

Not intended for print publication.

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

CHARLESTON DIVISION

ERIN B. SCHENZEL and
LORI SOVEL, on behalf of themselves
and other employees similarly situated,

Plaintiff,

v.

CIVIL ACTION NO. 2:02-0958

ENTERPRISE RENT-A-CAR COMPANY
OF KENTUCKY, a Kentucky corporation, dba
Enterprise Rent-A-Car of West Virginia, and
ENTERPRISE RENT-A-CAR COMPANY,
a Missouri corporation,

Defendants.

ORDER

Pending is plaintiffs' motion to dismiss the counterclaims of the defendants. For the following reasons, the court **GRANTS** the plaintiffs' motion and **DISMISSES** the defendants' counterclaims.

1. Background

The plaintiffs, Erin Schenzel and Lori Sovel, on behalf of themselves and others similarly situated, filed suit against various Enterprise Rent-A-Car corporations (collectively, "Enterprise"), alleging violations of the Fair Labor Standards Act (FLSA) relating to overtime wages and the West Virginia Human Rights Act (WVHRA) relating to gender discrimination. Schenzel and Sovel are, respectively, former and current employees of Enterprise. They allege that they were incorrectly

classified by Enterprise as being exempt from FLSA overtime requirements and that Enterprise's failure to pay them overtime violated the law. They further allege that Enterprise paid male employees more than female employees for doing comparable work, in violation of the WVHRA's anti-discrimination provisions.

Enterprise filed an answer to the complaint along with four counterclaims. Specifically, Enterprise brought counterclaims for violations of W. Va. Code § 5-11-9 (relating to willful obstruction of compliance with the WVHRA), abuse of process, breach of fiduciary duty, and civil conspiracy. The plaintiffs filed a motion to dismiss the defendants' counterclaims, and the defendants have filed a response in opposition.

2. Jurisdiction

The plaintiffs contest this court's jurisdiction over the defendants' counterclaims. The plaintiffs argue that the defendants' counterclaims are permissive, not mandatory, and that the defendants have failed to allege an independent jurisdictional basis for those claims. In response, the defendants argue first that their counterclaims are mandatory, not permissive, and second that in any case this court has supplemental jurisdiction under 28 U.S.C. § 1367 over their counterclaims. The court need not determine whether the defendants' counterclaims are permissive or mandatory, because the court concludes that it has supplemental jurisdiction over those claims. Initially, the court notes that the defendants' counterclaims, which are based on the plaintiffs' conduct in preparation for and in the filing of this lawsuit, are sufficiently "related to claims in the action within [the court's] original jurisdiction that they form part of the same case or controversy under Article III of the United States constitution." 28 U.S.C. § 1367(a) (West 2002). Thus, the court has supplemental jurisdiction over those claims.

The plaintiffs urge the court to decline to exercise its supplemental jurisdiction over the defendants' counterclaims in this case. Considering the factors enumerated in 28 U.S.C. § 1367(c), the court first notes that it has not dismissed the plaintiffs' claims that provide this court's original jurisdiction. Second, the court finds that the defendants' counterclaims do not predominate over the plaintiffs' claims. Nor are there other compelling reasons to decline jurisdiction. Finally, while a few of the defendants' counterclaims can in a sense be described as novel – that is, novel insofar as the West Virginia state courts have never had the need to address and reject them – the court has no doubts about the proper interpretation of West Virginia law as it relates to these claims. In sum, the court concludes that the interests of fairness, efficiency, and economy will best be served by the court exercising its supplemental jurisdiction to resolve the defendants' counterclaims.

3. Discussion

The court, satisfied of its jurisdiction over the defendants' counterclaims, now turns to the merits of those claims. After review, the court concludes that none of the four counterclaims successfully state a claim upon which relief can be granted. The court will address these four claims in turn.

a. Willful Obstruction

In their first claim, the defendants allege that the plaintiffs have violated W. Va. Code § 5-11-9(7)(B), which makes it an “unlawful discriminatory practice . . . [f]or any person . . . to . . . [w]illfully obstruct or prevent any person from complying with the provisions of [the WVHRA].” The defendants argue that if that the plaintiffs were aware of gender discrimination within Enterprise, their failure to report that discrimination constitutes a willful obstruction of Enterprise's attempts to comply with the WVHRA. The defendants cite no caselaw from West Virginia or

elsewhere in support of the novel argument that an alleged victim’s failure to report her own discrimination and that of her co-workers constitutes a willful obstruction of her employer’s compliance with the Act. The term “willful” connotes a “voluntary, intentional violation of a known legal duty.” *See United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also Board of Educ. v. Chaddock*, 398 S.E.2d 120, 122 (W. Va. 1990) (“The term ‘willful’ ordinarily imports a knowing and intentional act, as distinguished from a negligent act.”). The WVHRA contains no provision requiring employees to report suspected discrimination. Accordingly, the failure to report suspected discrimination cannot constitute the violation of a known legal duty – no such legal duty exists. The defendants respond that the plaintiffs had a duty to report suspected discrimination under “The Enterprise Business Practices Guide.” (Def. Ans. at ¶ 53.) This argument confuses an alleged contractual duty with a duty imposed by law.

Moreover, holding that the failure to report suspected discrimination constitutes a willful obstruction of compliance with the WVHRA would dramatically alter the effects of the WVHRA’s anti-discrimination provision by sharply reducing liability for employers, expanding liability for co-workers, and limiting recovery for the victims of discrimination themselves. First of all, under such a legal regime alleged victims of discrimination could sue not only their employers, but also anyone, such as co-workers, who they believe may have known about the discrimination but failed to report it. If the West Virginia legislature had intended to create such a broad-reaching scheme of liability, it would have done so directly by expressly imposing a duty to report suspected discrimination. Furthermore, even if a duty to report discrimination existed, applying that duty against the victims of discrimination themselves would contravene the primary purpose of the WVHRA – to remedy and prevent discrimination. A “willful obstruction” counterclaim against victims of discrimination

would have the practical effect of insulating employers from liability and reducing recovery for the victim whenever a victim failed to report her discrimination immediately. Again, the West Virginia legislature could have created such a regime in plain, express terms had it so intended. It did not do so, and this court declines the defendants' invitation to seize on the "willful obstruction" provision, plainly intended as a corollary to the primary provisions of the WVHRA that create employer liability for discrimination, and use that term to redefine the WVHRA's basic liability structure.

In sum, the defendants' counterclaim based on W. Va. Code § 5-11-9(7)(B), which alleges that the plaintiffs willfully obstructed the defendants' compliance with the WVHRA by failing to report the discrimination of themselves and others, fails to state a claim upon which relief can be granted. That counterclaim is therefore **DISMISSED**.

b. Abuse of Process

As a second counterclaim, the defendants alleged that the plaintiffs, as Enterprise's sole Accounting Supervisors for the state of West Virginia during the period in question, knew that their positions were exempt from federal overtime requirements and knew that there were no comparable male employees of Enterprise being paid at a higher rate than the plaintiffs. As such, the defendants argue, the plaintiffs knew that their legal claims were groundless but nonetheless instituted the present lawsuit solely to extort money from and to discredit Enterprise. This, according to the defendants, constitutes abuse of process.

The West Virginia Supreme Court of Appeals has explained that "abuse of process consists of the willful or malicious misuse or misapplication of lawfully issued process to accomplish some purpose not intended or warranted by that process." *Preiser v. MacQueen*, 352 S.E.2d 22, 28 (W.

Va. 1985). In a footnote, the *Preiser* court quoted a commentator further clarifying the elements of the tort of abuse of process:

The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions.

Id. at 28 n.8 (quoting W. Prosser, *Handbook of the Law of Torts* § 121 (1971)). The standard has elsewhere been articulated as requiring, among other things, “a wilful act in the use of legal process *after its issuance* that is not proper in the regular conduct of the proceeding.” 1 *Am. Jur. 2d*, Abuse of Process § 5 (2002) (emphasis added). Here, the defendants allege that the plaintiffs “filed the lawsuit for an ulterior purpose.” (Def. Ans. at ¶ 74.) They also allege that the plaintiffs “seek to extort money and discredit Enterprise.” (Def. Ans. at ¶¶ 75, 76.) At no point, however, do the defendants allege some willful act committed by the plaintiffs after the commencement of the suit. The defendants respond that “[o]nce the Complaint was received, it became apparent that Plaintiffs were attempting to extort money from enterprise. . . . Thus, the extortion and retaliation has occurred after the process was issued.” (Def. Resp. at 17.) The defendants appear to believe that the mere act of filing suit, the attendant legal fees incurred by the defendants, and the resulting incentive for the defendants to settle this lawsuit, constitute extortion. This is not so much an attack on the particular plaintiffs in this case as a generalized attack on the American legal system, in particular the American rule that parties to litigation usually bear their own attorney’s fees, *see Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Res.*, 532 U.S. 598, 602 (2001), and the courts’ general endorsement and encouragement of private settlement of litigation, *see*

McDermott, Inc. v. AmClyde, 511 U.S. 202, 215 (1994). More to the point, the defendants fail to allege *any* acts committed by the plaintiffs after the commencement of this lawsuit, let alone acts that might constitute extortion or retaliation. Accordingly, this claim likewise fails to state a claim upon which relief can be granted and is therefore **DISMISSED**.

c. Breach of Fiduciary Duty

Third, the defendants counterclaim for breach of fiduciary duty on the part of the plaintiffs. The defendants argue that the plaintiffs, as Enterprise's sole Accounting Supervisors in the state of West Virginia, owed a fiduciary duty to Enterprise to promptly report any suspected improprieties in Enterprise's financial and pay policies. As with many of their other arguments, the defendants fail to cite (and the court cannot find) any legal authority, be it caselaw, statute, regulation or commentary, in support of the proposition that employees have a fiduciary duty to report their suspicion that their employers' treatment of themselves and others is not in accordance with the law. Such a duty would raise many of the concerns discussed above in connection with the defendants' "willful obstruction" claim under the WVHRA. It would also shift the responsibility to ensure compliance with applicable wage and discrimination laws from the executives of a company (and the company's legal department) to the supervisors and other employees carrying out day-to-day company operations. The court concludes that the plaintiffs owed no fiduciary duty to the defendants to report suspected violations of the law in the defendants' treatment of the plaintiffs and other Enterprise employees. The court therefore **DISMISSES** the defendant's fiduciary duty counterclaim for failure to state a claim upon which relief can be granted.

d. Civil Conspiracy

Finally, the defendants allege that the plaintiffs have committed civil conspiracy because they (1) knew that the defendants were not violating the law; (2) “secretly” kept track of their alleged overtime hours; and (3) filed suit in an attempt to extort money from the defendants. Under West Virginia law, “a civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful means.” *Dixon v. Am. Indus. Leasing Co.*, 253 S.E.2d 150, 152 (W. Va. 1979) (quoting 15A *Corpus Juris Secundum* Conspiracy § 1(1)). Stated another way, “[t]here can be no conspiracy to do that which is lawful in a lawful manner.” Syl. Pt. 2, *Porter v. Mack*, 40 S.E. 459, 460 (W. Va. 1901). Here, the defendants concede that the means alleged to be used by the plaintiffs are lawful – keeping records of overtime hours and filing a lawsuit. The defendants argue, however, that the plaintiffs pursued these means towards an unlawful purpose – “abuse of process and extortion.” (Def. Resp. at 24.) The court has already discussed and dismissed the defendants’ abuse of process claim. As for extortion, the gist of the defendants’ argument appears to be that the plaintiffs’ wage and discrimination claims are without merit, that the plaintiffs know that their claims are without merit, and that the sole purpose of filing suit is to obtain money from Enterprise by way of settlement of these allegedly frivolous claims. If the plaintiffs’ claims are as frivolous as the defendants contend, the defendants should have no difficulty in obtaining dismissal of those claims under Rule 12(b)(6) and recovering costs and attorneys fees under Rule 11 of the *Federal Rules of Civil Procedure*. Rule 11 permits a litigant to move the court for sanctions and fees against a party who presents claims “for any improper purpose,” who presents claims unwarranted by the law, or who makes factual allegations without likely evidentiary support. *See Fed. R. Civ. P.* 11(b), (c). Apart from the plaintiffs’ alleged improper purpose in filing this suit, which will be dealt with, if at all,

under Rule 11, the defendants make no concrete allegations of an illegal goal on the part of the plaintiffs. Accordingly, the defendants' counterclaim for civil conspiracy is **DISMISSED**.

4. Conclusion

In sum, the court has reviewed the defendants' counterclaims and arguments in support of those claims and concludes that none of the four counts successfully state a claim upon which relief can be granted. The court therefore **GRANTS** the plaintiffs' motion to dismiss the defendants' counterclaims and **DISMISSES** the defendants' counterclaims under the WVHRA and for abuse of process, breach of fiduciary duty, and civil conspiracy.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: October 30, 2002

JOSEPH R. GOODWIN
UNITED STATES DISTRICT JUDGE