2002 WL 1162695
United States District Court, E.D. Kentucky.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
SHELBYVILLE MIXING CENTER, INC. Defendant.

No. Civ.A. 00–66–JMH. | May 16, 2002.

Opinion

MEMORANDUM OPINION AND ORDER

HOOD, J.

***1** This matter is before the Court on Defendant's motion for summary judgment [Record No. 33]. Plaintiff has filed a response [Record No. 37], to which Defendant has replied [Record No. 38]. This matter is now ripe for a decision.

BACKGROUND

The Equal Employment Opportunity Commission ("EEOC") brought this suit under Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991, charging that Defendant Shelbyville Mixing Center, Inc. ("Defendant Employer") refused to hire Janette Cowan and a class of female applicants because of their sex. After Defendant Employer filed its answer enumerating ten defenses to the action and prior to the completion of discovery, Plaintiff EEOC filed a motion seeking partial summary judgment regarding several of Defendant Employer's enumerated defenses. This Court granted in part and denied in part the motion [Record No. 23]. This Court determined that there was an issue regarding whether the EEOC had satisfied its jurisdictional prerequisite of engaging in good faith conciliation prior to bringing this suit, and ordered the parties to engage in further discover solely on this issue. Discovery on the conciliation issue is now completed and Defendant Employer has now moved for summary judgment on this issue.

APPLICABLE STANDARD OF REVIEW

Under Fed.R.Civ.P. 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." The moving party may discharge its burden by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party, which in this case is the plaintiff, "cannot rest on [its] pleadings," and must show the Court that "there is a genuine issue for trial." *Hall v. Tollett,* 128 F.3d 418, 422 (6th Cir.1997). In considering a motion for summary judgment the court must construe the facts in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

DISCUSSION

Under Title VII, "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal

methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e–5(b). 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 any respondent not a government, governmental agency, or political subdivision named in the charge." 42 U.S.C. § 2000e–5(f)(1). The EEOC must make a "good faith" effort to conciliate in order to satisfy the statutory requirements to bringing suit. *EEOC v. Keco Industries, Inc.* 748 F.2d 1097, 1102 (6th Cir.1984).

***2** The issue before this Court is whether the EEOC's conciliation effort's were made in good faith. Defendant Employer bases its argument that the EEOC's conciliation efforts were not made in good faith on the premise that EEOC offered Defendant an all or nothing deal, indicated it would not negotiate regarding the amount of punitive damages, and that its representatives did not have the authority to negotiate. However, the evidence, viewed in the light most favorable to the EEOC, does not support the defendant's position. The evidence shows that the EEOC's understanding of Defendant's rejection of their initial offer was that Defendant would not agree to *any* punitive damages, not that it was looking to negotiate on that issue. Although no individual representative had the authority to alter the terms of the offer, the individuals were authorized to bring any counter-offer for discussion among supervisors, who did have the authority to alter terms. Furthermore, Defendant agreed that conciliation had failed.

The initial conciliation offer was drawn up by EEOC investigator Hazel Emly ("Ms.Emly") and proposed that Defendant hire thirty-one unnamed women in addition to the charging party, pay these women back pay, and pay $1.5 million in punitive damages. Ms. Emly's supervisor Susan Ryan ("Ms.Ryan") approved the proposed agreement and it was sent to Defendant's counsel, Jerry Oliver ("Mr.Oliver").

Ms. Emly initiated the conciliation process by calling Mr. Oliver on August 24, 1999. Ms. Ryan participated in the conversation as an observer. Mr. Oliver communicated to EEOC that "there was no way in hell" his client would agree to the punitive damages because the company was near bankruptcy. When asked if conciliation had failed, he said no, that he would confer with his client.

On August 26, 1999, Mr. Oliver called the EEOC and spoke to Ms. Emly, Ms. Ryan, and Marcia Hall–Craig ("Ms.Hall–Craig"), the Area–Director. According to Ms. Emly's notes regarding the call, Mr. Oliver advised the EEOC that his client was willing to settle, but would not consider punitive damages because his client felt there had been no discrimination and the company was in serious financial trouble. He informed the EEOC that his client would be interested in continuing discussions if the EEOC removed the punitive damages and would consider the hiring of a list of people if they met qualifications. Ms. Emly told Mr. Oliver that she felt the EEOC would not remove the punitive damages. When Mr. Oliver was asked if conciliation had failed, he agreed that it had. Ms. Ryan's deposition supports this version of the events and she added that the conciliation had failed because the company objected to any punitive damages and that the offer to hire more women was unacceptable because of the requirement that the women meet certain qualifications. Ms. Ryan testified that the investigation had revealed that men were hired without meeting the qualifications in question.

***3** Defendant Employer's attempts to characterize the EEOC's conciliation effort as an extension of a "take or leave it offer" is a stretch at best. Although neither Ms. Emly, Ms. Ryan, nor Ms. Hall–Craig had the individual final authority to change the terms of the offer, they had the ability to receive a counter-offer and discuss it with the legal unit for a possible adjustment of the offer. Thus, in this instance, the parties appear to have reached an impasse regarding punitive damages and Mr. Oliver easily agreed that conciliation had failed. There is no evidence in the record that Mr. Oliver felt he had been given a take or leave it offer, that he felt that he was forced to agree that conciliation had failed, or that he indicated he wanted to continue conciliation discussions with the EEOC.

A "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." *Keco Industries, Inc.* 748 F.2d at 1102. In this case, it is clear that the EEOC made an attempt at conciliation. The merits of the offer of conciliation are not to be reviewed unless they are so outlandish that they would constitute a bad faith offer. Defendant Employer has not shown that the offer was outlandish. The EEOC has presented evidence that offer was based on statistics and that the punitive damage amount was below the statutory cap.

Accordingly, IT IS ORDERED, that Defendant's motion for summary judgment [Record No. 33] be, and the same hereby is, DENIED.

Parallel Citations

88 Fair Empl.Prac.Cas. (BNA) 1729, 82 Empl. Prac. Dec. P 41,051