco in March of 2003.4 (UWDC Defs. Rule 56.1 Stmt. ¶ 17.) Both Williamson and Simmons testified that they had not asked Kennett to check the dates of plaintiff's employment at Ayco. (Williamson Dep. at 245; Simmons Dep. at 111.) However, Kennett maintains that Williamson instructed her to follow up with Ayco and that he was aware she was doing so. (Kennett Dep. at 224, 227, 237.) Williamson admits that he told both plaintiff and Kennett that he had decided to waive the reference requirement as a condition to plaintiff's employment. (Williamson Dep. at 215, 244-45.)

The UWDC terminated plaintiff's employment on May 9, 2003. (UWDC Defs. Rule 56.1 Stmt. ¶ 18.) According to the UWDC defendants, the decision was made as a result of plaintiff's allegedly "knowing misrepresentations" regarding her employment history during the interview process. (Id.) The UWDC defendants allege that plaintiff made two material misrepresentations regarding her employment history: (1) that she was employed by Ayco in March of 2003; and (2) that she intentionally omitted another employer, a company called GHI HMO Select Inc. ("GHI"), from the resume she sent to the UWDC. (Id. ¶¶ 20-22, 24.) Plaintiff admits that she omitted her employment with GHI from the resume she submitted to the UWDC and also from the background screening forms she filled out as part of the UWDC's interview process, but did so because she was employed there for a very short period of time. (Pl. Rule 56.1 Stmt. ¶ 22.) Plaintiff contends that this omission could not have played a role in her termination because Williamson and Kennett had no knowledge of it at the time. (Id.) According to plaintiff, her alleged misrepresentation about the dates of her employment at Ayco could not have been the reason the UWDC defendants decided to terminate her because: (1) plaintiff understood that Williamson had already contacted Ayco at the time he made her an offer of employment at the UWDC; and (2) she explained to Williamson and Simmons during the interview process that she was on a leave from Ayco and also why she was unsure of her employment status at Ayco. (Id. ¶¶ 32, 33.) Plaintiff notes that she listed January 2003 as her end date at Ayco on the Fidelifacts form, which she knew was being used by the UWDC as part of her background check, and questions why she would have

Page 766

listed the January 2003 date if her true motive was to hide that information from the UWDC defendants. (Id. ¶ 13.)

According to plaintiff, Williamson told her that he would reconsider her termination if she could provide documentation showing that she was not terminated from Ayco. (Id. ¶ 77.) The UWDC defendants maintain that Williamson said he would reconsider plaintiff's termination if she provided documentation that she was employed by Ayco in March of 2003. (UWDC Defs. Rule 56.1 Stmt., Pl. Stmts. Denied ¶ 77.) Plaintiff maintains that she sent the UWDC a copy of a letter from Ayco stating that she had resigned and not been terminated, but received no response from Williamson. (Pl. Rule 56.1 Stmt. ¶¶ 78-81.) The UWDC defendants admit that after plaintiff was terminated the UWDC received a second letter from Ayco, dated May 12, 2003, which indicated that plaintiff had resigned on January 24, 2003. (UWDC Defs. Rule 56.1 Stmt. ¶ 19.)

Plaintiff maintains that during her termination meeting Williamson said that her credit report was "terrible." (Pl. Rule 56.1 Stmt. ¶ 82.) Williamson admits that he mentioned plaintiff's credit report during her termination meeting, but maintains that he told plaintiff that her credit report was worse that he had anticipated, instead of "terrible." (UWDC Defs. Rule 56.1 Stmt., Pl. Stmts. Denied ¶ 82.) Plaintiff never received a copy of her credit report. (Pl. Mem. Opp. Summ. J. at 10.) In Kennett's April 25, 2003 e-mail to Williamson she also stated that she was concerned because plaintiff's background check "indicates that she has problems managing her personal finances," and went on to question whether plaintiff should "be put in a position of managing United Way assets." (Wigdor Aff., Ex. 11.)

On or about July 7, 2003, plaintiff filed a charge of discrimination with the United States Equal Employment Opportunity Commission (the "EEOC"). (Compl.¶ 9.) Plaintiff received a Dismissal and Notice of Rights letter from the EEOC, dated October 16, 2003. (Wigdor Aff., Ex. 2.) On January 13, 2004, plaintiff filed her Complaint in the present action alleging the following claims: (1) against the UWDC and the UWA, discrimination on the basis of gender and pregnancy in violation of Title VII; (2) against the UWA, the UWDC and Williamson, discrimination on the basis of gender and pregnancy in violation of the NYSHRL; (3) against Williamson, knowing and reckless aiding and abetting unlawful discrimination in violation of the NYSHRL; and (4) against the UWA, the UWDC and Williamson, violations of the FCRA. (Compl.¶¶ 79-98.)

DISCUSSION

I. Standard on Motion for Summary Judgment

Under FED. R. CIV. P. 56, summary judgment may be granted where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. See FED. R. CIV. P. 56(c). The burden rests on the movant to demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant for a reasonable jury to return a verdict in her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). In deciding whether summary judgment is appropriate, the court resolves all ambiguities and draws all permissible factual inferences against the movant. See id. at 255, 106 S.Ct. 2505. To defeat summary judgment, the nonmovant must go beyond the pleadings and "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,

Page 767

586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The court's role at this stage of the litigation is not to decide issues of material fact, but to discern whether any exist. See Gallo v. Prudential Residential Servs., L.P., 22 F.3d 1219, 1224 (2d Cir.1994).

II. Defendant UWA

The UWA contends that summary judgment is warranted because plaintiff is unable to show either: (1) that the UWA employed her directly or as a joint employer; or (2) that the UWA took any adverse action against her that could support a claim for discrimination.5 (Id. at 3.) The UWA also contends that plaintiff's own testimony demonstrates that the UWA did not engage in any violation of the FCRA. (Id. at 4.) It is undisputed that plaintiff was not directly employed by the UWA. Therefore, the issue is whether the UWA was sufficiently integrated with the UWDC so that they were operating as joint employers with respect to plaintiff.

There are several ways for a court to assess whether "a defendant is an `employer' within the meaning of Title VII and other employment discrimination statutes." Rivera v. Puerto Rican Home Attendants Serv., Inc., 922 F.Supp. 943, 949 (S.D.N.Y.1996) (noting that the various formulations all focus on the amount of control or supervision a defendant exerts over another company's employees). One approach used by this Court and other courts in this Circuit, often called the "integrated enterprise" approach, seeks to determine whether two entities are "so interrelated that they may be treated as a `single employer' for the purpose of Title VII." Id.; see also Arculeo v. On-Site Sales & Marketing, LLC, 321 F.Supp.2d 604, 608 (S.D.N.Y.2004) (Conner, J.) (noting that the joint employer doctrine is analytically similar to the single employer doctrine). The integrated enterprise approach "can enable an employee to hold two or more nominally separate business entities accountable as a single entity under anti-discrimination laws...." Regan v. In the Heat of the Nite, Inc., No. 93 Civ. 862, 1995 WL 413249, at *2 (S.D.N.Y. July 12, 1995), 1995 U.S. Dist. LEXIS 9682, at *5.

Under the integrated enterprise approach courts consider four factors to uncover evidence of: (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership, between two entities. See Russo v. Lightning Fulfillment, Inc., 196 F.Supp.2d 203, 207 (D.Conn.2002) (quoting Radio & Television Broadcast Technicians Local Union v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 256, 85 S.Ct. 876, 13 L.Ed.2d 789 (1965) (per curiam)); see also Cook v. Arrowsmith Shelburne, Inc., 69 F.3d 1235 (2d Cir.1995). Generally, a "joint employer relationship may be found where there is sufficient evidence that a defendant had immediate control over another company's employees," and even more importantly, over the particular employee alleging discrimination. Rivera, 922 F.Supp. at 949 (noting that "[r]elevant factors include the commonality of hiring, firing, discipline, pay, insurance records and supervision").6 Upon

Page 768

careful consideration of the factors listed above, we conclude that the UWA and the UWDC do not function as an integrated enterprise or joint employers. Consequently, we hold that the UWA is not plaintiff's "employer" for purposes of Title VII and the NYSHRL.7

First, plaintiff has failed to demonstrate an interrelation of operations between the UWA and the UWDC. As plaintiff correctly notes, the UWDC is a member organization of the UWA, which means that it must comply with certain ethical and not-for-profit standards and pay annual membership dues. (UWA Rule 56.1 Stmt. ¶ 8; Pl. Mem. Opp. Summ. J. at 7-10.) Plaintiff also notes that the UWA licenses the use of the United Way logo and trade name to member organizations and that such use is subject to certain guidelines and restrictions related to maintaining a consistent representation to the general public. (Pl. Mem. Opp. Summ. J. at 7-10.) Additionally, plaintiff notes that the UWA provides member organizations with access to broad-based services such as electronic and web-based practice, communication, employment, marketing and education materials. (Id.) However, these assertions offer little, if any, weight for purposes of the present inquiry.

We find more persuasive the fact that the UWA and the UWDC never shared a payroll system, accounting records, a bank account or line of credit, advertising budget, telephone line or office space. (Pl. Rule 56.1 Stmt. ¶¶ 26, 40-42, 46, 47, 57-60.); Tatum v. Everhart, 954 F.Supp. 225, 228 (D.Kan.1997) (noting that the aforementioned factors have been recognized as indicia of interrelatedness for purposes of joint employer liability); see also Balut, 988 F.Supp. at 346 (noting that the two defendant corporations did not share a common office space); cf. Regan, 1995 WL 413249, at *1 1995 U.S. Dist. LEXIS 9682, at *1-2 (finding sufficient evidence of interrelatedness and denying defendant's motion for summary judgment where the two corporations' employee records, payroll records and bank deposits were kept together). Additionally, the UWA and the UWDC are independently incorporated, "operate under separate bylaws, are governed by separate boards, and have separate IRS exemptions." Tatum, 954 F.Supp. at 228. The evidence before us does not establish an interrelation of operations between the UWA and the UWDC.

Second, plaintiff has failed to allege any evidence of common management between the UWA and the UWDC. As stated supra, the UWDC is governed by an independent Board of Governors, with no overlap at all between the board and management of the UWA. (UWA Rule 56.1 Stmt. ¶¶ 9-11; Pl. Rule 56.1 Stmt., UWA Stmts. Denied ¶¶ 9-11); see Tatum, 954 F.Supp. at 229 (noting in a similar case a lack evidence of common directors, officers or board members between the UWA and the United Way of

Page 769

Wyandotte County). That same independent Board of Governors is also responsible for adopting and maintaining the UWDC's bylaws and governance procedures. (Id.) Plaintiff admits these facts and fails to allege any evidence to the contrary, further supporting the notion that the UWA and the UWDC do not operate as joint employers. (Pl. Rule 56.1 Stmt., UWA Stmts. Denied ¶¶ 9-11.)

The third factor to consider is centralized control of labor relations.8 To establish that the UWA had centralized control over the UWDC's labor relations, plaintiff must submit evidence that the UWA had actual day-to-day control over the UWDC's employment decisions. See Tatum, 954 F.Supp. at 229 (quoting Eichenwald v. Krigel's, Inc., 908 F.Supp. 1531, 1541 n. 9 (D.Kan.1995)) (noting that potential control is not enough for a finding of centralized control of labor relations). Additionally, there must be evidence that the UWA had and exercised actual control with respect to plaintiff's employment specifically. Id. (noting the importance of the plaintiff's actual experience as an employee with respect to whether an entity hired the plaintiff, fired the plaintiff, or supervised the plaintiff's work on a daily basis). Here, there is no evidence that the UWA had day-to-day, or any other, control over the UWDC's labor relations. Even more importantly, plaintiff has not demonstrated that the UWA hired, reviewed or fired plaintiff or played any role at all in making those decisions.

Rather, it is uncontroverted that: (1) plaintiff was not interviewed by any employee of the UWA prior to becoming employed at the UWDC; (2) Williamson did not consult with the UWA with respect to plaintiff's hiring, her offer letter or the terms of the offer itself; (3) Kennett did not consult with anyone at the UWA with regard to obtaining a credit report or reference check on plaintiff; (4) the UWA was not contacted in connection with the decision to terminate plaintiff's employment with the UWDC; and (5) the UWA was not aware of the UWDC's decision to terminate plaintiff's employment prior to her termination. (UWA Rule 56.1 Stmt. ¶¶ 88, 95, 116, 119, 122, 123; Pl. Rule 56.1 Stmt., UWA Stmts. Denied ¶¶ 88, 95, 116, 119, 122, 123.) The fact that, as plaintiff notes, the UWA maintains a job posting database on its website, collects information regarding member organizations' personnel profiles, in terms of total number of employees and average salary, and offers general policy statements or guidelines on employment matters is not sufficient evidence to establish centralized control. See Tatum, 954 F.Supp. at 230; see also Balut, 988 F.Supp. at 347.

The final factor to consider is whether there is evidence of common ownership or financial control between the UWA and the UWDC. The "UWA and its member organizations are nonprofit, charitable organizations and not owned in the traditional commercial sense. Although financial accountability is part of the eligibility criteria to become a member organization," and the amount of membership dues is

Page 770

calculated based on the success of the individual fund-raising campaigns, plaintiff does not submit any evidence indicating that the UWA exercises common ownership or financial control over the UWDC or any of its member organizations. See Tatum, 954 F.Supp. at 229-30.

Because we find the evidence insufficient to show that the UWA and the UWDC operate as joint employers or an "integrated enterprise," we decline to hold that the UWA was plaintiff's employer for purposes of her discrimination claims.9 Accordingly, the UWA's motion for summary judgment is granted and all claims against the UWA are dismissed with prejudice.10

III. Defendants UWDC and Williamson

A. Pregnancy Discrimination Act

The PDA is a definitional amendment to Title VII enacted to include pregnancy-based discrimination within Title VII's prohibition of gender-based employment discrimination. The elements of an employment discrimination claim are "virtually identical" under the New York Executive Law and Title VII. LaCoparra v. Pergament Home Centers, Inc., 982 F.Supp. 213, 225 (S.D.N.Y.1997) (Conner, J.). Therefore, our analysis of plaintiff's Title VII claim is also applicable to plaintiff's claim under the NYSHRL.11

A claim for employment discrimination is governed by the three-step burden-shifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See Dean v. Westchester County Dist. Attorney's Office, 119 F.Supp.2d 424, 430 (S.D.N.Y.2000) (Conner, J.). Under the McDonnell Douglas analysis, the plaintiff must first establish a prima facie case of discrimination. If the plaintiff is successful, a presumption that the employer unlawfully discriminated against the plaintiff is raised and the burden of production then shifts to the employer to "articulate a legitimate, clear, specific and non-discriminatory reason" for its actions. Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir.1995). If the employer does so, the presumption of discrimination no longer applies and the plaintiff has the burden to establish by a preponderance of the evidence that the employer's stated reason was merely a pretext for discrimination. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 515, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). In addition, the plaintiff must submit evidence that would permit a rational fact finder to infer that the discharge was actually motivated, in whole or in part, by discrimination. Grady v. Affiliated Cent., Inc., 130 F.3d 553, 561 (2d Cir.1997). In other words, the defendant's proffered reason "cannot be proved to be `a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." St. Mary's Honor Ctr., 509 U.S. at 515, 113 S.Ct. 2742 (emphasis in original).

To establish a prima facie case of discrimination, plaintiff must establish that: (1) she is a member of a protected class; (2) she was performing her duties satisfactorily; (3) she was discharged or suffered

Page 771

an adverse employment action; and (4) her position remained open and was ultimately filled by a non-pregnant employee. Quaratino, 71 F.3d at 64. In the alternative, plaintiff may satisfy the fourth element by showing that the discharge "occurred in circumstances giving rise to an inference of unlawful discrimination." Id.; Kerzer v. Kingly Mfg., 156 F.3d 396, 401-02 (2d Cir.1998). Plaintiff's burden to establish a prima facie case is de minimus. See Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203-04 (2d Cir.1995).

B. Plaintiff's Prima Facie Case

It is not in dispute that plaintiff is a member of a protected class, that she performed her duties satisfactorily or that she suffered an adverse employment action. What remains in dispute, however, is whether the adverse employment action occurred under circumstances giving rise to an inference of discrimination.12 Plaintiff's burden "is not onerous." Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).13

In support of her claim for unlawful discrimination, plaintiff offers the following evidence: (1) plaintiff advised the UWDC defendants of her uncertainty regarding her employment status at Ayco during the hiring process; (2) Williamson and Simmons knew that plaintiff was not actually working at Ayco at the time she was hired; (3) Williamson and Simmons explicitly waived any requirement for a reference check from Ayco based on other positive references and positive performance evaluations they received from Ayco; (4) Kennett's April 25, 2003 e-mail in which she charged that plaintiff had been less than forthcoming about her pregnancy; (5) the temporal proximity of less than one month between plaintiff's announcement of her pregnancy and her termination; and (6) the temporal proximity of mere days between plaintiff's announcement of her having toxoplasmosis and her termination. (Pl. Mem. Opp. Summ. J. at 15-16.)

Considering the light burden on plaintiff, we conclude that there is sufficient evidence to establish the fourth element of a prima facie case. See Burdine, 450 U.S. at 253-54, 101 S.Ct. 1089; see also Pellegrino v. County of Orange, 313 F.Supp.2d 303, 315 (S.D.N.Y.2004) (noting that evidence of a temporal proximity between an employee's announcement that she was pregnant and her termination is sufficient to establish an inference of discrimination). Therefore, plaintiff has presented a prima facie case of pregnancy discrimination.

C. UWDC Defendants' Proffered Legitimate Non-Discriminatory Reason

Once plaintiff has established a prima facie case of discrimination, the burden of production passes to the UWDC defendants to offer a legitimate, non-discriminatory reason for terminating plaintiff's employment. Burdine, 450 U.S. at 254, 101 S.Ct. 1089. Any such reason will suffice; the employer" `need not persuade the court that it was actually motivated by the proffered reasons' in order to nullify the presumption and obligate the plaintiff to

Page 772

satisfy the burden of proof." Fisher, 114 F.3d at 1335-36 (quoting Burdine, 450 U.S. at 254, 101 S.Ct. 1089).

The UWDC defendants contend that plaintiff was terminated as a result of her allegedly "knowing misrepresentations" during the employment application process. (UWDC Defs. Mem. Supp. Summ. J. at 10.) This explanation constitutes a legitimate, non-discriminatory reason for plaintiff's termination.14 See Robinson, 2001 WL 863418, *6, 2001 U.S. Dist. LEXIS 10810, *19-20. Accordingly, the prima facie presumption of discrimination is dispelled and the burden shifts back to plaintiff to offer evidence sufficient to permit a rational jury to decide that the UWDC defendants' proffered justification is in fact a pretext for discrimination. See Hicks, 509 U.S. at 515, 113 S.Ct. 2742.

D. Pretext

At this stage, plaintiff will prevail only if she shows by a preponderance of the evidence that the UWDC defendants' proffered explanation is a pretext for discrimination, "either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction — or both." Fisher, 114 F.3d at 1339.

We conclude that the evidence of pretext presented by plaintiff, which is essentially the same evidence she put forth to establish her prima facie case, has created a material issue of fact as to whether the UWDC defendants' claim that plaintiff was fired as a result of her alleged knowing misrepresentations is a pretext for discrimination. In particular, we find that the following evidence could lead a reasonable trier of fact to conclude that pregnancy was a motivating factor in the UWDC defendants' decision to terminate plaintiff's employment and that the UWDC defendants' proffered explanation is actually a pretext for pregnancy discrimination: (1) the April 25, 2003 e-mail from Kennett to Williamson wherein she criticizes plaintiff for being "less than forthcoming when hired about her pregnancy" and questions whether they were taking plaintiff's future maternity leave into consideration when making their recent decisions; (2) the alleged change in attitude toward plaintiff after she announced her pregnancy and her toxoplasmosis diagnosis; (3) the temporal proximity between plaintiff's termination and her announcement of her pregnancy and toxoplasmosis diagnosis; (4) the fact that plaintiff advised Williamson and Simmons of her uncertainty regarding the status of her employment at Ayco and that they understood that she was not actually physically working at Ayco in March of 2003; (5) the fact that Williamson and Simmons had waived the requirement of a reference check from Ayco and communicated the same to both plaintiff and Kennett; and (6) the fact that plaintiff performed her duties well and received compliments about her work during her employment at the UWDC.15

Page 773

The Second Circuit has indicated that "a trial court must be cautious about granting summary judgment to an employer when ... intent is at issue." Gallo, 22 F.3d at 1224. Accordingly, this is not an appropriate case to be resolved by summary judgment and therefore the UWDC defendants' motion with respect to plaintiff's first, second and third claims must be denied.16 We will now consider the UWDC defendants' motion with respect to plaintiff's fourth and final claim involving alleged violations of the FCRA.

IV. FCRA

Plaintiff alleges that the UWDC defendants violated the FCRA, in particular 15 U.S.C. § 1681b(b)(3), because they failed to provide her with a copy of her credit report, which they relied upon in deciding to terminate her employment.17 (Complt. ¶ 95; Pl. Mem. Opp. Summ. J. at 24.)

Section 1681b(b)(3) of the FCRA provides that:

in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates (A) a copy of the report; and (B) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission....

15 U.S.C. § 1681b(b)(3).

The UWDC defendants do not dispute that plaintiff was not provided with a copy of her credit report. (UWDC Defs. Mem. Supp. Summ. J. at 14.) Rather, they contend that no adverse action was taken when the UWDC received plaintiff's credit report because they made the decision to terminate plaintiff only upon learning of her alleged employment application misrepresentations. (Id.) The UWDC defendants also maintain that there is no evidentiary support for plaintiff's claim that her termination was based on information contained in the credit report. (Id.) We disagree.

In the April 25, 2003 e-mail from Kennett to Williamson, Kennett states, "I have concerns with the results of Sandra's [plaintiff's] background check.... I have concerns that we are giving Sandra [plaintiff]

Page 774

fiscal responsibilities.... The [credit] report indicates that she has problems managing her personal finances; so the question becomes should she be put in a position of managing United Way assets." (Wigdor Aff., Ex. 11.) Also, according to plaintiff, when she was terminated Williamson told her that her credit report was "terrible." (Pl. Rule 56.1 Stmt. ¶ 82; Woodell Dep. at 100.) Furthermore, the UWDC defendants admit that Williamson did mention plaintiff's credit report during her termination meeting, and that he told plaintiff that her credit was worse than he had anticipated. (UWDC Defs. Rule 56.1 Stmt., Pl. Stmts. Denied ¶ 82.)

Viewing the evidence as we must, in the light most favorable to plaintiff, we cannot state as a matter of law that no genuine factual dispute exists with respect to plaintiff's FCRA claim. See Anderson, 477 U.S. at 248, 106 S.Ct. 2505. Therefore, we conclude that plaintiff has presented sufficient evidence from which a fact finder could reasonably conclude that the UWDC defendants based the decision to terminate plaintiff, either in whole or in part, on her credit report. Accordingly, we deny the UWDC defendants' motion with respect to plaintiff's fourth claim as it pertains to the UWDC, and we must now consider whether Williamson may be held individually liable under the FCRA.

Williamson may be held liable as a user of information under § 1681 for violating § 1681b(b)(3) if it is found that he impermissibly obtained plaintiff's credit report for personal purposes, rather than merely in the ordinary course of his employment. See Northrop v. Hoffman of Simsbury, Inc., 134 F.3d 41, 49 (2d Cir.1997) (quoting Austin v. BankAmerica Serv. Corp., 419 F.Supp. 730, 734 (N.D.Ga.1974)) ("The Fair Credit Reporting Act is inapplicable to these defendants who are merely employees of a `user' of consumer credit reports...."); see also Wiggins v. Hitchens, 853 F.Supp. 505, 509 (D.D.C.1994) (finding that individual defendants could only be considered "users" under the FCRA if they were acting outside of the scope of their employment). Plaintiff has not alleged any facts that could support a finding that Williamson requested or used her credit report for anything other than the performance of his duties as an employee of the UWDC. Accordingly, we grant the UWDC defendants' motion with respect to plaintiff's fourth claim as it pertains to Williamson.

CONCLUSION

For all of the foregoing reasons, the United Way of America's motion for summary judgment is granted with respect to all of plaintiff's claims; the United Way of Dutchess County's motion for summary judgment is denied with respect to plaintiff's first, second and fourth claims; and Williamson's motion for summary judgment is denied with respect to plaintiff's second and third claims, but granted with respect to plaintiff's fourth claim.

SO ORDERED.

Notes:

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331.

2. The UWDC received the results of the Fidelifacts report after plaintiff began working at the UWDC. (UWDC Defs. Rule 56.1 Stmt. ¶ 15.)

3. According to the UWDC defendants, there was one incident involving plaintiff's failure to follow instructions with respect to setting up a phone system. (UWDC Defs. Rule 56.1 Stmt., Pl. Stmts. Denied ¶ 41.)

4. The May 8, 2003 fax from Ayco stated that, "Sandra started employment on 8/31/98 and terminated on 1/24/03." (Wigdor Aff., Ex. 7.) However, the second fax that Ayco sent to the UWDC on May 12, 2003 clarified that, "Sandra started employment on 8/31/98 and resigned on 1/24/03." (Id., Ex. 8 (emphasis added).)

5. Essentially, the UWA maintains that it was not plaintiff's "employer" under Title VII or the NYSHRL, both of which prohibit an "employer" from discriminating against employees. According to the UWA, plaintiff's Complaint contains only "baseless allegations of a `joint employer' relationship between UWA and UWDC, and does not allege any involvement, direct or otherwise, by UWA" in plaintiff's allegedly discriminatory discharge. (UWA Mem. Supp. Summ. J. at 4.)

6. We note that the integrated enterprise doctrine is reserved for exceptional cases only and will generally be found only where there is sufficient evidence that the defendant had a "hands on" relationship with the employee at issue. See Balut v. Loral Electronic Sys., 988 F.Supp. 339, 347 (S.D.N.Y.1997) (Conner, J.). Moreover, the burden on the employee can be extremely difficult, where, as here, plaintiff "attempts to show not that a subsidiary is integrated with its parent, but rather," that two seemingly independent corporations should be considered as one. See Regan, 1995 WL 413249, at *2, 1995 U.S. Dist. LEXIS 9682, at *5.

7. Plaintiff attempts to argue that joint employer liability exists automatically between the UWA and the UWDC merely because they have become associated with each other via a contractual relationship. However, plaintiff has confused the aforementioned concept, which is a description of the type of entities that may be held up to scrutiny under the joint employer doctrine, for the actual inquiry itself which, as discussed supra, focuses on whether one entity has immediate control over the other entity's employees. See Rivera, 922 F.Supp. at 949 (quoting NLRB v. Solid Waste Serv., Inc., 38 F.3d 93 (2d Cir.1994)).

8. We note that many courts consider centralized control of labor relations to be the most important factor in this type of inquiry. See Cook, 69 F.3d at 1241 ("We focus our inquiry ... on the second factor, centralized control of labor relations."); see also Laurin v. Pokoik, No. 02 Civ.1938, 2004 WL 513999, at *6 (S.D.N.Y. Mar. 15, 2004), 2004 U.S. Dist. LEXIS 4066, at *19 ("Centralized control over labor relations, the most important prong in the single-employer inquiry, can include such factors as whether the companies have separate human-resources departments and whether the entity `establishes its own policies and makes its own decisions as to the hiring, discipline, and termination of its employees.'") (citation omitted).

9. Because we conclude that plaintiff has failed to show that the UWA employed her either directly or indirectly, as a joint employer, it is not necessary to address the UWA's remaining arguments herein.

10. As discussed in more detail infra, in Part IV., the UWA's motion is granted with respect to plaintiff's FCRA claim because we have concluded that the UWA and the UWDC do not operate as an integrated enterprise and because plaintiff makes no independent claims against the UWA under the FCRA.

11. However, it should be noted that plaintiff's Title VII violation claim only applies to the UWDC and not Williamson individually, while plaintiff's NYSHRL violation claim applies to both the UWDC and Williamson. (Compl.¶¶ 79-98.)

12. Since plaintiff has not introduced evidence showing that her position remained open and was eventually filled by a non-pregnant employee, we turn our focus to the alternative showing under the fourth prong of a prima facie case.

13. In fact, some courts within this Circuit assume the existence of a prima facie case and move to the "ultimate issue" of "whether the plaintiff has proven that it is more likely than not that the employer's discriminatory decision was motivated at least in part by an `impermissible,' or discriminatory, reason." Shafrir v. Ass'n of Reform Zionists of Am., 998 F.Supp. 355, 360 (S.D.N.Y.1998).

14. While we recognize that plaintiff may have offered explanations for her alleged misrepresentations, the statement contained in her resume and cover letter regarding her being presently employed at Ayco in March of 2003 could certainly be viewed as a false statement. Therefore, defendants' termination of plaintiff could be considered justified in light of the statement plaintiff signed which read "I understand that false or misleading information given in my application or interview(s) may result in discharge." (UWDC Defs. Rule 56.1 Stmt. ¶ 7); see Robinson v. N.Y. City Health Dep't, No. 00 Civ. 8969 (S.D.N.Y. July 26, 2001), 2001 U.S. Dist. LEXIS 10810, at *19-20. However, whether or not plaintiff told the truth is not at issue here. Rather, the issue, as discussed infra, in Part III.D, is whether plaintiff has presented enough evidence to establish that the UWDC defendants' proffered reason for her termination was actually a pretext for an impermissible reason.

15. The UWDC defendants request that we adopt the EEOC's findings. (UWDC Mem. Supp. Summ. J. at 7.) However, it is well-settled that EEOC determinations do not preclude a trial de novo in federal court. See Weise v. Syracuse Univ., 522 F.2d 397, 413 (2d Cir.1975). Thus, "district courts have substantial discretion with respect to the weight to be accorded an EEOC determination." Greenberg v. N.Y. City Transit Auth., 336 F.Supp.2d 225, 241-42 (S.D.N.Y.2004) (citing Wanamaker v. Columbian Rope Co., 907 F.Supp. 522, 538 n. 24 (N.D.N.Y.1995), aff'd, 108 F.3d 462 (2d Cir.1997)). We deny the UWDC defendants' request and accord the EEOC determination no weight in this case because it was "sparse and conclusory" and provides no indication of what the EEOC's investigation actually involved. Id.

16. Because we conclude that there are material issues of fact as to plaintiff's second claim, whether the UWDC defendants violated the NYSHRL, we similarly conclude that there are material issues of fact as to plaintiff's third claim, whether Williamson "aided and abetted" a violation of the NYSHRL.

17. In the Complaint plaintiff also alleges that the UWDC defendants violated the FCRA by: (1) failing to disclose to her in writing that they were going to obtain her credit report; and (2) failing to obtain her written permission prior to obtaining her credit report. (Compl.¶¶ 96, 97.) However, based on plaintiff's own explanation of her FCRA claim in her response papers and the evidence submitted by both parties, it appears that plaintiff has since withdrawn her claims with respect to these other FCRA violations. (Pl. Mem. Opp. Summ. J. at 24.) Accordingly, we will address only plaintiff's claim under 15 U.S.C. § 1681b(b)(3) herein.

----

954 F.Supp. 225
Festus D. TATUM, Plaintiff,
v.
Carla Shelton EVERHART, The United Way of Wyandotte County, and The United Way of America, Inc., Defendants.
Civil Action No. 95-2518-GTV.
United States District Court, D. Kansas.
February 3, 1997.
Page 226

Annette M. Jackson, Kansas City, KS, for Festus D. Tatum.

Carl A. Gallagher, Deryl W. Wynn, McAnany, Van Cleave & Phillips, P.A., Kansas City, KS, for Carla Shelton Everhart, United Way of Wyandotte County.

David Lee Heinemann, Patricia A. Konopka, Stinson, Mag & Fizzell, P.C., Kansas City, MO, for United Way of America, Inc.

MEMORANDUM AND ORDER

VAN BEBBER, Chief Judge.

This employment discrimination case is before the court upon defendant United Way of America, Inc.'s motion for summary judgment (Doc. 15) and motion to remove the case from the June 2, 1997 trial calendar and set aside the scheduling order (Doc. 37). For the reasons set forth below, the summary judgment motion is granted and the other motion is denied as moot.

Background

In his complaint, plaintiff Festus D. Tatum alleges the following: He became an employee of United Way of Wyandotte County, Kansas (UWWC) in 1988. Defendant Carla Shelton Everhart became the plaintiff's supervisor as of January 1994 when UWWC employed her as its President. Everhart subjected Tatum to sexual harassment and discrimination. In retaliation for spurning her sexual advances, Everhart gave the plaintiff negative evaluations. She also made comments regarding Tatum's age and his "old-fashioned" mode of operation. Everhart terminated the plaintiff's employment with UWWC in January 1995. Tatum was replaced by a younger, white male.

On August 16, 1995, based upon the termination of his employment, Tatum filed a charge of gender, age, and race discrimination with the Equal Employment Opportunity Commission (EEOC) and the Kansas Human Rights Commission (KHRC). In the charge, the plaintiff named only UWWC as his employer.

On November 21, 1996, Tatum filed suit against Everhart, UWWC, and United Way of America, Inc. (UWA), alleging gender, age, and race discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq.; Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq.; Kansas Act Against Discrimination (KAAD), K.S.A. § 44-1001 et seq.; and Kansas Age Discrimination in Employment Act (KADEA), K.S.A. § 44-1111 et seq., as well as intentional infliction of emotional distress in violation of Kansas common-law.

Defendant UWA subsequently filed this motion for summary judgment, asserting three grounds for granting the motion. First, UWA argues that it was not Tatum's employer within the meaning of Title VII, the ADEA, the KAAD, the KADEA, or Kansas common law. Next, UWA contends that Tatum failed to exhaust his administrative remedies when he did not name UWA as a respondent in his discrimination charge to the EEOC and KHRC. Finally, UWA maintains that after dismissing the federal claims, this court should not exercise supplemental jurisdiction over the state-law claims, but even if the court did, those claims also must fail.

Summary Judgment

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue regarding any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). All disputed facts, and reasonable inferences derived from the evidence presented, must be resolved in favor of the nonmoving party. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986); Frandsen v. Westinghouse Corp., 46 F.3d 975, 977 (10th Cir.1995); Federal Deposit

Page 227

Ins. Corp. v. 32 Edwardsville, Inc., 873 F.Supp. 1474, 1479 (D.Kan.1995). The existence of factual disputes is not an automatic preclusion to the grant of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). A "material" fact is one "that might affect the outcome of the suit under the governing law," and the issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The initial burden of demonstrating want of a genuine issue of material fact rests with the movant. Showing a lack of evidence to support the nonmovant's case discharges this burden. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553-54, 91 L.Ed.2d 265 (1986). After the movant has supported properly the summary judgment motion, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial" and not rely upon allegations or denials contained in the pleadings. Anderson, 477 U.S. at 256, 106 S.Ct. at 2514.

The movant is entitled to judgment as a matter of law should the nonmoving party insufficiently establish an essential element of a claim for which the nonmovant has the burden. Celotex Corp., 477 U.S. at 322, 106 S.Ct. at 2552.

Rule 56 should be construed to satisfy one of its principal purposes, namely, to segregate and eliminate factually unsupported claims and defenses. Id. Entitlement to summary judgment must be proven beyond a reasonable doubt. Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir.1980).

Rule 56(f)

Tatum argues that this court should delay ruling upon the summary judgment motion until after discovery is complete and the parties have had the opportunity to supplement their pleadings based upon that discovery. The plaintiff suggests "there is information which tends to support the contention that there was an interrelation between the personnel operations of the corporate defendants and the control of their labor relations, as well as common management." (Pltf.'s Response, at 10.) Tatum submits the affidavit of his counsel in accordance with Fed.R.Civ.P. 56(f), which provides:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

In the affidavit, Tatum's counsel states that she has reviewed documents from the plaintiff and those UWA has filed with the court; that she has interviewed other persons concerning their knowledge of relevant and material facts concerning the plaintiff's cause of action and UWA's motion; and that the "plaintiff has information and believes" UWA and UWWC "have a dynamic, symbiotic relationship" partially evident from the attachments to UWA's summary judgment motion; and that the plaintiff expects to discover additional information, available only from the defendants, regarding "UWA's involvement in the process of personnel selection, setting wage and salary levels for the various positions in the local organizations."

The affidavit of Tatum's counsel is insufficient to invoke the protection of Rule 56(f). The affidavit does not explain "`why facts precluding summary judgment cannot be presented,'" does not describe "`what steps have been taken to obtain these facts,'" and does not explain "`"how additional time will enable [her] to rebut movant's allegations of no genuine issue of fact."'" First Sav. Bank v. First Bank Sys., Inc., 902 F.Supp. 1366, 1382 (D.Kan.1995) (quoting Committee for the First Amendment v. Campbell, 962 F.2d 1517, 1522 (10th Cir.1992) (quoting Meyer v. Dans un Jardin, S.A., 816 F.2d 533, 537 (10th Cir.1987))), rev'd on other grounds, 101 F.3d 645 (10th Cir.1996). The affidavit also does not specify which documents are relevant and with whom she spoke or what information, if any, they provided to rebut UWA's position. Simply asserting that

Page 228

UWA has evidence supporting the plaintiff's position will not justify denying summary judgment under Rule 56(f). See Jensen v. Redevelopment Agency of Sandy City, 998 F.2d 1550, 1554 (10th Cir.1993). Additionally, the record reveals that Tatum has not filed any formal discovery requests of UWA since filing suit on November 21, 1995. The plaintiff has had ample time to engage in discovery. See id. ("if the party filing the Rule 56(f) affidavit has been dilatory, ... no extension will be granted"); Friends of Santa Fe County v. LAC Minerals, Inc., 892 F.Supp. 1333, 1343 (D.N.M.1995) ("Plaintiffs had not attempted to serve discovery requests at this time ... and so fail to assert sufficient grounds to invoke Rule 56(f)"). The court will not defer its ruling and, accordingly, will address the merits of UWA's motion for summary judgment.

Employer under Title VII & ADEA

UWA argues that Tatum's Title VII and ADEA claims cannot withstand summary judgment because UWA was not Tatum's "employer" within the statutory meaning of that term. Both acts prohibit an employer from discriminating against an employee, 29 U.S.C. § 623(a)(1); 42 U.S.C. § 2000e-2(a)(1), and define employer similarly, Thomason v. Prudential Ins. Co., 866 F.Supp. 1329, 1334 n. 9 (D.Kan.1994); see Wheeler v. Hurdman, 825 F.2d 257, 263 (10th Cir.1987) (case law construing Title VII and ADEA definition terms generally are persuasive authority for the other act). Whether the plaintiff was UWA's employee "is both a jurisdictional question and an aspect of the substantive claim in [this] discrimination action." Id. at 259.

The essence of Tatum's position is that UWA and UWWC should be considered a single employer for Title VII and ADEA purposes. The Tenth Circuit has applied the following four factors, sometimes referred to as the integrated enterprise test, to determine whether two entities should be considered as one in employment discrimination actions: (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. See Lambertsen v. Utah Dep't of Corrections, 79 F.3d 1024, 1029 (10th Cir.1996) (single employer issue under Title VII); Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir.1993) (whether parent company liable for the actions of its subsidiary under Title VII and ADEA); see also Evans v. McDonald's Corp., 936 F.2d 1087, 1089-90 (10th Cir.1991) (whether restaurant franchisor was employer of franchise employee in Title VII action). The Lambertsen court concluded that the most important factor is centralized control over labor relations. 79 F.3d at 1029.

The Tenth Circuit has applied these factors in the context of commercial, for-profit corporations. Other courts have applied the single employer or integrated enterprise test in the nonprofit arena. In employment-related actions, the United States District Court for the Districts of Connecticut and Nebraska applied the test in addressing whether the American Red

Cross could be characterized as the employer of the plaintiff who worked for a local Red Cross chapter. See Owens v. American Nat'l Red Cross, 673 F.Supp. 1156, 1160-61 (D.Conn.1987) (after application of integrated enterprise factors, court concluded national organization was not plaintiff's employer); Webb v. American Red Cross, 652 F.Supp. 917, 919-22 (D.Neb.1986) (same).

The first factor of the single employer or integrated enterprise test is interrelated operations. The National Labor Relations Board, which initially adopted the test "as a self-imposed jurisdictional restriction" on Title VII's definition of employer, has identified seven indicia of interrelatedness: "(1) combined accounting records; (2) combined bank accounts; (3) combined lines of credit; (4) combined payroll preparation; (5) combined switchboards; (6) combined telephone numbers; and (7) combined offices." Eichenwald v. Krigel's Inc., 908 F.Supp. 1531, 1540, 1541 n. 8 (D.Kan.1995).

UWWC is a member organization of UWA, a nonprofit corporation organized under the laws of New York with its principal office in Virginia. To qualify as a member organization, each local organization must be nonprofit and tax-exempt, pay membership dues, and satisfy other requirements such as being nondiscriminatory in the composition

Page 229

of its board and staff. There is no evidence, however, to satisfy any of the above indicia.1

Additionally, UWA and UWWC are incorporated separately. See Frank, 3 F.3d at 1362 (in cases of separate incorporation, the limited liability doctrine "creates a strong presumption that a parent company is not the employer of its subsidiary's employees, and the courts have found otherwise only in extraordinary circumstances"). UWA and UWWC operate under separate bylaws, are governed by separate boards, and have separate IRS exemptions. The evidence before the court establishes the lack of interrelated operations.

Common management, the second factor, examines whether the two entities have common directors and officers. See Spicer v. Arbor Nall Nursery, Inc., No. 93-2537, 1995 WL 42660, *5 (D.Kan. Jan. 18, 1995). Here, there is no evidence of common directors, officers, or board members.

Additionally, UWA's professional officer search and referral program, one of UWA's primary services to member organizations, does not establish common management. Under this program, a professional employed by a member organization may establish a file with UWA in order to be considered for open positions with other member organizations. Upon request by a member organization, UWA shares the files of qualified candidates with the member organization. UWA's involvement ends there. The member organization reviews the files, contacts the candidates in which it is interested, schedules interviews, establishes the salary for the position, and makes any offer of employment.

Both Tatum and Everhart established files with UWA's referral service. When UWWC utilized the service in searching for a new president, Everhart was included in the list. UWA had no influence in UWWC's decision to hire or fire Tatum or to hire Everhart. UWA did not supervise or evaluate the work performance of either.

The third and most important factor is centralized control of labor relations.

To establish centralized control, the parent corporation's control of the day-to-day employment decisions of the subsidiary must be shown. Day-to-day control must actually be exercised; potential control is not sufficient. Courts have found centralized control when the parent was involved in the subsidiary's hiring decisions, when a common officer had approved all hiring decisions of the subsidiary, and when the parent has issued personnel policies and also fired at least one subsidiary employee. The Tenth Circuit has emphasized the importance of a plaintiff's actual experience as an employee with respect to whether the parent corporation hired the plaintiff, fired the plaintiff, or supervised the plaintiff's work on a regular, daily basis.

Eichenwald, 908 F.Supp. at 1541 n. 9 (citations omitted). There is no evidence UWA exercised actual day-to-day control over UWWC's labor relations. UWWC hired and fired Tatum. UWWC established and provided salaries and benefits for all employees. There is no evidence UWA made any decisions, let alone the final decision, regarding Tatum's employment. See Frank, 3 F.3d at 1363. The fact UWA espoused broad general policy statements on employment matters does not establish centralized control. See id.

The final and least important factor is common ownership or financial control. See Eichenwald, 908 F.Supp. at 1540. UWA and its member organizations are nonprofit, charitable organizations and not owned in the traditional commercial sense. Although financial

Page 230

accountability is part of the eligibility criteria to become a member organization, there is no evidence UWA exercises financial control over member organizations, including UWWC.

Here, the evidence establishes that UWA and UWWC should not be viewed as a single employer for Title VII and ADEA purposes. Because the court finds UWA is not Tatum's employer, the Title VII and ADEA claims against UWA must be dismissed for want of jurisdiction. See Wheeler, 825 F.2d at 259.

Because the court lacks original jurisdiction over the federal claims, the court has no authority to exercise supplemental jurisdiction over the plaintiff's state-law claims against UWA. See 28 U.S.C. § 1367(a); Nowak v. Ironworkers Local 6 Pension Fund, 81 F.3d 1182, 1187 (2d Cir.1996) ("While the district court may, at its discretion, exercise supplemental jurisdiction over state law claims even where it has dismissed all claims over which it had original jurisdiction, it cannot exercise supplemental jurisdiction unless there is first a proper basis for original federal jurisdiction") (citations omitted); Jordahl v. Democratic Party of Va., 947 F.Supp. 236, 241-42 (W.D.Va.1996) ("Because the court lacks subject-matter jurisdiction over the plaintiffs' federal claims, it has no supplemental jurisdiction over the state law claims."); see also Alexander v. Anheuser-Busch Cos., 990 F.2d 536, 540 (10th Cir.1993) (plaintiff had no standing to bring ERISA claim, basis upon which federal district court had jurisdiction; therefore, "district court was without jurisdiction to decide his pendent state claim"). Therefore, the state-law claims against UWA also are dismissed.

IT IS, THEREFORE, BY THE COURT ORDERED that defendant UWA's motion for summary judgment (Doc. 15) is granted. All claims against UWA are dismissed, and UWA is dismissed from this action.

IT IS FURTHER ORDERED that defendant UWA's motion to remove the case from the June 2, 1997 trial calendar and set aside the scheduling order (Doc. 37) is denied as moot.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Notes:

1. Tatum requests that the court strike the affidavit of Charles E.M. Kolb, alleging that the statements in the affidavit are conclusory and not based upon personal knowledge. The plaintiff also attempts to controvert many of the defendant's facts by responding "controverted as to relevance" and "controverted as to sufficiency of factual statement and affidavit."

The court will not strike the affidavit of Kolb, who served as the Secretary and General Counsel of United Way of America, Inc. (UWA) since 1992. In his affidavit, Kolb states that his facts are based upon personal knowledge or his review of UWA business records. Tatum offers no evidence to contradict that statement. Additionally, the plaintiff does not set forth specific facts to create genuine issues of material facts and therefore fails to satisfy the requirements of D.Kan.R. 56.1. UWA's facts are deemed admitted for purposes of this motion.
