IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

MARY KILGORE,	)	
	)	HAMILTON CHANCERY
Plaintiff/Appellant	)	
	)	No. 03A01-9604-CH-00117
v.	)	
	)	
DONNY R. GARNER, individually and d/b/a Donny R. Garner Insurance Agency and NATIONWIDE INSURANCE COMPANY,	)	
	)	AFFIRMED
Defendant/Appellee	)	

Catherine M. White, Chattanooga, For the Appellant

Richard A. Smith, Chattanooga, For the Appellee

O P I N I O N

INMAN, Senior Judge

This is an action for damages for sexual harassment in violation of the Tennessee Human Rights Act, T.C.A. § 4-21-401, *et seq.* The defendant Donny Garner owns a small entrepeneurial insurance agency. At times material, he employed three persons. In 1988, he contracted with Nationwide to sell its insurance products exclusively; the contract provided, *inter alia*, that Mr. Garner had "the right to exercise independent judgment as to time, place and manner of soliciting insurance, servicing insurance and otherwise carrying out the terms of the Agreement." He worked on a commission basis and paid his own expenses.

In May 1994, Garner employed the plaintiff as his office manager. She alleges that within weeks he began to harass her sexually and, upon hearing that liability could be fastened on him for such conduct, discharged her.

Garner's motion for summary judgment was granted because he employed

less than eight persons; Nationwide's motion was granted because it was neither the employer nor principal of Garner.

The plaintiff appeals and presents for review:

> I. Whether the trial court erred in granting the summary judgment of Donny R. Garner, Individually and d/b/a Donny R. Garner Insurance Agency, on the basis that Mary Kilgore was his direct employee, that Mr. Garner employed no more than two persons beside himself, that T.C.A. § 4-21-401(1) prohibits discriminatory practices by an employer because of sex, and that for the purposes of the THRA, the term "employer" is defined in T.C.A. § 4-21-102(4) as persons employing eight or more persons within the state.
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> II. Whether the trial court erred in granting summary judgment and dismissing both the defendants (Garner and Nationwide Insurance Company) for the same reasons referenced above and also because the Court apparently failed to take into consideration T.C.A. § 4-21-301(1) and (2) with respect to a person or persons who retaliate or discriminate against a person because they have opposed a practice declared discriminatory or aid a person engaged in any acts or practices that are declared discriminatory.
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> III. Whether the trial court erred in dismissing the claim for intentional and/or negligent infliction of emotional distress against both the defendants.

We note at the outset that the plaintiff, according to her brief, "brought suit against defendant Garner not as an individual, but within his *agency capacity* as *agent* for Nationwide Insurance Company."

T.C.A. § 4-21-401 provides:

> **4-21-401. Employer practices --** (a) It is a discriminatory practice for an employer to:
>
> (1) Fail or refuse to hire or discharge any person or otherwise to discriminate against an individual with respect to compensation, terms, conditions or privileges of employment because of such individual's race, creed, color, religion, sex, age or national origin; or
>
> (2) Limit, segregate or classify an employee or applicants for employment in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, because of race, creed, color, religion, sex, age or national origin.
>
> (b) This section does not apply to the employment of an individual by such individual's parent, spouse or child or to employment in the domestic service of the employer.

Under the statutory scheme, liability is imposed upon an employer who is defined as any person employing eight or more persons or *any person acting as an agent of an employer, directly or indirectly*. T.C.A. § 4-21-102(4).

Thus it is that the plaintiff's case is entirely hinged upon the proposition that Nationwide was her joint-employer and thus liable because Garner was the agent of Nationwide. As we read her brief, the appellant concedes that *Garner may be held liable only if he is found to be an agent of Nationwide*. (Brief of Appellant, p. 5) In light of the plain language of T.C.A. § 4-21-102(4), it would be mere paralogism to insist that Garner falls into the definition of an employer.

We agree with the appellees that the phrase "agent of an employer" was intended to identify an employer and to impose liability upon the employer where its agent, such as a supervisor, officer or manager, violates the protected rights of an employee.

The required relationship under the THRA is that of employer-employee as therein defined, and the concept of principal-agent is only relevant in the context of the employer-employee relationship.

The evidence is clear that the plaintiff was not an employee of Nationwide. She was employed by Garner, an entrepreneur, who paid her salary and controlled her work. The plaintiff concedes that Garner was not an employee of Nationwide, and it is therefore difficult to understand how the plaintiff could be. As we read her brief, the evidence relied upon as establishing the relationship of joint-employer-employee is the Nationwide Drug Policy she had to comply with. We do not believe the contention warrants further discussion.

She argues that since Garner was the agent of Nationwide, she was hence a sub-agent, making Nationwide liable to her under agency principles. We think this argument runs counter not only to the plain letter of the statute but to its spirit. The cases cited by the plaintiff are not applicable to the Tennessee statute or to the facts of the case at bar.

The retaliation proscribed by the THRA is *per se* applicable when the defendant has engaged in a practice declared to be discriminatory, T.C.A. § 4-21-301(1). In the absence of a finding that Garner and Nationwide were employers of

the plaintiff, this conduct towards her, within the purview of the Act, is not a discriminatory practice. The action for retaliatory discharge, therefore, fails. *See Roberson v. University of Tenn.*, 829 S.W.2d 149 (Tenn. App. 1992).

The claim for damages for intentional or negligent infliction of emotional distress is not subject to Chancery jurisdiction, and the dismissal of these claims without prejudice was proper.

Judgment is affirmed with costs to the appellant.

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William H. Inman, Senior Judge

Concur:

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Don T. McMurray, Judge

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Herschel P. Franks, Judge