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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

_____)
BETHANY ANNE PENNINGTON,)
)
Plaintiff,)
)
vs.)
)
INTERNATIONAL HOUSE OF)
PANCAKES, LLC et al.,)
)
Defendants.)
_____)

2:15-cv-0949-RCJ-CWH

ORDER

This case arises out of an employer’s alleged sex discrimination in violation of Title VII of the Civil Rights Act of 1964 and the Nevada Equal Employment Opportunity Act. Pending before the Court are two Motions to Dismiss as to one Defendant—International House of Pancakes, LLC (ECF Nos. 25, 38). For the reasons given herein, the Court grants the motion, with leave to amend in part.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Bethany Anne Pennington alleges that Julio Solano, general manager of an International House of Pancakes restaurant in Las Vegas, sexually harassed her by forcing her to provide sexual favors for him and sending her sexually explicit text messages. (*See Am. Compl.* ¶¶ 20–26, ECF No. 33). Plaintiff alleges that after she and other female employees reported sexual harassment to Hugo Escobedo, director of operations, he refused to investigate the

1 allegations or take action against Solano. (*Id.* at ¶¶ 27–31). Further, Plaintiff maintains that
2 Defendants transferred Solano to Wisconsin and promoted him. (*Id.* at ¶¶ 32–33). Plaintiff also
3 alleges that after she complained to Escobedo, Defendants’ employees chastised, harassed, and
4 ignored her, reduced her hours, and, ultimately, terminated her. (*Id.* at ¶¶ 34–36).

5 Plaintiff has named as Defendants Rainbow 1606, Inc. (“Rainbow”), a franchisee of
6 International House of Pancakes, LLC (“IHOP, LLC”), Farshad Ashoori, owner of Rainbow, and
7 IHOP, LLC. (*Id.* at ¶¶ 2–4, 12). Plaintiff has made five claims against all three Defendants: (1)
8 discrimination and harassment based on gender under Title VII of the Civil Rights Act, 42
9 U.S.C. § 2000e, et seq., and 42 U.S.C. § 1981; (2) retaliation under Title VII; (3) discrimination,
10 hostile work environment, and retaliation based on gender under the Nevada Equal Employment
11 Opportunity Act, NRS 633.310 et seq.; (4) intentional infliction of emotional distress; and (5)
12 negligent hiring, supervision, and/or training of employees. Plaintiff also claims that IHOP, LLC
13 is vicariously liable for the actions of Rainbow and Ashoori as IHOP, LLC’s agents. (Am.
14 Compl. at ¶¶ 72–74).

15 On May 8, 2012, Plaintiff filed a Charge of Discrimination with the Nevada Equal Rights
16 Commission and Equal Employment Opportunity Commission (“EEOC”). (*Id.* at ¶ 42; Pl.’s
17 Resp., Ex. 1, ECF No. 41). On August 29, 2014, the EEOC found Defendants to be an
18 “employer” within the meaning of Title VII and found probable cause to believe Defendants
19 violated Title VII. (*Id.* at ¶ 43). On February 19, 2015, Plaintiff received a Notice of Right to
20 Sue. (*Id.* at ¶ 44).

21 Plaintiff filed a complaint on May 20, 2015 (ECF No. 1). On July 14, 2015, Defendant
22 IHOP, LLC filed a motion to dismiss (ECF No. 25). Plaintiff then filed an amended complaint on
23 July 23, 2015 (ECF No. 33). The only change she made was to substitute Farshad Ashoori as a
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1 defendant for the Dan Ashoori Group. Defendant IHOP, LLC subsequently filed a second
2 motion to dismiss based on the Amended Complaint (ECF No. 38). In its two motions to dismiss,
3 IHOP, LLC asks the Court to dismiss the case only in respect to IHOP, LLC, pursuant to Federal
4 Rules of Civil Procedure 12(b)(6) and 12(b)(1).

5 **II. FAILURE TO STATE A CLAIM UNDER RULE 12(b)(6)**

6 **A. Legal Standards**

7 Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the
8 claim showing that the pleader is entitled to relief” in order to “give the defendant fair notice of
9 what the . . . claim is and the grounds upon which it rests.” *Conley v. Gibson*, 355 U.S. 41, 47
10 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
11 that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule
12 12(b)(6) tests the complaint’s sufficiency. *See N. Star Int’l v. Ariz. Corp. Comm’n*, 720
13 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule 12(b)(6) for
14 failure to state a claim, dismissal is appropriate only when the complaint does not give the
15 defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell*
16 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is
17 sufficient to state a claim, the court will take all material allegations as true and construe them in
18 the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th
19 Cir. 1986). The court, however, is not required to accept as true allegations that are merely
20 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
21 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

22 A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a
23 plaintiff must plead facts pertaining to his own case making a violation “plausible,” not just
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1 “possible.” *Ashcroft v. Iqbal*, 556 U.S. 662, 677–79 (2009) (citing *Twombly*, 550 U.S. at 556)
2 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
3 draw the reasonable inference that the defendant is liable for the misconduct alleged.”). That is,
4 under the modern interpretation of Rule 8(a), a plaintiff must not only specify or imply a
5 cognizable legal theory (*Conley* review), but also must allege the facts of the plaintiff’s case so
6 that the court can determine whether the plaintiff has any basis for relief under the legal theory
7 the plaintiff has specified or implied, assuming the facts are as the plaintiff alleges (*Twombly-*
8 *Iqbal* review). Put differently, *Conley* only required a plaintiff to identify a major premise (a
9 legal theory) and conclude liability therefrom, but *Twombly-Iqbal* requires a plaintiff additionally
10 to allege minor premises (facts of the plaintiff’s case) such that the syllogism showing liability is
11 complete and that liability necessarily follows therefrom, assuming the allegations are true.

12 “Generally, a district court may not consider any material beyond the pleadings in ruling
13 on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the
14 complaint may be considered on a motion to dismiss.” *Hal Roach Studios, Inc. v. Richard Feiner*
15 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citation omitted). Similarly, “documents
16 whose contents are alleged in a complaint and whose authenticity no party questions, but which
17 are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6)
18 motion to dismiss” without converting the motion to dismiss into a motion for summary
19 judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994). Moreover, under Federal Rule
20 of Evidence 201, a court may take judicial notice of “matters of public record.” *Mack v. S. Bay*
21 *Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986). Otherwise, if the district court
22 considers materials outside of the pleadings, the motion to dismiss is converted into a motion for
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1 summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.
2 2001).

3 **B. Analysis**

4 Plaintiff claims that Defendant IHOP, LLC is vicariously liable for the actions of
5 franchisee Rainbow based on a theory of agency. Defendant IHOP, LLC argues that Plaintiff's
6 allegations of liability as to IHOP, LLC are insufficient to state a claim for which relief can be
7 granted. Title VII "primarily govern[s] relations between employees and their employer, not
8 between employees and third parties." *Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211, 1214
9 (9th Cir. 1989) (quoting *City of Los Angeles v. Manhart*, 435 U.S. 702, 718 n.33 (1978)).
10 However, under Title VII, the term "employer" includes "a person engaged in an industry
11 affecting commerce who has fifteen or more employees . . . and *any agent* of such a person." 42
12 U.S.C. § 2000e(b) (emphasis added). Thus, "[a]n employer . . . cannot avoid title VII liability by
13 delegating discriminatory programs to third parties." *Morgan*, 884 F.2d at 1214. To establish the
14 employer's liability, "the employer must be more than a broker, or other intermediary . . . the
15 employer must affirmatively, actively participate in the third-party program." *Id.*

16 Here, Plaintiff essentially alleges that IHOP, LLC is her "employer" and that it has
17 delegated responsibility over its programs to its agents Rainbow and Ashoori. As a result, she
18 argues, IHOP, LLC is vicariously liable for Rainbow's allegedly discriminatory practices. (Am.
19 Compl. at ¶¶ 72–74; Pl.'s Resp., 8). To state a valid claim, then, Plaintiff must provide sufficient
20 facts to show it is plausible that Rainbow, as a franchisee, acts as IHOP, LLC's agent, and IHOP,
21 LLC actively participates in managing Rainbow's employees, or at least has established training,
22 policies, or procedures that affect the management of Rainbow's employees. *See, e.g., Miller v.*

1 *D.F. Zee’s, Inc.*, 31 F. Supp. 2d 792, 806 (D. Or. 1998) (holding that Denny’s, Inc. was liable for
2 acts of harassment by employees of its agent, a local franchisee).

3 Plaintiff alleges that Rainbow is “an employee, agent, joint venture, partner, subsidiary,
4 or other related business entity of Defendant IHOP,” and that IHOP, LLC “has the power to exert
5 control over . . . Rainbow[]’s day to day operations.” (Am. Compl. at ¶ 72). Specifically, IHOP,
6 LLC exerts control over Rainbow

7 by dictating the contents of its manuals and training programs, termination
8 procedures for the franchise/business agreement, hours of operations, inspections,
9 disciplinary procedures for employees, profit sharing and distribution, and direct
involvement in complaints and claims made against Defendant . . . Rainbow . . .
in addition to other aspects of their business operation.

10 (*Id.* at ¶ 73). As Defendant IHOP, LLC correctly argues, these allegations are mere recitations of
11 common elements of an agency relationship; they provide no specific facts to assist the Court in
12 determining whether Rainbow is plausibly an agent of IHOP, LLC.

13 Earlier in the Amended Complaint, Plaintiff does provide some specific facts to support
14 her claim: she alleges that “Defendants have maintained Solano’s employment and promoted
15 him since the time period in which the events of this Complaint took place,” (*id.* at ¶ 32), and
16 that “Solano is currently employed by Defendants in Wisconsin,” (*id.* at ¶ 33). These factual
17 allegations could indicate that IHOP, LLC was involved in hiring and disciplinary procedures
18 affecting Rainbow’s employees. For example, one might infer that IHOP, LLC transferred
19 Solano to another franchise in Wisconsin in response to Plaintiff’s allegations. On the other
20 hand, Solano might have simply moved to Wisconsin of his own accord and sought employment
21 with a local IHOP restaurant. The Complaint also alleges that all “Defendants” promoted and
22 transferred Solano—it does not specifically identify IHOP, LLC as being directly involved, and
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1 it provides sufficient facts only to make tenuous inferences regarding the cause and motives of
2 the alleged transfer.

3 Plaintiff also refers to “Defendants’ policy and practice of allowing disparate terms and
4 conditions of employment,” (*id.* at ¶ 57), and alleges that “Defendants failed to institute
5 sufficiently effective training programs” to identify and prevent discrimination, (*id.* at ¶ 85). If
6 true, these facts could implicate IHOP, LLC as being involved in the alleged discrimination, but,
7 again, these facts lack specificity. Thus, the Complaint provides sufficient facts to show it was
8 “possible” that Rainbow acted as IHOP, LLC’s agent and that IHOP, LLC should also be liable
9 for the alleged discrimination, but the facts provided do not make this conclusion “plausible.” As
10 a result, the Court grants Defendant IHOP, LLCs motion dismiss, but it gives Plaintiff leave to
11 amend her Complaint to allege facts showing IHOP, LLC’s control over Rainbow.

12 **III. FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES**

13 **A. Legal Standards**

14 A plaintiff must timely exhaust any administrative remedies before bringing a Title VII
15 claim to court. *Lyons v. England*, 307 F.3d 1092, 1103-04 (9th Cir. 2002). However, failure to
16 exhaust non-judicial remedies is generally treated as an affirmative defense. *Jones v. Bock*, 549
17 U.S. 199, 212 (2007). A Court should not dismiss a case based on an affirmative defense unless
18 the elements of the defense appear on the face of the pleading to be dismissed. *Rivera v. Peri &*
19 *Sons Farms, Inc.*, 735 F.3d 892, 902 (9th Cir. 2013). Where an affirmative defense is not clear
20 from the face of the complaint sought to be dismissed, it cannot be determined until (at least) the
21 summary judgment stage; it cannot be treated as a quasi-summary-judgment matter under Rule
22 12(b). *Albino v. Baca*, 747 F.3d 1162, 1168–69 (9th Cir. 2014) (en banc) (overruling *Wyatt v.*
23 *Terhune*, 315 F.3d 1108 (9th Cir. 2003)).

1 **B. Analysis**

2 Defendant IHOP, LLC argues that Plaintiff has failed to exhaust her administrative
3 remedies because she did not properly name IHOP, LLC in her Charge of Discrimination
4 (“Charge”) filed with the EEOC, and IHOP, LLC did not receive notification of the Charge. In
5 Title VII actions, failure to timely exhaust administrative remedies is an affirmative defense, *see*
6 *Davis v. D.C.*, 949 F. Supp. 2d 1, 12 (D.D.C. 2013); *Williams v. Runyon*, 130 F.3d 568, 573 (3d
7 Cir. 1997); thus, unless Plaintiff’s failure to exhaust is clear from the face of her Amended
8 Complaint, the Court must defer this issue until at least the summary judgment stage.

9 Plaintiff’s failure to exhaust as to Defendant IHOP, LLC is not clear from the face of the
10 Complaint or from the Charge she filed with the EEOC. (*See* Am. Compl. at ¶ 42; Pl.’s Resp.,
11 Ex. 1). In her Complaint, Plaintiff makes no admission that she did not exhaust her
12 administrative remedies as to IHOP, LLC. Indeed, Plaintiff asserts she “complied with all of the
13 administrative and/or procedural requisites to file suit against the Defendants under Title VII of
14 the Civil Rights Act of 1964.” (*Id.* at ¶ 8). She also claims to have timely filed charges of
15 discrimination against Defendants and received a Notice of Right to Sue based on EEOC’s
16 finding of probable cause that Defendants discriminated against her. (*Id.* at ¶¶ 42–44, 54).
17 Plaintiff also maintains that “Defendant received notice that its employees and supervisors are
18 engaging in conduct that violates Plaintiff’s rights when she complained to her immediate
19 supervisors and later reported her claims to the EEOC.” (*Id.* at ¶ 86). Nothing in the Complaint
20 indicates Plaintiff failed to include IHOP, LLC in her Charge or that IHOP, LLC did not receive
21 notice of the Charge.

22 Plaintiff’s Charge filed with the EEOC also does not clearly show she failed to exhaust
23 her administrative remedies as to Defendant IHOP, LLC. In her Charge, Plaintiff listed only one
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1 employer—"IHOP"—with a Las Vegas address. (Pl.'s Resp., Ex. 1). While Plaintiff did not list
2 IHOP, LLC as her employer, she also did not list Rainbow or Ashoori as her employers. Thus,
3 the name she submitted is subject to more than one interpretation. Also, Plaintiff listed her
4 employer as having "201-500" employees. (*Id.*). In her Complaint, however, Plaintiff stated that
5 "Defendants employ approximately seventy-one (71) individuals in Las Vegas." (Am. Compl. at
6 ¶ 15). It is unclear, therefore, whether Plaintiff meant to identify Rainbow as her employer or
7 IHOP, LLC, or whether she meant to include both. Finally, Plaintiff listed the address of
8 Rainbow's Las Vegas location as her employer's address, which might have prevented IHOP,
9 LLC from receiving notice of the Charge; however, nothing in the Complaint suggests IHOP,
10 LLC did not receive notice. Plaintiff's failure to exhaust as to Defendant IHOP, LLC is not clear
11 either from the face of the Complaint or from the Charge filed with the EEOC. As a result, the
12 Court must defer the issue of exhaustion to at least summary judgment.

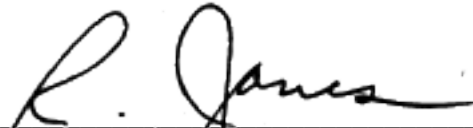
13 Based on Defendant IHOP, LLC's first argument—failure to state a claim—the Court
14 grants the motions to dismiss but gives Plaintiff leave to amend her claim to show whether
15 IHOP, LLC should be liable due to an agency relationship with Rainbow and Ashoori. The Court
16 defers the issue of exhaustion of remedies to the summary judgment stage.

17 CONCLUSION

18 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 25, 38) are
19 GRANTED, with leave to amend in part.

20 IT IS SO ORDERED.

21 DATED: This 13th day of November, 2015.

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ROBERT C. JONES
United States District Judge