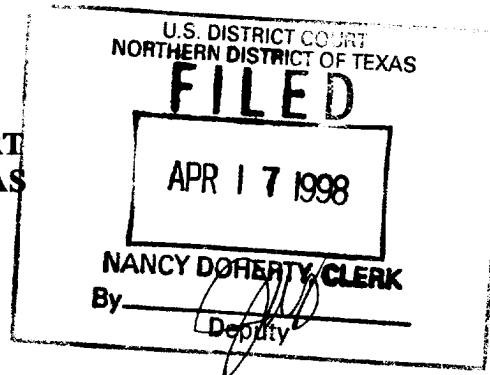


APR 17 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



**EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff,**

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v.

CA3:97-CV-1690-BC

**THE COOPER AEROBICS CENTER,
THE COOPER INSTITUTE FOR
AEROBICS RESEARCH and COOPER
AEROBICS ENTERPRISES,
Defendants.**

ORDER

Before the Court is **Defendants’ Motion for Reconsideration of Order Granting Leave to Intervene**, filed March 25, 1998. Having reviewed the defendants’ motion, the Court remains of the opinion that Karen C. Austen (“Austen”) should be permitted to intervene. Accordingly, the Court **ORDERS** that the defendants’ motion be **DENIED**.

In their motion for reconsideration, the defendants contend that Austen should not be permitted to intervene because her motion for leave to intervene was not timely. To determine if a motion to intervene was timely, the court must consider four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of her interest in the case before she petitioned for leave to intervene; (2) the extent of the prejudice to that the existing parties to the litigation may suffer as a result of the would-be intervenor’s failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely. *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994)(citation omitted).

33

In determining whether a motion to intervene is timely, “absolute measures of timeliness should be ignored.” *Id.* Further, the timeliness factor is not used as “a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner.” *Id.*

The first factor the court must consider is the length of time during which the would be intervenor actually knew or reasonably should have known of her interest in the case before she petitioned for leave to intervene. *Id.* The Fifth Circuit has explained that under the first factor, the court does not consider the time that the would-be intervenor first became aware of the pendency of the case. *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-65 (5th Cir. 1977). Instead, the inquiry should focus upon the speed which the would-be intervenor acted when she first discovered that her interests would no longer be protected by the original parties. *Espy*, 18 F.3d at 1206 (citation omitted).

In her response to the defendants’ motion for reconsideration, Austen contends that the timeliness of her motion should be considered from the time in which Steve Thorpe replaced Chrys Meador as the attorney in charge of the EEOC’s case against the defendants. According to Austen, at the time she became aware of her interests in the suit, the attorney in charge for the EEOC was Chrys Meador (“Meador”). *Austen’s Resp., Ex. A ¶¶ 4-5*. In her affidavit, Austen explains that she had a good relationship with Meador and believed that with Meador in charge, the EEOC could adequately represent her interests in this action. *Id.* at ¶¶ 5, 8, 10. However, Austen further explains that in December of 1997, Meador left the EEOC and Steve Thorpe (“Thorpe”) became the new lead attorney for the EEOC. *Id.* at ¶ 6. According to Austen, there is a strained relationship between her and Thorpe, and consequently, she no longer feels that the EEOC can adequately represent her

interests in this suit. *Id.* at ¶¶ 8-9.¹ Austen explains that once she realized that there were problems between her and Thorpe, she waited to seek private counsel for five weeks to determine if relations with Thorpe would improve. *Id.* Austen moved to intervene on January 22, 1998.

After taking all of the circumstances into consideration, the court concludes that the first factor weighs in Austen's favor. The court finds that Austen moved to intervene promptly after she discovered that due to personality conflicts between her and Thorpe, the EEOC could no longer adequately represent her interests. Thus, the court will next consider the second factor.

The second factor the court must consider is the extent of the prejudice to the existing parties as a result of the applicant's delay in seeking intervention. *Espy, supra.* Here, the defendants argue that they will suffer prejudice if Austen is permitted to intervene because Austen waited to intervene until after her deposition was completed. According to the defendants, because Austen requests additional relief from that requested by the EEOC, it will be necessary to reopen discovery. The court finds this argument unconvincing. It is significant to note that the defendants deposed Austen on December 5, 1997. As explained previously, Meador left the EEOC, and Thorpe replaced her, in December of 1997. Consequently, at the time of her deposition, Austen was not yet aware that the EEOC could not adequately represent her interests. As a result, it was not Austen's alleged delay in seeking intervention that caused the prejudice to the defendants. *See Espy, 18 F.3d at 1206 (explaining that prejudice is measured by the delay in seeking intervention, not the inconvenience to the existing parties by allowing the intervenor to participate).* Accordingly,

¹In a letter to the court dated 4/14/98, Mr. Thorpe stated, in pertinent part, as follows: "I have before me Ms. Austen's response and affidavit in support thereof. While I am distressed that Ms. Austen has reached the conclusion that she has, I am also sure that the sentiments expressed in her affidavit are sincere. Accordingly, and in the interests of justice, plaintiff concurs with Austen's response and asks the Court to deny defendant's motion to reconsider."

the court finds that the second factor weighs in Austen's favor.

The third factor in the timeliness inquiry is the extent of the prejudice the would-be intervenor would suffer if its motion to intervene were denied. *Espy*, 18 F.3d at 1206. The Fifth Circuit has explained that the rationale underlying the third factor is the principle that district courts "should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) than if [she] qualifies for intervention under section (b)." *Stallworth*, 558 F.2d at 266.

In this case, Austen qualifies for intervention of right under section (a). See **Order, March 18, 1998**. Further, Austen contends that her interests would not be adequately represented by the EEOC in the event that she is not permitted to intervene. The court finds that this factor weighs in favor of permitting Austen to intervene.

Lastly, the court must consider whether there are any unusual circumstances militating either for or against a determination that the application is timely. *Espy*, 18 F.3d at 1207. In *Stallworth*, the Fifth Circuit explained that where a would-be intervenor could articulate a convincing justification for her tardiness in moving to intervene, this factor would militate in favor of finding that her petition was timely. *Stallworth*, 558 F.2d at 266.

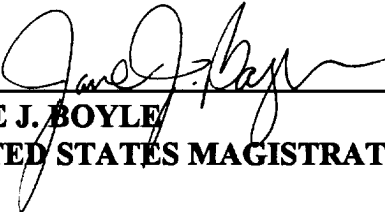
In this case, as explained previously, the attorney in charge of Austen's suit left the EEOC in December of 1997. Until that time, Austen contends that the EEOC could adequately represent her interests. However, in light of her personality conflict with Thorpe, Austen contends that the EEOC cannot adequately represent her interests in this case. Thus, the justification for Austen's tardiness was the change in attorneys at the EEOC. The court finds that this factor weighs in favor of permitting Austen to intervene.

In sum, the court finds that Austen promptly moved to intervene in this action after Thorpe

replaced Meador as the attorney in charge for the EEOC. The prejudice to the defendants -- possibly having to depose Austen again -- was caused by the temporal proximity between Austen's deposition and Meador's resignation, not by Austen's delay in moving to intervene. Further, after taking into account the unusual circumstance in this case and the fact that Austen qualifies for intervention of right under section (a), the court concludes that Austen's motion to intervene was timely.

Accordingly, the court **ORDERS** that the defendants' motion for reconsideration, filed March 25, 1998, be **DENIED**.

SO ORDERED. April 17th, 1998.



JANE J. BOYLE
UNITED STATES MAGISTRATE JUDGE