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UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	*	CIV 99-4174
-vs-	*	MEMORANDUM OPINION AND ORDER
JOHN MORRELL & COMPANY Defendant.	*	

* *

The defendant, John Morrell & Company ("Morrell"), has filed a motion to dismiss or, in the alternative, for summary judgment, on the complaint filed against it by the Equal Employment Opportunity Commission ("EEOC") alleging violations of Title VII of the Civil Rights Act of 1964. Morrell argues that the EEOC's claims should be dismissed with prejudice, based on the EEOC's delay in bringing the complaint, the EEOC's purported failure to accord substantial weight to the findings of the Sioux Falls Human Relations Commission, the EEOC's purported failure to attempt conciliation prior to filing this lawsuit, and the existence of a consent decree between Morrell and the EEOC. For the reasons stated below, Morrell's motion to dismiss or for summary judgment is denied.

BACKGROUND

The EEOC's complaint is based on Morrell's alleged treatment of a former employee, Jose Haro ("Haro"). According to the complaint, Haro was subjected to a "racially and ethnically hostile work environment" at Morrell's meat processing plant in Sioux Falls, where workers referred to him with racial epithets and threw pieces of meat at him. Although Haro allegedly complained three times to Morrell's managers, Morrell failed to take any corrective action. On one occasion, another Morrell employee, Allen Johnson ("Johnson") called Haro a "dirty Mexican," and threw three pieces of meat which struck Haro in the back. In retaliation, Haro punched Johnson in the face. Both Haro

and the other employee were terminated for the altercation on May 26, 1995. Johnson was reinstated to employment on July 12, 1995, but Haro was apparently never reinstated.

Prior to Johnson's reinstatement, on June 8, 1995, Haro filed a charge of employment discrimination with the Colorado Civil Rights Division (Mot. Ex. 1). The charge was investigated by the Sioux Falls Human Relations Commission ("SFHRC") which, on November 15, 1995, issued a finding of "no probable cause." (Mot. Ex. 3.) The SFHRC specifically found that Haro's termination was not discriminatory, because both Haro and Johnson were terminated for the altercation.[1] As for the alleged racial harassment of Haro, the SFHRC discredited Haro's statement that he had told several supervisors about the harassment, based on Morrell's denial that any supervisor received such a complaint prior to the fight that led to Haro's termination. The SFHRC found that there was insufficient evidence that supervisors were specifically informed of or had knowledge of the harassment, and thus insufficient evidence to hold Morrell responsible for the harassment. Based on these findings, the SFHRC dismissed Haro's complaint.

Haro's claim was then transferred to the EEOC's District Office in Denver, Colorado, for review. In January of 1996, the EEOC determined that additional investigation was necessary, and Haro's claim was referred to an investigator on April 12, 1996. On August 27, 1996 the investigator notified Morrell that the EEOC was investigating Haro's claim, and asked them for certain information relating to Haro's claim. (Mot. Ex. 4.) After nearly three years of investigation by several EEOC investigators (Flores Aff. 14-16), on December 18, 1998, the EEOC issued a determination finding reasonable cause to believe that Haro was harassed and discharged based on his national origin. (Mot. Ex. 10.) On February 18, 1999, the EEOC sent Morrell a proposed Conciliation Agreement, which would have required Morrell to implement certain policies and procedures designed to eliminate violations of Title VII, to pay Haro an unspecified amount in compensation for "non-pecuniary losses and backpay," and to reinstate Haro to the same position or a position similar to the one held prior to his termination. (Mot. Ex. 11.) On March 3, 1999,

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[1] The SFHRC did not address the fact that Johnson was reinstated but Haro was not.

Morrell's attorney sent the EEOC a letter rejecting the Conciliation Agreement on the grounds that its conduct toward Haro did not violate Title VII and that the EEOC failed to give substantial weight to the SFHRC's determination of no probable cause. The letter said that Morrell would not change its mind "absent additional information from the Commission which would convince [it] that it did, indeed, engage in unlawful discrimination against [Haro], and that the [SFHRC] reached an erroneous result." The letter did not object to the EEOC's failure to specify an amount of compensation sought on behalf of Haro, and did not make a counteroffer to the Conciliation Agreement. According to an EEOC investigator, Ann Muniz, Morrell's attorney told her on the telephone that the EEOC's determination was "ridiculous." (Muniz Aff. ¶ 13.)

On March 15, 1999, the EEOC responded with a letter notifying Morrell of its determination that further conciliation efforts would be futile or non-productive, and of its pending review of the case for litigation. (Mot. Ex. 13.) The EEOC filed the instant complaint against Morrell on September 27, 1999, and served the complaint upon Morrell on October 19, 1999. The complaint asks for injunctive relief: (1) prohibiting Morrell from engaging in discriminatory employment practices; (2) requiring Morrell to institute polices, practices, and programs to proscribe workplace harassment based or race or ethnicity and retaliation against those who complain about discriminatory employment practices; and (3) requiring Morrell to eradicate the effects of past and present unlawful employment practices. The complaint also seeks compensation for "past and future pecuniary and non-pecuniary losses" Haro allegedly suffered as a result of Morrell's unlawful employment practices, as well as punitive damages.

DISCUSSION

Morrell's motion seeks dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, summary judgment under Rule 56(b). Because Morrell has presented matters outside the pleadings which relate to each of Morrell's defenses, and the Court is not excluding these matters, the Court will treat Morrell's motion as it would a motion for summary judgment under the standard set forth in Rule 56(c). Under this standard, "[s]ummary judgment is proper when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit

of all reasonable inferences, shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Pace v. City of Des Moines, 201 F.3d 1050, 1052 (8th Cir. 2000).

"Even though the EEOC is not bound by a specific statute of limitations in filing a Title VII lawsuit, district courts possess the discretionary power to provide appropriate equitable relief to a defendant who has been prejudiced by the EEOC's unreasonable conduct." EEOC v. Liberty Loan Corp., 584 F.2d 853, 856 (8th Cir. 1978). These equitable powers include the authority to dismiss a lawsuit filed by the EEOC "in the narrow situation where there has been an inordinate EEOC delay in filing suit and this delay has unduly prejudiced the delay of the defendant." Id. at 857.

The four years and four months which passed between the time Haro filed his claim (June 8, 1995) and the date on which the EEOC served Morrell with its complaint (October 19, 1999) constitutes an inordinate delay. In determining whether a delay is unreasonable, the courts do not look to the length of the delay itself, but rather to the facts of the particular case and the EEOC's explanations for the delay. See Liberty Loan, 584 F.2d at 857. In this case, the EEOC has not explained why its first investigator did not begin investigating Haro's claim until more than three months after she was assigned the case (April 12, 1996 to August 27, 1996), why it took two years and eight months of investigation to produce a finding of probable cause (April 12, 1996 to December 28, 1996), or why it took seven months from its notice that conciliation had failed to file the complaint and serve it upon Morrell (March 15, 1999 to October 19, 1999). The EEOC's assertion that no time was lost in transferring the case among its investigators does not explain these delays. Nor do its statements as to the weight of its caseload in the Denver office. See id. at 857 n.6 (noting that "the heavy workload faced by the E.E.O.C. has not been considered an adequate explanation for procrastination") (citing EEOC v. Bell Helicopter Co., 426 F. Supp. 785, 793 (N.D. Tex. 1976)); but see EEOC v. North Central Airlines, 475 F. Supp. 667, 671 (D. Minn. 1979) (considering the case load in the EEOC's Milwaukee office as one factor mitigating against a finding that a six year delay between the filing of the charge and the filing of the complaint was unreasonable).

Morrell, however, has failed to show that it was prejudiced by this inordinate delay. Morrell claims that it was prejudiced because eight witnesses have left its employment since Haro filed his claim and the memories of other witnesses have faded. Contrary to Morrell's argument, it is not clear whether any of the eight witnesses will be unavailable for trial, because Morrell's affidavits demonstrate only that the eight witnesses no longer work at Morrell, and that five of the witnesses are not listed in the current Sioux Falls white pages. Morrell has not demonstrated that it cannot locate even these five witnesses through more diligent methods, such as asking former co-workers who still work at Morrell for their whereabouts or conducting an internet search, as it presumably would if it actually needed these witnesses for trial.[2] Moreover, although common sense supports the assumption that available witnesses' memories of detail will have faded somewhat during the EEOC's delay, the prediction that they will faded sufficiently to prejudice Morrell has not yet been tested through pre-trial discovery. See EEOC v. Gard Corp., 795 F. Supp. 1066, 1070 (D. Kan. 1992) (declining to find prejudice, where the defendant failed to provide "concrete examples" of lost recollection); compare Whitfield v. Anheuser -Busch, Inc., 820 F.2d 243, 245-46 (8th Cir. 1987) (crediting the defendant's claim that its witnesses suffered from "impaired recollection," where the witnesses testified in their depositions that they could no longer accurately recall the events in question and plaintiff's counsel "had ample opportunity to cross-examine them to expose any lack of credibility"). Although Morrell may be able to make such a showing later, it has not done so at this point.

Morrell also claims that the delay has caused prejudice in the form of exposure to increased back-pay liability. The increase in potential back-pay liability is not by itself sufficient prejudice to warrant dismissal of the complaint. While Morrell cites EEOC v. Alioto Fish Co., Ltd., 623 F.2d 86, 88-89 (9th Cir. 1980), in support of its argument that the increase in potential back-pay liability caused by the EEOC's delay constitutes prejudice sufficient to warrant dismissal, the Alioto decision

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[2] It should also be noted the absence of five of the eight witnesses whom Morrell claims are no longer available cannot be traced to the EEOC's unreasonable delay. These witness all left Morrell prior to August 31, 1996 (Mem. Ex. 15), a date on which the EEOC could have filed suit without having caused an unreasonable delay.

considered back-pay liability due to a ten-year delay as a factor secondary in importance to, among other things, the death of certain defense witnesses and the EEOC conciliator, and the complainant's having forgotten whether she ever applied to work for the defendant. See id. This case presents an increase in potential back-pay liability over a period of time which is fifty percent shorter than in Alioto and, so far, without demonstrated losses of testimony or other evidence. While the EEOC's delay may justify some equitable remedy with regard to back pay,[3] the delay does not justify outright dismissal of the complaint. See Corning Glass Works v. Ovsanik, 644 N.E.2d 1327 (N.Y. 1994) ("Increased exposure for back pay liability does not implicate a party's ability to defend. . . . What harm exists can be redressed without resorting to the drastic remedy of dismissing the complaint.").

The Court cannot say that the EEOC failed to accord substantial weight to the findings of the SFHRC. The EEOC was required to accord substantial weight to the findings of the SFHRC under Section 706(b) of Title VII, see 42 U.S.C. § 2000e-5(b), and a failure to do so would constitute a "serious procedural default." EEOC v. The Johnson Co., 421 F. Supp. 652, 657 (D. Minn. 1975). Morrell argues that "unless and until the EEOC is prepared to affirm under oath, that it did, in fact, afford the findings of the Sioux Falls Human Relations Commission 'substantial weight' as required under § 706(b), the Complaint is subject to dismissal . . . ." (Mem. at 24.) Because the EEOC made such an affirmation in response to the motion to dismiss (Flores Aff. ¶¶ 11-13), the complaint cannot be dismissed on this ground. See The Johnson Co., 421 F. Supp. at 657 (refusing to dismiss the complaint where the affidavit of the District Director who made the reasonable cause determination stated that substantial weight was given to the contradictory findings of the local human rights commission which initially investigated the claim).

Nor is the complaint subject to dismissal based on the EEOC's purported failure to conciliate

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[3] The EEOC now claims that the complaint does not seek back-pay compensation. However, even if the EEOC changes its mind and decides that the complaint is asking for such relief, and depending on the circumstances, the Court might deny at least some portion of back pay liability to the EEOC. See Albemarle Paper Co. v. Moody, 422 U.S. 405, 424, 95 S. Ct. 2362, 2375, 45 L. Ed. 2d 280 (1975) ("To deny backpay because a particular cause has been prosecuted in an eccentric fashion, prejudicial to the other party, does not offend the broad purposes of Title VII.")

with Morrell. A failure by the EEOC to make a good-faith attempt to conciliate a claim, see 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.24, can constitute cause for dismissing a complaint. See EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974) (stating that "it is beyond dispute that a Commission lawsuit brought before any attempt at conciliation is premature," and holding that the EEOC's failure to send a notice of termination of conciliation was grounds for dismissing the EEOC's complaint without prejudice). While "[t]he EEOC is obligated to make good faith efforts to conciliate employees' claims with employers before filing suit . . . the Commission is under no duty to attempt further conciliation after an employer rejects its offer." Gard Corp., 795 F. Supp. at 1069 (internal citation omitted). Although Morrell now objects to the proposed Conciliation Agreement on the ground that it failed to demand a specified sum in compensation for Haro's injuries, it made no such objection in March of 1999. Instead, Morrell flat-out rejected the proposed *Conciliation Agreement on the grounds that there was no basis for liability.*[4] *After this rejection, the* EEOC had no duty to continue efforts at conciliation. See id.

Finally, Morrell argues that the complaint is barred by the doctrine of res judicata and collateral estoppel. "Under the doctrine of res judicata, a judgment based on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.5, 99 S. Ct. 645, 649 n.5, 58 L. Ed. 2d 552 (1979). "Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action." Id. Morrell argues that these doctrines bar this lawsuit because the complaint's prayer for relief overlaps the terms of a Consent Decree entered into between the EEOC and Morrell in a previous case, EEOC v. John Morrell & Co., CIV 98-4131 (D.S.D., decree entered, Aug. 13, 1999).

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[4] Although Morrell characterizes the proposed Conciliation Agreement as "take-it-or leave-it" (Mem. at 25, 26), the cover letter which accompanied the proposed Agreement refutes that characterization, by inviting Morrell to "submit a counter proposal in the event the terms of the Agreement are not entirely agreeable" (Mem. Ex. 11). Instead of offering such a counter proposal, Morrell simply rejected the Agreement. (Mem Ex. 12 at 8 ("[My client is not inclined to offer any counterproposal to the EEOC's proposed Conciliation Agreement at this time.").)

Under appropriate circumstances, the doctrines of res judicata and collateral estoppel can apply to consent decrees. See EPA v. Tyson Foods, Inc., 921 F.2d 1394, 1403-5 (8th Cir. 1990); People Who Care v. Rockford Bd. of Educ., 68 F.3d 172m 178 n.5 (7th Cir 1995) (special requirements for collateral estoppel). Neither doctrine, however, applies here. Res judicata does not apply because the two lawsuits involved different transactions or occurrences. See L-Tec Electronics Corp. v. Cougar Electronic Org., Inc., *198 F.3d 85, 87-88 (2d Cir. 1999).* Collateral estoppel, or issue preclusion, does not apply either, because the two cases do not involve the same legal issues the prior case raised issues of discrimination based on sex, while this case involves issues of discrimination based on race and ethnicity. The instant complaint does seek some relief which is already provided in the Consent Decree, by asking for an injunction requiring Morrell to institute and carry out policies, practices and procedures that proscribe retaliation against those who complain about discriminatory employment practices. (The Consent Decree already requires Morrell to perform some of these duties, by maintaining a policy proscribing retaliation against any employee who complains about sexual harassment or who files a discrimination claim regarding sexual harassment.) The appropriateness of such injunctive relief can be determined by the Court, in light of the Consent Decree and the established facts of this case, if and when the EEOC prevails on its complaint. Accordingly,

IT IS ORDERED that Morrell's motion to dismiss or, alternatively, for summary judgment is denied.

Dated this 16th day of June, 2000.

BY THE COURT:

Lawrence L. Piersol
Chief Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: Shelly Marquiss
(SEAL) DEPUTY