IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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RUSSELL C. WINCHEL,

Plaintiff,

v.

ASSOCIATED TRAINING SERVICES CORPORATION, PHYSICIANS PLUS INSURANCE CORPORATION and JOHN KLABACKA,

Defendants.

OPINION AND ORDER
99-C-816-C

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This is a civil action for monetary and injunctive relief in which plaintiff Russell C. Winchel contends that defendants violated his rights by denying him the option to elect continuation health insurance coverage under the Comprehensive Omnibus Budget Reconciliation Act, 29 U.S.C. § 1161(a). Also, plaintiff brings a state law claim for misrepresentation. Subject matter jurisdiction is present. See 28 U.S.C. § 1331.

Presently before the court is the amended motion of defendants Associate Training Services Corporation and John Klabacka for summary judgment and the motion of defendant Physicians Plus Insurance Corporation for summary judgment. Defendants Associate Training

and Klabacka contend that plaintiff was not eligible for coverage because he was not an employee of defendant Associated Training on the day that he would have become eligible for coverage. Defendant Physicians Plus contends that plaintiff is not eligible for continuation coverage because he was not an "eligible employee" under the plan and that plaintiff cannot recover for his spouse and children because they are not parties in this case. All of the defendants contend that plaintiff was not eligible for continuation coverage because defendant Associated Training did not have the requisite number of employees in 1998 to be governed by COBRA. In response, plaintiff contends that defendant Associated Training is governed by COBRA because it is a member of a controlled group of corporations, whose employees exceed the requisite number and that he is an eligible employee under the health insurance plan. Because I find that plaintiff has failed to adduce evidence that defendant Associated Training has the requisite number of employees to be liable under COBRA or is part of a controlled group of corporations, defendants' motions will be granted.

As explained in this court's Procedures to be Followed on Motions for Summary Judgment, a copy of which was given to each party with the Preliminary Pretrial Conference Order on April 11, 2000, I will take as undisputed plaintiff's proposed facts supported by evidence in the record that defendants Associated Training and Klabacka dispute in their reply brief but did not contest with proposed facts of their own. See Procedures, II.C.2 ("The court

will not consider any factual propositions contained in a brief that are not the subject of a finding of fact proposed in response to movant's proposed findings of fact."); Plt.'s Proposed Findings of Fact #23-26.

For purposes of summary judgment, I find the following facts submitted by the parties to be material and undisputed.

UNDISPUTED FACTS

A. Plaintiff's Employment with Defendant Associated Training

Plaintiff Russell Winchel became an employee of defendants Associated Training Services Corporation and John Klabacka on November 17, 1998. Previously, plaintiff had been employed by defendant Associated Training from October 24, 1996 until October 5, 1997.

B. Strike

On March 5, 1999, plaintiff and another employee gave defendant Associated Training their request for union representation. In response, defendant Klabacka told plaintiff that if he did not rescind his request, defendant Klabacka would shut down defendant Associated Training, leaving all of its employees unemployed. On March 6, 1999, plaintiff notified defendant Associated Training that he was beginning an unfair labor strike against defendant

as of that day. On March 8, 1999, defendant Klabacka met with defendant Associated Training's employees and a union representative. The employees gave defendant Klabacka a letter, stating that they were on strike. Plaintiff was not a member of a union recognized by defendant Associated Training at any time. During the declared unfair labor strike, the employees, including plaintiff, refused to perform any work for defendant Associated Training and defendant did not schedule plaintiff for work.

On March 25, 1999, plaintiff received a certified letter from defendant Associated Training, stating, "this letter is to advise you that you are still an active employee and we have work available. Please advise if you are available for work. Please response [sic] within ten days of receipt of this letter." Plaintiff's only response to this letter was on April 14, 1999, when plaintiff informed defendant Associated Training that he was ending his declared unfair labor practice strike. Following the strike, plaintiff did not return to work for defendant Associated Training and defendant did not schedule plaintiff for work again.

C. Insurance Coverage

Defendant Associated Training sponsored a group health plan for its employees by providing coverage with defendant Physicians Plus. The health plan was available to employees who met defendant Associated Training's eligibility requirements for the group health plan, set

forth in defendant Associated Training's employee handbook as follows:

> All full-time regular employees are entitled to benefits under the Company's Medical Benefit Plan on the first of the month after 120 consecutive work days of employment.
>
> It is the employee's responsibility to understand the employee benefits. Employees must notify the Personnel Department with any change of status which may affect insurance coverage; i.e., . . . marital status, number of children, etc.

During his second period of employment with defendant Associated Training, plaintiff did not sign an employee handbook.

Defendant Physicians Plus provided group health coverage to defendant Associated Training's employees who met the eligibility requirements of defendant Associated Training's group health plan and the terms of the medical plan certificate issued by defendant Physicians Plus. The medical plan certificate of defendant Physicians Plus defines employee eligibility as follows:

> An employee is a person who: (1) appears on the policyholder's regular payroll records (excluding temporary employees); and (2) is scheduled to perform all the duties of his/her occupation in his/her job with the policyholder for at least the minimum number of hours per month as shown in the policyholder's current application for coverage.
>
> An employee is eligible for coverage under the policy if he/she: (1) is actively at work; and (2) has completed the probationary period, if any, as shown on the policyholder;'s current application for coverage.

One hundred and twenty days after plaintiff began working for defendant Associated Training was March 17, 1999. Accordingly, the first day plaintiff could have been eligible for coverage was April 1, 1999.

On April 5, 1999, plaintiff spoke to Kathryn Otto, a representative of defendant Physicians Plus Insurance. Otto told plaintiff that he was covered under defendant Associated Training's group health plan #P50673 and that if defendant Associated Training fired plaintiff, he would be eligible for continuation health insurance coverage under COBRA.

On April 20, 1999, defendant Associated Training sent a letter to defendant Physicians Plus, stating, "Pursuant to our telephone conversation of this date, please be advised Mr. Russell Winchel was terminated in the month of February, and therefore, he was adjusted off the March billing."

On August 2, 1999, Otto wrote plaintiff a letter, stating that after their phone conversation in April 1999, she had obtained information that indicated that neither he nor his family was ever covered by defendant Physicians Plus.

D. Size of Defendant Associated Training

Defendant Associated Training employed fewer than 20 employees on a typical business day during the 1998 calendar year. Specifically, defendant had five full-time employees and

three part-time employees during 1998.

As a result of his experience with defendant Associated Training, plaintiff knows that defendant Associated Training was associated with the following five corporations through common ownership, management and employees: Employment Services Associated Corp.; Earthworks of Wisconsin, Inc.; Diesel Truck Driver Training School, Inc.; Goldstar Diversified Incorporated; and Watertower Inn, Inc. of Sun Prairie, Wisconsin. At some point, six or fewer members of the Klabacka family owned stock in the six corporations. During 1998, the six corporations employed a total of more than 20 employees.

OPINION

A. Standard of Review

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). 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 v. Catrett, 477 U.S. 317, 324 (1986).

B. Number of Employees

COBRA 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). Section 1161(b) provides that subsection (a) "shall not apply to any group health plan for any calendar year if all employers maintaining such plan normally employed fewer than 20 employees on a typical business day during the preceding calendar year." The parties do not dispute that defendant Associated Training employed fewer than 20 employees in 1998. Plaintiff's contention is that defendant Associated Training is liable as a part of a brother-sister controlled group of corporations, including Employment Services Associated Corp.; Earthworks of Wisconsin, Inc.; Diesel Truck Driver Training School, Inc.; Goldstar Diversified Incorporated; and Watertower Inn, Inc. of Sun Prairie, Wisconsin. Plaintiff contends that because the six corporations employed more than 20 employees during 1998, COBRA's exemption for small businesses does not apply.

COBRA incorporates 26 U.S.C. § 414(t) in its definition of "employer." See 29 U.S.C. § 1167(4). Section 414(t) refers to § 414(b), which provides that "all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a) . . .) shall be treated as employed by a single employer." Section 1563(a)(2)

defines a brother-sister controlled group of corporations as:

> Two or more corporations if 5 or fewer persons who are individuals, estates, or trusts own (. . .) stock possessing--
>
> (A) at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of the stock of each corporation, and
>
> (B) more than 50 percent of the total value of shares of all classes of stock of each corporation, taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation.

Plaintiff contends that defendant Associated Training qualifies as part of a controlled group because defendant Klabacka, Mark Klabacka, Robert Klabacka and Lucille Klabacka each owned stock in the above named six corporations in 1998. In support of his contention, plaintiff's sole evidence is the general statements in his affidavit that the six corporations "are all entirely owned by members of the Klabacka family, [including] defendant Klabacka, Mark Klabacka, Robert Klabacka, Lucille Klabacka, Mike Klabacka and Jerry Klabacka," Plt.'s Aff. ¶ 16, and that five of the corporations "are almost entirely owned by four members of the Klabacka family," see Plt.'s Aff. ¶ 17. Without more specific information as to who owned how much stock in which company, this falls far short of establishing that five or fewer individuals own a "controlling interest" in and exercise "effective control" over each entity. See 26 U.S.C. § 1563(a)(2); 26 C.F.R. § 1.414(c)-2 (defining "controlling interest" as ownership of at least

80% of the total voting power or total value of shares, see 26 C.F.R. § 1.414(c)-2(b)(2)(A), and "effective control" as ownership of more than 50% of the total voting power or the total value of shares, see 26 C.F.R. § 1.414(c)-2(c)(2)(i)).

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex v. Catrett, 477 U.S. 317, 322 (1986). Plaintiff has failed to meet his burden of establishing an essential element of his claim; specifically, plaintiff has failed to show that defendant Associated Training qualifies as an employer under COBRA. 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). Without properly proposed facts establishing that defendant Associated Training and related corporations constitute a controlled group under 26 U.S.C. § 1563(a)(2) or that defendant Associated Training has the requisite number of employees, plaintiff cannot raise a triable issue of fact on his claim that defendants acted improperly in denying him the option to elect continuation health insurance coverage.

Although defendants failed to submit proposed findings of fact in accordance with this court's Procedures relating to whether defendant Associated Training is part of a controlled group under § 1563(a)(2), they did submit affidavits from defendant John Klabacka, Robert Klabacka, Lucille Klabacka and Mark Klabacka in which each individual stated what percentage of each corporation he or she owned. According to the four affidavits, stock ownership is as follows:

	Associated Training	Earthworks	Employment Services	Goldstar Diversified	Gygo	Diesel Trucking
Number of employees	5 full-time 3 part-time	3 full-time	0	6 full-time		
Defendant John	26.67%	26.67%	26.67%	25%		
Robert					86%	100%
Lucille	20%	20%	20%		14%	
Mark	26.67%	26.67%	26.67%	25%		
Total	**73.34%**	**73.34%**	**73.34%**	**50%**	**100%**	**100%**

As illustrated by the table, defendant Associated Training is not part of a brother-sister controlled group of corporations. Although Gygo[1] and Diesel Trucking meet the requirements of § 1563(a)(2)(A) because they are 100% owned by Robert and Lucille Klabacka, they do not

[1]Gygo Corporation owns 100% of the stock in Diesel Truck Driving School, Inc. and Watertower Inn, Inc.

meet the requirements of § 1563(a)(2)(B) because Robert and Lucille do not each own the same amount in both corporations. Regardless whether Gygo and Diesel Trucking constitute a controlled group of corporations, defendant Associated Training is not a part of such group. In addition, while defendant Klabacka and Lucille and Mark Klabacka own "more than 50 percent of the total value of shares of all classes of stock of [defendant Associated Training, Earthworks and Employment Services], taking into account the stock ownership of each such person only to the extent such stock ownership is identical with respect to each such corporation," § 1563(a)(2)(B), their combined ownership falls short of the requisite 80 percent, see § 1563(a)(2)(A). Even if defendant Associated Training, Earthworks and Employment Services constitute a controlled group of corporations under § 1563(a)(2), plaintiff's claim would fail because their combined number of employees is insufficient for liability under COBRA. However, because the affidavits from the Klabacka family were not the subject of properly proposed facts, I will not consider this evidence on summary judgment. Nonetheless, defendants' motions will be granted because I find that plaintiff has failed to adduce evidence establishing that defendant Associated Training is part of a controlled group of corporations.

C. State Law Claim

Because plaintiff has not raised a viable federal law claim, I decline to exercise

supplemental jurisdiction pursuant to 28 U.S.C. § 1367(a) over plaintiff's state law claim. See 28 U.S.C. § 1367(c)(3). The Court of Appeals for the Seventh Circuit has recognized that "a district court has the discretion to retain or to refuse jurisdiction over state law claims." Groce v. Eli Lilly & Co., 193 F.3d 496, 500 (7th Cir. 1999).

ORDER

IT IS ORDERED that the amended motion of defendants Associated Training Services Corporation and John Klabacka for summary judgment is GRANTED. FURTHER, IT IS ORDERED that the motion of defendant Physicians Plus Insurance Corporation for summary judgment is GRANTED. The clerk of court is directed to enter judgment for defendants and close this case.

Entered this 30th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge