IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Equal Employment Opportunity Commission, Plaintiff, vs. Federal Cleaning Contractors, Inc., an Illinois corporation, Defendant.	No. CV-04-2063-PHX-DGC **ORDER**

Carmen Moreles Cruz and Liveth Romero are former employees of Defendant. On August 26, 2003, Cruz and Romero filed charges of employment discrimination with Plaintiff Equal Employment Opportunity Commission ("EEOC"). On June 29, 2004, the EEOC sent Defendant letters of determination finding reasonable cause to believe that Cruz, Romero, and a class of similarly-situated people were sexually harassed and constructively discharged by Defendant in violation of Title VII of the Civil Rights Act of 1964 and inviting Defendant to participate in a conciliation process, and letters outlining the relief that must be included in any conciliation agreement.

On July 12, 2004, Defendant agreed to participate in the conciliation process. The parties subsequently attempted to reach a settlement. The EEOC commenced this action on September 30, 2004 by filing a complaint against Defendant that purports to state sexual harassment and hostile work environment claims under Title VII. Doc. #1.

Defendant has filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing that the EEOC failed to satisfy the jurisdictional prerequisite of good faith conciliation efforts. Doc. #18. The EEOC has filed a response to the motion and Defendant has filed a reply. Docs. ##19, 21, 24. For the reasons set forth below, the Court will deny the motion.[1]

I. Rule 12(b)(1) Motion to Dismiss Standard.

"A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004); *see Thornhill Publ'g Co. v. Gen. Tel. & Elecs.*, 594 F.2d 730, 733 (9th Cir. 1979). "In a facial attack, the challenger asserts that the allegations contained in the complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Meyer*, 373 F.3d at 1039.

In resolving a factual attack on jurisdiction, the Court "may review evidence beyond the complaint without converting the motion to dismiss to a motion for summary judgment." *Id.*; *see Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The Court may not, however, resolve genuine factual disputes if the jurisdictional and substantive issues are intertwined. *See id.*; *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987) (stating that the district court is not limited to the allegations in the pleadings if the "jurisdictional issue is separable from the merits of [the] case"). Where such issues are not intertwined, the Court may resolve factual disputes in ruling on the motion. *See Meyer*, 373 F.3d at 1039.

II. Defendant's Motion is a Factual Attack on Jurisdiction.

A good faith effort at conciliation is a "'jurisdictional condition precedent to suit by the EEOC.'" *EEOC v. Bruno's Rest.*, 13 F.3d 285, 288 (9th Cir. 1993) (quoting *EEOC v.*

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[1] Defense counsel should note that their motion and memoranda do not comply with LRCiv 7.1(a)(1). Among other defects, the Court cannot tell which defense lawyer signed the pleadings. In the future, Defendant's filings shall comply with all local rules.

Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982)); *see* 42 U.S.C. § 2000e-5(f)(1). Defendant does not dispute that the complaint sufficiently alleges that the EEOC satisfied this condition. *See* Doc. #1 ¶ 6 ("All conditions precedent to the institution of this lawsuit have been fulfilled."); Fed. R. Civ. P. 9(c) ("[I]t is sufficient to aver generally that all conditions precedent have been performed or have occurred."); *EEOC v. Wah Chang Albany Corp.*, 499 F.2d 187, 190 (9th Cir. 1974) (stating that conditions precedent to suit by the EEOC may be pleaded generally). Rather, Defendant contends that the Court lacks subject matter jurisdiction because the EEOC did not in fact conciliate this matter in good faith. *See* Doc. #18 ¶ 6. Defendant's motion is thus a factual attack on jurisdiction. *See Meyer*, 373 F.3d at 1039. Because the jurisdictional issue is not intertwined with the merits of the EEOC's claims, the Court may resolve factual disputes in ruling on the motion to dismiss. *See id.*

III. Was the EEOC's Conciliation Effort Sufficient?

Defendant argues that the EEOC made a "take it or leave it" offer and refused to negotiate in good faith. Doc. #19 at 5. The EEOC argues that Defendant derailed settlement efforts "by dragging its feet and failing to make a meaningful counterproposal in a timely manner." Doc. #21 at 8. The Court finds that the performance of both parties was less than ideal. Case law makes clear, however, that the EEOC's conciliation burden is easy to satisfy and that courts must grant considerable deference to the agency's judgment on when conciliation has failed. Given these relatively modest legal standards (addressed in more detail below), the Court concludes that the jurisdictional minimum has been satisfied.

The evidence shows the following: On June 29, 2004, the EEOC invited Defendant to conciliate this matter and informed it of the type of relief that must be included in a conciliation agreement, including reinstatement, back pay, compensatory damages, removal of all references to the EEOC charges from the charging parties' personnel files, training, and the posting of a notice. Docs. ##19 Exs. B-C, 21 Ex. 1 ¶ 6 & Exs. B-C. The EEOC further informed Defendant that the charging parties would be entitled to up to $300,000 in

damages if they prevailed in a lawsuit. *Id.* Defendant, through its attorney William Dugan, agreed to conciliation two weeks later. Docs. ##19 Ex. D, 21 Ex. 1 ¶ 7 & Ex. D.

The EEOC did not respond for more than one month. On August 17, 2004, the investigator assigned to conciliate the matter, Roberto Rivera, made a settlement offer to Defendant. Docs. ##19 Ex. E, 21 Ex. 1 ¶ 8 & Ex. E. Rivera sent Dugan an e-mail identifying the six putative class members and offering to settle all claims against Defendant for $90,000 and evidence of training by Defendant. *Id.* Rivera stated a willingness to discuss the offer with Dugan. *Id.*

Rivera and Dugan exchanged telephone and e-mail messages over the next few weeks. Docs. ##19 Ex. I ¶ 4, 21 Ex. 1 ¶ 10 & Ex. F. On August 23, 2004, Dugan sent Rivera an e-mail acknowledging receipt of the settlement offer and requesting Rivera's contact information. *Id.* On August 31, 2004, Rivera sent Dugan an e-mail noting that the settlement offer was two weeks old and asking whether Dugan had a response from Defendant. *Id.* Dugan replied the next day by stating that he had been conducting an investigation regarding the charging parties' allegations and suggesting that he and Rivera meet to discuss the matter during the week of September 13, 2004. *Id.* Rivera responded a day later, questioning why Dugan was conducting an investigation into the allegations when the EEOC already had issued a reasonable cause determination and the parties were in the conciliation process – as though Defendant was required to accept the EEOC's determination as final. *Id.* Rivera nonetheless stated that he would be willing to meet with Dugan to discuss a resolution of the matter. *Id.*

On September 8, 2004, Rivera wrote:

> We want to negotiate in good faith to resolve these cases and keep the conciliation negotiations alive but without a demonstration in the form of a meaningful counter-proposal to our demand, we are not able to determine whether a meeting might be productive. If we don't receive a meaningful counter-proposal by September 15, 2004, we will assume that further efforts to conciliate will be futile and we will proceed accordingly.

Doc. #21 Ex. 1 ¶ 12 & Ex. G. Dugan responded by requesting a meeting on September 17 and stating that it was essential that he discuss the matter with Rivera before a meaningful

response to the EEOC's offer could be made. *Id.*

During the September 17 meeting, Rivera disclosed some of the reasons for the EEOC's reasonable cause determination and $90,000 demand. Doc. #19 Ex. I ¶ 6. Dugan questioned the determination and sought to defend Defendant's actions. Doc. #21 Ex. 1 ¶ 15. Dugan also argued that the EEOC could not bring a class claim without thirty class members and could not bring an action on behalf of class members who had not filed charges with the EEOC. *Id.* ¶ 16. Dugan made no counteroffer. *Id.* ¶¶ 17-18. Dugan and Rivera left the meeting with an apparent misunderstanding as to whether Defendant would make a counteroffer by September 22 or September 24, 2004.[2]

Having not received a counteroffer by September 22, 2004, the EEOC sent Dugan letters on September 23 stating that conciliation efforts would be futile and that the matter would be considered for possible litigation. *Id.* ¶ 21, Ex. H. The next day, Dugan presented Rivera with an $8,000 counteroffer which the charging parties rejected. Docs. ##19 Ex. I ¶ 7, 21 ¶¶ 22-23. Rivera promptly informed Dugan of the rejection and reiterated that conciliation had failed. Docs. ##19 Ex. I ¶ 7 & Ex. G, 21 ¶¶ 22-26 & Exs. I-J. The EEOC filed this action on September 30, 2004. Doc. #1.[3]

The evidence does not support Defendant's contention that the EEOC made a "take it or leave it" offer and otherwise refused to negotiate. Doc. #19 at 3-7. The EEOC invited Defendant to conciliate this matter, made a $90,000 offer with the proviso that there was room to negotiate, agreed to meet on September 17, disclosed some of the reasons for its position at the meeting, and filed suit only after it had determined that Defendant's $8,000

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[2] Rivera asserts that Dugan said a counteroffer would be made by September 22. Doc. #21 Ex. 1 ¶ 19. Defendant contends that Dugan said he would attempt to make a counteroffer by September 22, but definitely by September 24. Docs. ##19 Ex. J, 24 at 3 n.2.

[3] Defendant has included arguments about ongoing settlement discussions after the filing of this lawsuit. Because Defendant's jurisdictional argument is based on the alleged failure of the EEOC to engage in good faith conciliation before the lawsuit was filed, this Order addresses only the parties' pre-filing efforts.

counteroffer was insufficient and conciliation had failed. Although both parties were too slow in responding and too unwilling to engage in open, frank settlement talks, the Court concludes that the EEOC satisfied the modest jurisdictional prerequisites to filing this action. *See* 42 U.S.C. § 2000e-5(f)(1) ("If . . . the Commission has been unable to secure from the respondent a conciliation agreement *acceptable to the Commission*, the Commission may bring a civil action against [the] respondent[.]") (emphasis added); 29 C.F.R. § 1601.24(a) (stating that the Commission shall *endeavor* to eliminate unlawful employment practices through conciliation and that the Commission shall *attempt* to obtain a conciliation agreement with the employer); 29 C.F.R. § 1601.25 ("Where the Commission is unable to obtain voluntary compliance . . . and *it determines that further efforts to do so would be futile or non-productive*, it shall . . . so notify the respondent in writing.") (emphasis added); *see also EEOC v. Keco Indus., Inc.*, 748 F.2d 1097, 1101-02 (6th Cir. 1984) ("The EEOC is under no duty to attempt further conciliation after an employer rejects its offer"); *EEOC v. Greyhound Lines, Inc.*, 411 F. Supp. 97, 102 (W.D. Pa. 1976) (denying a motion to dismiss and stating: "Title VII does not define or require a standard conciliation process. . . . It is enough that [the] EEOC attempted to conciliate this matter before the complaint was filed."). Case law makes clear that "substantial deference" must be accorded an EEOC determination that conciliation has failed. *See EEOC v. N. Cent. Airlines*, 475 F. Supp. 667, 669 (D. Minn. 1979) (denying a motion to dismiss and stating: "[I]f some conciliation efforts have occurred, substantial deference should be given to the EEOC's determination that conciliation efforts have failed[.]"); *EEOC v. Wayside World Corp.*, 646 F. Supp. 86, 89 (W.D. Va. 1986) (denying a motion to dismiss alleging that the EEOC took an "all or nothing approach" to the charging party's claims because substantial deference must be given to the EEOC's determination that conciliation had failed) (citing *N. Cent. Airlines*, 475 F. Supp. at 669; *Greyhound Lines*, 411 F. Supp. 97); *EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1091 (C.D. Ill. 1998) (stating that the good faith conciliation requirement is an easy burden to satisfy and that substantial discretion is vested in the EEOC with respect to conciliation).

The EEOC disclosed only some of the reasons for its reasonable cause determination and settlement offer at the September 17 meeting, but the law does not require more. *See EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 939-40 (N.D. Ill. 2001) (holding that the EEOC conciliated in good faith where it did not inform the defendant of the identities of the putative class members or the facts supporting their claims and stating that the "'EEOC may make a sufficient initial effort [at conciliation] without undertaking exhaustive investigations or proving discrimination to the employer's satisfaction'") (quoting *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985)); *cf. EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996) ("By the time the obligation to conciliate arises pursuant to [the ADEA], the EEOC has already conducted an initial investigation and 'has a reasonable basis to conclude that a violation of the ADEA has occurred or will occur.' . . . The conciliation period allows the employer and the EEOC to negotiate how the employer might alter its practices to comply with the law . . . [and] how much, if any, the employer will pay in damages.") (citations and alterations omitted).[4]

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[4] For the reasons identified in the following parentheticals, the Court finds that the cases cited by Defendant are distinguishable from this case. *See EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18-19 (2d Cir. 1981) (dismissing suit where EEOC made no settlement offers with respect to two stores, stating that EEOC may not "'attempt conciliation on one set of issues and having failed, litigate a different set'") (citation omitted); *EEOC v. Magnolia Elec. Power Ass'n*, 635 F.2d 375, 378-79 (5th Cir. 1981) (reversing dismissal where EEOC failed to include two of three respondents in the conciliation process and remanding the case so that the defendant could attempt to show that the inclusion of the other respondents may have obviated the need for litigation); *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002-03 (5th Cir. 1980) (vacating dismissal and remanding the case so that the parties could further conciliate where EEOC refused to conciliate the class issues merely because an impasse occurred with respect to the charging party); *EEOC v. Reeves & Assocs.*, No. CV0010515DT(RZX), 2002 WL 1151459, *5-7 (C.D. Cal. May 6, 2002) (holding that EEOC did not conciliate in good faith where it acted in a heavy handed manner by demanding reinstatement of unidentified individuals and $1 million in damages without providing any facts underlying the claims against the employer), *rev'd*, 68 Fed. Appx. 830 (9th Cir. 2003); *EEOC v. Golden Lender Fin. Group*, No. 99 Civ. 8591(JGK), 2000 WL

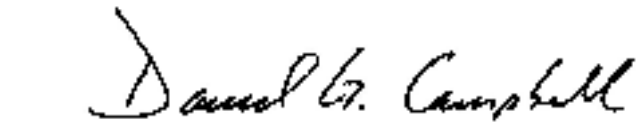
In summary, the Court concludes that it has subject matter jurisdiction over this suit. The EEOC satisfied the minimal requirements of pre-litigation conciliation. *See* 42 U.S.C. § 2000e-5(f)(1).

IT IS ORDERED:

1. Defendant's Motion to dismiss (Doc. #18) is **denied**.

2. By separate order the Court will set a Rule 16 case management conference.

DATED this 4th day of August, 2005.



David G. Campbell
United States District Judge

381426, *5 (S.D.N.Y. Apr. 13, 2000) (holding that EEOC did not respond reasonably to defendant's request for some information about the class members where defendant had agreed to other terms proposed by EEOC and had made a specific offer of compensation for the charging parties); *EEOC v. Die Fliedermaus, L.L.C.*, 77 F. Supp. 2d 460, 466-68 (S.D.N.Y. 1999) (staying the case for further conciliation and holding that the EEOC did not respond reasonably to the defendant's request for some information about back pay and compensatory damages where the defendant had agreed to training, notices, and a harassment policy); *EEOC v. Asplundh Tree Expert Co.*, No. 1:99CV121 MMP, 2002 WL 5000935, *2-5 (N.D. Fla. Feb. 20, 2002) (finding that EEOC acted in a "grossly arbitrary manner" and engaged in "unreasonable conduct" by giving the defendant only sixteen days to respond to a conciliation agreement proposed after a two-year investigation and refusing to grant the defendant's request for an extension of time so that the parties could discuss the matter).