

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
JASPER DIVISION

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U.S. DISTRICT COURT
N.D. OF ALABAMA

EQUAL EMPLOYMENT OPPORTUNITY)
COMMISSION,)

Plaintiff,)

v.)

Civil Action No. CV-03-RRA-0502-J

RPH MANAGEMENT, INC., d/b/a)
McDONALD'S,)
an Alabama Corporation,)

Defendant.)

DEFENDANT'S MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b) defendant RPH Management, Inc., d/b/a McDonald's ("RPH") respectfully moves this Court to dismiss with prejudice the claims against it for lack of subject matter jurisdiction. In support of this motion, RPH states as follows:

1. The Equal Employment Opportunity Commission ("EEOC") filed the complaint in this action on March 6, 2003. Service was accomplished by waiver pursuant to Federal Rule of Civil Procedure 4(d)(3).

2. The EEOC has instituted this action pursuant to the Americans with Disabilities Act of 1990.

3. In its Answer, RPH has denied all alleged discrimination at issue in this action.

4. The EEOC has failed to allege in its complaint that all conditions precedent to this action have been met to permit it to file this action, which alone supports dismissal of this complaint for lack of subject matter jurisdiction. EEOC v. Griffin Wheel Co., 360 F. Supp. 424, 426 (N.D.

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Ala. 1973). In fact, the EEOC could not truthfully make such an allegation. This is because the EEOC failed to engage in good faith conciliation efforts, which is a condition precedent to the EEOC's filing suit. EEOC v. United States Pipe & Foundry Co., 375 F. Supp. 237, 244 (N.D. Ala. 1974) ("in order for the Commission to bring suit under Section 706(f)(1), it *must at least make a bona fide effort to conciliate a charge with all respondents before bringing suit*") (emphasis in original). See also 29 C.F.R. § 1601.24(a), which provides that the Commission "shall endeavor to eliminate [alleged unlawful practices] by informal methods of conference, conciliation, and persuasion" and "shall attempt to achieve a just resolution."

5. As will be shown in the brief to be filed in support of this motion, the EEOC refused to consider a reasonable offer made in good faith by RPH on September 27, 2001, two weeks after a cause determination was received by RPH. In response to this reasonable offer, the EEOC issued a statement on September 30, 2001 that conciliation efforts had failed. This statement was issued despite the fact that the EEOC never engaged in any discussion with RPH regarding the resolution of the charge underlying this action. The EEOC later refused to communicate with RPH. Approximately eighteen months after RPH made its good faith offer, which was entirely ignored, the EEOC filed this action on March 6, 2003. Such conduct does not equate with the plaintiff's statutory mandate to conciliate, and dismissal is proper. EEOC v. Sears, Roebuck & Co., 490 F. Supp. 1245, 1258 (M.D. Ala. 1980) ("total failure to conciliate the issues sued upon cannot be cured after civil suit is brought" and dismissal is thus warranted).

6. Because the EEOC must engage in good faith conciliation efforts in order for subject matter jurisdiction to exist, this case should be dismissed with prejudice. EEOC v. Magnolia Elec.

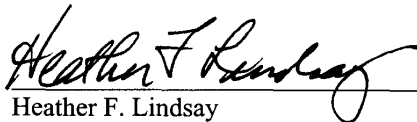
Power Assoc., 635 F.2d 375, 378 (5th Cir., Jan. 26, 1981)¹ (“When the EEOC ignores, fails to obey or capriciously deprives a respondent of its administrative procedures, no suit may be prosecuted against that respondent regardless of prejudice); Patterson v. American Tobacco Co., 535 F.2d 257, 272 (4th Cir.) (claim should be dismissed where Commission failed to engage in conciliation efforts), cert. denied, 429 U.S. 920 (1976); EEOC v. Hickey-Mitchell Co., 507 F.2d 944, 948 (8th Cir. 1974) (affirming dismissal because the EEOC failed to engage in good faith conciliation efforts); EEOC v. Wilson & Co., 452 F. Supp. 202, 205 (W.D. Okla. 1978) (court lacked subject matter jurisdiction because the EEOC failed to engage in good faith conciliation efforts).

WHEREFORE, RPH respectfully requests that this action be dismissed with prejudice for lack of subject matter jurisdiction based on the EEOC’s grossly arbitrary conduct in failing to engage in good faith conciliation efforts.

Respectfully submitted,



Charles A. Powell, III



Heather F. Lindsay
Attorneys for RPH Management, Inc.

¹ In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

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CERTIFICATE OF SERVICE

I hereby certify that I have served the above and foregoing by placing a copy of the same in the United States Mail, properly addressed and postage prepaid, on this the 22 day of April, 2003, upon the following:

Charles E. Guerrier
Prisca M. DeLeonardo
Mason D. Barrett
Equal Employment Opportunity Commission
Ridge Park Place
1130 22nd Street, South, Suite 2000
Birmingham, Alabama 35205-2881

A handwritten signature in black ink, appearing to read "C. Guerrier", is written over a horizontal line.

Of Counsel