

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DAVID FLAHERTY,)
)
 Plaintiff)
)
 v.)
)
 S. D. WARREN COMPANY,)
)
 Defendant and Third-)
 Party Plaintiff)
)
 v.)
)
 UNITED PAPERWORKERS)
 INTERNATIONAL UNION, et al.,)
)
 Third-Party Defendants)

Docket No. 98-254-P-H

**RECOMMENDED DECISION ON THIRD-PARTY DEFENDANTS’
MOTION TO DISMISS**

The third-party defendants, United Paperworkers International Union, AFL-CIO, and Cumberland Mills Local 1069, move to dismiss the third-party complaint brought against them by defendant S. D. Warren Company in this action raising claims under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 *et seq.*, and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.* I recommend that the court deny the motion.

I. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to

dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993). In this case, where the motion to dismiss addresses a third-party complaint, that document will be read together with the initial complaint for purposes of consideration of the motion to dismiss. *Bozsi Ltd. Partnership v. Lynott*, 676 F. Supp. 505, 515 (S.D.N.Y. 1987).

II. Factual Background

The amended complaint and the third-party complaint set forth the following relevant facts. Cumberland Mills Local 1069 (“Local 1069”) is a local labor organization affiliated with the United Paperworkers International Union (“UPIU”). Third-Party Complaint (Docket No. 5) ¶4. Since 1967 the UPIU and Local 1069 (together, the “Union”) have been jointly certified by the National Labor Relations Board as the sole bargaining representative for production and maintenance employees at the Westbrook, Maine location of defendant S. D. Warren. *Id.* ¶ 6. A collective bargaining agreement between the Union and S. D. Warren has been in effect since 1968, with the current version applicable from 1997 through 2002. *Id.* ¶ 7.

The plaintiff, David Flaherty, is an employee of S. D. Warren and at all relevant times has been a member of the Union. The terms and conditions of his employment are governed by the collective bargaining agreement. *Id.* ¶ 9. The collective bargaining agreement includes terms that

govern the promotion and seniority of Union members, and an additional agreement, known as Millwide 28 and incorporated into the collective bargaining agreement, concerns the seniority rights of Union members who have medical restrictions on their work. *Id.* ¶¶ 8, 10. In 1985 Flaherty injured his arm, resulting in an inability to perform certain jobs in the order of promotion within certain S. D. Warren departments that is set forth in the collective bargaining agreement. *Id.* ¶ 11. Flaherty alleges that he is an individual with a disability and that discrimination due to his disability has prevented him from obtaining certain permanent bargaining unit positions. Amended Complaint (Docket No. 2) ¶¶ 18-19. Millwide 28 prevents Flaherty from obtaining the employment positions that he desires, and he contends that Millwide 28 therefore violates the ADA and the Maine Human Rights Act. Third-Party Complaint ¶ 15.

The rights under the collective bargaining agreement and Millwide 28 of bargaining unit employees other than Flaherty would be violated if Flaherty were promoted to the positions he seeks despite the terms of Millwide 28. *Id.* ¶ 16. A representative of the Union appeared before the Maine Human Rights Commission when it was considering Flaherty's charge based on these circumstances. *Id.* ¶ 19. The amended complaint seeks damages for S. D. Warren's alleged "policies [that] treat [Flaherty] differently because of his disability, record of disability or because he is regarded or treated as disabled and restrict [Flaherty's] ability to gain a bargaining unit position based on [Flaherty's] seniority when compared to non-disabled employees." Amended Complaint ¶ 19.

In June 1997 Flaherty asked S. D. Warren and the Union to amend Millwide 28 in a particular manner that would allow him to obtain the position or positions he seeks. Third-Party Complaint ¶ 22. In July 1997 S. D. Warren proposed to the Union certain specific changes to Millwide 28 that would have "satisfied Flaherty's request to amend Millwide 28" and allowed him to seek a

permanent bargaining unit position within his medical restrictions based on his seniority. *Id.* ¶¶ 23-24. The Union rejected the proposal. *Id.* ¶ 25. As a result, S.D. Warren has been unable to make the accommodation requested by Flaherty. *Id.*

The third-party complaint seeks contribution from the Union for any damages awarded against it on Flaherty's claims (Count I) and contends that the Union is a necessary party to the action for the purpose of any equitable relief that might be granted to Flaherty (Count II). *Id.* ¶¶ 28-35. A copy of Millwide 28 is attached to the third-party complaint, but the collective bargaining agreement is not presently before the court.

III. Discussion

The Union makes two arguments in its motion to dismiss the third-party complaint: (1) that the third-party complaint charges it with a refusal to bargain in good faith and that such a claim is time-barred under the National Labor Relations Act, specifically 29 U.S.C. § 160(b); and (2) that Flaherty has no right to a reasonable accommodation under the ADA as a matter of law because the accommodation he seeks would violate the seniority rights of other employees under the collective bargaining agreement. Third-Party Defendant Union's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) ("Motion to Dismiss") (Docket No. 9) at 2-10. The Union also argues that the claim under the Maine Human Rights Act must be treated in all respects in the same manner as the federal ADA claim. *Id.* at 10-11.

In response, S. D. Warren denies that it has alleged any illegal refusal to bargain or other unfair labor practice in the third-party complaint. Defendant and Third Party Plaintiff S. D. Warren's Objection to Third Party Defendants' Motion to Dismiss ("S. D. Warren's Objection") (Docket No.

11) at 3, 12-13. Accordingly, there is no need to address the Union's first argument. On the remaining points, S. D. Warren contends that the Union's argument is appropriate for summary judgment but does not justify dismissal of the third-party complaint, that the Union is a necessary party under Fed. R. Civ. P. 19(a) for any injunctive relief that might be granted, and that it is entitled to contribution for damages awarded under the Maine statute, although it concedes that it is not entitled to contribution under the ADA. *Id.* at 2, 4-12.

Initially, so long as Flaherty maintains any claim for injunctive or equitable relief against S. D. Warren, it is clear that the Union is an appropriate third-party defendant. *EEOC v. Rockwell Int'l Corp.*, 23 F.Supp.2d 892, 894 (N.D.Ill. 1998).¹ See also 7 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1620 (2d ed. 1986) at 295; *Forsberg v. Pacific Northwest Bell Tel. Co.*, 622 F. Supp. 1147, 1150 (D. Ore. 1985) (union joined under Fed. R. Civ. P. 19(a)). The Union is thus entitled to dismissal of Count II of the third-party complaint only if it succeeds on its argument that S. D. Warren cannot be liable to Flaherty on the underlying complaint as a matter of law. That argument cannot be resolved on the present record. The issue would be appropriate for consideration on a motion for summary judgment, where the collective bargaining agreement and other relevant evidence would be before the court, but does not lend itself to resolution in the context of a motion

¹ The fact that the Union was not a named party before the Maine Human Rights Commission (and hence the Equal Employment Opportunity Commission) does not require dismissal of the kinds of claims made in the third-party complaint. *Rockwell Int'l Corp.*, 23 F.Supp.2d at 894. This circumstance has no bearing on Count I, since the requirement only extends to the plaintiff's federal claim, and S. D. Warren concedes that it has no claim for contribution under the federal statute. S. D. Warren's Objection at 11 n.4. See also *Boczon v. Northwestern Elevator Co.*, 652 F. Supp. 1482, 1486 (E.D.Wis. 1987) (rule requiring dismissal of claims against defendants not charged before the EEOC applies only to plaintiffs, not to defendants "who had no control over the EEOC charging decision"); *Curran v. Portland Superintending Sch. Comm.*, 435 F. Supp. 1063, 1074 (D. Me. 1977) (holding that this exclusion does not apply if the defendant at issue had notice of and participated in the agency proceeding or if the defendant is an "indispensable party" under Rule 19).

to dismiss.

The Union contends that since “S. D. Warren acknowledges that the ADA does not require the provision of reasonable accommodations which contradict a seniority system provided for in a bona fide collective bargaining agreement,”² “there is no dispute regarding the unavailability of the relief sought from the Unions by Plaintiff³ and/or Third-Party Plaintiff.” Third-Party Defendant Unions’ Reply Memorandum on Motion to Dismiss (Docket No. 12) (“Union’s Reply”) at 2. The conclusion does not necessarily follow from the premise. While the third-party complaint does allege that “[p]ursuant to the C[ollective] B[argaining] A[greement] and Millwide 28, . . . the rights of other bargaining unit employees (those in the same line of progression as Flaherty) would be violated if S. D. Warren granted the exemption and promoted Flaherty to the positions to which he contends he is entitled,” Third-Party Complaint ¶ 16, it also alleges that Flaherty contends “that the bona fide seniority provisions of the C[ollective] B[argaining] A[greement] and Millwide 28 violate the ADA, the MHRC and/or the ‘Civil Rights Act of 1991,’” and that, if Flaherty is correct, the Union is liable, *id.* ¶ 32. Based on the record before the court, I cannot conclude that there is no dispute regarding the availability of any and all relief sought by Flaherty, nor can I say that it appears to a certainty that S. D. Warren would not be entitled to some relief from the Union under any set of facts.

In addition, basic fairness demands that a defendant not be put in the position of forsaking its defense to a plaintiff’s claim in order to preserve its right to assert that another entity is liable to it for all or some portion of the damages or is a necessary party to ensure full equitable relief if the plaintiff is nonetheless ultimately successful on his claim.

² The case law cited by the Union in support of this proposition arises solely in the context of motions for summary judgment.

³ There is no indication in the record that Flaherty seeks any relief from the Union.

The Union argues in the alternative that it is entitled to dismissal of Count I of the third-party complaint because S. D. Warren is not entitled to contribution on claims made under the ADA or the Maine Human Rights Act. S. D. Warren concedes that it is not entitled to contribution on ADA claims, *see Pattison v. Meijer, Inc.*, 897 F. Supp. 1002, 1009 (W.D.Mich. 1995); *Lane v. United States Steel*, 871 F. Supp. 1434, 1436-37 (N.D.Ala. 1994), but contends that it has a viable claim under the state statute. The Union responds that the Maine Human Rights Act “closely tracks the provisions of the ADA,” Union’s Reply at 3, citing *Soileau v. Guilford of Maine, Inc.*, 928 F. Supp. 37 (D. Me. 1996), apparently to suggest that the unavailability of contribution under the ADA must be extended to the state statute, and that the state statute “provides only for those remedies set forth in the Act, and . . . common law remedies are not available to MHRA plaintiffs,” Union’s Reply at 3, citing *LaPlante v. United Parcel Serv., Inc.*, 810 F. Supp. 19, 22 (D. Me. 1993), and *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1525 (D. Me.), *vacated in part on other grounds*, 765 F. Supp. 1529 (D. Me. 1991).

This court stated in *Soileau* that “[i]n analyzing the ADA and MHRA, the Court need not continuously distinguish between the two statutes as to their scope and general intent because Maine courts consistently look to federal law in interpreting state anti-discriminatory statutes.” 928 F. Supp. at 45 (addressing question whether plaintiff qualified as disabled). This court held in *LaPlante* that the plaintiff’s remedies under the Maine Human Rights Act “are limited to reinstatement with or without back pay . . . and fringe benefits” and specifically that compensatory damages for pain and suffering and punitive damages are not available. 810 F. Supp. at 22, citing 5 M.R.S.A. § 4613. That statute has since been amended to make compensatory and punitive damages available in cases of intentional employment discrimination. 5 M.R.S.A. § 4613(2)(B)(8).

In *Harris* this court held only that “compensatory damages for pain and suffering, and punitive damages, are not available under the MHRA.” 765 F. Supp. at 1525. Neither *LaPlante* nor *Harris* can be stretched to exclude third-party common-law claims for contribution by defendants found liable under the state statutory scheme. Nor can *Soileau*’s general observation concerning the scope and general intent of the federal and state statutes be extended to include such claims.

The federal district courts that found no right to contribution from unions for employers found liable under the ADA based that finding on the Supreme Court’s opinion in *Northwest Airlines, Inc. v. Transport Workers Union of Am., AFL-CIO*, 451 U.S. 77 (1981), in which the Court held that there is no right of contribution on Title VII claims when the statute upon which liability was based does not expressly provide for such a right and no such right may be implied because the statutory language does not indicate that it was enacted for the special benefit of the class of which the party seeking contribution is a member. 451 U.S. at 91-92. The Maine Law Court addresses the question whether the remedies provided by a statute are exclusive in a distinctly different manner. Under Maine law, a statute does not provide an exclusive remedy “in the absence of express language to that effect.” *Swan v. Sohio Oil Co.*, 618 A.2d 214, 220 (Me. 1992), quoting *Klingerman v. Sol Corp. of Maine*, 505 A.2d 474, 477 (Me. 1986). A common law cause of action is not extinguished in the absence of statutory language making a remedy exclusive. *Id.* This approach is particularly significant in light of the Law Court’s consistent position that an action for contribution is an equitable right distinct from the statutory action for damages that may give rise to it. *E.g.*, *St. Paul Ins. Co. v. Hayes*, 676 A.2d 510, 511-12 (Me. 1996). *See also Brown v. Augusta Sch. Dep’t*, 963 F. Supp. 39, 41 (D. Me. 1997). Coupled with the fact that the Maine Human Rights Act does not expressly exclude actions for contribution by defendants liable for damages as a result of its violation

and indeed states that the remedies for unlawful employment discrimination “may include, but are not limited to” a list of alternatives, 5 M.R.S.A. § 4613(2)(B), this case law leads to the conclusion that a right of contribution is available under the Maine Human Rights Act.

IV. Conclusion

For the foregoing reasons, I recommend that the third-party defendant unions’ motion to dismiss be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 26th day of January, 1999.

*David M. Cohen
United States Magistrate Judge*