IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

GLENNETTE MAXWELL,

Plaintiff,

v. **Case No. 1:15cv216-MW/GRJ**

SUN BAY APARTMENTS D/B/A ETHERFI-BLUESKIES COMMUNICATIONS, FRED HARMS, MARIBETH COLLER, DONALD COLLER, and GREAT SOUTHERN, LLC,

Defendants.
_____/

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS

This Court has considered, without hearing, Defendants' Motion to Dismiss, ECF No. 10.

This is a retaliation case. Glennette Maxwell sues her former employer, an apartment complex where she was a leasing agent, alleging that she was terminated in retaliation for complaining about sexual harassment. The Defendants, a group of individuals and entities that allegedly constituted the ownership of the apartment complex, move to dismiss on the grounds that the Complaint does not sufficiently allege that they were her employer.

After careful review, this Court finds that the Complaint adequately alleges that the individual defendants, but not the corporate defendants, employed her. It also finds that the Complaint fails to state a claim for violation of a local antidiscrimination ordinance. Defendants' motion is therefore granted in part and denied in part.

FACTUAL BACKGROUND

When deciding a motion to dismiss, courts must "accept[ ] the allegations in the complaint as true and construe them in the light most favorable to the plaintiff." *McCone v. Pitney Bowes, Inc.*, 582 F. App'x 798, 799 (11th Cir. 2014) (quoting *Spain v. Brown & Williamson Tobacco Corp.*, 363 F.3d 1183, 1187 (11th Cir. 2004)).

Plaintiff Glenette Maxwell was employed as a leasing agent at an apartment complex in Gainesville, Florida. ECF No. 1 at 3. One day, as part of her ordinary duties, she escorted a pest control technician through the property. ECF No. 1 at 5. The technician made an unwanted sexual assault on Maxwell by cornering her and attempting to kiss her. *Id.* After Maxwell reported the incident to her supervisor, the company retaliated her against by, among other things, terminating her. *Id.*

Maxwell alleges that an entity called Sun Bay Apartments D/B/A Etherfi-Blueskies Communications responded to her pre-suit discrimination charges against the apartment complex. *Id.* at 2. That entity is a fictitious name operated

by Fred Harms and Maribeth Coller. *Id.* at 2-3; ECF No. 1-9. Additionally, Fred Harms and Donald Coller were listed as Maxwell's employers with the State of Florida Department of Unemployment Compensation. ECF No. 1 at 2; ECF No. 1-12. Additionally, Maxwell received her paychecks from a corporation called Great Southern, LLC, with an address in Bloomington, Indiana. ECF No 1 at 3; No. 1-10.

Maxwell filed suit in this Court alleging retaliation under Title VII of the Civil Rights Act (Count I), retaliation under the Florida Civil Rights Act (Count II),[1] and retaliation under the Gainesville Code of Ordinances § 8-48(a) (Count III). Defendants Sun Bay Apartments d/b/a Etherfi-Blueskies Communications, Mariebth Coller, Donald Coller, and Great Southern, LLC, move to dismiss the Complaint.[2]

DISCUSSION

The four Defendants move to dismiss on the grounds that (1) Maxwell did not exhaust her administrative remedies; (2) the individual defendants cannot be liable; (3) the Complaint does not sufficiently establish that each Defendant was her employer; (4) the Complaint does not establish retaliation under the Gainesville

[1] The Florida Civil Rights Act, Chapter 760, was patterned after Title VII. Florida courts have construed the act in accordance with decisions of federal courts interpreting Title VII. *See Wilbur v. Corr. Servs. Corp.*, 393 F.3d 1192, 1195 (11th Cir.2004).

[2] Defendant Fred Harms does not appear to have yet entered an appearance in this action.

Code; and (5) the Complaint does not establish personal jurisdiction over out-of-state Defendants.

Sun Bay and Maribeth Coller

Maxwell named Sun Bay Apartments D/B/A Etherfi-Blueskises Communications ("Sun Bay") in her EEOC and FCRA complaints. ECF No. 1-11. Sun Bay, in turn, responded as her employer, ECF No. 1 at 2. It appears to have responded under the names "Sun Bay Apartments," ECF No. 1-6; 1-7, and "Sun Island," ECF No. 11-1, although both of those entities use the same Gainesville address attributed to Sun Bay. *See* ECF No. 1-9. Based on these allegations, it is "plausible," *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), that Sun Bay operated the Gainesville apartment complex that employed Maxwell as a leasing agent.

The Complaint alleges, however, that Sun Bay is a mere fictitious name. Pursuant to Florida's Fictitious Name Act, a fictitious name is "any name under which a person transacts business in this state, other than the person's legal name." Fla. Stat. § 865.09(2)(a). The Complaint further alleges that Fred Harms and Maribeth Coller operate the fictitious entity. Based on the allegations in the Complaint and the attached registration statement, ECF No. 1-9, it is certainly "plausible" that Coller operates Sun Bay, notwithstanding the fact that the registration statement has expired.

Defendants' argument that Maribeth Coller cannot be liable merely because she is an individual is not well-taken. While individuals *acting on behalf on an employer* cannot be liable under Title VII, *see Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir. 1995), individuals *who are, in fact, employers* may be liable. *See Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991) ("The relief granted under Title VII is against the *employer*.") (emphasis in original). To hold otherwise would uniformly exempt sole proprietors and general partnerships from suit under the Civil Rights Act—a completely absurd outcome.

Defendants' argument that Maxwell failed to exhaust administrative remedies against Maribeth Coller by failing to name her in the pre-suit charges likewise falls short. Sun Bay was merely a fictitious name for Harms and Coller, so the charge did, in fact, name Coller. Further, Coller, as an individual who employed Maxwell in Florida, is subject to personal jurisdiction in Florida.

The flip side of Maxwell's allegation, however, is that Sun Bay, as a mere fictitious name for Harms and Coller, has no independent legal existence apart from its owners and is therefore not a properly named defendant. Based on the allegations in the Complaint, the claims against Sun Bay are improper and must be dismissed.[3] *See Osmo Tec SACV Co. v. Crane Envtl., Inc.*, 884 So. 2d 324, 327

[3] In so ordering, this Court is *not* granting Defendants' motion to dismiss as it relates to Sun Bay. Sun Bay is not a legal entity and has no standing to move dismiss the claims against it. The Court is granting its own motion pursuant to Fed. R. Civ. P. 12(b)(1).

(Fla. 2d DCA 2004) ("Haliant Technologies, a fictitious name, had no independent legal existence and could not be enjoined; any reference to Haliant Technologies was simply a reference to Andalite Industries.").

Coller, however, as an individual owning and operating the fictitious Sun Bay name, is properly named as an individual who operated the apartment complex that employed Maxwell.

Defendants' motion is therefore denied as to Maribeth Coller.

Donald Coller

Maxwell named Donald Coller as a defendant, alleging that he was also her employer. Maxwell based this allegation on the fact that he was listed as her employer on the State of Florida Department of Unemployment Compensation's website. ECF No. 1-12.

The fact that Coller is listed as Maxwell's employer on a government website plausibly suggests that he was, in fact, her employer. It suggests that he was affiliated with the fictitious Sun Bay entity to such an extent that he held himself out to be Maxwell's employer to a state agency. The fact that the attached screenshot of the government's website, ECF No. 1-12, may be hearsay is not relevant at this early stage in this litigation.

Coller—to the extent he may liable as an owner of the fictitious entity Sun Bay—may likewise be properly sued even though he was not specifically named in

the pre-suit charges. Although ordinarily "a party not named in the EEOC charge cannot be sued in a subsequent civil action . . . courts liberally construe this requirement." *Virgo v. Riviera Beach Associates, Ltd.*, 30 F.3d 1350, 1358 (11th Cir. 1994). It is plausible at this point in the litigation that the "purposes of the Act are fulfilled," *id.* at 1359, as to Coller, given that—taking the allegations in the light most favorable to the plaintiff—he was affiliated with the entity named in the charge to such an extent that he held himself out to be Maxwell's employer. For these same reasons, Coller is clearly subject to personal jurisdiction in Florida.

Defendants' motion is therefore denied as to Donald Coller.

Great Southern, LLC

The Complaint finally names Great Southern, LLC, as Maxwell's joint employer. It bases this allegation solely on the allegation that Maxwell received her paychecks from Great Southern. ECF No. 1 at 3; 1-10.

However, to be considered a joint employer, "an entity must exercise sufficient control over the terms and conditions of a plaintiff's employment." *Kaiser v. Trofholz Technologies, Inc.*, 935 F. Supp. 2d 1286, 1293 (M.D. Ala. 2013) (citing *Virgo,* 30 F.3d at 1360 (11th Cir.1994)). "[M]erely providing benefits, insurance, and payroll administration does not establish central control of labor relations that is present in a joint employer situation." *Clark v. St. Joseph's/Candler Health Sys., Inc.*, No. 4:05-CV-119, 2006 WL 2228929, at *7

(S.D. Ga. Aug. 3, 2006) (citing *Watson v. Adecco Employment Services, Inc.*, 252 F.Supp.2d 1347, 1356 (M.D.Fla.2003)). The Complaint contains no allegations that Great Southern, LLC exercised any control over Maxwell, much less "sufficient" control over the terms and conditions of her employment, other than ministerially issuing her paychecks.

However, because it is possible that Maxwell could allege additional factual material to establish that Great Southern, LLC was her joint employer, the claims against it will be dismissed with leave to amend.

The Gainesville Ordinance Claims

Count III of the Complaint alleges that the Defendants retaliated against Maxwell in violation of the Gainesville Code of Ordinances § 8-48(a). Defendants argue that the Complaint fails to state a claim because § 8-48(a) does not extend to informal claims of retaliation. In her responsive memorandum, ECF No. 11, Maxwell failed to respond to this argument.

Here, Defendants' argument appears to have merit. Gainesville Code of Ordinances § 8-48(a), in its entirety, reads

> "It shall be an unlawful employment practice for an employer to:
> (1) Fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his/her compensation, terms, conditions or privileges of employment because of the individual's sexual orientation, race, color, gender, age, religion, national origin, marital status, disability or gender identity.
> (2) Limit, segregate or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of

> employment opportunities or otherwise adversely affect his/her status as an employee, because of such individual's sexual orientation, race, color, gender, age, religion, national origin, marital status, disability or gender identity.
> (3) Discriminate against any person because of his/her physical or mental disability except in respect to a bona fide occupational qualification.
>
> Gainesville, Fla., Code of Ordinances § 8-48(a) (2015),

https://www.municode.com/library/fl/gainesville/codes/code_of_ordinances?nodeId=PTIICOOR_CH8DI_ARTIIIEQEMOP_S8-48PRDIEMPR. This provision does not contain any anti-retaliation provision, and only prohibits discrimination based on certain protected characteristics. The Complaint therefore cannot state a claim under § 8-48(a).

The Gainesville Code of Ordinances does contain an anti-retaliation provision at § 8-48(f), which is the provision that the Gainesville Human Rights Board found may have been violated. *See* ECF No. 1-8 at 15. However, even liberally construing the Complaint to allege such a violation, § 8-48(f) does not appear to prohibit retaliation based on informal complaints of sexual harassment because it does not contain an opposition clause. *Compare* § 8-48(f) (prohibiting retaliation against employees who "made a charge, testified, assisted or participated in any matter in an investigation, proceeding or hearing under this article"), *with* 42 U.S.C. § 2000e-3(a) (prohibiting retaliation against employees who "opposed any practice made an unlawful employment practice by this subchapter" *or* who "made a charge, testified, [etc.]").

The Complaint thus cannot state a claim for a violation of § 8-48, and Count III must be dismissed with prejudice.

Additionally, Maxwell did not appear to name Great Southern, LLC as a defendant in her Gainesville Human Rights Board complaint, ECF No. 1-8, and Count III must also be dismissed as against Great Southern for failure to exhaust administrative remedies.

CONCLUSION

For the reasons stated,

IT IS ORDERED:

1. Defendants' Motion to Dismiss, ECF No. 10, is **GRANTED IN PART, DENIED IN PART.**
2. The Motion is **GRANTED** as to Count III. Count III as to all Defendants is **DISMISSED WITH PREJUDICE**. The Court does *not* direct entry of judgment as to the dismissed claims pursuant to Fed. R. Civ. P. 54(b).
3. The Motion is **GRANTED** as to Counts I and II as to Defendant Great Southern, LLC. Counts I and II as to Defendant Great Southern, LLC are **DISMISSED WITHOUT PREJUDICE.** Plaintiff has leave to file an amended complaint not later than fourteen days from the date of this Order to address the deficiencies in these claims.

4. The Motion is **DENIED** as to Counts I and II as to Defendants Maribeth Coller and Donald Coller.

5. On the Court's own motion pursuant to Fed. R. Civ. P. 12(b)(1), all claims against Defendant Sun Bay Apartments D/B/A Etherfi-Blueskies Communications are **DISMISSED.** The Clerk is directed to terminate this Defendant. The Clerk is *not* directed to issue judgment in favor of this Defendant, because it is not a legal entity.

SO ORDERED on November 18, 2015.

s/Mark E. Walker
United States District Judge