

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 05-cv-00969-LTB-MEH

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,

Plaintiff,

v.

TXI Operations, LP, d/b/a TXI - Boulder

Defendant.

**STIPULATED MOTION TO DISMISS WITHOUT PREJUDICE PURSUANT TO
FED.R.CIV.P. 41(A)(1)(II)**

The undersigned parties respectfully submit this Stipulated Motion to Dismiss Without Prejudice pursuant to Fed.R.Civ.P. Rule 41(a)(1)(ii). In support thereof, the parties state:

1. This matter was instituted by Plaintiff, Equal Employment Opportunity Commission (“Commission” or “Plaintiff” or “EEOC”), an agency of the United States government, alleging that Defendant TXI Operations, LP, d/b/a TXI – Boulder (hereinafter “Defendant TXI”) discriminated against Michael Murphy and a class of individuals by maintaining a hostile work environment based on race, color and national origin. The EEOC further alleged that after Mr. Murphy complained to Defendant TXI about the racially hostile environment, Defendant TXI retaliated against him for having complained about race discrimination in the workplace. The EEOC further alleged that in October 2002, Mr. Michael Murphy was constructively discharged because of his race, African-American, and in further retaliation for his complaints of discrimination.

2. In 2004, Mr. Murphy filed a lawsuit in U.S. District Court for the District of Colorado entitled, *Murphy v. TXI Operations, LP*, Civil Action No. 1:04-cv-02053-EWN-MJW (the “Murphy Lawsuit”). In the Murphy Lawsuit, Mr. Murphy asserted claims of racial discrimination, racial harassment and retaliation under 42 U.S.C. § 1981. Murphy also asserted claims for intentional infliction of emotional distress and breach of the covenant of good faith and fair dealing. The Court entered summary judgment against Mr. Murphy on all of the claims he asserted. During the appeal process, Murphy and TXI resolved all issues.

3. The EEOC states that under the U.S. Supreme Court holding in *EEOC v. Waffle House*, 534 U.S. 279 (2002), Plaintiff EEOC could continue to litigate the instant lawsuit, even though Mr. Murphy has resolved his parallel Section 1981 claims. However, in the interest of efficiently using the limited resources of the Commission and the Court, the Commission has agreed to dismiss this action without prejudice, with each party to pay its own costs and attorney's fees.

4. TXI states that it does not agree with the EEOC’s characterization of the effect of the *Waffle House* decision, as stated in paragraph 3 of this Motion. However, TXI does not oppose the Court’s granting of the relief requested by the EEOC in the attached proposed order and affirms its commitment to providing equal employment opportunity in all of its operation and in all areas of employment practices, and to ensuring that there shall be no unlawful discrimination against any employee or applicant for employment on the grounds of race, color, religion, sex, pregnancy, national origin, age or disability.

Dated: October 31, 2006

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2006, a true and correct copy of the **Stipulated Motion to Dismiss *Without Prejudice* Pursuant to Fed.R.Civ.P. Rule 41(a)(1)(ii)** was filed electronically with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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