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

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	**CASE NO.1:03CV2023**
	)	**JUDGE KATHLEEN M. O'MALLEY**
Plaintiff,	)	
v.	)	
S & Z TOOL & DIE CO., INC.	)	**DEFENDANT'S MEMORANDUM IN OPPOSITION TO MOLLY BARON'S MOTION TO INTERVENE**
Defendant.	)	

I. INTRODUCTION.

Four years after she filed a charge with the Equal Employment Opportunity Commission ("EEOC"), and over two years since the EEOC started settlement discussions with Defendant, S & Z Tool & Die Co., Inc. ("S&Z"), Molly Baron ("Ms. Baron") now claims that the EEOC is not adequately representing her interests in this matter and has filed a Motion to Intervene ("Motion"). Ms. Baron's Motion is facially deficient since she cannot meet the basic requirements for intervention set forth in Civ.R. 24 of the Federal Rules of Civil Procedure. Accordingly, Ms. Baron's Motion to Intervene must be denied.

II. FACTUAL BACKGROUND

In August 1999, Ms. Baron allegedly applied for a position as a general laborer at S&Z. On October 7, 1999, after she was not hired, Ms. Baron filed a Charge of Discrimination with the EEOC. On March 21, 2001, the EEOC issued a letter to S&Z which stated that the investigation revealed that S&Z's actions with regard to hiring were discriminatory. After receiving this letter, Ms. Baron did nothing, and obviously believed that the EEOC was adequately protecting her interests.

On June 18, 2001, the EEOC issued a Determination Letter which also stated that there was reasonable cause to believe that Ms. Baron had been discriminated against because of her sex when she was not hired. After receiving this letter, S&Z and the EEOC began lengthy settlement discussions. These settlement discussions continued from June 2001 through January 2003. During this 18 month time period, Ms. Baron did nothing.

In January 2003, settlement discussions between the EEOC and S&Z ended. When the settlement discussions ended, Ms. Baron still did nothing. On October 30, 2003, the EEOC filed its Complaint against S&Z. During this 10 month period, Ms. Baron did not hire her own attorney and file a complaint against S&Z.

Now, after the EEOC and S&Z have resumed settlement discussions, Ms. Baron apparently claims that the EEOC is no longer adequately protecting her rights and interests.

III. LAW AND ARGUMENT

Federal Rule of Civil Procedure 24(a) provides:

> Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant

> claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a) is interpreted as establishing a four-prong test that must be satisfied in order for the district court to grant intervention as of right: (1) the application for intervention is timely; (2) the applicant has a substantial legal interest in the action; (3) the applicant's ability to protect that interest may be impaired in the absence of intervention; and (4) the existing parties do not adequately represent the applicant's interest. *Johnson v. City of Memphis*, 73 Fed. Appx 123, 131 (6th Cir. 2003) . The applicant has the burden of demonstrating the four prongs, and the failure to satisfy any of the four prongs prevents the applicant from intervening as of right. *Id.*

Significantly, the failure to meet any one of the elements of Civ.R. 24(A) demands the denial of the right to intervene. *Stupak-Thrall v. Glickman,* 226 F.3d 467, 471 (6th Cir. 2000). Here, Ms. Baron cannot meet the first, third or fourth prongs of this test. Thus, Ms. Baron's failure to meet the basic requirements of a Rule 24 motion to intervene is fatal and her Motion to Intervene must be denied.

A. Ms. Baron's Motion Was Not Timely Filed.

First, Ms. Baron's Motion must be denied because it was not timely. In the context of a motion to intervene, the following five factors should be considered in determining timeliness: (1) the point to which the suit has progressed; (2) the purpose for which intervention is sought; (3) the length of time preceding the application during which the

proposed intervenors knew or should have known of their interest in the case; (4) the prejudice to the original parties due to the proposed intervenor's failure to promptly intervene after they knew or reasonably should have known of their interest in the case; and (5) the existence of unusual circumstances militating against or in favor of intervention. *Johnson, supra*, at 131. The determination of whether a motion to intervene is timely should be evaluated in the context of all relevant circumstances. *Id.*

Here, in reality, this suit has been progressing for over four years, since the time that Ms. Baron filed her charge against S&Z. Despite the fact that the EEOC stated in June 2001 that it had found discrimination, Ms. Baron did nothing. Moreover, even though Ms. Baron was aware of the settlement negotiations which have been continuing for over two years, Ms. Baron still did nothing. This delay unfairly prejudices S&Z in the defense of Ms. Baron's individual claim in contrast to the EEOC's claims on behalf of the overall class. S&Z cannot adequately gather evidence from four years ago regarding Ms. Baron's alleged application and the reasons why she was not hired by the company . To require S&Z to do so at this time, and to open the possibility that S&Z would have to do so regarding other individual class members who may attempt to interview, is unjust and should not be allowed. Thus, because of her lengthy delay and her more than ample opportunities to file a lawsuit against S&Z, Ms. Baron's Motion should be denied.

B. Ms. Baron's Interest Are Adequately Represented And Protected By The EEOC.

Ms. Baron's Motion should be denied for a second reason because her rights in this matter are adequately protected and represented by the EEOC. A proposed intervenor must demonstrate that its interest is not adequately protected by an existing party. *Johnson, supra.* This requirement of showing inadequacy of representation is satisfied where there is a showing of collusion, adversity of interest, possible nonfeasance or incompetence. *Williamson v. Bethlehem Steel Corp.*, 1978 U.S. Dist. LEXIS 15606 (W.D. N.Y. 1978), unreported, a copy attached as Exhibit A. In cases where an agency of the United States represents the public interest, a strong showing of inadequate representation must be made to allow a private party to intervene. *Id.*

Ms Baron cannot prove that the EEOC is not adequately representing her interests. In fact, by her own actions, Ms. Baron has implied that the EEOC does adequately represent her interests. Indeed, without complaint, Ms. Baron has been represented by the EEOC for the last four years. Moreover, as a charging party, Ms. Baron assisted the EEOC in its lawsuit against S&Z by providing the EEOC with information relevant to S&Z's alleged discriminatory practices. Thus, Ms. Baron's interests are identical to the EEOC's – to prevent unlawful discrimination.

Finally, in order to intervene, Ms. Baron must prove that there is collusion, adversity of interest, possible nonfeasance or incompetence on the part of the EEOC. In her Motion, Ms. Baron does not claim any of the above. Thus, for this additional reason, Ms. Baron's Motion should be denied.

C. Ms. Baron's Motion Should Be Denied In The Interests Of Judicial Economy.

Finally, Ms. Baron's Motion should be denied because S&Z will be prejudiced if she is allowed to join this lawsuit as an individual defendant. As stated previously, S&Z cannot adequately prepare a defense regarding an isolated application and hiring decision allegedly made over four years ago.

IV. CONCLUSION.

For these reasons, Ms. Baron's Motion should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Opposition to Molly Baron's Motion to Intervene has been filed this 18th day of December 2003 through the Court's electronic filing system. All parties may access the foregoing via the Court's electronic filing system.

/s/ Mary G. Balazs
Mary G. Balazs

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Terms: **eeoc and "collusion, adversity of interest, possible nonfeasance"** (Edit Search)

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*1978 U.S. Dist. LEXIS 15606, *; 26 Fair Empl. Prac. Cas. (BNA) 1214*

WILLIAMSON, et al. v. BETHLEHEM STEEL CORPORATION, et al.; EQUAL EMPLOYMENT OPPORTUNITY COMMISSION v. Same

Nos. Civ-1971-487 and Civ-1967-432

United States District Court for the Western District of New York

1978 U.S. Dist. LEXIS 15606; 26 Fair Empl. Prac. Cas. (BNA) 1214

September 12, 1978.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employees filed a motion to intervene in a related action filed by the Equal Employment Opportunity Commission (**EEOC**) against the employer. The employees also filed a motion for further discovery in their own action against the employer.

OVERVIEW: Two substantive motions were before the court. First, the employees filed a motion to intervene in a related case wherein the **EEOC** filed an action against the employer. The court denied the motion to intervene. The court held that the requirements of Fed. R. Civ. P. 24(a), (b) were not met. The court held that while the employees had an interest in the fair and speedy processing of grievances involved in the action, they could not show that the existing parties did not adequately represent their interest. The court held that where a United States agency represented the public interest, a strong showing of inadequate representation had to be made to allow a private party to intervene. The court found no **collusion, adversity of interest, possible nonfeasance,** or incompetence to establish inadequate representation. Second, the court held that while the employees made no effort at discovery for nearly five years in their action against the employer, the court would not foreclose all discovery. Thus, the court granted the employees' motion for further discovery, but in a limited manner.

OUTCOME: The court denied the employees' motion to intervene in the action between the **EEOC** and employer. The court granted the employees' motion for further discovery.

CORE TERMS: grievance, discovery, motion to intervene, processing, intervene, removal, inadequate representation, adequately represented, government action, motion to amend, progress

LexisNexis (TM) HEADNOTES - Core Concepts - ◆ Hide Concepts

Civil Procedure > Joinder of Claims & Parties > Intervention

HN1 To intervene as a matter of right, the petitioners must meet the requirements of Fed. R. Civ. P. 24(a). More Like This Headnote

Civil Procedure > Joinder of Claims & Parties > Intervention

HN2 In cases where an agency of the United States represents the public interest, a strong showing of inadequate representation must be made to allow a private party to intervene. The petitioner must make a showing of **collusion, adversity of interest, possible nonfeasance** or incompetence to establish inadequate representation. More Like This Headnote

Civil Procedure > Joinder of Claims & Parties > Intervention

HN3 In reviewing the petitioners' request for permissive intervention under Fed. R. Civ. P. 24(b), the court must exercise its discretion. More Like This Headnote

COUNSEL: [*1]

Paul J. Spiegelman, Berkeley, Calif., and William D. Wells, New York, N.Y., for plaintiffs in No. Civ-1971-487.

Cravath, Swaine & Moore (Ralph L. McAfee, of counsel), New York, N.Y., Dunnington, Bartholow & Miller (Anthony A. Dean, of counsel), New York, N.Y., and Edward C. Perkins, Bethlehem, Pa., for defendant employer.

Bredhoff, Gottesman, Cohen & Weinberg (Michael H. Gottesman, of counsel), Washington, D.C., for defendant union.

Elaine Bloomfield, Washington, D.C., for plaintiff in No. Civ-1967-432.

OPINIONBY: CURTIN

OPINION: CURTIN, Chief Judge: --
INTRODUCTION

Three motions are currently pending before the court in this complex litigation. The plaintiffs have filed a motion on May 1, 1978 to reconsider the portion of this court's order of March 30, 1978 which denied them further discovery on the grievance processing issues in the Williamson v. Bethlehem Steel Corp. (Civil No. 1971-487) action. Meanwhile the parties in **EEOC** v. Bethlehem Steel Corp. (Civil No. 1967-432) have filed a joint motion to amend the court orders in Williamson of March 31, 1976 and April 14, 1976 to permit the removal of complaint and grievance files of the Implementation Committee from the office **[*2]** of the Court Clerk and return them to the Company's Lackawanna plant to facilitate processing of these matters.Finally, the plaintiffs in Williamson have a long-standing motion to intervene in the **EEOC** v. Bethlehem Steel action which was originally filed in 1976.

Since these motions are closely inter-related, I find it appropriate to consider them in a single order. I shall begin my examination with the oldest motion, namely, the motion by the Williamson plaintiffs to intervene in the government action.
MOTION TO INTERVENE

The motion to intervene in the government action was filed by the Williamson plaintiffs on March 23, 1976. Oral argument was held before the court on April 27, 1976 and memoranda were filed with the court. Essentially plaintiffs seek to intervene in order to modify the Implementation Committee complaint resolution process to ensure proper implementation of the Amended and Consent Decrees. They assert that the Committee has failed to resolve numerous grievances, has willfully violated the orders of the court, and that the government has not adequately represented the steelworkers.

HN1 To intervene as a matter of right, the petitioners must meet the requirements **[*3]** of

Fed.R.Civ.P. 24(a). Limited as it is to the performance of the Implementation Committee and not to the merits of the action, the motion to intervene may be found timely. However, since the action is a pattern or practice suit brought by the government under § 706 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a), no unconditional right of private litigants to intervene exists. See **EEOC** v. United Air Lines, Inc., 515 F.2d 946, 949, 10 FEP Cases 909 (7th Cir. 1975). They must therefore establish their right to intervene under Rule 24(a)(2). Conceding for the moment that petitioners have an interest in the fair and speedy processing of grievances by the Implementation Committee that may as a practical matter be impaired, they must still establish that their interest is not adequately represented by the existing parties.

HN2 In cases where an agency of the United States represents the public interest, a strong showing of inadequate representation must be made to allow a private party to intervene. See Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 1909 at 530-531. Even the Supreme Court decision in Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967), **[*4]** upon which petitioners rely heavily, allowed intervention only where it was clear that the government representatives had not followed the earlier direction of the Court regarding proper divestiture. In this circuit the petitioner must make a showing of **collusion, adversity of interest, possible nonfeasance** or incompetence to establish inadequate representation. See United States v. Int'l Bus. Machines Corp., 62 F.R.D. 530, 538 (S.D.N.Y. 1974); British Airways Bd. v. Port Authority of N.Y. and N.J., 71 F.R.D. 583, 585 (S.D.N.Y. 1976), aff'd, 556 F.2d 554 (2d Cir. 1976).

Here petitioners claim that the government representatives on the Implementation Committee have failed to insist upon proper notice to grievants of their rights in Committee meetings and of their right to appeal Committee decisions to the court. Furthermore, the government representative is alleged to have missed a substantial number of the intake meetings and to have failed to conduct any independent investigation of grievances. The petitioners claim that the government has thereby acquiesced in Company domination of the Implementation Committee.

While I find evidence that the operations of the Implementation **[*5]** Committee have not been totally effective, I do not find that the government's representation has been so inadequate to justify intervention by petitioners. The current government representative has been in frequent contact with the court regarding the Committee's progress and has made diligent efforts to improve the Committee's efficiency. In addition, the court has directed the Committee to file semiannual progress reports and is currently exploring further means of improving Committee procedures. If will be meeting with the members of the Committee on October 12, 1978 at 11:00 a.m. to continue this process. Therefore, the motion to intervene under Rule 24(a) is denied.

HN3 In reviewing the petitioners' request for permissive intervention under Rule 24(b), the court must exercise its discretion.Here I find that intervention would serve no useful purpose and actually would introduce a new element of delay and confusion into a situation which is already overly complex. Therefore, intervention under Rule 24(b) is also denied.
GRIEVANCE PROCESSING DISCOVERY

In my order of April 24, 1978 I denied the Williamson plaintiffs' motion for further discovery on the grievance processing **[*6]** claims found in their complaint with provision for reconsideration if the plaintiffs filed a motion requesting leave for discovery including the discovery sought and an affidavit explaining why such discovery is necessary. These papers were filed by the plaintiffs on May 1, 1978.

I find it to be somewhat extraordinary that the plaintiffs should now seek discovery on an issue where no effort at discovery has been made for nearly five years. However, since the suit has not yet gone to trial, it would be inappropriate to foreclose all discovery.

Nevertheless, I do not grant the discovery requested in the plaintiffs' motion of May 1, 1978. Instead, the plaintiffs will be limited to an examination of the grievance processing files which both the Company and the Union offered to make available to the plaintiffs several years ago, and which plaintiffs never took the time to examine. These shall be examined by the plaintiffs at the Company's offices where they are centrally located. Any costs for inspection and copying shall be borne by the plaintiffs.

REMOVAL OF IMPLEMENTATION COMMITTEE FILES

The **EEOC,** Company and Union have filed a joint motion to amend the court orders of **[*7]** March 31, 1976 and April 14, 1976 in **EEOC** v. Bethlehem Steel to allow the removal of certain complaint and grievance files from the Courthouse and the return of these files to the Company's Lackawanna Plant. The proposed intervenors declined to consent to removal of the files while the motion for intervention remained undecided.

These files were originally brought to the Courthouse to provide all parties with ready access to them and to aid in a large scale effort to resolve the grievances pending before the Implementation Committee.

At present it appears that the continued maintenance of the files at the Courthouse may actually be hindering the work of the Committee. This matter will be discussed at my meeting with the Committee members on October 12, 1978 at 11:00 a.m., after which I will reach a final decision on this motion.

So ordered.