

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

EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

Plaintiff

-vs-

THE ESAB GROUP, INC., d/b/a ESAB  
WELDING AND CUTTING PRODUCTS

Defendant

and

UNITED AUTOMOBILE, AEROSPACE  
AND AGRICULTURAL IMPLEMENT  
WORKERS OF AMERICA (UAW),  
LOCAL 1834

Rule 19 Defendant

CASE NO. 1:00 CV 2497

JUDGE: PATRICIA A. GAUGHAN

**MOTION TO WITHDRAW IN PART  
MEMORANDUM OF OPINION AND  
ORDER DATED FEBRUARY 19, 2002**

FILED  
2002 AUG 29 AM 10:10  
CLERK OF COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Plaintiff Equal Employment Opportunity Commission and Defendant ESAB Group Inc. ("the parties") jointly move this Court to withdraw section B.3 of its Memorandum of Opinion and Order dated February 19, 2002. Plaintiff EEOC's Memorandum in Support of Motion to Withdraw in Part Memorandum of Opinion and Order Dated February 19, 2002 is attached and sets forth the grounds for this motion.

oef 53

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

EQUAL EMPLOYMENT OPPORTUNITY )  
 COMMISSION )  
 )  
 Plaintiff )  
 )  
 -vs- )  
 )  
 THE ESAB GROUP, INC., d/b/a ESAB )  
 WELDING AND CUTTING PRODUCTS )  
 )  
 Defendant )  
 )  
 and )  
 )  
 UNITED AUTOMOBILE, AEROSPACE )  
 AND AGRICULTURAL IMPLEMENT )  
 WORKERS OF AMERICA (UAW), )  
 LOCAL 1834 )  
 Rule 19 Defendant )

CASE NO. 1:00 CV 2497  
 JUDGE: PATRICIA A. GAUGHAN  
**MOTION TO WITHDRAW IN PART  
 MEMORANDUM OF OPINION AND  
 ORDER DATED FEBRUARY 19, 2002**

2002 AUG 24 AM 10:10  
 FILED  
 CLERK OF DISTRICT COURT  
 NORTHERN DISTRICT OF OHIO  
 CLEVELAND

Plaintiff Equal Employment Opportunity Commission and Defendant ESAB Group Inc. (“the parties”) jointly move this Court to withdraw section B.3 of its Memorandum of Opinion and Order dated February 19, 2002. Plaintiff EEOC’s Memorandum in Support of Motion to Withdraw in Part Memorandum of Opinion and Order Dated February 19, 2002 is attached and sets forth the grounds for this motion.


WHEREFORE, the parties respectfully request that this Court withdraw section B.3 of its opinion.

Respectfully submitted,

NICHOLAS M. INZEO  
Acting Deputy General Counsel

C. LARRY WATSON  
Regional Attorney

JOHN D. SARGENT  
Supervisory Trial Attorney



SOLVITA A. MCMILLAN  
Bar # 0040011  
solvita.mcmillan@eeoc.gov  
Trial Attorney  
U.S. Equal Employment Opportunity Commission  
Cleveland District Office  
Tower City – Skylight Office Tower  
1660 West Second Street, Suite 850  
Cleveland, OH 44113-1412  
(216) 552-7453  
Fax (216) 552-7430  
Counsel for Plaintiff  
Equal Employment Opportunity Commission



HAYES C. STOVER  
PA I.D. # 01388  
hstover@kl.com  
Kirkpatrick & Lockhart LLP  
Henry W. Oliver Building  
535 Smithfield Street  
Pittsburgh, PA 15222  
(412) 355-6476  
Fax (412) 355-6501  
Counsel for Defendant The ESAB Group Inc.



## Background

The EEOC brought this litigation against ESAB under the Americans with Disabilities Act (ADA). The EEOC contended that ESAB had violated the confidentiality provisions of the ADA by posting a manning schedule with a notation that one of ESAB's employees, Ivan Stowers, was receiving a reasonable accommodation. The EEOC argued that this posting revealed information about Stowers's medical condition, in violation of the ADA, 42 U.S.C. § 12112(d)(4)(C).

On February 19, 2002, this Court granted ESAB's motion for summary judgment. In section B.3, the Court ruled that § 12112(d) applied only to information obtained through preemployment medical exams, voluntary exams that are part of an employee health program, or inquiries by the employer into the employee's ability to perform job-related functions. The Court concluded that none of these situations were applicable to ESAB's manning schedule. This section of the opinion was the only part that addressed the merits of the EEOC's case. The rest of the discussion concerned claims asserted by Stowers, who had intervened. Stowers has not appealed and his claims are not at issue in this motion.

On April 18, 2002, the EEOC filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit. The EEOC contended that this Court's reading of § 12112(d) was unduly restrictive. On April 26, 2002, the Sixth Circuit scheduled a mediation conference under Fed. R. App. P. 33 and 6th Cir. R. 33. Through this court-sponsored mediation, the EEOC and ESAB reached an agreement whereby the EEOC would move voluntarily to dismiss its appeal with prejudice. On July 30, 2002, the Sixth Circuit dismissed the EEOC's appeal pursuant to the Settlement Agreement.

As part of the Settlement Agreement, the EEOC and ESAB agreed to move jointly for

this Court to vacate section B.3 of the February 19, 2002 opinion. The Agreement provides that this Court's withdrawal of this portion of the opinion shall in no way be construed as a modification of the Court's decision, nor act in any way to affect the res judicata effect of the decision. In addition, the Settlement Agreement shall remain in force regardless of the Court's disposition of this joint motion.

### **Discussion**

A federal district court may exercise its discretion to vacate its judgment or opinion, in whole or in part, upon the parties' settlement. See, e.g., Gould v. Bowyer, 11 F.3d 82, 84 (7th Cir. 1993) ("Even if under [Seventh Circuit precedent] the district court was not required to vacate its decision, it was authorized to do so."); Novell, Inc. v. Network Trade Ctr., 187 F.R.D. 657 (D. Utah 1999) (indicating the court's intention to grant a joint motion to vacate in part); Lindsey v. Metro. Life Ins. Co., 929 F. Supp. 1435 (D. Wyo. 1996) (granting a joint motion to vacate); see also U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) ("The determination [to grant vacatur] is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. . . . Of course, even in the absence of . . . extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).").

In determining whether to withdraw section B.3 of its opinion, this Court must weigh the equities and balance the public interest against the interests of the parties. Thus, for example, in Motta v. District Director of INS, 61 F.3d 117, 118 (1st Cir. 1995) (per curiam), the First Circuit vacated the district court's judgment to effectuate a settlement between a federal agency and a private party after the agency lost in the district court. In that case, the INS was amenable to

complying with the result of the district court's judgment—granting a temporary stay of deportation proceedings—but appealed in order to seek reversal of what it viewed as “dangerous and erroneous precedent” in the district court. Id. The First Circuit, after encouraging the parties to settle at oral argument, found “no appreciable harm to the orderly functioning of the federal judicial system by vacating judgment.” Id. The court recognized that

it can be argued that depriving the public and the judicial system of the precedential value of the district court's opinion works a kind of harm. But we do not believe that such a species of harm is entitled to take priority over the parties' best interests. Placing the former above the latter would be inequitable. This case contrasts with the usual appeal, where vacatur is only one consideration among others in a settlement. Here, the INS, as a repeat player before the courts, is primarily concerned with the precedential effect of the decision below.

Id.; see also Novell, 187 F.R.D. at 661 (noting that “Novell is a ‘repeat player’ and . . . is concerned that notwithstanding the facts in the case at bar which distinguish it from other cases, a precedent could be perpetuated causing mischief in other cases and in future litigation.”). Moreover, although judicial precedents are “valuable to the legal community as a whole,” U.S. Bancorp, 513 U.S. at 26, the public value of settled precedent carries “considerably less weight” when it is a district court opinion, rather than an appellate opinion, that is being vacated, as “its precedential value . . . is limited to only its persuasive effect.” Russman v. Bd. of Educ., 260 F.3d 114, 122 n.2 (2d Cir. 2001). Finally, although some of these cases involve settlements that were conditioned on vacatur, the same considerations are in play even when the settlement is not so conditioned. See Microsoft v. Bristol Tech., 250 F.3d 152, 155-56 (2d Cir. 2001) (per curiam) (vacating the district court's order after the parties settled on appeal, apparently without conditioning the settlement on vacatur).<sup>1</sup>

---

<sup>1</sup>Much of the case law addresses motions to vacate the court's judgment entirely, thereby removing any claim- or issue-preclusive effect of the decision and potentially affecting the

In this case, as in Motta, the EEOC is a federal enforcement agency primarily concerned with the precedential effect of this Court's decision. As did the parties in Motta, the parties here reached their settlement with the assistance of the court of appeals. Thus, the considerations explained in Motta support this joint motion. Moreover, as this Court noted in its Order of May 2, 2002, denying ESAB's motion for attorney's fees, the EEOC relied on agency Enforcement Guidance in bringing this case. The EEOC is concerned that outside observers will view its decision not to pursue an appeal as tacit agreement with this Court's legal interpretation of § 12112(d). This, in turn, might raise questions about the continuing validity of the EEOC's Enforcement Guidance or the EEOC's willingness to defend its interpretation of the statute. By withdrawing section B.3 of the opinion, this Court will ensure that there is no confusion as to the EEOC's position. It will ensure that the legal issues are "left open to be decided another day in future litigation." Novell, 187 F.R.D. at 661-62.

### **Conclusion**

For the foregoing reasons, the EEOC and ESAB respectfully request that this Court withdraw section B.3 of its Memorandum of Opinion and Order dated February 19, 2002.

NICHOLAS M. INZEO  
Acting Deputy General Counsel

---

interests of third parties in a concrete manner. Cf. In re Memorial Hosp., 862 F.2d 1299, 1302 (7th Cir. 1988) ("A judgment also has preclusive benefits for third parties to the extent explained in Parklane Hosiery Co. v. Shore, 439 U.S. 322 [] (1979). . . . To the extent an opinion permits the invocation of Parklane, it may have great value to strangers—a value that one or another party to today's case may try to appropriate in the settlement, but which is not theirs to sell."). In this case, however, we do not ask the Court to vacate the judgment or remove the preclusive effect of its prior ruling. Rather, we ask only that the Court withdraw the part of its opinion that would have been at issue on appeal. Thus, preclusion does not need to be considered in the equitable balance here.



C. LARRY WATSON  
Regional Attorney

JOHN D. SARGENT  
Supervisory Trial Attorney



SOLVITA A. MCMILLAN

Bar # 0040011

[solvita.mcmillan@eeoc.gov](mailto:solvita.mcmillan@eeoc.gov)

Trial Attorney

U.S. Equal Employment Opportunity Commission  
Cleveland District Office

Tower City – Skylight Office Tower

1660 West Second Street, Suite 850

Cleveland, OH 44113-1412

(216) 552-7453

Fax (216) 552-7430

Counsel for Plaintiff Equal Employment  
Opportunity Commission

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

ESAB GROUP, INC.,

Defendant-Appellee.

No. 02-3431

SETTLEMENT AGREEMENT

The parties to this Settlement Agreement ("Agreement") are the Equal Employment Opportunity Commission ("EEOC") and the ESAB Group, Inc. ("ESAB"). This Agreement resolves the issues arising out of the EEOC's lawsuit filed against ESAB in the United States District Court for the Northern District of Ohio (No. 1:00-CV-2497) and the EEOC's appeal of the district court's summary judgment order to the United States Court of Appeals for the Sixth Circuit (No. 02-3431).

In consideration of the covenants and promises set forth below, the EEOC and ESAB agree as follows:

- 1. Within twenty days of the date of this Agreement, ESAB shall tender payment, by check made payable to Ivan Stowers, in the amount of \$5,000.00. As the parties agree that these payments represent compensatory damages under Title VII rather than lost wages, ESAB is not required to withhold taxes or to make any employer contributions for Federal Insurance Contribution Act (FICA) taxes, but it must issue an IRS form 1099 for this payment. ESAB shall deliver the check to Solvita McMillan, EEOC Cleveland District Office, 1660 West Second Street, Suite 850, Cleveland, OH 44113-1412. ESAB shall pay interest at the rate calculated under 28 U.S.C. § 1961 on any untimely or unpaid amounts.
2. Within ten days of receiving the check and form 1099 from ESAB, the EEOC shall move to dismiss with prejudice its appeal of this action (No. 02-3431)
3. Within ten days of the Sixth Circuit's dismissal of the EEOC's appeal, the EEOC and ESAB shall move jointly for the district court to vacate section B.3 of its Memorandum of Opinion and Order dated February 19, 2002. EEOC shall draft the Motion, subject to ESAB's review and concurrence with the content. This Agreement shall remain in force regardless of the district court's disposition of this joint motion. The Court's withdrawal of this portion of its opinion shall in no

way be considered as a modification of the Court's decision, nor act in any way to affect the res judicata effect of the decision.

- 4. Within thirty days of the date of this Agreement, ESAB shall review Ivan Stowers's personnel file and remove from it: (1) all doctor's notes, (2) any documents revealing that Mr. Stowers is disabled or receiving a reasonable accommodation for a disability, and (3) any other documents revealing information about Mr. Stowers's medical condition. Any documents removed from the personnel file during this review shall be placed in Mr. Stowers's separate confidential medical file. ESAB shall notify Solvita McMillan at the EEOC's Cleveland District Office when it has completed this review. ESAB shall permit a representative from the EEOC to inspect Mr. Stowers's personnel file to verify that ESAB has complied fully with the terms of this paragraph.
- 5. ESAB agrees that it will not appeal the district court's Order dated May 2, 2002, denying its motion for attorneys' fees.
- 6. Each party shall bear its own costs and attorneys' fees associated with this appeal.

Signed and dated:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By: Benjamin M. [Signature]

Title: Attorney

Date: July 9, 2002

ESAB GROUP, INC.

By: Hayes C. Storer

Title: Attorney

Date: June 27, 2002