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

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

ENTERED
APR 28 2004

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

SAMANTHA A. ROBICHAUD,

Plaintiff-Intervenor,

vs.

RPH MANAGEMENT, INC., d/b/a McDONALD'S,

Defendant.

CIVIL ACTION NO. 03-RRA-0502-W

REPORT AND RECOMMENDATION

(Re Defendant's Motion to Dismiss, ct. doc. 3)

Before the court is the defendant's motion to dismiss. The Equal Employment Opportunity Commission (EEOC) initiated this action against the defendant. The charging party, Samantha Robichaud, was later granted leave to intervene, and she filed her own discrimination complaint. On February 6, 2004, the undersigned entered an order (ct. doc. 48) setting out the nature of the case, the issues, certain statements of law, and a date for oral argument. At oral argument — a transcript of which has been submitted by the defendant — defendant's counsel stated that the defendant is asking for the dismissal of the EEOC

53

complaint only, and that the granting of the defendant's motion would leave Robichaud's action untouched.[1]

Evidence

The parties submitted a great deal of evidence, which includes the following. The EEOC's determination of liability included an offer that the defendant propose terms for a conciliation agreement. The letter stated, in part:

> The remedies for violations of the statutes we enforce are designed to make the identified victims whole and to provide corrective and preventive relief. These remedies may include, as appropriate, an agreement by the Respondent to not engage in unlawful employment practices, placement of identified victims in positions they would have held but for the discriminatory actions, back pays, restoration of lost benefits, injunctive relief, compensatory and/or punitive damages, and notice to employees of the violation and the resolution of the claim.

In a letter dated September 27, 2001, the defendant's counsel responded, in part:

> Although we strongly disagree that any constructive discharge claim would survive a motion for summary judgment in federal court, Respondent is willing to offer back pay at the rate of $5.75/hr. from the date she quit until October 1, 2001, based upon the average of her pay period hours. We calculate that to be 6009.44, which when added to the above differential totals $6,088.94. (Respondent would be entitled to an offset for interim earnings.) We do not believe that any damages for pain and suffering are provable, given the lack of credible evidence of harassment at work and given Charging Party's statement to her manager that she has accommodated herself to negative public reactions for her entire life.
>
> We think the above represents a reasonable compromise of these claims short of any further proceedings. The Commission may have questions or wish to discuss this further, and if so please do not hesitate to call.

[1] Robichaud has not participated in this motion.

On September 27, 1001, EEOC investigator Brenda Owens received the defendant's settlement offer, and immediately contacted Robichaud. Robichaud stated, among other things, that the offer was tantamount to being kicked in the face, and that she felt that McDonald's was not making a real attempt to settle the case. Owens did not talk to Robichaud about making a counter-offer or attempting to get the defendant to make a better offer. Shortly thereafter, Robichaud's attorney sent a letter to Owens stating that the defendant's offer was unacceptable and that the defendant had no counter-offer at that time, and requested a right-to-sue letter. On Sunday, September 30, 2001, W. D. Files, Jr., Enforcement Manager, reviewed the Robichaud file which had been submitted on Friday, September 28, 2001, and concurred that conciliation had failed. In a letter to the defendant dated September 30, 2001, the EEOC stated that it had been determined that "further conciliation would be futile or nonproductive," and that "no further efforts to conciliate this case will be made by the EEOC." The EEOC states the inadequacy of the defendant's offer:

> Defendant's correspondence of September 27, 2001, focused primarily on challenging the determination of the Commission rather than seeking resolution of the dispute. Defendant's offer was for back pay only. There was no offer for anything else listed in the Letter of Determination - the harassment through demeaning comments; the direct evidence that Defendant regarded Charging Party as disabled due to her facial disfigurement and, for that reason, did not consider her for promotion; the evidence of pretext; or the evidence of constructive discharge. Defendant did not offer to re-instate Charging Party and/or promote her; it did not offer to restore Charging Party's lost benefits; it did not offer any type of injunctive relief, such as training employees on the Americans with Disabilities Act; there was no offer of compensatory damages, including damages for pain and suffering and mental anguish; there was no offer to pay Ms. Robichaud's attorney's fees; and there was no offer by McDonald's to post a notice of the violation and the resolution of the violation.

EEOC's Supplemental Brief in Opposition to Motion to Dismiss, pp. 7-8. The EEOC contends that the degree of this inadequacy, along with Robichaud's refusal to accept the offer, was sufficient reasonably to conclude that conciliation had failed.

The defendant contends, however, that the EEOC failed in its duty to engage in good faith conciliation negotiations by summarily cutting off dialogue at this point. Representatives of the EEOC testified that conciliation is to include persuasion and that filing a lawsuit is to be used as a last resort. One EEOC representative testified in his deposition that "you have to assess what a charging party wants, what a respondent is willing to offer, and determine where you need to go from there." *Gosa Deposition*, pp. 19-20. Gosa further testified that the investigator has a duty to tell the charging party what the EEOC is expecting in terms of resolution. Supervisor Kennedy testified that if he had been the investigator he would have asked Robichaud what amount she wanted for pain and suffering, and Acting District Director Burris testified that Owens should have gotten a figure from Robichaud as to the amount of compensatory damages she wanted. In fact, if a charging party proved unreasonable, the Birmingham District had executed conciliation agreements unsigned by the charging party:

> Q. Aren't there occasions when the EEOC and the Respondent will develop an agreement that is unsigned by the Charging Party?
>
> A. It has happened.
>
> Q. It is covered in the compliance manual, isn't it?
>
> A. Yes.
>
> Q. Have y'all never done that at the Birmingham office?

> A. We have. This usually arises when the charging party is completely unreasonable and asks for blood or money equivalent, and we see a public purpose to be served in some of the other relief that we can obtain from a Respondent. We have executed those types of agreements. It doesn't happen that often because there aren't that many crazy people out there, but occasionally we get one. Then we say we are going to execute an agreement that will satisfy the Commission. We can't satisfy you.

Id.

Robichaud testified that she was willing to keep the settlement process open, and expected the defendant to make another offer. Owens, however, did not remember whether she even considered asking the defendant for an additional offer. Burris "would have made either the supervisor or the investigator go back to the respondent RPH and see if they wanted to make a counter offer or whether they wanted to hold to the $6,088.94." *Burris Deposition,* p. 129.

The defendant suggests that internal EEOC time pressure to conclude this case might explain why the EEOC ended the conciliation process when it did:

> A conciliation failure closes the file on that charge for purposes of evaluating case loads of investigators and their enforcement units. (*Burris Dep.* 36, 39-40.) Kennedy pressures his investigators to close as many files as legitimately possible prior to the end of the fiscal year. (*Kennedy Dep.* 69.) When Files issued the conciliation failure letter, the Robichaud file was no longer counted as a part of Owens' case load. (*Burris Dep.* 39-40.) In 2001, after conciliation failure was noted, the file moved to the Legal Unit to review for purposes of issuing a right to sue or seeking litigation authority. (*Burris Dep.* 39, 87.) [Defendant's counsel's] October 4, 2001 letter requesting that conciliation be re-opened was ignored. (*Owens Dep.* 6; *Gosa Dep.* 187-88.)

Defendant's Supplemental Brief, p. 14. Also, the charging party is entitled to a notice of right to sue after the expiration of 180 days from the date the discrimination charge was filed. That time period had expired in Robichaud's case.

Law/Discussion

> The specific language of Title VII says that the Commission, after its investigation has confirmed reasonable cause to believe that the charge is true, "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. s 2000e-5(b). In evaluating whether the EEOC has adequately fulfilled this statutory requirement, the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances. *Marshall v. Sun Oil Company (Delaware)*, 605 F.2d 1331, 1335-36 (5th Cir. 1979). The EEOC has fulfilled its statutory duty to attempt conciliation if it outlines to the employer the reasonable cause for its belief that Title VII has been violated, offers an opportunity for voluntary compliance, and responds in a reasonable and flexible manner to the reasonable attitudes of the employer. *Id.* at 1335-39.

Equal Employment Opportunity Commission v. Klinger Electric Corporation, 636 F. 2d 104, 107 (5th Cir. 1981). Conciliation is an important part of the EEOC's work because of "Congress's determination that administrative tribunals are often better suited 'to handle the complicated issues involved in employment discrimination cases,' and that 'the sorting out of the complexities surrounding employment discrimination can give rise to enormous expenditure of judicial resources in already heavily overburdened Federal district courts.' *Pearce v. Barry Sable Diamonds*, 912 F.Supp. 149, 153 (E.D. Pa. 1996)(internal citations omitted)." *Dinkins v. Charoen Pokphan USA, Inc.*, 133 F. Supp. 2d 1237, 1241(M. D. Ala. 2001.) Negotiations are expected and counter-offers are typical.

> Every litigator knows that few cases can be settled with a single offer, because even if the first offer is reasonable the offeree seldom believes that the opening offer is the final offer. In fact, litigators are expressly advised to start with an inflated demand or a stingy offer in order to leave room for further bargaining. Roy D. Simon, Jr., The *Riddle of Rule 68,* 54 GEO. WASH. L. REV. 1, 29 n. 162 (1995) (citing X. FRASCOGNA, JR. & H. HETHERINGTON, NEGOTIATION STRATEGY FOR LAWYERS 222 (1984)).

Id. at 1244, n 18. Indeed, "bad faith may exist if the agency refuses to continue negotiations with an employer who has extended a counteroffer to the agency's opening offer." *Id.* at 1241.

> One circuit has recognized that "[t]o withdraw from discussions while the other party is offering to negotiate the broad issues, merely because an impasse has occurred as to the charging party, smacks more of coercion than of conciliation." *EEOC v. Pet, Inc.*, 612 F.2d 1001, 1002 (5th Cir. 1980). Thus, the court concluded, "[s]uch an all-or-nothing approach on the part a commission, one of whose most essential functions is to attempt conciliation, will not do." *Id.* (citation omitted.)

E. E. O. C. v. Dial Corp., 156 F. Supp. 2d 926, 941, n. 10 (N. D. Ill. 2001). "However, after an employer rejects an offer made by the EEOC, the EEOC has no further duty to conciliate." *Equal Employment Opportunity Commission v. One Bratenahl Place Condominium Association*, 644 F.Supp. 218, 219 (N.D. Ohio 1986).

In the case before this court, the EEOC presented the defendant no dollar offer of settlement, but merely stated the types of relief to which it determined Robichaud was entitled. In response to the defendant's settlement offer, Owens merely presented to Robichaud the defendant's offer of back pay and its statement that it did not believe the evidence supported Robichaud's other claims.[2] Unsurprisingly, Robichaud indignantly rejected the offer. Still, Robichaud was open to attempts to settle her claims. Owens, however, did not mention to Robichaud the possibility of making a counter-offer or seeking to obtain a better offer from the defendant, but seemed satisfied to consider conciliation over, in spite of the defendant's settlement offer having ended with the statement that "[t]he Commission may have questions or wish to discuss this further, and if so please do not hesitate to call" and Owens' sure knowledge that the first offer of negotiators, including lawyers, is rarely the final offer.[3] In fact, even EEOC witnesses testified that Owens was wrong in letting conciliation efforts end at this point, and that Files should have had Owens seek a better offer. It is concluded that the EEOC made no real effort to conciliate Robichaud's claims.

Recommendation

Wherefore, it is hereby recommended that the defendant's motion to dismiss the EEOC's complaint be granted. Robichaud's intervenor complaint would then proceed alone.

DONE this 28th day of April, 2004.

Robert R. Armstrong
United States Magistrate Judge

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[2] The defendant also stated that it did not believe the back-pay claim would survive a motion for summary judgment in court.

[3] In an October 4, 2001 letter, the defendant's attorney requested that conciliation be re-opened.