IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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MICHAEL J. FAAS and MARY JANE FAAS,

Plaintiffs,

v.

OPINION & ORDER
99-C-249-C

ARAMIA, LTD., ARAMIA I, LTD., ARAMIA II, LTD., ARAMIA III, LTD., ARAMIA IV, LTD., ARAMIA V, LTD., ARAMIA VI, LTD., ARAMIA VII, LTD., ARAMIA VIII, LTD., SMITH REALTY CO., INC., SCHOLL & ASSOCIATES, DODGEVILLE MOTEL INVESTORS, RED WING MOTEL INVESTORS, PDC MOTEL INVESTORS, GALENA MOTEL INVESTORS, THOMAS W. SCHOLL and Q.H. MANAGEMENT ASSOCIATES, INC.,

Defendants.

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This is a civil action for monetary relief in which plaintiffs Michael J. Faas and Mary Jane Faas contend that defendants violated their rights under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634; the Family and Medical Leave Act, 29 U.S.C. §§ 2611-2619; and the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161-1169. Plaintiffs also bring various

state laws claims. Plaintiffs' claims are summarized in the table below. (For convenience, I will refer to all of defendant Aramia companies as Aramia in the table.)

Count	Cause of Action	Defendants
I	Americans with Disabilities Act	PDC Motel Investors; Q.H. Management Ass., Inc.
II	Age Discrimination in Employment Act	PDC Motel Investors; Q.H. Management Ass., Inc.
III	Breach of Contract (Limited Partnership Agreements)	PDC Motel Investors; Galena Motel Investors; Dodgeville Motel Investors; Red Wing Motel Investors; Aramia
IV	Breach of Contract (Employment Contract)	PDC Motel Investors
V	Breach of Contract (Oral Employment Contract)	Q.H. Management Ass., Inc.
VI	Wisconsin Limited Partnership Act	PDC Motel Investors; Galena Motel Investors; Dodgeville Motel Investors; Red Wing Motel Investors; Aramia
VII	Breach of Fiduciary Duty	Aramia
VIII	Intentional/Tortious Interference with Contract	Scholl; PDC Motel Investors; Smith Realty, Co.; Scholl & Ass.
IX	Intentional Infliction of Emotional Distress	Scholl; PDC Motel Investors
X	Negligent Infliction of Emotional Distress	Scholl; PDC Motel Investors
XI	Fraud	Scholl; Aramia
XII	Negligent Misrepresentation	Scholl; Aramia

Count	Cause of Action	Defendants
XIII	Consolidated Omnibus Budget Reconciliation Act	PDC Motel Investors; Q.H. Management Ass., Inc.
XIV	Defamation	Scholl; PDC Motel Investors
XV	Family Medical Leave Act	PDC Motel Investors; Q.H. Management Ass., Inc.

On February 4, 2000, defendants filed a motion for judgment on the pleadings as to counts I, II, XIII and XV for lack of subject matter jurisdiction and a motion for summary judgment as to counts III, V, VI, VII, IX and X. (Defendants have not moved for summary judgment on claims IV, VIII, XI and XII.) In an order entered on April 17, 2000, I notified the parties that defendants' motion for judgment on the pleadings was being converted into one for summary judgment under Fed. R. Civ. P. 56 because matters outside the pleadings had been submitted and would be considered by the court. See Fed. R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.") In the April 17 order, I also gave plaintiffs time to respond to defendants' motion to dismiss plaintiffs' ADA and FMLA claims because of plaintiffs' failure to name a medical expert before the deadline for naming expert witnesses.

Presently before the court is defendants' motion to dismiss plaintiffs' ADA and FMLA

claims and for summary judgment on all of plaintiffs' federal law claims (counts I, II, XIII and XV) and six of plaintiffs' state law claims (counts III, V, VI, VII, IX and X). Jurisdiction is present. See 28 U.S.C. §§ 1331 and 1367(a). I will grant defendants' motion for summary judgment on (1) plaintiffs' claims under the ADEA, FMLA and COBRA because defendants PDC and Q.H. do not have the requisite number of employees to bring them within those statutes; (2) plaintiffs' disparate treatment claim under the ADA because plaintiffs have not shown that they are disabled within the meaning of the act; and (3) plaintiffs' state law claims because they are all without merit. The motions of defendants PDC and Q.H. for summary judgment on plaintiffs' retaliation claim under the ADA and for dismissal of plaintiffs' ADA and FMLA claims will be denied.

For the sole purpose of deciding defendants' motion for summary judgment, I find the following facts proposed by the parties and from the record to be material and undisputed.

UNDISPUTED FACTS

A. Parties

Plaintiff Michael Faas was born on September 13, 1935 and plaintiff Mary Jane Faas was born on May 11, 1938. In 1997, plaintiff Michael Faas earned $115 each week and plaintiff Mary Jane Faas earned $500 each week as the on-site managers of the Best Western

Quiet House in Prairie du Chien, Wisconsin. Currently, plaintiffs are limited partners in defendants Dodgeville Motel Investors, Red Wing Motel Investors, Galena Motel Investors and PDC Motel Investors.

Defendant PDC Motel Investors is a limited partnership that operates the Best Western Quiet House in Prairie du Chien. Defendant PDC's general partner is Aramia, Ltd. On December 17, 1997, defendant PDC had 18 employees, including plaintiffs.

Defendant Q.H. Management, a Florida corporation, was incorporated in June 1994. It is a management company that manages several motels in the state of Wisconsin, including the Best Western in Prairie du Chien. Defendant Q.H. Management does not perform the day-to-day management of the motels.

Defendant Thomas Scholl is the sole stockholder of defendants Aramia I, Aramia II, Aramia III, Aramia IV, Aramia V, Aramia VI, Aramia VII and Aramia VIII. Defendants Dodgeville Motel Investors, Red Wing Motel Investors, Galena Motel Investors and PDC Motel Investors are all limited partnerships. Each of the limited partnerships was created in order to construct and run an independent motel. The general partner of each defendant limited partnership is one of the defendant Aramia corporations.

There is one worker's compensation policy and one health insurance policy that covers all of the employees of the defendant individual limited partnerships. The insurance company

offered a lower rate for all of the partnerships to be covered under one policy. The insurer itemizes the premium amount for each type of insurance for each entity because each entity pays separately. All of the employees of all the motels had the same employee handbook and the same uniforms. Collectively, defendants employed approximately 150 people.

Each defendant limited partnership has its own operating checking account, savings account and petty cash checking account, paying suppliers and vendors out of its individual checking account. Each defendant limited partnership gave a payroll service enough money to cover the wages for the employees of the individual motel and then the service issued paychecks to the employees.

B. Plaintiffs' Employer

Plaintiffs started working for defendant PDC in 1988. Defendant PDC paid plaintiffs W-2 wages. Defendant Q.H. Management paid plaintiff Mary Jane Faas income for her services and reported that income on IRS Form 1099.

Cathy Scholl is defendant Q.H.'s sole shareholder and sole employee (with the possible exception that plaintiffs were employees of defendant Q.H. as well). Plaintiff Mary Jane Faas performed management services for defendant Q.H. She negotiated how much she was to be paid for those services with defendant Q.H. In order to perform her job for defendant Q.H.,

plaintiff Mary Jane Faas supplied her own car and paid for expenses relating to her car, food, telephone calls and postage. The defendant limited partnerships may have paid plaintiff Mary Jane Faas's bonuses out of their individual partnership accounts. On at least one occasion, plaintiff Mary Jane Faas was paid a management fee out of the general funds of defendant Mequon Motel Investors.

C. Plaintiffs' Leave

In an unsigned memorandum dated December 15, 1997 from plaintiff Michael Faas to defendant Thomas Scholl, plaintiff complained that he had received "numerous petty faxes and . . . letters of harassment" from defendant Scholl and his wife Cathy since November 20, 1997, when plaintiff informed defendant Scholl that plaintiff was going to build a motel and was going to have a knee replacement at the Mayo Clinic. Plaintiff also wrote that the harassment "has caused both Mary Jane and myself many sleepless nights. Since then Mary Jane has had stomach problems and I have had chest pains and have resorted to using nitro." Defendant Scholl denies receiving this memo. He also denies that plaintiff notified him that he had a disability.

A fax dated December 15, 1997, from defendant Scholl to plaintiff Michael Faas stated that defendant had "scheduled a meeting in Mequon for Thursday, December 18, 1997, at

3:00 P.M. . . . It is imperative that you attend so that you can hear firsthand what our new [ADA] policy is and how it is to be implemented."

On December 17, 1997, plaintiffs' lawyer informed defendant Scholl that plaintiffs were too ill to work for the next two weeks. On December 18, 1997, plaintiffs did not attend the meeting with defendant Scholl in Mequon; instead, plaintiffs drove over four hours to New Richmond, Wisconsin with their builder to present their own motel development plans to the New Richmond Planning Commission. After their meeting with the commission, plaintiffs drove back to Prairie du Chien on December 19, 1997.

Because plaintiffs had attended a personal business meeting in New Richmond on December 18, 1997, defendant Scholl concluded that plaintiffs were not too ill to work and that their business endeavors were adverse to the business interests of their employer, defendant PDC Motel Investors. Defendant Scholl determined that plaintiffs had lied about their illness and were derelict in their duties.

In an unsigned letter dated December 18, 1997, to Douglas Henry, defendant Scholl wrote, "Please accept this letter as [an] offer to employ[] your services as a General Manager of the six Quiet Houses and the Super 8 Motel in Prairie du Chien, Wisconsin. . . ." A letter dated December 26, 1997, to Lyle Ernst and Shirley Feuerhelm on Smith Realty Co. Inc. and Scholl and Associates letterhead stated, "This letter will also serve to formally state our terms

of employment which we have discussed prior hereto. You will be responsible for managing the Best Western Quiet House in Prairie du Chien, Wisconsin, or possibly the Quiet House in Dodgeville, Wisconsin."

In a letter dated December 19, 1997, to plaintiffs' lawyer, defendant Scholl wrote

> I have taken over all the responsibilities covered by [plaintiffs'] employment, due to their inability to perform their duties as outlined in your letter of December 17th, and due to the fact that as of the 18th your clients were unreachable. Employees that answered directly to Mike and Mary Jane were unable to reach them, and because they walked off the job without notice on Thursday, I had no choice but to assume all of their responsibilities. It is evident from your correspondence that they need rest, medication, and time away from the business. . . . I will continue to perform all of Mike and Mary Jane's responsibilities. Because of [plaintiffs'] illness, I request that they not perform any duties, nor enter any of my premises, nor speak to any of my employees for any reason what-so-ever.

Between December 19, 1997 and January 2, 1998, plaintiffs took a two-week leave from work because they were suffering from extreme stress and emotional distress. During that time, plaintiff Michael Faas took tranquilizers and sleeping pills as well as nitroglycerine for his chest pains and plaintiff Mary Jane Scholl took anti-anxiety medication and sleeping pills. At the end of the two-week period, plaintiffs' doctor released them to return to work. In a letter to plaintiffs' lawyer dated January 2, 1998, defendant Scholl wrote that he accepted plaintiffs' "resignation of all their positions effective 12:01 A.M. December 18, 1997."

D. Plaintiffs' Replacements

Lyle Earnst, a 60-year old man, and Shirley Feuerhelm, a 45-year old woman, replaced plaintiffs as on-site managers of the Best Western Quiet House in Prairie du Chien. Earnst performed 70% of the duties and Feuerhelm performed 30% of the duties. Doug Henry, a 52-year old man, replaced plaintiffs as general manager of the other motels.

E. Plaintiffs' COBRA Coverage

After receiving the necessary forms to elect health insurance coverage under COBRA, plaintiff Michael Faas signed a document declining continuation of plaintiffs' coverage on February 11, 1998.

OPINION

A. Standard of Review

To succeed on a motion for summary judgment, the moving party must show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Celotex v. Catrett, 477 U.S. 317, 324 (1986). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving

party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex, 477 U.S. at 324.

B. Plaintiffs' Employer

1. Statutory minimums

Plaintiffs contend that defendants violated their rights under various federal statutes. Each of the statutes requires that an employer have a threshold minimum number of employees in order to be liable. Under the Americans with Disabilities Act, employer is defined as "a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calender weeks in the current or preceding calender year." 42 U.S.C. § 12111(5)(A). The parties agree that plaintiffs were employed by defendant PDC and that defendant PDC had a total of 18 employees during the relevant time, satisfying the ADA's requirement of a minimum of 15 employees. The parties disagree whether defendant Q.H. was also plaintiffs' employer and whether plaintiffs qualify for protection under the remaining three acts.

Under the Age Discrimination in Employment Act, an employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees for each working

day in each of twenty or more calender weeks in the current or preceding calender year." 29 U.S.C. § 630(b). The Employee Retirement Income Security Act of 1974, as amended by the Consolidated Omnibus Budget Reconciliation Act, provides that the relevant section does not apply "to any group health plan for any calender year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." 29 U.S.C. § 1161(b). The Family Medical Leave Act defines an employer as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees for each working day during each of 20 or more calender workweeks in the current or preceding calendar year." 29 U.S.C. § 2611(4)(A)(i).

2. Three approaches to determining whether to aggregate employees

"Although a direct employment relationship provides the usual basis for liability, . . . courts have fashioned various doctrines by which a defendant that does not directly employ a plaintiff may still be considered an 'employer' under" various statutes. Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993 (6th Cir. 1997). The courts have used three approaches in determining "the issue of aggregation for the purpose of meeting the jurisdictional threshold." Shauna Cully Wagner, *Propriety of Treating Separate Entities as One for Determining Number of Employees Required by Title VII of Civil Rights Act of 1964*, 160 A.L.R. Fed. 441, 452

(2000).

First, in order to determine whether two entities are joint employers, "courts have required that one entity, generally engaged in a contractual relationship with the independent direct employer, retain substantial control of the terms and conditions of employment of those persons employed by the direct employer." Id. Second, in order to determine whether two employers are a single employer or an integrated enterprise, courts have traditionally considered four factors: interrelation of operations, common management, centralized control of labor relations and common ownership or financial control. See Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 582-83 (7th Cir. 1993); Burdi v. Uniglobe Cihak Travel, Inc., 932 F. Supp. 1044, 1048 (N.D. Ill. 1996). "Although the presence or absence of any one factor is not controlling, . . . 'control over the elements of labor relations is a central concern.'" Rogers, 7 F.3d at 582. "No one of these factors is conclusive; instead, the decisionmaker must weigh the totality of the circumstances." Trustees of the Pension, Welfare and Vacation Fringe Benefits Funds of IBEW Local 701 v. Favia Electric Co., Inc., 995 F.2d 785, 788 (7th Cir. 1993). Third, "a relatively small number of cases address the propriety of aggregating employees on the theory of agency." Wagner, 160 A.L.R. Fed. at 452. Plaintiffs contend that the second approach is applicable in this case, arguing that the various defendant entities qualify as an integrated enterprise under the four-factor test. Defendants contend that the four-factor test is not valid, following the

most recent decision by the Court of Appeals for the Seventh Circuit addressing the theory of an integrated enterprise under antidiscrimination laws. See Papa v. Katy Industries, Inc., 166 F.3d 937, 939 (7th Cir. 1999).

In Papa, 166 F.3d at 939, the Court of Appeals for the Seventh Circuit addressed the proper test "to use to determine whether an employer that has fewer than 15 or 20 employees, and thus falls below the threshold for coverage by the major federal antidiscrimination laws . . . should be deemed covered because it is part of an affiliated group of corporations that has in the aggregate the minimum number of employees." See Diani v. Valex, Inc., 56 F. Supp. 2d 1023, 1025 (N.D. Ill. 1999) (holding that Papa extends beyond antidiscrimination statutes to the FMLA, stating "Limited affiliate liability under the FMLA falls well within the purpose of that limitation as expressed by the Seventh Circuit.") In analyzing this question, the Seventh Circuit examined the four-factor test that courts have used to determine "whether the nominal employer is part of an 'integrated enterprise.'" Papa, 166 F.3d at 940. The court stated that a fresh look at the standard was warranted because of "the vagueness of three of the four factors (all but 'common ownership' and it . . . is useless)" and because "the test was not custom-designed for answering exemption questions under the antidiscrimination laws." Id.

The court then examined the purpose "of exempting tiny employers from the antidiscrimination laws" in formulating a "proper standard." Id. "The purpose is to spare very

small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws, establishing procedures to assure compliance, and defending against suits when efforts at compliance fail." Id. The court held that the exemption should exclude three situations "in which the policy behind the exemption is vitiated by the presence of an affiliated corporation": (1) where the traditional conditions are present for piercing the corporate veil to allow a creditor to sue a parent or other affiliate; (2) where a business enterprise has split itself up into a number of corporations "for the express purpose of avoiding liability under the discrimination laws"; and (3) where the parent corporation "directed the discriminatory act . . . of which the employee of its subsidiary was complaining." Id. at 940-41.

In the first of the two cases the court of appeals reviewed in Papa, the plaintiff sued his former employer (a corporate subsidiary) for liability under the ADA and ADEA by aggregating its employees with those of its parent. Id. at 939. The plaintiff argued that there was sufficient integration among the defendants to be an integrated enterprise because, among other things, the parent ordered the subsidiary to lay off some of its employees, the parent fixed the salaries of the subsidiary's employees, subsidiary employees participated in the parent's pension plan, the parent funded the subsidiary, the computer systems were integrated and the subsidiary used certain subaccounts in the parent's checking account. Id.

In the second case, the plaintiff sued his former employer and sought to aggregate its

employees with those of another company, arguing that there was sufficient integration because of the centralization of payroll, benefits and computer operations, the overlapping members of the board of directors and the movement of employees between the affiliates. Id. The Seventh Circuit held that in both situations, the defendants did not qualify as a single employer because none of the three exceptions to the exemption for small employers under the antidiscrimination laws was applicable. Id. at 943.

3. Determining whether defendants are an integrated enterprise

Because there is no parent-subsidiary relationship between defendants, the parties disagree as to which test applies to determine whether defendants are an integrated enterprise. Although the Seventh Circuit's holding in Papa may not extend beyond determining affiliate liability among corporate parents and their subsidiaries, the court indicated its skepticism of the four-factor test as well as the importance of formulating a test specific to the antidiscrimination law context. Id. at 940. I will apply the traditional four-factor test in conjunction with the court's decision in Papa to decide whether any combination of defendants constitute an integrated enterprise.

a. Defendant Q.H.

Plaintiffs contend that in addition to being employees of defendant PDC, they were employees of defendant Q.H. and that defendants PDC and Q.H. were a single employer. Defendant Q.H. disagrees, maintaining that plaintiffs were independent contractors rather than its employees. Although it is undisputed that plaintiff Mary Jane Faas performed managerial services for defendant Q.H., the parties disagree whether plaintiff Michael Faas did as well. On a motion for summary judgment a dispute such as this must be resolved in favor of the nonmoving party. Therefore, I will assume that plaintiff Michael Faas performed services for defendant Q.H. I need not determine whether plaintiffs were employees or independent contractors of defendant Q.H. because even if they were employees, defendant Q.H. lacks a sufficient number of employees by itself for liability under the ADA. See Aberman v. J. Abouchar & Sons, Inc., 160 F.3d 1148, 1150 (7th Cir. 1998) (applying five-factor test to determine whether a worker is an employee or an independent contractor under ADA). Even if defendants PDC and Q.H. are joined together for liability and their employees are aggregated, the number of employees reaches 19, one short of the 20 required under the ADEA and COBRA and four over the 15 required under the ADA. Although plaintiffs focus on establishing that they were employees of defendant Q.H., the crucial issue is whether defendants Q.H. and PDC are integrated sufficiently so that plaintiffs can bring a claim against both defendants under the ADA.

In making this determination, the first consideration is the relationship of the defendants' operations. Defendants Q.H. and PDC performed different types of work: defendant Q.H. is a Florida corporation operating as a management company responsible for managing several motels throughout Wisconsin, including defendant PDC's motel, and defendant PDC is a Wisconsin limited partnership that owns and runs a motel in Wisconsin. Second, "[a]s to common management, the two businesses had at least nominally separate management." Trustees of the Pension, 995 F.2d at 788. Defendants allege that defendant Scholl's wife Cathy managed defendant Q.H. and that defendant Scholl managed defendant PDC. Plaintiffs disagree, alleging that defendant Scholl was in charge of managing both operations. The third factor, the centralization of labor relations, provides the strongest support for plaintiffs' position that defendants Q.H. and PDC are a single employer. In support of their argument that defendant Scholl controlled labor relations, plaintiffs point to the letter to plaintiffs' lawyer in which defendant Scholl accepted plaintiffs' "resignation of all their positions effective 12:01 A.M. December 18, 1997." Although defendants dispute whether defendant Scholl had the authority to terminate plaintiffs' employment with both defendants PDC and Q.H., defendant Scholl's letter indicates his involvement in the management of employees of both defendants.

Fourth, there is no overlap between the owners of defendant PDC and Q.H. because

Cathy Scholl is the sole shareholder of defendant Q.H. and defendant PDC is a limited partnership, owned by various partners, including defendant Scholl. However, the parties dispute whether defendant Scholl had actual financial control over defendant Q.H. as a result of his marriage to Cathy. Because the parties dispute the facts relating to three of the four factors, it is inappropriate to determine defendant Q.H.'s integration with defendant PDC on summary judgment. Viewing the facts in the light most favorable to plaintiffs and examining the "totality of the circumstances," defendant Scholl's involvement in both businesses provides the necessary link between defendants Q.H. and PDC to evidence an integrated enterprise.

b. Defendants Dodgeville Motel Investors, Red Wing Motel Investors and Galena Motel Investors

Plaintiffs contend that defendants Dodgeville, Red Wing and Galena are so integrated with defendant PDC that they qualify as a single employer. Each defendant partnership owns and runs an independent motel. In order to do so, each partnership has its own operating checking account, savings account and petty cash checking account and each partnership pays vendors, suppliers and a payroll service out of its individual checking account. See Swallows, 128 F.3d at 994 (holding that there was "insufficient evidence of interrelation of operations" when two businesses "each kept their own records, and maintained separate bank accounts and

offices). Without any indication that the defendants "had common offices, common record keeping, and shared bank accounts and equipment," E.E.O.C. v. Oak Lawn Ltd., 987 F. Supp. 647, 650 (N.D. Ill. 1997), the evidence falls short of establishing that the defendant entities were "highly integrated with respect to . . . operations." Rogers, 7 F.3d at 583.

As evidence that there is some degree of centralized control of labor relations among the defendant limited partnerships, plaintiffs point out that there is one worker's compensation policy and one health insurance policy that covers all of the employees of defendant individual limited partnerships. However, the evidence shows that the individual motels were covered under one insurance policy to take advantage of reduced rates resulting from "economies of scale," while each defendant partnership paid for its own premium out of its individual account. Papa, 166 F.3d at 942. In Papa, the court stated that "[f]irms too tiny to achieve the realizable economies of scale or scope in their industry will go under unless they can integrate some of their operations with those of other companies, whether by contract or by ownership." Id. The court noted that small businesses did not become joint employers by "pool[ing] with other employers by buying an insurance policy," whether the employers were pooled by common ownership or by contract. Id. Plaintiffs also point out that all of the employees of the various motels had the same employee handbook and the same uniforms. That the employees shared handbooks and uniforms indicates a common thread in labor management between the

defendant partnerships; however, the thread is insufficient to establish integration when compared to the centralized personnel management held to be within the boundaries of the small employer exception in Papa, including one entity's fixing the salaries of another entity's employees and ordering the other entity to layoff employees. See id. at 939.

Plaintiffs contend that there is common ownership among the four defendant partnerships. Although the general partner of each limited partnership is one of the defendant Aramia corporations owned by defendant Scholl, the remaining limited partners are various investors; plaintiffs have not established that the same investors share an ownership interest in each of the defendant partnerships. In an effort to fit within one of the exceptions to the small business exemption that the Seventh Circuit set forth in Papa, plaintiffs suggest that defendant Scholl split the defendant businesses into several companies in order to avoid liability for their discriminatory acts. See Papa, 166 F.3d at 941. However, sworn statements in defendant Scholl's affidavit show that each of the four defendant limited partnership began construction on different motels in different years, ranging from 1988 to 1997. In short, plaintiffs have not presented evidence to contradict defendant Scholl's explanation that the defendant business are separate because each was created to open different motels at various times. An examination of the "totality of the circumstances" demonstrates that each defendant limited partnership is running its own motel with its own staff and money rather than

participating in an integrated enterprise. Trustees of the Pension, 995 F.2d at 788.

c. Defendant Aramia corporations and defendants Smith Realty Co., Inc. and Scholl & Associates

Plaintiffs have not submitted any evidence that the defendant Aramia corporations or defendants Smith Realty and Scholl & Associates are so integrated with defendant PDC as to qualify as a single employer. Plaintiffs' conclusory assertion that defendant Scholl is involved with each of the defendants is not enough to aggregate defendants' employees under the integrated enterprise theory. Because plaintiffs have not presented sufficient evidence to demonstrate that defendants are an integrated enterprise and that defendants' employees should be aggregated, defendants' motion for summary judgment on plaintiffs' claims under the ADEA, FMLA and COBRA will be granted.

C. Americans with Disabilities Act

1. Disparate treatment

Under the Americans with Disabilities Act, two distinct categories of disability discrimination claims exist: disparate treatment and failure to accommodate. See Foster v. Arthur Andersen, LLP, 168 F.3d 1029, 1032 (7th Cir. 1999). This case falls into the first category: plaintiffs contend that defendant Scholl fired them from defendant PDC because he

regarded them as disabled. See Sutton v. United Air Lines, 119 S. Ct. 2139, 2149 (1999) (stating that ADA protects people who are regarded as disabled).

The act prohibits discrimination by covered entities, including private employers, against qualified individuals with disabilities. See Nowak v. St. Rita High School, 142 F.3d 999, 1002 (7th Cir. 1998) (citing 42 U.S.C. § 12112(a)) (ADA proscribes discrimination against "'a qualified individual with a disability because of the disability.'") Specifically, the act provides that no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8).

A plaintiff may attempt to prove a violation of the ADA by presenting direct or circumstantial evidence that her discharge was a result of intentional discrimination or by establishing a prima facie case through indirect evidence under the McDonnell Douglas burden shifting framework. See Weigel v. Target Stores, 122 F.3d 461, 465 (7th Cir. 1997). Because plaintiffs have not presented direct evidence that disability was the determining factor in their

discharge, they must proceed under the indirect burden shifting method. Plaintiffs can establish a prima facie case of disability discrimination by showing that (1) they are disabled within the meaning of the ADA; (2) their work performance met their employer's legitimate expectations; (3) they were discharged; and (4) the circumstances surrounding their discharge indicate that it is more likely than not that they were discharged because of their disability. See Rehling v. City of Chicago, 207 F.3d 1009, 1018 n. 7 (7th Cir. 2000) (citing Weigel, 122 F.3d at 465).

Plaintiffs must first show that they are disabled within the meaning of the act. See Best v. Shell Oil, 107 F.3d 544, 547-48 (7th Cir. 1997). The act defines a disability as (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) "a record of such impairment"; or (3) "being regarded as having such an impairment." 42 U.S.C. § 12102(2)(A)-(C). A major life activity is "substantially limited" when the person is unable to perform it or is significantly restricted in the manner, condition, or duration in which she can perform it in comparison to the general population. 29 C.F.R. § 1630.2(j) (1998). Major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 29 C.F.R. § 1630.2(I).

Having a disability includes "being regarded as having," § 12102(2)(C), "a physical or

mental impairment that substantially limits one or more of the major life activities of such individual." § 12102(2)(A). "There are two apparent ways in which individuals may fall within this statutory definition: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities." see Sutton, 119 S. Ct. at 2149; see also 29 C.F.R. § 1630.2(l).

Although plaintiffs contend that defendant Scholl regarded them as disabled, the undisputed evidence demonstrates that defendant Scholl believed that plaintiffs had lied about their stress-related illness, evidenced by their attendance at a personal business meeting the day after their lawyer had informed defendant Scholl that plaintiffs needed two weeks off to recover from various stress-related ailments. Plaintiffs face an additional problem because they cannot demonstrate that defendant Scholl thought that plaintiffs' stress-related illnesses caused allegedly by working with defendant Scholl limited their ability to perform "a class or range of jobs." Defendant Scholl knew that they were healthy enough to conduct their own business. Davidson v. Midelfort Clinic, Ltd., 133 F.3d 499, 511 (7th 1998).

Even if plaintiffs could establish that defendant Scholl regarded them as disabled, their claim of illegal discrimination fails because they failed to adduce evidence sufficient to show that "the circumstances surrounding [the adverse action] indicate that it is more likely than not

that [their] disability was the reason for these adverse actions." See Rehling, 207 F.3d at 1018 n. 7. Defendant Scholl terminated plaintiffs after concluding that they had lied about their illness, that they were developing business relationships that were adverse to the interests of their employer by presenting plans for their own motel to the New Richmond Planning Commission and that they had neglected to attend a business meeting with him in Mequon the day they went to New Richmond. Because no reasonable trier of fact could conclude that plaintiffs were fired because of their disabilities, defendants' motion for summary judgment on plaintiffs' ADA disparate treatment claim will be granted.

2. Retaliation

To establish a prima facie case of retaliation under the ADA, a plaintiff must show evidence from which a reasonable jury could find that (1) she engaged in statutorily protected activity; (2) she suffered an adverse employment action; and (3) there is a causal connection between her protected activity and the defendant's adverse employment action. Silk v. City of Chicago, 194 F.3d 788, 799 (7th Cir. 1999) (citing Talanda v. KFC National Management Co., 140 F.3d 1090, 1095 (7th Cir. 1998)). Plaintiffs contend that defendants PDC and Q.H. retaliated against them for filing a complaint with the EEOC.

In moving for summary judgment on plaintiffs' retaliation claim, defendants' sole

argument is that the retaliation claim should be dismissed because plaintiffs are not disabled within the meaning of the act and therefore, they do not qualify for the act's protection. Defendants cite no cases in support of their position that a plaintiff must be disabled in order to bring a retaliation claim under the ADA and research reveals no such cases in this circuit. In fact, the Court of Appeals for the Third Circuit has held that "[a]n individual who is adjudged not to be a 'qualified individual with a disability' may still pursue a retaliation claim under the ADA." Krouse v. American Sterilizer, Co., 126 F.3d 494, 498 (3rd. Cir. 1997); see also Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3rd Cir. 1998) (same). In reaching this conclusion, the Third Circuit compared the language of the ADA's retaliation provision which protects "any individual," 42 U.S.C. § 12203(a) with the ADA's antidiscrimination provision which may be invoked only by a "qualified individual with a disability." 42 U.S.C. § 12112(a). Although not binding, the Third Circuit's reasoning is persuasive. Accordingly, defendants' motion for summary judgment on plaintiffs' ADA retaliation claim will be denied. In addition to their motion for summary judgment, defendants filed a motion to dismiss plaintiffs' ADA and FMLA claims because of plaintiffs' failure to name a medical expert to prove their claims before the relevant deadline. Because plaintiffs' retaliation claim is not dependent on their ability to prove their disabilities, defendants' motion will be denied.

D. Consolidated Omnibus Budget Reconciliation Act

The Consolidated Omnibus Budget Reconciliation Act of 1985 requires that "[t]he plan sponsor of each group health plan shall provide . . . that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan." 29 U.S.C. § 1161(a). Even if defendants' employees could be aggregated in order to meet the requisite number of employees under COBRA, see § 1161(b), no reasonable juror could find that defendants' violated plaintiffs' rights under COBRA. The undisputed evidence demonstrates that defendants sent plaintiffs the necessary forms to elect coverage and that plaintiffs declined coverage. Although plaintiffs contend that they declined coverage because of defendant Scholl's continued harassment of them and his refusal to process the necessary COBRA forms, they have provided no evidence in support of this contention.

E. State Law Claims

"[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III." 28 U.S.C. § 1367(a). Pursuant to § 1367(a), I will exercise supplemental

jurisdiction over plaintiffs' state law claims.

1. Breach of contract (oral employment contract)

"Under Wisconsin law, employment is generally terminable at will by either party without cause and there is a strong presumption that an employee contract is at will unless the terms of the contract state otherwise." Heinritz v. Lawrence University, 194 Wis. 2d 606, 611, 535 N.W.2d 81, 83 (Ct. App. 1995) (citing Forrer v. Sears, Roebuck & Co., 36 Wis. 2d 388, 393 153 N.W.2d 587, 589-90 (1967)). To overcome this presumption, a plaintiff must show that both parties intended to restrict the reasons for which an employee could be discharged. See Forrer, 36 Wis. 2d at 393, 153 N.W.2d at 589-90. "Employees hired for an indefinite term without a formal written employment contract are employees at-will." Heinritz, 194 Wis. 2d at 611, 535 N.W.2d at 83 (citing Brockmeyer v. Dun & Bradstreet, 113 Wis. 2d 561, 566-67, 335 N.W.2d 834, 837 (1983)).

Plaintiffs contend that defendant Q.H. breached an oral employment contract by failing to pay them their wages. Defendants argue that there was no oral employment contract between plaintiffs and defendant Q.H. and that plaintiffs were independent contractors of defendant Q.H. In support of the contention that an oral employment contract existed, plaintiffs submit their sworn affidavit statements setting forth the amount of money defendant

Q.H. agreed orally to pay them to manage eight motels. Even if plaintiffs had an oral employment contract with defendant Q.H. to manage various motels, they have not presented any evidence to rebut the presumption that they were at-will employees of defendant Q.H. Therefore, it is presumed that defendant Q.H. could terminate the relationship at any time and plaintiff had no right to future employment with defendant Q.H. Insofar as plaintiffs are bringing a breach of contract claim for defendant Q.H.'s failure to pay them wages for services performed before they were terminated, plaintiffs have failed to present any evidence indicating that defendant Q.H. owes them money. Defendants' motion for summary judgment on this claim will be granted.

2. Breach of fiduciary duty

Plaintiffs contend that the defendant Aramia companies breached their common law fiduciary duties as general partners to plaintiffs and to the four defendant limited partnerships. In their motion for summary judgment, defendants argue that Wisconsin's Uniform Limited Partnership Act governs the fiduciary duties that general partners owe to limited partners. See, e.g., Wis. Stat. § 179.33 (discussing the powers and liabilities of general partners in limited partnerships). Regardless whether the cause of action arises under statute or common law, plaintiffs have failed to respond to defendants' motion for summary judgment on this claim and

to submit any facts indicating a breach of fiduciary duty. "Arguments that are not developed in any meaningful way are waived." Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc., 181 F.3d 799, 808 (7th Cir. 1999); see also Finance Investment Co. (Bermuda) Ltd. v. Geberit AG, 165 F.3d 526, 528 (7th Cir. 1998); Colburn v. Trustees of Indiana University, 973 F.2d 581, 593 (7th Cir. 1992) ("[plaintiffs] cannot leave it to this court to scour the record in search of factual or legal support for this claim); Freeman United Coal Mining Co. v. Office of Workers' Compensation Programs, Benefits Review Board, 957 F.2d 302, 305 (7th Cir. 1992) (court has "no obligation to consider an issue that is merely raised, but not developed, in a party's brief"). Defendants' motion for summary judgment on this claim will be granted.

3. Intentional infliction of emotional distress and negligent infliction of emotional distress

In order to sustain a claim of intentional infliction of emotional distress against defendants Scholl and PDC, plaintiffs must prove that: (1) the purpose of their conduct was to cause emotional distress; (2) their conduct was extreme and outrageous; (3) their conduct was the cause in fact of the injuries; (4) plaintiffs suffered an extreme disabling emotional response. See Musa v. Jefferson County Bank, 233 Wis. 2d 241, 249 n.9, 607 N.W.2d 349, 353 (Ct. App. 2000) (citing Anderson v. Continental Insurance Company, 85 Wis. 2d 675, 694-95, 271 N.W.2d 368 (1978)); see also Alsteen v. Gehl, 21 Wis. 2d 349, 356, 124 N.W.

2d 312, 316 (1963) (concluding that a claim for intentional infliction of emotional distress requires extreme and outrageous conduct undertaken for the purpose of inflicting psychological harm). In order to sustain a claim of negligent infliction of emotional distress against defendants Scholl and PDC, plaintiffs must prove three elements: (1) defendants' conduct fell below the applicable standard of care; (2) plaintiffs suffered injuries; and (3) defendants' conduct was a cause-in-fact of plaintiffs' injuries. See Rosin v. Fort Howard Corp., 222 Wis. 2d 365, 588 N.W.2d 58 (Ct. App. 1998) (citing Bowen v. Lumbermens Mutual Casualty Co., 183 Wis. 2d 627, 632, 517 N.W.2d 432, 434 (1994)).

Although it is not clear, plaintiffs appear to contend that their claims of negligent and intentional infliction of emotional distress derive from defendant Scholl's conduct, which allegedly caused them to become ill and require a two-week leave. However, they have failed to submit facts detailing the incidents leading up to their leave. Without any properly proposed facts showing that defendant Scholl's conduct was extreme and outrageous or fell below an applicable standard of care, plaintiffs cannot raise a triable issue of fact under the torts of intentional or negligent infliction of emotional distress. (Plaintiffs are mistaken in their contention that defendants moved for summary judgment on plaintiffs' claim for negligent but not intentional infliction of emotional distress.) In an attempt to show that the conduct of defendants Scholl and PDC was tortious, the only evidence plaintiffs submitted was a

memorandum from plaintiff Michael Faas to defendant Scholl in which plaintiff complained that he had received "numerous petty faxes and . . . letters of harassment" from defendant Scholl and his wife Cathy, causing plaintiffs sleepless nights, stomach problems and chest pains. Without more specific evidence as to the allegedly harassing letters and faxes, this falls far short of establishing that defendants' conduct was extreme or outrageous or fell below the standard of care.

Even if plaintiffs had proposed the necessary facts regarding defendants' conduct, they face the additional hurdle of showing that they suffered the requisite injuries. Although plaintiffs may be correct that with additional discovery, defendants would have discovered that plaintiffs suffered severe and debilitating emotional distress, it is plaintiffs' burden, not defendants', to demonstrate the extent of plaintiffs' injuries. It is plaintiffs that have an obligation to show the existence of facts sufficient to raise a question for the jury on all of the essential elements of their claims. See Celotex, 477 U.S. at 322. Summary judgment is appropriate if the court concludes that "if the record at trial were identical to the record compiled in the summary judgment proceedings, the movant would be entitled to a directed verdict because no reasonable jury would bring in a verdict for the opposing party." Russell v. Acme-Evans Co., 51 F.3d 64, 69 (7th Cir. 1995). On the basis of this record, a reasonable trier of fact could not conclude that defendants are liable for intentional or negligent infliction of

emotional distress.

4. Breach of contract (limited partnership agreements) & Wisconsin Limited Partnership Act

Plaintiffs contend that defendants PDC, Galena, Dodgeville, Red Wing and the Aramia companies (1) failed to abide by the terms of the limited partnership agreements, including their failure to make appropriate disbursements to plaintiffs and provide financial information in a timely manner; and (2) violated various provisions of the Wisconsin Limited Partnership Act. Defendants contend that because the alleged harm is to the limited partnerships rather than the individual investors, plaintiffs must bring a derivative action pursuant to Wis. Stat. §§ 179.91-94, rather than a direct action. In response, plaintiffs do not offer any support for their position that direct actions are appropriate in this case. Because of the lack of facts regarding these claims, it is not possible to determine whether plaintiffs have standing to bring a direct action against certain limited partners and their general partners. Even if plaintiffs have standing to bring a direct action, they have failed to adduce any evidence in support of their allegations. Therefore, entry of summary judgment on this claim is appropriate.

ORDER

IT IS ORDERED that the motion for summary judgment filed by defendants Aramia,

Ltd., Aramia, I Ltd., Aramia II, Ltd., Aramia III, Ltd., Aramia IV, Ltd., Aramia V, Ltd., Aramia VI, Ltd., Aramia VII, Ltd., Aramia VIII, Ltd., Smith Realty Co., Inc., Scholl & Associates, Dodgeville Motel Investors, Red Wing Motel Investors, PDC Motel Investors, Galena Motel Investors, Thomas W. Scholl and Q.H. Management Associates, Inc. is GRANTED as to all defendants with respect to claims I, II, III, V, VI, VII, IX, X, XIII and XV, with the exception of plaintiffs' retaliation claim under the Americans with Disabilities Act against defendants PDC Motel Investors and Q.H. Management Associates, Inc.

FURTHER, IT IS ORDERED that defendants' motion to dismiss plaintiffs' Americans with Disabilities Act and Family and Medical Leave Act claims for plaintiffs' failure to name expert witnesses is DENIED as moot.

Remaining for trial are the following of plaintiffs' claims:

1. Federal claim of retaliation under the Americans with Disabilities Act against

defendants PDC Motel Investors and Q.H. Management Associates, Inc. (Count I);

2. State law breach of employment contract claim against defendant PDC Motel Investors (Count IV);

3. State law tortious interference with contract claim against defendants Thomas Scholl, PDC Motel Investors, Smith Realty Co., Inc. and Scholl & Associates (Count VIII);

4. State law fraud claim against defendants Thomas Scholl, Aramia, Ltd., Aramia, I Ltd., Aramia II, Ltd., Aramia III, Ltd., Aramia IV, Ltd., Aramia V, Ltd., Aramia VI, Ltd., Aramia VII, Ltd. and Aramia VIII, Ltd. (Count XI);

5. State law negligent misrepresentation claim against defendants Thomas Scholl, Aramia, Ltd., Aramia, I Ltd., Aramia II, Ltd., Aramia III, Ltd., Aramia IV, Ltd., Aramia V, Ltd., Aramia VI, Ltd., Aramia VII, Ltd. and Aramia VIII, Ltd. (Count XII);

6. State law defamation claim against defendants Thomas Scholl and PDC Motel Investors (Count XIV).

Entered this _____ day of May, 2000.

BY THE COURT:

_____
BARBARA B. CRABB
District Judge