

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CA
SEP 15 1999
U.S. DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
ST. LOUIS

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)
)
Plaintiff,)
and)
)
ZINA LINDSEY, et al.,)
)
Plaintiff-Interveners,)
)
vs.)
)
BEVERLY ENTERPRISES-)
MISSOURI, INC.,)
)
Defendant.)

Case No. 4:98CV1579 RWS

MEMORANDUM AND ORDER

This matter is before the Court on defendant's amended motion for partial dismissal or, in the alternative, for partial summary judgment. Defendant moves to dismiss the pattern-or-practice discrimination claim brought by the Equal Employment Opportunity Commission ("EEOC") on the ground that the EEOC failed to satisfy the statutory prerequisites for pursuing such a claim. The EEOC opposes the motion, and the issues have been fully briefed. Because the EEOC failed to make a reasonable cause determination or conciliate the pattern-and-practice claim, the Court lacks jurisdiction over this claim and will grant defendant's motion to dismiss.

Discussion

In late 1994 and early 1995, nine former employees of defendant's Bridgeton, Missouri nursing home filed charges of

discrimination with the EEOC alleging that defendant discriminated against them on account of race and/or retaliated against them for opposing such discrimination.¹ None of these charges specifically references a widespread pattern or practice of racial discrimination or retaliation by defendant, although several of the charging parties alleged that they were retaliated against for opposing racially derogatory comments toward black employees and that other employees were subject to racial discrimination.

After the charges were filed, the EEOC conducted an investigation. The EEOC's investigation exceeded the scope of the allegations set forth in the original charges. In September and October of 1997, the EEOC sent defendant reasonable cause determinations for each of the nine charges. None of these determinations explicitly mentions a pattern or practice of discrimination. However, all of the determinations state that "[w]itness testimony reveals that [defendant's] Administrator used racial slurs and displayed racial animus toward black employees." In addition, the EEOC's amended determination on the charge filed by Wallace Brady states that "[t]he evidence shows the Administrator's use of racial slurs and animus toward Blacks created a racially hostile work environment in which Black

¹The charging parties have been granted leave to intervene in this action by Order dated July 15, 1999.

employees including Charging Party were subjected to harassment and discriminatory working conditions of various kinds."

On December 11, 1997, the EEOC sent defendant nine proposed conciliation agreements relating to the charges. These agreements do not mention a pattern or practice of discrimination, nor do they purport to settle a specific pattern-or-practice claim. The EEOC filed the instant complaint after conciliation efforts failed.

Defendant contends that the pattern-or-practice claim under Title VII fails as a matter of law because the EEOC did not fulfill the statutory prerequisites to bringing such a claim; namely, filing a separate charge of discrimination, issuing a reasonable cause determination and attempting conciliation of the claim prior to instituting the instant action. According to defendant, the EEOC's failure to engage in these mandatory pre-suit proceedings divests the Court of subject matter jurisdiction over the claim.

The EEOC argues that it is entitled to bring a pattern-or-practice claim because it "believes that, taken as a group, these claims reflect a pattern and practice of prohibited discrimination" (Pl.'s Mem. Opp. at 2). According to the EEOC, Title VII does not require a separate charge of discrimination, reasonable cause determination or pre-suit conciliation prior to filing a pattern-or-practice claim pursuant to Section 707 of Title VII, 42 U.S.C. 2000e-6(a).

Discussion

Section 707 of Title VII, 42 U.S.C. § 2000e-6, authorizes the EEOC to file a pattern-or-practice claim against an employer whom it believes has engaged in wide-spread discriminatory practices against its employees as follows:

The Commission shall have authority to investigate and act on a charge of a pattern and practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in [§706] of this title.

Section 706 of Title VII requires: a timely charge of discrimination, prompt notification of the charge, investigation, a reasonable cause determination and conciliation efforts before the EEOC may bring suit. 42 U.S.C. § 2000e-5(b) and (f).

The EEOC is correct that a separate charge of discrimination need not be filed before it may bring a pattern-or-practice claim pursuant to Section 707 of Title VII. "The permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge." EEOC v. Delight Wholesale Co., 973 F.2d 664, 668 (8th Cir. 1992). Thus, "the original charge is sufficient to support EEOC action, including a civil suit, for any discrimination stated in the charge or developed during a

reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding." Id. at 668-69.

In the present case, defendant concedes that the EEOC's investigation exceeded the scope of the allegations contained in the original nine charges. The EEOC alleges that the pattern-or-practice discrimination was uncovered during the course of its investigation into these charges alleging racial discrimination and harassment. Therefore, the original charges of discrimination were sufficient to support the EEOC's pattern-or-practice claim in the instant case as long as the other statutory requirements were satisfied.

The problem in this case, however, is that the EEOC failed to satisfy the remaining statutory prerequisites -- a reasonable cause determination and conciliation -- before filing its pattern-or-practice claim. Under 42 U.S.C. § 2000e-5(b), after the EEOC investigates a charge of discrimination, it should "so far as practical and not later than 120 days from the filing of the charge" make a determination on whether it believes the charge is true. "[T]he reasonable cause determination is intended to serve both as a formal means of placing the respondent on notice of the particular employment practice which the [EEOC] views as violative of Title VII and as a framework for the conciliation efforts to

follow." EEOC v. Sherwood Medical Industries, Inc., 452 F. Supp. 678, 681 (M.D. Fla. 1978). Because of the importance of the reasonable cause determination, "the Commission must make an express finding in the determination concerning each employment practice which it concludes to be violative of Title VII." Id. at 682.

Although each of the nine reasonable cause determinations states that defendant's administrator "used racial slurs and displayed racial animus toward black employees," there is no finding that defendant engaged in a pattern of discriminatory behavior. Moreover, each determination issues a finding of discrimination only with respect to the individual charging party, not any other employee. The vague reference to the administrator's conduct is simply insufficient to constitute a reasonable cause determination on a pattern-or-practice claim or otherwise place defendant on notice that pattern-or-practice discrimination was a matter in issue.

The EEOC argues that because it issued reasonable cause determinations for nine separate charges of discrimination, it is entitled to bring a pattern-or-practice claim based upon these nine underlying charges without first fulfilling the statutory prerequisites for filing this separate claim of discrimination. Notably, however, the EEOC offers no legal support for this position, and the Court's own research has uncovered nothing in the

statute or caselaw which would permit the Court to treat a pattern-or-practice claim differently than any other type of discrimination claim. Simply because the EEOC believes that a pattern or practice of discrimination may be evidenced by reading the nine charges "together" does not excuse it from issuing a reasonable cause determination for a pattern-or-practice claim. After all, a pattern-or-practice claim of discrimination is more than an amalgamation of sporadic or isolated instances of discrimination. The EEOC is required to prove that the challenged employment practices were "more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts," but were instead the "standard operating procedure - the regular rather than the unusual practice." International Bhd. of Teamsters v. U.S., 431 U.S. 324, 336 (1977). For this reason, an employer should not be forced to speculate whether it will be subject to a pattern-or-practice claim of discrimination whenever the EEOC issues more than one reasonable cause determination against it.²

²The EEOC argues that defendant had sufficient notice of the pattern-or-practice claim because its attorney allegedly informed counsel for defendant that "if pre-suit settlement could not be reached, the EEOC would file a single lawsuit containing all of the claims and would assert that all of the claims were part of the same pattern of discriminatory conduct by Defendant." (Pl.'s Mem. Opp. at 5). Even if the Court assumes that this statement is true, the EEOC is still not excused from complying with the statutory prerequisites to filing suit simply because its attorney notified opposing counsel during conciliation of the nine underlying charges that it intended to allege a pattern of discriminatory conduct. Moreover, this statement does not necessarily imply that the EEOC intended to file a pattern-or-practice claim.

The EEOC also failed to conciliate the pattern-or-practice claim prior to filing the instant complaint. When the EEOC finds reasonable cause, 42 U.S.C. § 2000e-5(b) requires it to "endeavor to eliminate any such unlawful employment practice by informal methods of conference, conciliation and persuasion." Only after conciliation fails is the EEOC authorized to institute a civil action against the employer. In the present case, the separate conciliation agreements submitted to defendant relating to the nine charges did not address or attempt to remedy a pattern or practice of discrimination. Despite this fact, the EEOC contends that it attempted to conciliate the pattern-or-practice claim because it engaged in conciliation efforts for the nine underlying charges. This argument fails for the same reasons discussed above.

The EEOC argues that requiring it to issue a reasonable cause determination and engage in conciliation before filing a pattern-or-practice claim undermines the remedial purposes of Title VII "without enhancing the fairness of this or any other proceeding." (Pl.'s Mem. Opp. at 7). This argument fails. "The power of enforcement is bottomed on an administrative scheme giving every employer charged with discrimination under Title VII the opportunity to correct its fault out of court Consistent with this scheme, we require that a particular charge of discrimination be the subject of the reasonable cause determination and conciliation before being subject to suit by the EEOC." EEOC

v. American Nat. Bank, 652 F.2d 1176, 1186 (4th Cir. 1981), cert. denied, 459 U.S. 923 (1982). The Court is not free to disregard the plain language of the statute (and the policy considerations embodied therein) simply because the EEOC believes that its application may be inequitable in this particular case.³

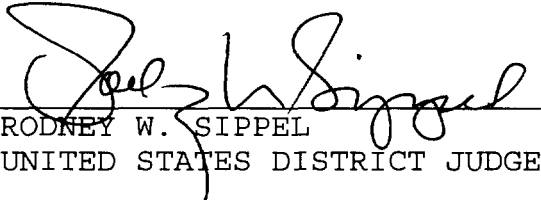
Finally, in light of the ongoing discovery disputes between the parties, the Court wishes to make clear that this ruling should not be used by defendant as a procedural weapon to resist discovery on the issue of its discriminatory conduct toward employees other than the charging parties. Although the Court is dismissing the pattern-or-practice claim, evidence of discrimination against similarly-situated employees and evidence of discrimination in hiring practices may properly serve as background or circumstantial evidence of discrimination against the charging parties. See White v. Honeywell, 141 F.3d 1270, 1275-76 (8th Cir. 1998). Accordingly, this kind of evidence should remain discoverable in this case even absent a pattern-or-practice claim. Because the Court concludes that it lacks jurisdiction over the EEOC's pattern-or-practice

³At least one court has concluded that "it would emasculate the Title VII administrative enforcement system" if the EEOC were excused from complying with the mandatory pre-suit conciliation requirement. EEOC v. International Bhd. of Elec. Workers, 476 F. Supp. 341, 349 (D. Mass. 1979). In that case, the district court reasoned that "[i]f failure to comply with statutory procedures might be excused whenever necessary to make possible a broad and far-reaching remedy, courts could easily be transformed into the primary agency for Title VII enforcement, a result at odds with the statutory scheme." Id.

claim, it shall dismiss that claim without prejudice. See Sherwood, 452 F. Supp. at 682 (holding that "failure to conciliate is fatal to a Title VII action brought by the [EEOC]; the suit or claim must be dismissed as premature."); Ahmed v. U.S., 147 F.3d 791, 797 (8th Cir. 1998) ("Under Rule 41(b) of the Federal Rules of Civil Procedure, dismissal for lack of jurisdiction is not an adjudication on the merits and thus such a dismissal should be without prejudice.").

Accordingly,

IT IS HEREBY ORDERED that defendant's amended partial motion to dismiss [#11-1] is granted, and defendant's amended motion for partial summary judgment [#11-2] is denied as moot.


RODNEY W. SIPP
UNITED STATES DISTRICT JUDGE

Dated this 15th day of September, 1999.

UNITED STATES DISTRICT COURT -- EASTERN MISSOURI
INTERNAL RECORD KEEPING

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4:98cv1579 EEOC vs Beverly Ent - MO

42:2000e Job Discrimination (Employment)

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