

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Housing Authority Risk Retention Group,
Inc.

Plaintiff,

vs.

Cuyahoga Metropolitan Housing Authority

Defendant

CASE NO. 1:01 CV 2515

JUDGE PATRICIA A. GAUGHAN

Memorandum of Opinion and Order

Introduction

This matter is before the Court upon defendant's Motion for Summary Judgment and Declaratory Judgment (Doe. 35) and plaintiffs Motion for Summary Judgment (Doc. 39). The issue before this Court is whether plaintiff, a risk retention group, has a duty to indemnify defendant with respect to a settlement of an underlying lawsuit wherein defendant was sued by one of its employees. For the following reasons, defendant's Motion is DENIED and plaintiffs Motion is GRANTED.

Facts

Effective June 1, 1997, plaintiff, Housing Authority Risk Retention Group, Inc. (hereafter, "HARRG"), issued a three year commercial liability policy (hereafter, "the Policy") to defendant, Cuyahoga Metropolitan Housing Authority (hereafter, "CMHA"). (Doe. 36 Ex. I). HARRG had provided commercial liability coverage to CMHA for a number of years on an annual coverage basis.

On June 11, 1999, a lawsuit was filed in the Cuyahoga County Common Pleas Court by Sumbra L. Giles against CMHA (hereafter, "the underlying litigation"). Giles alleged that she was employed by CMHA as a police dispatcher. Giles alleged that her supervisor permitted a hostile work

environment and that he published a newsletter entitled "The Scoop." The September and October 1997 editions of The Scoop allegedly contained defamatory and sexually harassing material concerning plaintiff. Giles's supervisor allegedly retaliated against her after she approached her employee union for the purpose of filing a complaint. Giles eventually filed an EEOC charge and was allegedly retaliated against and wrongfully terminated. Giles set forth the following claims for relief: sexual harassment and retaliation in violation of Ohio Revised Code (O.R.C.) § 4112 (Count One), intentional infliction of emotional distress (Count Two), defamation (Count Three), wrongful termination (Count Four) and sexual harassment and retaliation in violation of Title VII (Count Five). She also sought punitive damages. (Id. Ex. 2).

By letter of June 28, 1999, CMHA tendered the underlying litigation to HARRG. (Id.). HARRG issued a "reservation of rights letter" dated August 2, 1999. HARRG stated that it acknowledged a duty of defense with respect to the wrongful termination claim only and

only to the limited extent that the allegations in the complaint fall within the policy's definition of 'termination,' and such 'termination' was undertaken pursuant to and in conformance with CMHA's 'personnel policies and procedures officially adopted' by CMHA...

(Id. Ex. 4). HARRG stated that pursuant to Endorsement No. 138¹ of the Policy, coverage was excluded for claims relating to termination of an employee unless the termination was undertaken pursuant to personnel policies and procedures adopted by CMHA and reviewed and approved by legal counsel. Accordingly, HARRG requested that CMHA provide certain information and

¹This endorsement is actually "Endorsement No. 138a."

documentation with regard to Giles's termination.² (Id.). CMHA provided the information by letter of April 18, 2000, stating that it "has adopted an official personnel policy and procedure embodied in the Administrative Order 11." CMHA further stated that it "fully complied with the official policy and procedure in its termination of Giles." (Id. Ex. 8).

The underlying litigation proceeded to trial in May 2000. The claim for intentional infliction of emotional distress was withdrawn and the claim for punitive damages was dismissed. The court entered a directed verdict in favor of Giles and against CMHA on the issue of liability on the remaining claims. The jury was instructed to only consider damages and returned a verdict for the plaintiff in the amount of \$1,290,000.00. No reference was made allocating the award among the several claims. (Ex. to Doc. 39 and Doe. 36 Ex. 10).

On June 2, 2000, CMHA provided HARRG with a written post-trial analysis and filed its Motion for JNOV or New Trial. (Doc. 36 Exs. 13 and 14). The Motion was denied and CMHA appealed the trial court's order. (Id. Ex. 18).

By letter of June 16, 2000, HARRG requested further information from CMHA in its review of "whether it has a continuing duty of defense, and whether the duty of indemnity is triggered." (Id. Ex. 15). On November 8, 2000, HARRG informed CMHA that

The directed verdict against CMHA with respect to Plaintiff's claim of wrongful termination, was clearly based on a determination that, in fact, CMHA did not terminate Plaintiff pursuant to and in conformance with CMHA's 'personnel policies and procedures.' Accordingly, the directed verdict is conclusive proof that CMHA did not comply with the requirements of

² Because it was not provided, HAARG made three subsequent requests for this information. (Id. Exs. 5,6,7).

Endorsement 138, and thus there is no coverage under the HARRG policy. We understand that CMHA is not appealing the determination of wrongful termination, and, in fact, is arguing that the damages should be limited to 'back pay.' Since the pending appeal is solely addressed to the issue of damages, not liability, there is no potential for a judgment in this matter against CMHA which would trigger any coverage under the policy. (Doc. 36 Ex. 19). HARRG advised CMHA that it would provide a defense to CMHA "on a gratuitous basis pending resolution" of the appeal filed by CMHA. (Id.).

By letter of December 27, 2000, CMHA notified HARRG that it disagreed with the determination of no liability coverage. CMHA also indicated that it had been presented with a demand by plaintiff to settle the matter in the amount of \$750,000.00. (Id. Ex. 21). HARRG responded by letter of January 24, 2002, reiterating that all the claims of Giles' complaint were excluded under the policy with the exception of the wrongful termination. With respect to the latter, HARRG restated that it had reserved the right to deny indemnity under Coverage D of the Policy but that it 'had considered providing a defense pursuant to Endorsement 138 if certain terms were satisfied. However, because it had determined that such were not satisfied, it disclaimed a duty to indemnify. HARRG further stated that it would continue to provide a defense with respect to the appeal and would "voluntarily advance funding" toward the settlement on certain conditions. (Id. Ex. 22).

On February 7, 2001, CMHA and HARRG entered into an Agreement whereby "HARRG will voluntarily fund, on behalf of CMHA, the settlement of the Giles Lawsuit, in the amount not to exceed, in order to effect a complete release of CMHA from the claims in the Giles Lawsuit." HARRG's agreement to fund the settlement was contingent upon its right to seek reimbursement on the basis that it does not have a duty to indemnify. (Id. Ex. 23). A Settlement

Agreement and General Release was thereafter entered into between Giles and CMHA resolving the matter for a payment by CMHA of \$750,000.00. (Doc. 38 filed under seal).

HARRG subsequently filed its Complaint for Declaratory Judgment. HARRG alleges that, pursuant to the above-referenced Agreement, it paid the sum of \$750,000.00. HARRG now seeks a declaration that it "had no duty to indemnify CMHA with respect to the Judgment and/or settlement since the damages CMHA were obligated to pay were not covered by the Policy." CMHA answered and filed a counterclaim seeking a declaratory judgment that HARRG does have a duty to indemnify it.

This matter is now before the Court upon the parties' cross motions for summary judgment.

Standard of Review

Summary Judgment is appropriate when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (citing Fed. R. Civ. P. 56(c)); see also LaPointe v. UAW, Local 600, 8 F.3d 376, 378 (6th Cir. 1993). The burden of showing the absence of any such genuine issues of material facts rests with the moving party:

[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits," if any, which it believes demonstrates the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323 (citing Fed. R. Civ. P. 56(c)). A fact is "material only if its resolution will affect the outcome of the lawsuit." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden of proof, the burden then shifts to the nonmoving party. Federal Rule of Civil Procedure 56(e) provides:

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his response], by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.

The court must afford all reasonable inferences and construe the evidence in the light most favorable to the nonmoving party. Cox v. Kentucky Dep't. of Transp., 53 F.3d 146, 150 (6th Cir. 1995) (citation omitted; see also United States v. Hodges X-Ray, Inc., 759 F.2d 557, 562 (6th Cir. 1985)). However, the nonmoving party may not simply rely on its pleading, but must "produce evidence that results in a conflict of material fact to be solved by a jury." Cox, 53 F.3d at 150.

Summary judgment should be granted if a party who bears the burden of proof at trial does not establish an essential element of his case. Tolton v. American Biodyne, Inc., 48 F.3d 937, 941 (6th Cir. 1995) (citing Celotex, 477 U.S. at 322). Accordingly, "the mere existence of a scintilla of evidence in support of plaintiffs position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Copeland v. Machulis, 57 F.3d 476, 479(6th Cir. 1995) (quoting Anderson, 477 U.S. at 52 (1986)). Moreover, if the evidence is "merely colorable" and not "significantly probative," the court may decide the legal issue and grant summary judgment. Anderson, 477 U.S. at 249-50 (citation omitted).

Discussion

HARRG argues that it has no liability to indemnify CMHA under the terms of the Policy. CMHA asserts that the Policy does provide coverage for the Giles settlement and, therefore, it must reimburse it.

The Policy provides coverage to CMHA under various sections, including Coverage Section A, Coverage Section B, Coverage Section C, Coverage Section D and Coverage Section G.³ HARRG asserts that it has no duty to indemnify under any of these sections. CMBA contends that coverage is provided by each section, and by Coverage Section D "undeniably." Each Coverage Section will be addressed in the order found in the Policy.

(1) Coverage Section A- Bodily Injury and Property Damage⁴

This section provides in pertinent part:

We will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this Coverage Section applies. ... The 'bodily injury' or 'property damage' must be caused by an 'occurrence.'...

The definitions portion of the Policy defines "bodily injury" as "bodily injury, sickness or disease, mental anguish or mental injury, sustained by a person..." it is not disputed that "property damage" is not relevant here.

HARRG acknowledges that Giles's claim for emotional distress falls within the Policy's definition of "bodily injury."⁵ However, HARRG asserts that the General Exclusions⁶ to the Policy are applicable and prevent

³ The parties agree that three other coverage sections are not relevant herein.

⁴ Each recited portion of the Policy is taken from Doc. 36 Ex. 1.

⁵ While this claim was withdrawn prior to trial, the settlement agreement between Giles and CMHA provided, *inter alia*, that Giles would be compensated for all personal injuries, including emotional distress.

⁶ The Policy's General Exclusions apply generally to all Coverage Sections.

coverage. Specifically, HARRG points to General Exclusions 3 and 11 which provide in relevant part:

The coverage under this Policy does not apply to any liability arising out of:

3. 'Bodily injury' to... An employee of the insured arising out of and in the course of employment by the insured.

This exclusion applies..., whether the insured maybe liable as an employer...

11. 'Personal injury' ... and/or 'bodily injury' arising out of any:

- a. refusal to employ;
- b. termination of employment;
- c. coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or other employment-related practices, policies, acts or omissions; or
- d. consequential 'personal injury' as a result of a through c above.

HARRG contends that these exclusions apply because Giles's "bodily injury" arose out of and in the course of her employment with CMHA. Further, her claim seeking relief for "bodily injury" was premised upon her employment and decisions made with respect to her employment.

CMHA does not specifically address General Exclusion 3. CMHA merely cites to General Exclusion 11 in the factual section of its Motion but does not address whether it prevents coverage. In fact, CMHA's Motion focuses its argument on the applicability of a special exclusion to this coverage area which prevents coverage for liability where the bodily injury is "expected or

intended from the standpoint of the insured."⁷ However, because, as discussed below, the General Exclusions applies, it is irrelevant whether or not a special exclusion bars coverage.

The Court agrees that General Exclusions 3 and 11 prevent coverage for "bodily injury." General Exclusion 3 excludes coverage to CMHA employees for bodily injury arising in the course of employment. Giles's allegations involve the intentional infliction of emotional distress resulting from actions occurring during her employment. General Exclusion 11 excludes coverage for bodily injury arising out of the termination of employment, defamation, discrimination, or other employment-related practices. The underlying litigation alleged that CMHA's sexual harassment of plaintiff, the hostile work environment and the retaliatory actions caused plaintiff emotional distress. These clearly fall within the Exclusion's language.

Finally, the Court agrees with HARRG that David v. Nationwide Mutual Insurance Co., 665 N.E.2d 1171 (Ohio App. 1st Dist. 1995) shows the appropriateness of this conclusion. In David, the commercial general liability policy at issue contained a general exclusion containing identical language as that found in the instant Policy's General Exclusion 3. The court determined that the language of the exclusion "directly and unambiguously" excluded injuries for emotional distress of an employee who had been sexually harassed by a co-employee at work because the emotional distress arose out of and in the course of the victim employee's employment with the insured.⁸

For these reasons, there is no duty to indemnify with regard to Count Two of Giles's Complaint.

(2) Coverage Section B- Personal Injury and Advertising Injury

⁷ While CMHA filed subsequent briefs, it limited its assertions to some specific arguments. It did not address all of the issues raised by HARRG and generally indicated that it would rest on the arguments made in its motion.

⁸ Again, CMHA blithely ignores the David case.

This section provides in pertinent part:

We will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages because of 'personal injury' or 'advertising injury' to which this coverage applies...

The definitions portion of the Policy defines personal injury as "injury, other than 'bodily injury,' arising out of... oral or written publication of material that slanders or libels a person...; illegal discrimination, violation of federal or state civil rights..."

HARRG acknowledges that Giles's claims for sexual harassment and discrimination and defamation fall within the Policy's definition of "personal injury." However, HARRG asserts that General Exclusion 11, set forth above, is applicable and prevents coverage.

Again, CMHA does not address General Exclusion 11 with respect to Coverage Section B. CMHA only states generally, "None of the general or special exclusions provided in the Policy prevent coverage under Section B." (Doc. 35 at 13). While CMHA discusses special exclusions with regard to this Section, it does not explain why General Exclusion 11 is inapplicable.

The Court finds that General Exclusion 11 does apply because Giles's claims for sexual harassment and discrimination under state and federal law and defamation (Counts I, III and V) arise out of plaintiff's termination and the alleged harassment, humiliation and discrimination of plaintiff.

Therefore, HARRG has no duty to indemnify for Giles's claims set forth in Counts I, III and V.

(3) Coverage Section C- Law Enforcement Liability

This section provides in pertinent part:

We will pay on behalf of the insured those sums that the insured

becomes legally obligated to pay as damages because of a claim first made against the insured during the Policy Period for a 'Wrongful Act' which results in 'bodily injury,' 'property damage,' or 'personal injury' to which this Coverage Section applies.

This coverage applies only if the 'Wrongful Act' was committed in the course of and the injury or damage arises out of 'Law Enforcement.' Such 'Law Enforcement' activity or operations must be related to the authorized activities of you, the Public Housing Authority named in this Policy.

"Law Enforcement" is defined in the Policy as

operations or activities engaged in or conducted in furtherance of your obligation to provide law enforcement services. This includes operations or activities which arise out of the ownership, maintenance or use of premises you designate for these operations and activities as well as all operations and activities necessary and incidental thereto. Law enforcement activities include enforcement of criminal or motor vehicle laws or any activity involving maintenance of safety and security within a Housing Authority, including security patrols, detentions, arrests, searches or use of force for the purpose of controlling or preventing criminal acts; or activities providing emergency type of police services such as rescue and first aid response; or traffic control activities.

"Wrongful Act" is defined in the Policy as "an actual or alleged error, omission, misstatement, act or neglect of, or breach of duty including misfeasance, malfeasance, or nonfeasance of you or an insured while acting in the capacity of a Public Official or a participant in law enforcement activities."

CMHA asserts that the allegations of Giles's complaint occurred in the course of CMHA's operation of its police force. Specifically, CMHA asserts

that Giles alleges that the publication of "The Scoop" was an internal newsletter distributed to members of the police force and, thus, was part of police activities. As such, CMHA contends that its alleged "wrongful act" occurred as a result of a law enforcement activity and is covered by Coverage Section C.

HARRG argues that none of the alleged "wrongful acts" were committed in the course of, and no injury or damage arose out of CMHA's obligation to provide law enforcement services and the claims do not involve CMHA's performance of its law enforcement functions. Even so, HARRG asserts that General Exclusions 3 and 11 again apply to exclude Giles's claims for bodily and personal injury.

The Court finds that the underlying lawsuit did not involve a wrongful act committed in the course of CMHA's law enforcement, Even assuming that the alleged harassment, discrimination and defamation was committed in the course of, and the injury arose out of, CMHA's law enforcement, General Exclusions 3 and 11 apply to exclude the claims for the reasons discussed above.

(4) Coverage Section D- Public Officials Liability

This section provides in pertinent part:

We will pay on your behalf those sums which you become legally obligated to pay as damages because of a claim first made against you during the 'Policy Period' by reason of a 'Wrongful Act.'

Part 2 to this Coverage Section sets forth Special Exclusions which include 18 subparts under section "a." Special Exclusion a. (6) to this Coverage Section states that "this coverage section does not apply to a claim for, based upon, or arising from 'bodily injury,' 'property damage,' 'personal injury,' or 'personal injury' inclusive of any mental or emotional distress or injury."

Based upon the express language of this Special Exclusion, the Court agrees with HARRG that it has no duty to indemnify CMHA under Coverage Section D for Giles's claims of sexual harassment and discrimination and defamation.

CMHA asserts that Endorsement 138a to the Policy "deletes exclusions 1 through 14." (Doc. 35 at 7). This would mean that Special Exclusion a. (6) is no longer a part of the Policy and, therefore, bodily and personal injury are covered. As discussed below, the Court disagrees.

Endorsement 138a states that it "modifies insurance provided under Coverage Part D by adding Coverage Section 1-14." The language provides:

Coverage Section: 1-14

The Special Exclusions provision of Coverage Section D is hereby amended by deleting the language of special exclusion A. (16), dealing with claims arising out of your official employment practices or policies and replacing it with the following:

(16) Claims arising out of the failure to select or hire an applicant for employment and claims relating to the termination or discharge of an employee, unless such failure to hire, termination or discharge is undertaken pursuant to and in conformance with PERSONNEL POLICIES AND PROCEDURES OFFICIALLY ADOPTED BY YOU, which policies have been reviewed by legal counsel experienced in employment law matters who has provided a written legal opinion that such policies and procedures comply with all applicable local, state, and federal law, regulatory and contractual

requirements to which you are subject.

The language, "by adding Coverage Section 1-14" does not refer in anyway to Special Exclusions a. (1)-(14). Rather, "Coverage Section: 1-14" is the heading to the paragraph amending special exclusion a. (16). Because Special Exclusions a. (1) through (14) are not referred to in the Endorsement, there is no indication that the reference to "1-14" is related to them. Further, examination of other endorsements reveals that the heading "Coverage Section: 1-14" has no relation to the numbered special exclusions. For example, Endorsement 111 to the Policy states that it "modifies insurance provided under Coverage Part A by adding Coverage Part 1-7." This Endorsement contains the heading "Coverage Part 1-7." Coverage Part A does not contain any part listing seven items and, therefore, "1-7" could not be modifying it. Additionally, Endorsement No. 141 states that it "modifies insurance provided under Coverage Part D by adding Coverage Section 1-15." This Endorsement contains the heading "Coverage Section 1-15." This Endorsement contains no reference to Special Exclusions a. (1) through (15). For these reasons, the Court finds CMHA's argument that Endorsement 13 8a deletes Special Exclusions a. (1) through (14) to be unavailing. Therefore, the only issue is whether this Coverage Section encompasses the wrongful termination claim.

As stated earlier, in its August 2, 1999 reservation of rights letter, HARRG informed CMHA that it would provide a defense of the wrongful termination claim provided that "the allegations in the [underlying litigation] fall within the policy is' definition of 'termination,'⁹ and such 'termination' was undertaken pursuant to and in conformance with CMHA's 'personnel policies and procedures officially adopted' by CMHA..." HARRG now argues that it has no duty to indemnify because Giles's termination was not

⁹ It apparently is now undisputed that Giles's termination itself within the Policy's definition.

in accordance with CMHA's personnel policies and procedures and/or in violation of law. Nor, HARRG asserts, has CMTHA provided evidence that Administrative Order 11 (pursuant to which CMHA stated Giles was terminated) was "reviewed by legal counsel experienced in employment law matters who has provided a written legal opinion that such policies and procedures comply with all applicable local, state, and federal law, regulatory and contractual requirements." For these reasons, HARRG asserts that the requirements of Endorsement 138a have not been satisfied. For the following reasons, the Court agrees.

Special Exclusion a. (16) to Coverage Section D provides that there is no coverage for claims arising out of dismissal of an employee. However, Endorsement 138a modifies this special exclusion as stated above. Again, this Endorsement provides that claims relating to termination of an employee are not covered "unless such failure to hire, termination or discharge is undertaken pursuant to and in conformance with PERSONNEL POLICIES AND PROCEDURES OFFICIALLY ADOPTED BY YOU, which policies have been reviewed by legal counsel experienced in employment law matters who has provided a written legal opinion that such policies and procedures comply with all applicable local, state, and federal law, regulatory and contractual requirements to which you are subject."

First, HARRG asserts that Giles's termination was not undertaken in conformance with CMHA's personnel policies and procedures. HARRG points out that Giles's Complaint alleges, "Defendant CMHA's unfair treatment of plaintiff and the wrongful termination of Plaintiff's employment with Defendant constituted retaliatory acts against Plaintiff for her having brought forth her complaint for sexual harassment and the hostile work environment she was forced to endure." (¶ 25). As such, HARRG asserts that Giles alleges she was terminated as retaliation for engaging in activity

protected by the civil rights statutes.¹⁰ And, HARRG points out that in its Motion for JNOV, CMHA stated, "The Trial Court entered judgment on the liability issues against CMHA, finding that CMHA terminated Giles in violation of federal and state law." (Doc. 36 Ex. 14). Accordingly, HARRG argues that a termination in violation of law could not have been carried out pursuant to personnel policies. Moreover, HARRG points to CMHA's Administrative Order 11 which does not contain a provision allowing CMHA to terminate an employee in retaliation for engaging in protected activity. (Id. Ex. 28).

CMHA asserts that there is no evidence in the underlying litigation that the trial court reviewed Administrative Order 11 or arrived at any decision regarding its legality. This misses the point. CMHA's employment policies would not have been an issue in a wrongful termination case. Rather, the Court must have been satisfied that the elements of a retaliatory discharge had been met.

CMHA also asserts that the validity of Administrative Order 11 was recently upheld in Brenda Harper-McIntosh v. CMHA, No. 79316, 2002 WL 192084 (Ohio App. 8th Dist. February 7, 2002). That case involved whether the plaintiff had exhausted her administrative remedies, prior to filing suit to challenge her discharge, given that Administrative Order 11 sets forth a grievance procedure. As such, that case has no relevance herein where the issue is whether Giles's discharge was in conformance with Administrative

¹⁰ To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate that: (1) she engaged in activity protected by Title VII; (2) plaintiff's exercise of her civil rights was known by the defendant; (3) thereafter, defendant made an employment decision adverse to plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment decision. Williams v. Nashville Network 132 F.3d 1123, 1131 (6th Cir. 1997) and EEOC v. Avery Dennison Corp., 104 F3d 858, 860(6th Cir.1997). Ohio courts use the same analysis for determining claims brought under the Ohio civil rights statute. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 668 (6th Cir. 2000).

Order 11.

Finally, CMHA contends,

Plaintiff argues that CMHA is not protected by Endorsement # 138A(16) because Defendant has somehow failed to provide adequate support that Giles' termination from CMHA occurred pursuant to personnel policies and procedures 'officially adopted by' CMHA.

(Doc. 43 at 5). However, CMHA does not assert, nor could it without violating civil rights statutes, that Administrative Order 11 permitted termination based on retaliation for reporting sexual harassment. Only if it did contain such a provision, would Endorsement 138a be satisfied.

Therefore, there is no duty to indemnify for the settlement with regard to the wrongful termination claim.

Second, although the Court need not reach the issue, HARRG asserts that CMHA has not sufficiently demonstrated that Administrative Order 11 was reviewed and approved by legal counsel. HARRG points to CMHA's Response to Plaintiffs Request for Admission on this issue. (Doc. 39 Lx. 2). CMHA was asked to admit that it did not obtain a written legal opinion from counsel that the personnel policies and procedures it had adopted complied with legal and contractual requirements. CMHA would not make such an admission and stated that "CMHA does obtain an approval form from the legal department at CMHA approving the use and incorporation of CMHA's written policies and procedures applicable to CMHA's employees." (Id.). CMHA attached supporting documents.

However, as pointed out by HARRG, these documents only show that a resolution authorizing an amendment to Administrative Order 11 was reviewed and approved "for the placement on the agenda for consideration by the board of commissioners." (Id.). They do not show that a legal opinion was obtained

as required by the Endorsement. CMHA now submits the affidavit of Laverne Nichols Boyd, Acting General Counsel of CMHA's legal department, who avers that the legal department reviews proposed amendments to Administrative Order 11 prior to submission to the board of commissioners for consideration and vote and that its provisions are reviewed by the legal department prior to submission to the board of commissioners for consideration and vote. She also avers, "Subsequent to the Legal Department's review and approval of any policies relative to Administrative Order it, the procedure is for such approval to be indicated on a resolution approval form, signed by the reviewing attorney." (Boyd aff.). However, there is no evidence of a written legal opinion as required and, as asserted by HARRG, Boyd's affidavit is an "after-the-fact attempt to comply" with Endorsement 138a's requirements.

Regardless, Administrative Order 11 probably did comply with the applicable law and, in fact, contained provisions prohibiting sexual discrimination and harassment. (Doc. 37 Ex. 28). However, unless it contained a provision allowing CMHA to terminate Giles for reporting sexual harassment, she was not terminated in compliance with it.

Conclusion

For these reasons, defendant's Motion is denied and plaintiff's Motion is granted. Accordingly, plaintiff is entitled to a declaration that it had no duty to indemnify CMHA with respect to the settlement of the underlying litigation. While plaintiff does not specifically request reimbursement of the sum it paid to fund the settlement, plaintiff is entitled to such reimbursement in accordance with the above-referenced Agreement with CMHA wherein CMHA agreed to reimburse HARRG in the event this Court determined that it had no duty to indemnify. As such, defendant's Counterclaim seeking a declaration that plaintiff had a duty to indemnify is dismissed.

IT IS SO ORDERED.

PATRICIA A. GAUGHAN
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Housing Authority Risk Retention
Group, Inc.,

Plaintiff,

vs.

Cuyahoga Metropolitan Housing
Authority,

Defendant.

CASE NO. 1:01 CV 2515

JUDGE PATRICIA A. GAUGHAN

Judgment Entry

This Court, having issued its Memorandum of Opinion and Order denying defendant's Motion for Summary Judgment and Declaratory Judgment (Doc. 35) and granting plaintiff's Motion for Summary Judgment (Doc. 39), hereby enters judgment for plaintiff and against defendant.

IT IS SO ORDERED.

PATRICIA A. GAUGHAN
United States District Judge