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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

SUN CAB COMPANY, INC., d/b/a
NELLIS CAB COMPANY,

Defendant.

Case No. CV-S-03-1230-KJD-RJJ

ORDER

Presently before the Court is Plaintiff's Motion for Partial Summary Judgment (#27). Defendant ("NELLIS") filed a response in opposition (#28) to which Plaintiff replied (#30).

I. Facts and Procedural History

On or about October 10, 2002, Hassan Bashir filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging that Defendant had failed to hire him because of his Ethiopian national origin. The EEOC began an investigation, and Defendant cooperated with the EEOC's requests for information. On August 7, 2003, the EEOC conducted on-site interviews of NELLIS management and employees. Following the interviews, the EEOC demanded more information regarding the national origin and race of NELLIS employees and job applicants.

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1 On September 11, 2003, the EEOC issued its Letter of Determination finding reasonable
2 cause to believe that violations of Title VII of the Civil Rights Act of 1964 ("Title VII") had
3 occurred. Specifically, the letter found reasonable cause to believe that Hassan Bashir had not been
4 hired due to his national origin and that other similarly situated Ethiopians had been discriminated
5 against. The letter also mentioned that NELLIS was invited to resolve the matter through
6 conciliation.

7 On September 16, 2003, another letter was sent inviting NELLIS to conciliate the matter
8 without resulting to litigation. The letter contained terms of a proposed settlement including a
9 monetary figure for damages, injunctive relief, and requiring NELLIS to provide training on Title VII
10 to employees. NELLIS responded on September 22, 2003 by letter agreeing to some terms and
11 proposing new or altered terms, and requesting additional information regarding the claim for
12 monetary damages. On September 23, 2003, NELLIS' counsel spoke with EEOC officials who
13 explained that the monetary damages were punitive in nature rather than compensatory. By letter the
14 same day, the EEOC confirmed the details of the phone conversation, requested a response to the
15 proposed monetary damages, and required a response by the end of the day on September 24, 2003.
16 The letter also invited a counter-offer on the monetary damages. The letter notified NELLIS that
17 failure to respond or provide a counter-offer by the deadline would result in the end of conciliation
18 and forwarding of the matter to the Legal Unit for possible litigation.

19 Mr. Winner, counsel for NELLIS, was dissatisfied with the EEOC's explanation for requiring
20 punitive damages. NELLIS did not respond to the September 23rd letter by the deadline. The EEOC
21 filed the present action on September 30, 2003. On November 19, 2004, Plaintiff filed the present
22 motion seeking to dismiss any defense Defendant may have based on a failure to conciliate.¹

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24 ¹Title VII commits the decision of whether to stay proceedings for further efforts to conciliate
25 or to dismiss the action to the sound discretion of the trial court. See EEOC v. Asplundh Tree Expert
26 Co., 340 F.3d 1256, 1259 n.1 (11th Cir. 2003)(citing 42 U.S.C. § 2000e-5(f)(1); EEOC v. Sears,
Roebuck and Co., 650 F.2d 14 (2d Cir. 1981)). A district court would prefer a defense based upon
an alleged failure of the EEOC to conciliate to be made by a motion to dismiss early in the litigation.
Since the issue of conciliation is jurisdictional and because a court has the option to stay proceedings,

1 II. Standard for Summary Judgment

2 Summary judgment may be granted if the pleadings, depositions, answers to interrogatories,
3 and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any
4 material fact and that the moving party is entitled to a judgment as a matter of law. See Fed. R. Civ.
5 P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the
6 initial burden of showing the absence of a genuine issue of material fact. See Celotex, 477 U.S. at
7 323. The burden then shifts to the nonmoving party to set forth specific facts demonstrating a
8 genuine factual issue for trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
9 587 (1986); Fed. R. Civ. P. 56(e).

10 All justifiable inferences must be viewed in the light most favorable to the nonmoving party.
11 See Matsushita, 475 U.S. at 587. However, the nonmoving party may not rest upon the mere
12 allegations or denials of his or her pleadings, but he or she must produce specific facts, by affidavit
13 or other evidentiary materials provided by Rule 56(e), showing there is a genuine issue for trial. See
14 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The court need only resolve factual
15 issues of controversy in favor of the non-moving party where the facts specifically averred by that
16 party contradict facts specifically averred by the movant. See Lujan v. Nat'l Wildlife Fed'n., 497
17 U.S. 871, 888 (1990); see also Anheuser-Busch, Inc. v. Natural Beverage Distribs., 69 F.3d 337, 345
18 (9th Cir. 1995) (stating that conclusory or speculative testimony is insufficient to raise a genuine
19 issue of fact to defeat summary judgment).

20 Summary judgment shall be entered "against a party who fails to make a showing sufficient
21 to establish the existence of an element essential to that party's case, and on which that party will
22 bear the burden of proof at trial." Celotex, 477 U.S. at 322. Summary judgment shall not be granted
23 if a reasonable jury could return a verdict for the nonmoving party. See Anderson, 477 U.S. at 248.

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waiting until the deadline for dispositive motions or for trial is disfavored.

1 III. Analysis

2 Several conditions precedent must be satisfied before the EEOC may bring suit. See EEOC
3 v. Pierce Packing Co., 669 F.2d 605, 607 (9th Cir. 1982). A charge of unlawful employment practice
4 must be filed with the EEOC. See 42 U.S.C. § 2000e-5(b); Pierce Packing, 669 F.2d at 607. The
5 EEOC must then notify the alleged wrongdoer, conduct an investigation and determine whether
6 reasonable cause exists to believe the charge. See id. If reasonable cause is found, the EEOC must
7 “endeavor to eliminate” the practices through informal methods including conciliation. Id. If the
8 EEOC determines that further conciliation efforts would be futile or nonproductive, it must notify the
9 employer in writing. See id. at 607. “Only after the preceding steps have been exhausted, and the
10 [EEOC] is unable to reach an acceptable conciliation, may the [EEOC] bring a civil action.” Id.; 42
11 U.S.C. § 2000e-5(f)(1).

12 Plaintiff has moved for summary judgment asking the Court to find that the law of the case
13 doctrine has resolved the jurisdictional issue of conciliation and that the EEOC’s conciliation efforts
14 satisfied the jurisdictional requirements. Because the Court finds that the EEOC satisfied the
15 jurisdictional requirements, it is not necessary to address the law of the case argument. In opposition
16 to Plaintiff’s motion, Defendant mainly seeks to show that Plaintiff’s efforts at conciliation were not
17 adequate. Primarily, Defendant relies on the Eleventh Circuit Court of Appeals case EEOC v.
18 Asplundh Tree Expert Co., 340 F.3d 1256 (11th Cir. 2003).

19 In Asplundh, the court found fault with the EEOC’s efforts to conciliate before filing suit. Id.
20 at 1260. Primarily the court faulted the EEOC for expanding a local incident that did not involve
21 Asplundh’s employees into a nationwide case against Asplundh without explaining to Asplundh how
22 it could be held liable for the actions of another entity’s employees. Id. at 1259-60. The court also
23 criticized the EEOC for failing to respond to a request by Asplundh’s newly retained counsel for
24 additional time to respond to the proposed conciliation agreement. Id. at 1258-60. The factual
25 circumstances in the present case are different.

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1 In the present case, a lengthy investigation determined that NELLIS had not hired Hassan
2 Bashir due to his national origin and that other similarly situated Ethiopians had been discriminated
3 against. This theory of liability was provided to NELLIS in the Letter of Determination sent
4 September 11, 2003. Additionally, unlike the employer's counsel in Asplundh, NELLIS' counsel
5 was involved in the investigation from the time the Charge of Discrimination had been filed until the
6 EEOC filed suit. Also, unlike Asplundh, NELLIS never requested an extension of the conciliation
7 period and failed to respond at all to the EEOC's letter on September 23, 2003 that set a deadline for
8 response and requested a counter-offer. The Court finds that the EEOC made a reasonable effort to
9 conciliate and that NELLIS' failure to present a further counter-offer or request an extension of time
10 to conciliate led the EEOC to reasonably believe that conciliation was futile. See id. at 1259, 1260.
11 Therefore, the Court grants Plaintiff's motion for partial summary judgment.

12 IV. Conclusion

13 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary
14 Judgment (#27) is **GRANTED**.

15 DATED this 7th day of September 2005.

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19 Kent J. Dawson
20 United States District Judge
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