

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

AMANDA PETERS, )  
 )  
 Plaintiff, )  
 )  
 v. ) Civil No. 9-204-B-W  
 )  
 MAXIM HEALTHCARE SERVICES, INC., *et al.*, )  
 )  
 Defendants )

**RECOMMENDED DECISION**

Amanda Peters sued her employer Maxim Health Care Services, Inc., a staffing agency, in state court under state employment law, claiming employment discrimination and retaliation. Peters worked on assignment as a certified nursing assistant at Togus Veterans Affairs Medical Center in Augusta, Maine. Maxim removed the matter to this court based on diversity jurisdiction. It then filed a third-party complaint against Togus, incorporating the allegations of Peters's complaint and adding counts for contribution and indemnification against Togus. In its answer, Maxim explained that it employed Peters and placed her on temporary assignment at Togus pursuant to a contractual staffing relationship it had with Togus. Togus has moved to dismiss the third-party complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), claiming both lack of subject matter jurisdiction and failure to state a claim. The District Judge has referred the motion to dismiss to me for a recommended decision pursuant to 28 U.S.C. 636(b). I now recommend that the Court grant the motion pursuant to Rule 12(b)(1) because this Court lacks subject matter jurisdiction over this claim against Togus.

## **Preliminary Matters**

Togus devotes a page of its motion to explaining that Maxim fails to state a claim for discrimination pursuant to Title VII and another page to explaining why any tort claim must be dismissed. (Mot. to Dismiss at 4-5 & 6, Doc. No. 11.) Maxim responds to those arguments by stating that Togus seeks dismissal of issues that have not been pled and therefore the motion should be denied. (Opposition Mem. at 1, Doc. No. 13.) I agree with Maxim, in part. It does not appear that Maxim has alleged any Title VII claim or tort claim, although I certainly do not fault the Government for addressing those issues because it is hard to know what claims Maxim is pressing. Theoretically, the claim for contribution might be based upon a theory that Maxim is a joint tortfeasor or it might be based upon Togus's violation of anti-discrimination laws that apply to Togus (although the only underlying violations pled by Ms. Peters involve state laws). In any event, I take from Maxim's response that it has not raised any claims against Togus based upon Title VII or that sound in tort and I therefore recommend that the Court grant Togus's motion seeking dismissal of any such claims because Maxim has waived those claims.

Maxim makes a secondary argument that it would be premature to dismiss the complaint against Togus because it was a "joint employer" of Ms. Peters and is therefore an indispensable party. However, as Maxim itself admits, if Togus is truly an indispensable party, Maxim has an available remedy of its own by filing a motion to dismiss Peters's Complaint in its entirety for failure to join an indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure. (Opposition Mem. at 13 n.3.) The perceived efficacy of that particular course of action might be why this third-party action was commenced in the first place, but, be that as it may, the point is that this argument does not explain why Togus's motion to dismiss for lack of subject matter jurisdiction should be denied.

With these preliminary matters addressed, the central issue that remains is whether a contract claim for indemnification and/or a claim for "equitable" contribution/indemnification can survive Togus's motion to dismiss. I conclude that such claims cannot and, therefore, I recommend dismissal of the third-party complaint.

### **Legal Standard**

It is axiomatic that neither the United States nor its agencies may be sued except by consent; the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 535, 538 (1980) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). Congress determines the scope and terms of any consent, as well as the applicable procedures. Tacoma v. Taxpayers of Tacoma, 357 U.S. 320, 336 (1958). Congressional consent "cannot be implied"; it must be "unequivocally expressed." United States v. Testan, 424 U.S. 392, 399 (1976). In this case, for any alleged claim arising from this set of facts, Maxim must identify not only a valid cause of action, but also a jurisdictional basis, or waiver of sovereign immunity, to allow any of its claims to go forward.

### **Discussion**

According to Maxim, this Court has jurisdiction over its claims against the United States under two separate theories. The first theory is that the complaint alleges a contract claim for indemnification that *might be* worth less than \$10,000.00, so that the Tucker Act, 28 U.S.C. § 1491(a)(1), would not vest exclusive jurisdiction in the United States Court of Federal Claims. Maxim appears to base this theory upon a strained reading of the "Little Tucker Act," 28 U.S.C. § 1346(a)(2), which gives federal district courts concurrent jurisdiction with the Court of Claims

over contract and other non-tort claims against the United States valued at \$10,000.00 or less.

Knott v. FERC, 386 F.3d 368, 374 (1st Cir. 2004) (describing the Little Tucker Act).

There are two problems with Maxim's contractual indemnification argument. First, under Maine law a party cannot be subject to a contractual indemnification obligation that it has not unambiguously assumed. Devine v. Roche Biomedical Labs., Inc., 637 A.2d 441, 446 (Me. 1994). In spite of filing a third-party complaint that consists of 108 pages of pleadings, Maxim has not pointed to any express contractual undertaking by Togus. Under the pleading standard announced in Iqbal v. Ashcroft, 129 S. Ct. 1937 (2009), Maxim has an obligation to allege "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Id. at 1949. Applying that standard in the context of this claim, I seriously doubt that Maxim has stated a claim for contractual indemnification. In any event, even if Maxim has stated a claim, the second problem with Maxim's approach is that the claim is one over which this court lacks subject matter jurisdiction. Without citing any case even remotely on point, Maxim espouses the theory that this court can retain "conditional" jurisdiction over a contractual indemnification claim because it might turn out in the end that Peters's claim will be worth less than \$10,000.00. Maxim makes this argument in the face of its own notice of removal which asserts that the amount in controversy in this matter exceeds the jurisdictional minimum for diversity jurisdiction of \$75,000.00. (Notice of Removal ¶ 8, Doc. No. 1.) Maxim's theory that this Court can exercise subject matter jurisdiction over third-party contract claims under the Little Tucker Act is untenable where the underlying action has come to this Court only as a result of Maxim's representation that the amount in controversy exceeds \$75,000.00.

Maxim's second theory is that its third-party claims survive because they are equitable in nature. This theory is more fully explained in a memorandum in support of Maxim's motion to

bifurcate (Doc. No. 15), which is not yet fully briefed and has not been referred to me. The theory is a further refinement upon the Little Tucker Act jurisdictional discussion, however, so the \$10,000 limitation is still operative. For instance, Maxim lights upon Giordano v. Roudebush, 617 F.2d 511, 514 (8th Cir. 1980), where the Eighth Circuit held that the Court of Claims' exclusive jurisdiction over monetary claims exceeding \$10,000 did not deprive the district court of jurisdiction over associated equitable remedies. On the surface, such cases do present claims for equitable relief that went forward in the district court despite the presence of monetary claims exceeding the Little Tucker Act's \$10,000 ceiling.<sup>1</sup> But the fact still remains that Maxim's mere invocation of "equity" is not a sufficient basis for concluding that Congress authorized this Court to exercise subject matter jurisdiction over non-tort claims involving monetary relief in excess of \$10,000. In Giordano, for instance, a district court's award of an equitable remedy of reinstatement was upheld, but there was no contention that the district court had erred when it declined to exercise jurisdiction over a claim for back pay, id. at 513, which is a species of equitable monetary relief. See Sibley v. Ball, 924 F.2d 25, 28-29 (1st Cir. 1991). Thus, even if Maxim artfully pleads claims in equity as an alternative to its "legal" contract theory, that does not evade the Little Tucker Act's \$10,000 ceiling.<sup>2</sup> Unless Maxim can carry its

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<sup>1</sup> Parenthetically, not all courts observe the Giordano rule. See Keller v. Merit Sys. Prot. Bd., 679 F.2d at 223. It is also worth noting that a district court would have an independent basis for exercising jurisdiction in cases like Giordano: the Administrative Procedures Act, which "is at pains to exclude suits seeking money judgments." Sibley v. Ball, 924 F.2d 25, 28 (1st Cir. 1991). Needless to say, Maxim's third-party claims do not arise under the Administrative Procedures Act.

<sup>2</sup> Maxim's "claim" against Togus is in the nature of a claim to apportion or shift its statutory damages liability to a party that does not have liability under the statute in question. These equitable theories depend on the existence of a common liability. Equitable contribution involves a "common obligation" that should be discharged by Togus and indemnification involves a claim that Togus is primarily liable whereas Maxim is liable only passively or as a result of a technicality. Daigle Commercial Group, Inc. v. St. Laurent, 734 A.2d 667, 676 (1999). Without alleging any basis for primary liability under the Maine Human Rights Act on the part of Togus, Maxim fails to allege that Peters's action involves a common legal obligation shared by Togus. Consequently, there is a failure to state a claim as well as a subject matter jurisdiction concern. This aspect of the case distinguishes it from Giordano, where the equitable relief being sought was a remedial option associated with a claim within the district court's original jurisdiction. Here, Maxim's discussion of equity is a distraction unless it can point to a basis for finding a waiver of sovereign immunity.

burden to identify a congressional waiver of sovereign immunity, this Court lacks subject matter jurisdiction over the third-party claims.

### Conclusion

Because Maxim fails to identify any congressional authorization for its third-party claims to proceed in this Court against Togus, a federal agency, I RECOMMEND that the court GRANT Togus's motion to dismiss and DISMISS the third-party complaint, WITHOUT PREJUDICE, for want of subject-matter jurisdiction.

### 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, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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.

/s/ Margaret J. Kravchuk  
U.S. Magistrate Judge

September 15, 2009

PETERS v. MAXIM HEALTHCARE SERVICES INC

Assigned to: JUDGE JOHN A. WOODCOCK, JR

Referred to: MAGISTRATE JUDGE MARGARET J. KRAVCHUK

Case in other court: Kennebec County Superior Court,  
CV-09-00122

Cause: 28:1441 Petition for Removal - Employment  
Discrim

Date Filed: 05/21/2009

Jury Demand: Both

Nature of Suit: 442 Civil Rights: Jobs

Jurisdiction: Diversity

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