

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

BARBARA L. LEMERICH, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 01-124-B-C  
 )  
 INTERNATIONAL UNION OF )  
 OPERATING ENGINEERS )  
 )  
 Defendant )

**RECOMMENDED DECISION ON  
DEFENDANTS' MOTION TO DISMISS  
AND ORDER ON VARIOUS MOTIONS**

This matter is before the court on four interrelated motions, beginning with defendant's motion for a more definite statement (Docket No. 2); followed by defendant's motion to dismiss (Docket No. 5) responding to the amended complaint filed by plaintiff in response to the motion for a more definite statement; succeeded by plaintiff's motion to amend its amended complaint (Docket No. 7); and culminating in defendant's motion for summary judgment on the second amended complaint (Docket No. 11). I now recommend that the court **GRANT** defendant's motion for summary judgment on the second amended complaint and I enter appropriate orders disposing of the other three motions. A brief procedural history is in order.

**Procedural Background**

Lemerich began this action on May 21, 2001, in the state court, alleging in a two-count complaint that the International Union of Operating Engineers ("the International" or "International Union") had discriminated against her on the basis of

gender under Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Maine Human Rights Act (“MHRA”). The International removed the matter to this court on June 19, 2001, and filed a motion for a more definite statement, contending inter alia that Lemerich failed to allege with specificity her compliance with procedural prerequisites to claims under Title VII and MHRA vis-à-vis the International. Lemerich responded by filing an amended complaint that incorporated an eight-page investigator’s report prepared in conjunction with a Maine Human Rights Commission (“MHRC”) investigation of a complaint Lemerich made against Local 877 of the International Union of Operating Engineers.

The International countered with a motion to dismiss the amended complaint under Title VII and to dismiss all damage claims under the MHRA, except for a claim for back pay. According to the International the only party named as a respondent before the MHRC was Local 877 and that defect defeated a claim under Title VII and eliminated any claim for attorney fees and damages, other than back pay, under 5 M.R.S.A. § 4622. Lemerich decided at this point to file a motion to amend her second amended complaint to add Locals 877 and 4<sup>1</sup> as defendants and incorporate further allegations suggesting that the International and Locals were engaged in a common enterprise in dealing with the discrimination complaint filed with the Maine Human Rights Commission. Lemerich noted parenthetically in her memorandum that the Locals may have a statute of limitations defense available to them but that the International did not have standing to

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<sup>1</sup> Hereafter I refer to these defendants as Local 877 for simplicity’s sake. These newly named defendants have not filed any pleadings to date. Perhaps they are waiting for a determination to be made on the motion to amend the amended complaint -- a motion that names them but provides no new factual allegations concerning these entities.

raise such a cry in its opposition to her motion to amend. The International does not dispute that contention, which brings us to the third and final round of this litigation.

The International has filed a motion for summary judgment in its favor on all aspects of the second amended complaint. The motion is primarily addressed to the “common enterprise element” of the second amended complaint. Although the International also argues that the motion to amend the amended complaint should be denied as futile, the focus of its summary judgment argument is directed against the allegations contained within that complaint. As a procedural matter it seems to me that the motion to amend the amended complaint should be allowed and that it should become the operative pleading in this case. Having reached that conclusion, my entries on the first three motions become apparent: (1) the defendant’s motion for a more definite statement (Docket No. 2) and motion to dismiss the amended complaint (Docket No. 5) are **DISMISSED as moot**; (2) the plaintiff’s motion to amend the amended complaint (Docket No. 7) is **GRANTED**. Having placed the operative pleading in procedural context, I will now turn to the merits of the motion for summary judgment.

### **Statement of Facts**

The undisputed material facts are taken entirely from the defendant’s statement of material facts not in dispute (“DSMF”) as not one fact recited therein has been denied or qualified by record citation or otherwise.<sup>2</sup> Any fact supported by a record citation that the plaintiff did not properly controvert is deemed admitted under Local Rule 56(e).

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<sup>2</sup> The plaintiff filed the following one-page response to defendant’s nineteen paragraph statement of facts: “Plaintiff does not dispute Defendant’s numbered paragraphs 1, 2, 4, 5, 6, 11, and 16. Plaintiff disputes Defendant’s undisputed material facts 3, 7, 8, 9, 10, 12, 13, 14, 15, 17, 18, and 19. However, until discovery is complete, Plaintiff cannot, by way of deposition transcripts, interrogatory answers or responses to requests for production of documents dispute these charges on a point-by-point basis. However, the affidavit of Barbara J. Lemerich makes it clear that the dispute here is a genuine one.” Accompanying the response is a six-paragraph affidavit by Barbara Lemerich (Docket No. 22) wherein she recites her belief

***A. Plaintiff Agrees These Facts Are True***

On September 16, 1999, Barbara Lemerich filed a charge of sex discrimination against Local 877 with the MHRC and the Equal Employment Opportunity Commission (“EEOC”). Her charges did not name the International Union as a respondent. The alleged act of discrimination occurred on May 27, 1999. Following factfinding the MHRC concluded that there were reasonable grounds to believe that “unlawful sex discrimination and the denial of full benefits of membership ha[ve] occurred against Ms. Barbara Lemerich by Local 877.” In Penobscot County Superior Court on May 15, 2001, Lemerich filed a complaint against the International Union but not against Local 877. (DSMF ¶¶ 1, 2, 4, 5, 6.)

***B. Plaintiff Professes No Knowledge***

Service was made upon Allen McWade, the business manager for Local 877, on May 21, 2001. McWade holds no position in the International Union. The International Union is not a party to the collective bargaining agreement with Holtrachem (Lemerich’s employer) that governed the terms and conditions of Lemerich’s employment. The International Union has not been involved in administering the collective bargaining agreement between Local 877 and Holtrachem. The International Union was never provided with a copy of the MHRC charge and only learned of the allegations in the

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that it was never made apparent to her that the Local and the International were separate entities. She thought Richard Draper, an individual involved in this dispute, was an International employee or agent because she had been told by undisclosed sources that Richard Draper represented the interest of the International. There is no motion pursuant to Federal Rule of Civil Procedure 56(f) to obtain further discovery nor is there any hint of what sort of discovery would be required in order to be able to properly refute the facts alleged by the International. Richard Draper filed an opposing affidavit (Docket No. 26) stating that he holds no position with the International, he is paid by Local 877, and when he organized the Holtrachem employees (Lemerich’s employer) he never identified himself as an employee of the International.

complaint at the time the second amended complaint was filed. (DSMF ¶¶ 7, 8, 13, 14, & 15; McWade Aff., Docket No. 23; see also Docket No. 27.)

***C. Plaintiff Objects To the Hearsay Nature of this Information and the Insufficiency of the Jurat<sup>3</sup>***

According to James A. Van Dyke, the Executive Assistant to the International Union's General President, the International Union and Local 877 are distinct entities. He says that under Article XXIV of the International Union's Constitution each Local Union is a distinct, self-governing body independent of the International Union. Each Local conducts its own election and independently elects and compensates its officers. Each local has its own office and conducts its own meetings. Article I, section 3 of the International's Constitution specifies that no local union can act on behalf of the International Union, including inter alia, accepting service on behalf of the International Union. (DSMF ¶¶ 17, 19, Van Dyke Aff. ¶ 3 (a) –(d), ¶ 9, Docket No. 13.)

***D. So, How Did We Get Here?***

When McWade received the complaint and summons, he referred the matter to Local 877's attorney, Vida Berkowitz. Berkowitz had represented Local 877 throughout the administrative proceedings before the MHRC and the EEOC. The International Union did not authorize Berkowitz to represent it in response to the complaint. Berkowitz is not licensed to practice in Maine and accordingly retained local counsel, Jeffrey Young, to respond to the complaint. At that time he was unaware that Berkowitz had not obtained the approval of the International to represent it in this matter. Young entered the case in June 2001 and effectuated its removal to this court. In late August

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<sup>3</sup> Defendant has replied to this objection by filing with the court a complete copy of the International Union's Constitution and a supplemental jurat dated October 22, 2001, affirming that the information recited by Van Dyke in his September 7, 2001, affidavit is based on personal knowledge and is true.

2001 he learned for the first time that the International Union had not authorized Berkowitz to represent it in this matter. Following a telephone conversation with the International's in-house legal counsel, Young was retained by the International Union and given authority to act on its behalf. (DSMF ¶¶ 3, 9, 10, 11, 12, & 18; Berkowitz Aff., Docket No. 15; Young Aff., Docket No. 16.) This motion for summary judgment was filed approximately one month later. Young indicated to the court that the International Union adopted the earlier pleadings, including the notice of removal filed at Berkowitz's behest. (Def.'s Mot. for Summ. J. at 5 n.1.)

### **Discussion**

As this court has made clear time and again, “[t]he parties are bound by their Rule [56] Statements of Fact and cannot challenge the court’s summary judgment decision based on facts not properly presented therein.” Pew v. Scopino, 161 F.R.D. 1, 1 (D. Me. 1995). “A party fails to honor this rule at its peril.” Benchmark v. Benchmark Builders, Inc., 2000 WL 1886570, \*2 (D. Me. 2000) (recommended decision, Cohen, Mag. J.). Lemerich has not provided record citations to adequately deny or otherwise qualify any of defendant’s factual assertions. The affidavit of Barbara Lemerich, even if the court chose to somehow incorporate it into the statement of facts, provides no facts that contradict the assertions put forth in defendant’s statement of undisputed fact.

Instead of complying with the Local Rule 56(c) Lemerich has taken the approach of arguing in her memorandum that “this is a case which meets the requirements of F.R.Civ.P. 56(f) in that Plaintiff cannot meaningfully contradict those affidavits.” (Pl.’s Mem. in Opp’n at 1.) Although Lemerich has not filed a motion to continue the matter to allow for further discovery, her response to the motion for summary judgment coupled

with the affidavits of Lemerich and her attorney Arthur J. Greif fairly alert the court to the fact that she wants an opportunity to conduct further discovery. Therefore I must first explore that request pursuant to “the Rule 56(f) paradigm.” See Resolution Trust Corp. v. North Bridge Assocs., Inc., 22 F.3d 1198, 1202 (1st Cir. 1994) (“When a party claims an inability to respond to an opponent's summary judgment motion because of incomplete discovery or the like, Fed. R. Civ. P. 56(f) looms large.”); see also id. at 1203 (“[D]istrict courts should construe motions that invoke the rule generously, holding parties to the rule’s spirit rather than its letter.”)

Subsection (f) of Rule 56 reads:

Should it appear from the affidavits of a party opposing the motion [for summary judgment] 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.

Fed. R. Civ. P. 56(f).

In order for a litigant opposing summary judgment under Rule 56(f) to prevail he or she must make a timely and sufficient proffer explaining why the party is unable to currently adduce the essential facts, how the “the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion,” and, most significantly for this case, the proffer should set forth “a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist.” Resolution Trust Corp., 22 F.3d at 1203. From this general framework, the First Circuit has formulated five requirements: “authoritativeness, timeliness, good cause, utility, and materiality.” Id. While the requirements need not all be satisfied in order to obtain 56(f) relief, if they are all satisfied it creates a strong presumption in favor of granting the

request. Id. The guidepost is that the request should be treated liberally unless the court reasonably concludes that prolonged discovery would be an exercise in futility. Id.

The law of this Circuit recognizes that an international union can only be liable for the allegedly unlawful conduct of a local union if the international independently participated in the unlawful conduct or if the local acted as the international's agent with respect to the conduct. Borowiec v. Local No. 1570, 889 F.2d 23, 26 (1<sup>st</sup> Cir. 1989). Lemerich's position, supported by Cook v. Mountain States Tel. & Tel. Co., 397 F. Supp. 1217 (D. Ariz. 1975), is that Local 877 was acting as an agent for the International Union vis-à-vis her discrimination complaint; therefore her failure to name the International Union in her complaint before the MHRC is not fatal to her claim. Cook, on its facts, involved a case where the international union was not a named party in the original complaint before the EEOC but had participated throughout the proceedings. Having granted the motion to amend the second amended complaint, I am acknowledging that this legal theory is not an exercise in futility. Assuming *arguendo* that this court would apply the same rule in ultimately evaluating whether to hold the International responsible for the conduct, the issue now before me is whether Lemerich's proffer reasonably suggests that further discovery will take us where she wants to be. In order to assess that issue I must examine the six-paragraph affidavit filed by Lemerich and the three-paragraph affidavit filed by her counsel.

Counsel asserts in the first paragraph of the affidavit that "this case represents the first employment discrimination case of any sort [he has] brought against a union at any level, administrative or judicial." (Greif Aff. ¶ 1.) While this fact may help explain why Local 877 was not named as a defendant in the original complaint, it does nothing to

show how further discovery will lead to evidence relevant to the issue of whether the local union acted as the International's agent in the context of this case.

In his Rule 56(f) affidavit Lemerich's counsel then offers the following non sequitor: "I am unable to obtain affidavits in this matter to contradict the affidavits of the agents of the Defendants . . . because all of the individuals who have signed those affidavits are management agents of the Defendants," and "I can only conduct those interviews by way of deposition." (*Id.* ¶ 2.) Under the Resolution Trust Corp. paradigm counsel does not need opposing affidavits to present a proffer that would allow for further discovery. His own affidavit might be sufficient if it explained what sort of discovery he needed. There is no reasonable probability, based on anything in Lemerich's proffer, that deposing Berkowitz, Young, McWade, or Draper would provide evidence contrary to what they have stated in their affidavits. Thus Greif's contention in his affidavit that he is unable to oppose the summary judgment motion because he is ethically barred from speaking with the affiants does nothing to meet his good cause requirement under the Rule 56(f) paradigm.

In the final paragraph Greif states the following: "Full discovery of the relationship between the Local and the International will require, at a minimum evaluation of the articles and by-laws and constitutions of each, evaluation of the correspondence between the Local and the International, and an evaluation of the methods by which various individuals, such as Alan McWade and Dick Draper are paid." (Greif Aff. ¶ 3.) If there is something in the Constitution or by-laws that contradicts the portion of the record presented by the International in its statement of material facts, Lemerich could have pointed it out in her response. If there are pertinent facts about

salary payment or correspondence that would shed light on the relationship between the International and Local 877 as it relates to this dispute, counsel's affidavit has not highlighted what they might be. While I realize that counsel cannot be expected to know what might exist if he has not yet asked for correspondence and salary information, in order to support a Rule 56(f) motion he has to do something more than ask for permission to go on a fishing expedition. This case is not about the relationship between the Local and the International in an academic sense. In order to come within the Cook landscape, the International would have to be somehow tied to the current dispute. Nowhere in his proffer does counsel suggest that there is any avenue of discovery that would have any reasonable probability of making that connection.

The problem is compounded by voids in Lemerich's own affidavit. In it she states that it was never made clear to her that Local 877 and the International were not the same legal entity. (Lemerich Aff. ¶ 2.) She states that her union dues were deducted in a single amount from her paycheck (id.), that to the best of her understanding at the time of unionization the individuals who organized the HoltraChem employees into a union represented the International (id. ¶ 5), and that an undisclosed individual told her that Richard Draper represented the interest of the International (id. ¶ 3). She does not need additional discovery to assert these facts in an affidavit in opposition to a motion for summary judgment. If they are material and admissible<sup>4</sup> facts, they are uniquely within her knowledge and they could be asserted at this juncture. None of the "discovery" that Lemerich and her counsel propose would do anything to further her argument that Local

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<sup>4</sup> It would appear that what she was told by anyone other than the principals involved would be hearsay. However, if Richard Draper told her he represented the International and that he was an agent of the International she could have said so in the context of this affidavit and it would, at least, have been a fact upon which to base an order that further discovery should take place.

877 was acting as the International's agent at the MHRC proceedings. In fact, she does not propose any discovery that would shed light on the International's participation in the discriminatory conduct that forms the basis of this suit.

Here the legal issue posed is relatively straightforward. The failure to name the International as a party before the MHRC is a nonjurisdictional defect. In fact the courts have noted that if there is a "substantial identity" between the respondent in an EEOC charge and the defendant in a civil action or if the named respondent was the agent of the defendant, then the failure to name the defendant in the administrative charge may be excused. McKinnon v. Kwong Wah Rest., 83 F.3d 498, 505 (1<sup>st</sup> Cir. 1996) (citing Curran v. Portland Super. Sch. Comm., 435 F.Supp.1063, 1074 (D. Me. 1977)). The abstract legal issue is thus answered in the affirmative, i.e., Lemerich's proposed second amended complaint states a claim. The issue is simply whether her Rule 56(f) proffer is sufficient to establish a reasonable probability that further discovery will yield evidence that would move this case into an exception excusing her failure to name the International before the MHRC. There is absolutely nothing in the proffer that suggests there is any cache of evidence implicating the International in this discriminatory conduct or suggesting that it participated in any fashion during the agency proceedings. See Curran v. Portland Super. Sch. Comm., 435 F.Supp.1063, 1074 (D. Me. 1977). At best Lemerich suggests that if discovery went forward she could learn a lot of information about the relationships between local unions and their internationals.

Lemerich's Title VII complaint against the International fails because she has no evidence that the International participated in the discriminatory conduct, either directly or through its agent nor has she shown that through further discovery there is a

reasonable probability that she would be able to uncover that sort of evidence. Her failure to name the International is fatal to her claims under Title VII and the MHRA, not merely because of the failure to name the International, but more because of the paucity of any evidence to suggest that the International was involved in the complained of conduct. While the motion for summary judgment is filed “early” in the case, this matter has been pending since May of this year when it was first filed in the state court. Furthermore the allegations before the MHRC go back to September 16, 1999. Lemerich was represented by counsel throughout the proceedings. If there is a shred of evidence that the International had something to do with this particular contract, counsel has done nothing to bring that evidence to my attention.

Unfortunately this case involves a situation where plaintiff simply named the wrong defendant in her initial pleading. The error was compounded when Attorney Berkowitz entered her unauthorized appearance on behalf of the International. While the confusion attendant to Berkowitz’s mistaken appearance suggests that the International and the Local 877 may have a close relationship, the International’s “substantial supervisory control over its locals” does not translate into liability for the locals’ unlawful conduct. Borowiec, 889 F.2d at 28.

Although the second amended complaint at least theoretically states a claim against the International Union, Lemerich’s proffer under Rule 56(f) is woefully inadequate. See Resolution Trust Corp., 23 F.3d at 1203 (observing that the Rule 56 “prophylaxis” does not “extend to litigants who act lackadaisically,” litigants must exercise due diligence and meet the benchmarks of authoritativeness, timeliness, good cause, utility, and materiality). Lemerich does not make a Rule 56(f) showing that even

begins to suggest that further discovery could cure the failure in proof. She alleges the involvement of no union officials other than Draper and McWade. Though Lemerich may have believed otherwise, she offers no factual framework in juxtaposition to the defendant's contention, supported by the summary judgment record, that both worked solely for Local 877. When the sole basis offered in support of a Rule 56(f) proffer is that the plaintiff always thought the International and the local were one and the same entity, she has not presented a "plausible basis for a belief that discoverable materials exist that would likely suffice to raise a genuine issue of material fact, and thus, defeat summary judgment." Id. at 1206.

The allegations and the factfinding report suggest that Lemerich was treated poorly by Local 877 and was indeed the victim of unlawful gender discrimination. In fact the blatant nature of the discrimination she suffered makes it even more unfair to attempt to haul the International into what has been for over two years a dispute between Local 877 and Lemerich.

On this summary judgment record I believe there is no alternative but to conclude that the International Union is entitled to judgment as a matter of law on both the Title VII complaint and the MHRA complaint.<sup>5</sup>

### **Conclusion**

Based upon the foregoing, I **GRANT** plaintiff's motion to amend the second amended complaint and I further recommend that the court **GRANT** defendant's motion

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<sup>5</sup> In its motion to dismiss the first amended complaint the International acknowledged that Lemerich is able to maintain an action for back pay against the International under 5 M.H.R.A. § 4622 even though the International was not named in that administrative complaint. However, in its motion for summary judgment the International seeks judgment with respect to the entire complaint and the record establishes that the claim under both Title VII and the MHRA fails on its merits.

for summary judgment on that complaint. The other pending motions are **DISMISSED** as moot.

**Notice**

A party may file objections to those specified portions of this report or proposed findings or recommended decision for which de novo review by the district court is sought, together with a supporting memorandum, within ten days after being served with a copy hereof. A responsive memorandum shall be filed within ten 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.

January 2, 2002.

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Margaret J. Kravchuk  
U.S. Magistrate Judge

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-124

LEMERICH v. INTERNATIONAL UNION, et al

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Assigned to: JUDGE GENE CARTER

Demand: \$0,000

Nature of Suit: 442

Lead Docket: None

Jurisdiction: Federal Question

Dkt # in Penobscot Superior : is 2001-96

Cause: 42:2000 Job Discrimination (Sex)

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