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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

CATHY ZOCCOLI, Plaintiff, vs. DBSI, INC.; and DBSI REAL ESTATE L.L.C., Defendants.	No. CV-08-1339-PHX-GMS **ORDER**

Pending before the Court is the Motion to Dismiss of Defendants DBSI, Inc. and DBSI Real Estate LLC. (Dkt. # 5.) For the reasons set forth below, the Court denies Defendants' motion.[1]

BACKGROUND

The following facts are derived from Plaintiff's Complaint and are taken as true for purposes of this motion. Plaintiff Cathy Zoccoli is a woman and a former employee of both Defendant DBSI Inc. ("DBSI") and DBSI Real Estate, LLC. ("DBSI Real Estate"). DBSI employed Plaintiff as a Facilities Manager from September 29, 2005, until February 25,

[1]Defendants have requested oral argument. The request is denied because the parties have thoroughly discussed the law and the evidence, and oral argument will not aid the Court's decision. *See Lake at Las Vegas Investors Group, Inc. v. Pac. Malibu Dev.*, 933 F.2d 724, 729 (9th Cir. 1991).

2008. When Plaintiff was hired, she assumed that position, which had been vacated by a prior employee, Don Shepherd. DBSI Real Estate employed Plaintiff as a real estate agent from September 29, 2005, until February 25, 2008, and as a Designated Broker from March 1, 2006, until January 23, 2008. DBSI compensated Plaintiff in the form of a salary while DBSI Real Estate compensated Plaintiff in the form of commissions.

During the time that Plaintiff worked for DBSI, Jeff Roesch was also employed by DBSI as a Facilities Manager. The duties assigned to Plainitff, Roesch, and Shepherd "required the same skill, effort and responsibilities" (Dkt. # 1 ¶¶17, 21), and the duties were "done under similar working conditions." (*Id.*) Despite working in comparable positions, Plaintiff was compensated at a rate less than the rate at which Shepherd and Roesch were compensated. Plaintiff alleges that this discrepancy was "not based on a seniority system, a merit system, a system which measures earning by quantity or quality of production, or a differential based on any other factor other than sex." (*Id.* ¶¶ 19, 23.)

On July 21, 2008, Plaintiff filed her complaint alleging that Defendant DBSI violated the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), and alleging a state law wage claim against DBSI Real Estate. (Dkt. # 1 ¶¶ 1, 3.) Shortly thereafter, on August 18, 2008, Defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) seeking dismissal of Plaintiff's EPA claim and requesting that the Court not retain jurisdiction over the state law wage claim. (Dkt. # 5.)

DISCUSSION

I. Federal Rule of Civil Procedure 12(b)(6) Standard of Review

To survive a dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action"; it must contain factual allegations sufficient to "raise the right of relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). "The pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1216 (3d ed. 2004)). While "a complaint need not

contain detailed factual allegations . . . it must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 127 S. Ct. at 1974).

When analyzing a complaint for failure to state a claim under Rule 12(b)(6), "[a]ll allegations of material fact are taken as true and construed in the light most favorable to the non-moving party." *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). In addition, the Court must assume that all general allegations "embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994). Although "a complaint need not contain detailed factual allegations," *Clemens*, 534 F.3d at 1022, the Court will not assume that the plaintiff can prove facts different from those alleged in the complaint, *see Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005). Similarly, legal conclusions couched as factual allegations are not given a presumption of truthfulness, and "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

II. Analysis

The EPA prohibits an employer from discriminating:

> between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to . . . a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d)(1).

To recover under the EPA, a plaintiff is required to show that (1) the employer pays different wages to employees of the opposite sex; (2) the employees perform jobs that require substantially equal skill, effort, and responsibility; and (3) the jobs compared are performed under similar working conditions. *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1414

(9th Cir. 1988); *see also Stanley v. Univ. of S. Cal.*, 178 F.3d 1069, 1073-74 (9th Cir. 1999) (stating that an EPA claim requires a showing that "employees of the opposite sex were paid different wages for equal work"). When analyzing an EPA claim, the jobs being compared need not be identical; instead, "a court should rely on actual job performance and content rather than job descriptions, titles, or classifications." *Forsberg*, 840 F.2d at 1414.

Plaintiff contends that Defendant DBSI violated the EPA due to "a consistent practice of paying Zoccoli (a female) wages at a rate less than the rate at which DBSI paid male employees who worked in substantially similar positions." (Dkt. # 1 ¶ 2.) Defendant DBSI directs only one argument at the adequacy of Plaintiff's Complaint. Defendant argues that Plaintiff failed to plead that her employment at DBSI was a full-time position and her employment at DBSI Real Estate was an "additional" part-time position. Defendant apparently aims to establish that Plaintiff did not perform employment duties that entailed the same effort or responsibility as Shepherd and Roesch's positions, or that Plaintiff's position was not preformed under similar conditions to that of Shepherd and Roesch. Such a dispute involves factual maters and is not appropriate on a motion to dismiss. The Complaint sets forth facts sufficient to establish a prima facie EPA claim. In respect to DBSI's argument, Plaintiff alleges that her position with DBSI required the same effort and responsibility as the positions of Shepherd and Roesch, two male employees, and that her work was performed under similar working conditions as the work of Shepherd and Roesch. (Dkt. # 1 ¶¶ 16-18, 20-22.) Because Plaintiff pleads factual allegations sufficient to "raise the right of relief above the speculative level," *Twombly*, 127 S. Ct. at 1965, Defendants' motion to dismiss is denied. Accordingly, because the Court retains jurisdiction over Plaintiff's EPA claim, the Court declines to dismiss Plaintiff's state law wage claim.

The majority of the arguments set forth in Defendants' briefs assail the truthfulness of the factual allegations in Plaintiff's Complaint. Specifically, Defendants take issue with the allegation that Plaintiff was paid less than Shepherd and Roesch and the inference that Plaintiff's position is comparable to that of Shepherd and Roesch. (Dkt. # 5 at 5-6.) Additionally, Defendant seeks to introduce evidence sufficient to show that the "joint

employers" exception of the Fair Labor Standards Act would apply. (*Id.*) However, any argument that Plaintiff's factual allegations should not be credited or any argument which relies on facts outside of the Complaint is, of course, not a proper basis for dismissing the EPA claim under Rule 12(b)(6).

In their reply brief, Defendants argue that because they presented "matters outside the pleading" to the Court, the Court was "empowered . . . to treat [the] Motion to Dismiss as a Motion for Summary Judgment." (Dkt. # 13 at 2.) Further, Defendants state that because Plaintiff failed to come forward with controverting evidence, Plaintiff's failure "must be construed as a concession that the factual assertions [presented by Defendants] are true." (*Id.*) Federal Rule of Civil Procedure Rule 12(d) allows a court to convert a motion to dismiss to a motion for summary judgment, but, "all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." If a party objects, generally the Court will not grant a motion for summary judgment before discovery can be completed. *See generally* Fed. R. Civ. P. 56(f); *Thi-Hawaii, Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991, 994 (9th Cir. 1980). In this case, Plaintiff responded to Defendants' motion as it was styled – as a motion to dismiss under Rule 12(b)6). Plaintiff notes that "factual disputes are not appropriate for a 12(b)(6) Motion to Dismiss" and responds accordingly. Because Plaintiff was not given a reasonable opportunity to present its evidence, and because Plaintiff objects to converting the motion, the Court declines to treat Defendants' motion as one for summary judgment. The Court's conclusions do not render the factual issues presented by Defendants moot and Defendants are free to reassert their arguments in a timely-filed motion for summary judgment.

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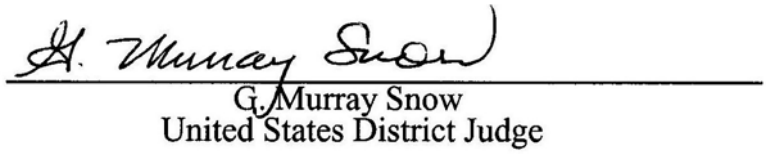
Because Plaintiff has properly plead a violation of the EPA,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss (Dkt. # 5) is **DENIED**.

DATED this 23rd day of December, 2008.



G. Murray Snow
United States District Judge