Minute Order Form (06/97)

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	David H. Coar	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	99 C 4100	DATE	JUN 13 2000
CASE TITLE	EEOC v. Bernina		

[In the following box (a) indicate the party filing the motion, e.g., plaintiff, defendant, 3rd party plaintiff, and (b) state briefly the nature of the motion being presented.]

MOTION:

DOCKET ENTRY:

(1) ☐ Filed motion of [use listing in "Motion" box above.]

(2) ☐ Brief in support of motion due _____.

(3) ☐ Answer brief to motion due_____. Reply to answer brief due_____.

(4) ☐ Ruling/Hearing on _____ set for _____ at _____.

(5) ☐ Status hearing[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(6) ☐ Pretrial conference[held/continued to] [set for/re-set for] on _____ set for _____ at _____.

(7) ☐ Trial[set for/re-set for] on _____ at _____.

(8) ☐ [Bench/Jury trial] [Hearing] held/continued to _____ at _____.

(9) ☐ This case is dismissed [with/without] prejudice and without costs[by/agreement/pursuant to]
☐ FRCP4(m) ☐ General Rule 21 ☐ FRCP41(a)(1) ☐ FRCP41(a)(2).

(10) ■ [Other docket entry] For the reasons stated in the attached Memorandum Opinion and Order, the EEOC's motion for partial summary judgment [#15-1] ~~is~~ GRANTED.

David H. Coar

(11) ☐ [For further detail see order (on reverse side of/attached to) the original minute order.]

X	No notices required, advised in open court.		2 number of notices	Document Number
	No notices required.		JUN 13 2000 date docketed	29
	Notices mailed by judge's staff.		dk docketing deputy initials	
	Notified counsel by telephone.		6-13-00 in open Court date mailed notice	
	Docketing to mail notices.			
	Mail AO 450 form.			
	Copy to judge/magistrate judge.			
dc(lc)	courtroom deputy's initials	00 JUN 13 PM 12:45 Date/time received in central Clerk's Office	Pam mailing deputy initials	

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	No. 99 C 4100
v.	)	HONORABLE DAVID H. COAR
BERNINA OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The Equal Employment Opportunity Commission ("EEOC") filed an employment discrimination suit against Bernina of America ("Bernina") pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e et seq. In its answer to the EEOC's complaint, Bernina asserted that the EEOC failed to discharge its statutory duty to conciliate before bringing this civil action. The EEOC now moves this court for partial summary judgment regarding Bernina's defense that the EEOC failed to conciliate. For the reasons discussed below, the EEOC's motion is granted.

I. Factual Background

Linda Eiermann ("Eiermann") filed an EEOC charge of discrimination against her employer, Bernina of America. Monique Debusmann ("Debusmann"), who investigated Eiermann's charge, found reasonable cause to believe that Bernina had discriminated against a class of female employees, including the charging party, on the basis of their sex, by maintaining

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a maternity leave policy and practice which subject pregnant female employees to adverse terms and conditions of employment in violation of Title VII.

On August 6, 1998, Debusmann mailed and faxed a Letter of Determination to Bernina's attorney, Bill Miossi ("Miossi"). The letter informed Bernina that the EEOC had found reasonable cause to believe that Bernina had engaged in discriminatory practices and invited Bernina to participate in conciliation efforts by proposing terms for a conciliation agreement. On August 19, Debusmann called Miossi. On behalf of the EEOC, Debusmann demanded a change in Bernina's policy and practice such that the employer would pay sick pay for pregnancy-related disability, including for the disabling effects of a normal pregnancy and childbirth; sick pay on behalf of Eiermann and the class members; and the posting of notices conveying Bernina's revised policy. In response, Miossi offered to amend the company's Family and Medical Leave Act ("FMLA") policy so as to clarify its sick leave policy to "state what it has always done," and pay sick pay to the class members, but only if they could produce contemporaneous medical records demonstrating their disability. Believing that Bernina had committed no legal violation, Miossi refused to post notices. An August 25, 1998 letter from Miossi to Debusmann outlined Bernina's counteroffer.

On September 16, 1998, Debusmann and Miossi spoke again. They discussed the details of Bernina's proposal. The EEOC stood firm in its stance, as did Bernina. Miossi maintains that, at the close of their conversation, he was informed by Debusmann that his proposal would be considered and that he would be recontacted. In contrast, Debusmann states that she placed the onus on Miossi to contact her should his client's position change. In a letter dated September 30, 1998, the EEOC conveyed to Bernina that conciliation efforts would be futile or non-

productive. The EEOC filed suit on June 21, 1999. On August 25, 1999, Miossi attempted to reinitiate settlement discussions with the EEOC. Since that time, the parties have exchanged correspondences in an effort to reach a resolution, but to no avail.

II. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Cox v. Acme Health Serv., Inc., 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986); Eiland v. Trinity Hosp., 150 F.3d 747, 750 (7th Cir. 1998).

The movant bears the burden of establishing that there exists no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Rule 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322, 106 S. Ct. at 2552-53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary

judgment motion; "there must be evidence on which the jury could reasonably find for the [non-movant]." Anderson, 477 U.S. at 250, 106 S. Ct. at 2511. Weighing evidence, determining credibility, and drawing reasonable inferences are jury functions, not those of a judge deciding a motion for summary judgment. Anderson, 477 U.S. at 255, 106 S. Ct. at 2515.

III. Analysis

Section 706(b) of Title VII requires the EEOC to "endeavor to eliminate any [ ] alleged unlawful employment practice with informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The EEOC is charged with making a "sincere and reasonable effort to negotiate by providing [an employer with] an adequate opportunity to respond to all charges and negotiate possible settlements." EEOC v. Prudential Fed Sav. & Loan Ass'n, 736 F.2d 1166, 1169 (10th Cir. 1985) (quoting Marshall v. Hartford Fire Ins. Co., 78 F.R.D. 97, 107 (D. Conn. 1978)). The EEOC is under no duty to attempt further conciliation after an employer rejects its offer. EEOC v. Keco Indus., Inc., 748 F.2d 1097, 1101-02 (6th Cir. 1984). Once the EEOC is unable to secure an acceptable conciliation agreement from the employer, the agency may bring a civil action. See Keco, 748 F.2d at 1101. See also 42 U.S.C. § 2000e-5(f)(1).

Judicial review of the conciliation process may not delve into the substance of the proposals, which are entirely within the EEOC's discretion. Keco, 748 F.2d at 1102; EEOC v. Mitsubishi Motor Manuf. of America, Inc., 990 F. Supp. 1059, 1090 (C.D. Ill. 1998) (noting that courts should not "examine the details of offers and counteroffers between parties, nor impose its notion of what an agreement should provide) (citing EEOC v. Zia Co., 582 F.2d 527, 533 (10th

Cir. 1978)); EEOC v. Acorn Niles Corp., No. 93 C 5981, 1995 WL 519976, at *6 (N.D. Ill. Aug. 30, 1995). If improper conciliation efforts were made, the appropriate remedy is not dismissal of the case, but rather a stay of the proceedings so that conciliation may take place. Prudential, 763 F.2d at 1169.

In the instant case, the EEOC satisfied its statutory duty to make "sincere and reasonable efforts to negotiate." Prudential, 763 F.2d at 1169. The EEOC issued a letter of determination inviting Bernina to conciliate. That letter was followed by two telephone calls. In the first call, Debusmann called Miossi to articulate the EEOC's demands: revisions in Bernina's pregnancy-related disability leave policy; payment of sick pay to Eiermann and the class members; and a posting of a notice. Miossi rejected this proposal and instead offered a counterproposal: an amendment of the company's FMLA policy and clarification of its current policy; and payment of sick pay to female employees who could tender contemporaneous documentation of their disability. With respect to the posting of notices, Miossi refused to comply with this demand.

In a second phone conversation, Debusmann and Miossi discussed the details of Bernina's counteroffer. The parties made no further contact until two weeks later, when the EEOC issued a letter stating that conciliation efforts had failed and that further efforts would be futile. Thus, each party initiated and rejected a set of proposals. Those two rounds of proposals demonstrate to this court that Bernina was provided with an "adequate opportunity to respond to all charges and negotiate possible settlements." Prudential, 763 F.2d at 1169.

Bernina, however, challenges the sufficiency of the EEOC's conciliation efforts. In particular, Bernina argues that the EEOC did not act in good faith because the agency (1) failed to hold a meeting; (2) refused to provide specific information about the proposed class members;

and (3) terminated conciliation efforts while Bernina was willing to engage in further negotiations. The court declines to force the EEOC to dance to Bernina's tune.

Bernina cites to EEOC v. One Bratenahl Place Condo. Assoc., 644 F. Supp. 218 (N.D. Ohio 1986), to establish its first point. The court in One Bratenahl Place found that the EEOC merely gave "lip service" to the conciliation process when, despite the employers' repeated requests, the EEOC investigator refused to meet with the employer. 644 F. Supp. at 221, 220. "Such a meeting," that court observed, "would have provided a forum for the free exchange of ideas and proposals to hopefully reach mutually-accepted remedies." Id. at 221. This court is not convinced that a meeting would have furthered the negotiations. The parties set forth and stood firm in their respective positions. If the inability to meet presented the only impediment to reaching a resolution, one would expect Bernina to have requested such a forum. Bernina, however, did no such thing. Even if the case law were to be construed so as to require the EEOC to meet with the employer upon request, it certainly does not impose upon the EEOC the duty to personally meet an employer on the agency's own initiative.

Bernina also points to EEOC v. First Midwest Bank, N.A., 14 F. Supp. 2d 1028 (N.D. Ill. 1998), in support of its argument that the EEOC acted in bad faith when it failed to disclose specific information about the class and the damage calculation. Indeed, that court determined that the EEOC had not satisfied its statutory mandate when, among other things, the agency forced the employer to negotiate in an "evidentiary vacuum." 14 F. Supp. 2d at 1032. Yet the employer in First Midwest had requested additional information as a predicate to its formulation of a counteroffer.

The present case is entirely distinguishable. Bernina never requested additional information from the EEOC. Instead, Bernina was able to fashion a counteroffer based on the information given. The court cannot understand how the now-requested information would have facilitated the negotiation process. Notwithstanding the fact that the parties had reached an impasse on the notice issue, the parties clashed not on the matters of who or what, but on the how of payment-- that is, Bernina seemed to care neither about who the class members were or what they would be paid, but on how the class members would prove their entitlement to sick pay. Bernina expected Eiermann and the class members to produce contemporaneous medical records reflecting a disability whereas the EEOC rejected this precondition to payment. Therefore, information on the class members and the damage amount, the absence of which is now proclaimed by Bernina to have been problematic, would not have done away with the schism between the parties' positions.

Moreover, Bernina interprets First Midwest, 14 F. Supp. 2d 1028, as requiring the EEOC to continue the conciliation process so long as the employer expresses a willingness to further negotiate. Bernina misconstrues that case. In First Midwest, the EEOC issued the letter of determination before the employer responded to the EEOC's proposal, either by rejecting the EEOC's offer or presenting its own counteroffer. 14 F. Supp. 2d at 1029-31. That court held that the EEOC, in withdrawing from the process even before the employer had an opportunity to respond, failed to discharge its statutory duty. Id. at 1033. Thus, First Midwest stands for limited proposition that the EEOC must allow the employer to respond to its offer before proceeding with litigation. Compare Keco, 748 F.2d at 1101-02 (finding the EEOC's efforts sufficient where the conciliation process broke down after the employer rejected the EEOC's

overtures); Acorn, 1995 WL 519976, at *6 (same) with EEOC v. Pet, Inc., 612 F.2d 1001 (5th Cir. 1980) (concluding that the EEOC prematurely ended negotiations where the employer had not responded to the class claims); EEOC v. Hugin Sweda, Inc., 750 F. Supp. 165, 166-67 (D. N.J. 1990) (holding that the EEOC failed to act in good faith where the agency denied the employer an opportunity to respond to the EEOC's offer). As detailed previously, however, both Bernina and the EEOC put on the table their own proposals before the EEOC determined that conciliation would be futile.

Dissatisfied, Bernina suggests that the conciliation process should have been prolonged even beyond that point. At the close of Miossi's second conversation with Debusmann, Bernina contends, Debusmann promised to contact Miossi regarding the EEOC's acceptance of his counteroffer. The next time the EEOC contacted Bernina was via the letter of determination. This was a clear rejection of the counteroffer. Apparently, Bernina believes that the EEOC was required to either make a new offer or attempt to persuade Bernina to change its mind. The law does not require the EEOC to become a supplicant.

Even if this court were to accept Bernina's contention that the EEOC had a duty to continue the conciliation process as long as the employer expresses a willingness to negotiate, the court cannot accept that factual premise. In true lawyer-like fashion, Miossi asserts that "at no time [during the conciliation process] did I state that Bernina was unwilling to negotiate a compromise." See Miossi Affid. ¶¶ 5, 7, 9. When the court looks beyond the double negatives, however, it is clear that Bernina made no affirmative overtures that would convey to the EEOC a willingness to change its stance. As far as the EEOC was concerned, Bernina had rejected the EEOC's initial settlement proposal, presented an unacceptable counteroffer, and tendered no

alternative options. Two weeks thereafter, the EEOC reasonably concluded that conciliation was futile. Bernina then waited eleven months to assert the defense of the EEOC's purported failure to conciliate in its answer to the EEOC's complaint. Bernina's renewed efforts at settlement, initiated nearly a year after the letter of determination was issued and subsequent to the filing of this case, does not in any way undermine the reasonableness of the EEOC's determination.

In effect, Bernina wants this court to force the EEOC to agree to the terms set forth by the company or to continue to talk as long as the employer says it wants to conciliate. Bernina thinks its counteroffer was close enough, and it argues that its counterproposal satisfied every "substantive term" sought by the EEOC. See Def. Opp'n Memo at 1, 4. The undisputed facts contradict Bernina's assertion. The EEOC demanded that Bernina post a notice, which the company refused to do. The EEOC also found the additional terms of Bernina's counteroffer to be unsatisfactory. This court will not and cannot question the agency's judgment. See Keco, 748 F. 2d at 1102 ("The district court finding that the EEOC did not sufficiently conciliate the class claim reflects an apparent dissatisfaction with the EEOC conciliation attempt. This is not the appropriate standard of review. The district court should only determine whether the EEOC made an attempt at conciliation The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review.")

If the court upheld Bernina's position, employers would delay resolution of Title VII claims indefinitely by merely claiming (whether true or not) that they wished to continue conciliation efforts. At some point in any conciliation process, each party must be free to cease further efforts because of probable lack of success. The EEOC did that in this case and this court

sees no basis for second-guessing that determination on a record which indicates that the EEOC acted reasonably and in good faith.

IV. Conclusion

For the foregoing reasons, the EEOC's motion for partial summary judgment is granted.

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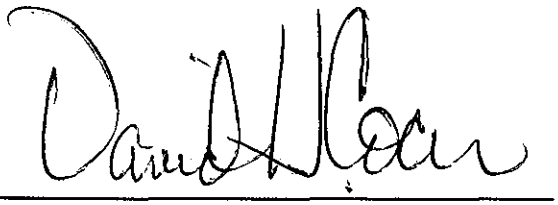

David H. Coar

United States District Judge

Dated: JUN 13 2000