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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

vs.

ROBERT L. REEVES AND ASSOCIATES, A PROFESSIONAL CORPORATION,

Defendant.

CASE NO. CV 00-10515 DT (RZx)

ORDER **DENYING** DEFENDANT ROBERT L. REEVES & ASSOCIATES' MOTION FOR DISMISSAL FOR LACK OF SUBJECT MATTER JURISDICTION AND/OR SUMMARY JUDGMENT PURSUANT TO FED. R. CIV. P. 12(b)(1), 12(b)(6), and 56

I. Background

A. Factual Summary

This action is brought by Plaintiff U.S. Equal Employment Opportunity Commission ("Plaintiff" or "EEOC") against Defendant Robert L. Reeves and Associates, a Professional Corporation ("Defendant firm") under Title VII of the Civil Rights Act of 1964, as amended, the Pregnancy Discrimination Act of 1978 and Title I of the Civil Rights Act of 1991 to correct alleged unlawful

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employment practices on the basis of sex, and to provide appropriate relief to certain females who were adversely affected by such practices.

The following facts are undisputed and relevant to the issues currently before this Court:

On or about July 18, 1997, Judith Ignacio Quilaton, who was hired on March 25, 1997, was terminated from Defendant firm. Although Daniel Hanlon terminated Ms. Quilaton, Robert L. Reeves ("Reeves") had the ultimate authority to terminate employees at Defendant firm from 1996 to 2000 and Reeves was the one that made the decision to terminate the employment of Ms. Quilaton. Ms. Quilaton never complained about sexual harassment or pregnancy discrimination while she worked for the firm. On or about August 11, 1997, Ms. Quilaton filed a Charge of Discrimination with the EEOC claiming she was terminated because of her pregnancy. On October 14, 1997, Robert L. Reeves ("Reeves") responded to the Quilaton Charge, providing sworn declarations from himself and Daniel Hanlon, providing a detailed explanation, with documents and corroborating sworn declarations, that Ms. Quilaton's employment terminated because of her ongoing poor performance, including locking partners out of the firm on at least two occasions, and that Hanlon did not know Quilaton was pregnant when he terminated her employment. Reeves heard nothing further from the EEOC after responding to Ms. Quilaton's Charge in 1997.

The EEOC investigator, Kinzel-Barnes ("Barnes"), received an anonymous telephone call which she later identified as being from Mehrpoo Jacobson, on or about June 7, 1999, alerting her to sexual harassment claims at Defendant firm. Barnes notified Reeves by mail and by facsimile on August 10 and 18, 1999, that the investigation had expanded to include sexual harassment and requested information relating to the sexual harassment allegations. Shortly

after Barnes notified Reeves of the expanded investigation, Reeves received a call from Barnes asking him to respond to a letter she had already sent him. Reeves allegedly had received no letter from the EEOC and asked Barnes what it was about. She said it was about charges of a class of women being sexually harassed and a class that was subjected to pregnancy discrimination but that she could not identify any names in the file at that time. She further told Reeves that he was the alleged harasser. Thereafter, Defendant firm retained attorney Susanne Bendavid-Arbiv to provide legal assistance in response to the EEOC's claims.

On September 9, 1999, Defendant firm was served with a subpoena for information concerning sexual harassment documents. Barnes issued subpoenas for the testimony of Colon Greene ("Greene"), Mehrpoo Jacobson ("Jacobson") and Daniel Hanlon ("Hanlon") on September 13, 1999.[1] Barnes interviewed Greene, Jacobson and Hanlon on September 23, 28, and 29, respectively. When Reeves did not respond to the subpoena, Barnes contacted his counsel on November 9, 1999, about enforcing the subpoena. Barnes prepared written affidavits on April 11, April 28, and May 24, 2000, for Greene, Jacobson and Hanlon, respectively detailing the information she had learned in their interviews.

On June 20, 2000, the EEOC issued its Letter of Determination, wherein EEOC found cause to believe that defendant had violated Title VII by

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[1] Defendant firm states that Hanlon and Greene had planned and did secretly leave Defendant firm and destroyed a great amount of Defendant firm's computer records on approximately June 30, 1999. Jacobson, Greene's girlfriend, also left the firm with Hanlon and Greene. However, Barnes declares that she had no knowledge of any alleged plans by Hanlon, Greene, and Jacobson to secretly leave and destroy Reeves and Defendant firm or its computer records until they finally left the firm on June 30, 1999, three weeks after Barnes had received the initial anonymous call from Jacobson.

discriminating against women as a class on the basis of pregnancy and by creating a hostile environment for women as a class. On June 21, 2000, Barnes called Arbiv and told her that the EEOC's Letter of Determination was mailed that prior day, on June 20, 2000. Barnes said that the EEOC determined that Reeves violated Title VII in that individuals, as a class, were allegedly terminated based on pregnancy, and there were like and related claims for alleged sexual harassment. Arbiv inquired from Barnes as to the amount of money the EEOC was interested in to resolve the dispute. Barnes said she could not provide the dollar amount. Arbiv also asked Barnes who the EEOC claimed to represent and Barnes did not provide Arbiv that information either.

Reeves subsequently received a copy of the EEOC's June 20, 2000, Determination letter. The letter did not outline any facts or law to support a prima facie pregnancy discrimination or sexual harassment claim. The EEOC letter stated as a fact that Quilaton's Charge asserted "she was discharged . . . because of her sex (pregnancy)". The EEOC letter then concluded with no factual or legal support that there was "reasonable cause" to believe Title VII was violated by the termination of Quilaton's employment. The letter enlarged Quilaton's Charge from one of pregnancy discrimination to one of sex discrimination, and then stated "pregnant females as a class were terminated in violation of Title VII" and "females as a class, were subjected to frequent harassment" in violation of Title VII. It identified one female (Ms. Quilaton) who was subjected to pregnancy discrimination but identified no individuals who were subjected to harassment. Furthermore, the letter identified no Charge of harassment.

On July 5, 2000, the EEOC issued a conciliation letter to Defendant firm inviting them to conciliate the charge. On July 18, 2000, Arbiv received another call from Barnes, who asked whether Arbiv received her July 5, 2000

conciliation letter. Arbiv stated she had not and asked Barnes to fax the letter to her.[2] During the same phone conversation, Barnes apparently said the EEOC was seeking $50,000 in compensatory "and punitive damages" for each claimant, even though her letter had stated that the EEOC was seeking $50,000 in compensatory *and* $50,000 in punitive damages for each claimant. Arbiv again asked Barnes for the names of the allegedly aggrieved individuals that the EEOC claimed to represent but Barnes did not disclose the identities of the class members. Barnes further alleged she did not yet know the size of the sexual harassment class, since additional interviews needed to be conducted. Arbiv then received the letter of conciliation from the EEOC.

The EEOC's July 5, 2000 conciliation letter was meant to initiate the conciliation process. However, it did not identify the two classes of claims, or outline any facts or law to support the EEOC's pregnancy discrimination or sexual harassment claims. Further, it did not identify any individual who allegedly suffered from harassment, or any Charge of harassment. It demanded redress of the violations identified in the Determination letter, and that Defendant firm agree to the following: (1) "Cease discrimination on the basis of sex" in all aspects of employment. (2) Sign and conspicuously post for one year the "standard Notice to Employees" without stating what that is. (3) Offer employment to Quilaton and "any identified aggrieved individuals" who were subjected to pregnancy discrimination. (4) Agree to have all supervisors and individuals involved in employment selection go through training of 8 hours per year for five years by a vendor approved by the Commission. (5) Pay $50,000 in compensatory damages and $50,000 in punitive damages to Quilaton and "any identified aggrieved

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[2] Barnes later received the original July 5, 2000 conciliation letter back, designated "undeliverable."

individuals." The amount requested was twice the $50,000 statutory cap the EEOC was entitled to demand. The letter further demanded a response by July 17, 2000, only 12 days later.

On July 21, 2000, Arbiv sent a letter to Barnes stating that Defendant firm "has long objected to the EEOC's investigation into purported acts of sexual harassment." Arbiv's letter continued to explain that she had insufficient information with which to respond to EEOC's allegations and the firm's own investigation revealed no supporting facts, and for these and other reasons, Defendant firm was "not in the position to accept the settlement proposal set forth in [the] July 5, 2000 letter." Defendant firm provided no counter-offer and did not ask to meet with the EEOC to discuss the matter further. On August 3, 2000, the EEOC notified Defendant firm that conciliation had failed and that the matter would be referred to the legal department.

The EEOC filed suit on September 29, 2000, on behalf of Judith Quilaton and similarly situated female employees alleging pregnancy discrimination, and on behalf of a class of female employees alleging sexual harassment. On Monday, October 2, 2000, the EEOC issued a press release stating it was suing a *law firm* and that Defendant firm discriminated against both current and former female employees, including a "class" who were sexually harassed and another "class" who suffered pregnancy discrimination. The press release lists Kathleen Mulligan as the EEOC's trial attorney contact on the case and acknowledges the EEOC had not yet identified the names of the claimants, stating "The women affected by the alleged practices at the [Defendant] firm will be identified in future court proceedings."

After filing suit, attorney Kathleen Mulligan ("Mulligan") met and conferred with Defendant firm's counsel to discuss, among other things, the

EEOC's conciliation efforts, which Defendant firm claimed were inadequate and supported a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Mulligan repeated the position she articulated at the meeting, "that if Defendant wished to . . . engage in good faith, confidential settlement discussions, I would be amenable to doing so." This was memorialized in a letter. Defendant firm did not accept the EEOC's offer to explore a confidential settlement and did not file a motion to dismiss due to EEOC's alleged failure to conciliate.[3]

B. Procedural Summary

On September 29, 2000, the EEOC filed the Complaint for Civil Rights Employment Discrimination in the United States District Court for the Central District of California, which was assigned to District Judge Dickran Tevrizian as Case No. CV 00-10515 DT (RZx).

On December 5, 2000, Defendant filed an Answer to the Unverified Complaint.

On June 11, 2001, Defendant filed a Motion for Leave to Amend Answer, which this Court granted on July 9, 2001.

On June 26, 2001, the EEOC filed a Motion for Review and Reconsideration of Magistrate Judge's Order on Plaintiff's Motion to Compel, which this Court denied on July 27, 2001, and further ordered a clarification of the Magistrate Judge's protective order.

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[3] This Court has reviewed and taken into consideration both the EEOC's Objections to Evidence Submitted by Defendant In Support of its Motions for Dismissal and/or Summary Judgment, and Defendant's Objections to Evidence Submitted in Opposition to Motion for Dismissal and/or Summary Judgment, and to the extent evidence is included in this Order, to which objections have been made, said objections are deemed overruled.

On August 31, 2001, Defendant filed a Motion for Partial Summary Judgment as to Claimants Catuira and Preciado.

On September 25, 2001, this Court entered an Order Granting Defendant Robert L. Reeves and Associates' Motion for Partial Summary Judgment as to Claimants Catuira and Preciado.

On October 18, 2001, Defendant filed the Statement of Fact and Conclusions of Law as to Claimants Catuira and Preciado.

On October 19, 2001, this Court entered a Partial Summary Judgment Following September 24, 2001 Ruling.

On November 1, 2001, Defendant filed a Motion for Attorneys' Fees, which this Court denied on November 26, 2001.

On November 27, 2001, Defendant filed a Motion for Partial Summary Judgment as to Claimants Quilaton, Silva, Saez, Wang, Arai and Eum, which this Court granted on January 22, 2002. This Court's Order Granting Defendant's Motion was thereafter entered on January 23, 2002.

On January 25, 2002, EEOC filed a Motion for Partial Summary Judgment on Defendant's Fourteenth and Fifteenth Affirmative Defenses.

On January 28, 2002, Defendant filed an Ex Parte Application for Leave of Court to File Final Motion for Summary Judgment, which this Court granted on January 29, 2002.

On January 29, 2002, Defendant filed a Motion for Summary Judgment as to Wilkenson, Jacobson and Liao.

On February 20, 2002, this Court entered an Order Granting Defendant's Motion for Summary Judgment as to Claimants Wilkerson, Jacobson and Liao and Denying as Moot Plaintiff EEOC's Motion for Summary Judgment on Defendant's Fourteenth and Fifteenth Affirmative Defenses.

On April 5, 2002, Defendant filed a Motion for Attorneys' Fees. This Court's Order Granting in Part and Denying in Part Defendant's Motion for Attorneys' Fees was thereafter entered on May 7, 2002.

On May 20, 2002, EEOC filed a Notice of Appeal.

On August 2, 2002, EEOC Appellant's Filed a Notice of Motion and Motion to Stay Enforcement of Judgment of Attorneys' Fees and Costs Pending Appeal. This Court's Order Staying Enforcement of Judgment of Attorneys' Fees and Costs Pending Appeal was thereafter filed on September 3, 2002.

On June 20, 2003, the Ninth Circuit Court of Appeals reversed and remanded to this Court for further proceedings.

On September 18, 2003, this Court issued a minute order Filing and Spreading Judgment of the Ninth Circuit Court of Appeals wherein this Court set a Status Conference on October 14, 2003.

On October 8, 2003, this Court filed an Order Continuing Status Conference to October 20, 2003, pursuant to a stipulation by both parties. On October 20, 2003, this Court set the following dates during the Status Conference: Discovery Cutoff - December 31, 2003; Pretrial Conference - March 29, 2004 at 1:30pm; Jury Trial - May 11, 2004 at 9:30am.

On October 29, 2003, the EEOC filed a Notice of Motion and Motion for Partial Summary Judgment as to Defendant's Affirmative Defenses, Nos. 14 & 15, which was Granted in Part and Denied in Part on December 8, 2003. This Court's Order Granting Plaintiff's Motion in Part and Denying in Part was thereafter entered on December 9, 2003.

On February 12, 2004, Defendant filed a Notice of Motion and Motion for Reconsideration and Review of Magistrate's Ruling on Plaintiff's Motion to Compel and Award of Sanctions, which is Denied on March 8, 2004.

This Court's Order Denying Defendant's Motion for Reconsideration and Review of Magistrate's Order was thereafter entered on March 10, 2004.

On March 1, 2004, Defendant filed a Motion for Dismissal for Lack of Subject Matter Jurisdiction and/or Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56, which is currently before this Court.

On March 8, 2004, the EEOC filed its Opposition to Defendant's Motion for Dismissal for Lack of Subject Matter Jurisdiction and/or Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56.

On March 15, 2004, Defendant filed a Reply in Support of its Motions for Dismissal for Lack of Subject Matter Jurisdiction and/or Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6), and 56.

II. Discussion

A. Standard

1. Motion to Dismiss Under FED. R. CIV. P. 12 (b)(1)

Federal courts are courts of limited jurisdiction. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1972). Federal courts are "presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears." Stock West, Inc. v. Confederated Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989). Thus, when a defendant brings a motion to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of establishing jurisdiction. See Kokkonen v. Guardian Life Ins., 511 U.S. 375, 378, 114 S. Ct. 1673, 1675 (1994). When determining subject matter jurisdiction, this Court may consider outside the pleadings without converting the motion to dismiss into a motion for summary judgment. See McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1989).

2. Motion to Dismiss Under FED. R. CIV. P. 12 (b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a defendant may seek to dismiss a complaint "for failure to state a claim upon which relief can be granted." FED.R.CIV.P. 12(b)(6). Pursuant to Rule 12(b)(6), the court may only dismiss a plaintiff's complaint if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). The question presented by a motion to dismiss is not whether a plaintiff will prevail in the action, but whether a plaintiff is entitled to offer evidence in support of his claim. See Cabo Distributing Co., Inc. v. Brady, 821 F.Supp. 601 (N.D. Cal. 1992). Dismissal is proper under Rule 12(b)(6) only where there is a lack of cognizable legal theory. See Balisteri v. Pacifica Police Department, 901 F.2d 696, 699 (9th Cir. 1988).

In testing the sufficiency of a complaint, the court must assume that all of the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. See United States v. City of Redwood City, 640 F.2d 963, 966 (9th Cir. 1981) (citing California Dump Truck Owners Assn. v. Associated General Contractors of America, 562 F.2d 607, 614 (9th Cir. 1977); McKinney v. DeBord, 507 F.2d 501, 503 (9th Cir. 1974). Therefore, it is only the extraordinary case in which dismissal is proper. See Corsican Productions v. Pitchess, 338 F.2d 441, 442 (9th Cir. 1964). Generally, orders granting motions to dismiss are without prejudice unless "allegations of other facts consistent with the challenged pleading could not possibly cure the defect." See Schreiber Dist. v. Serv-Well Furniture, 806 F.2d 1393, 1401 (9th Cir. 1986).

3. Motion for Summary Judgment Under FED. R. CIV. P. 56

Under the Federal Rules of Civil Procedure, summary judgment is proper only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. See id.; Fed. R. Civ. P. 56(e).

A non-moving party who bears the burden of proof at trial to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. See Anderson, 477 U.S. at 250-51, 106 S. Ct. at 2511. The non-movant's burden to demonstrate a genuine issue of material fact increases when the factual context renders her claim implausible. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement or the bald assertion that a genuine issue of material fact exists no longer precludes the use of summary judgment. See Harper v. Wallingford, 877 F.2d 728 (9th Cir. 1989); California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

If the moving party seeks summary judgment on a claim or defense on which it bears the burden of proof at trial, it must satisfy its burden by showing affirmative, admissible evidence.

Unauthenticated documents cannot be considered on a motion for summary judgment. See Hal Roach Studios v. Richard Feiner and Co., 896 F.2d 1542, 1550 (9th Cir. 1990).

On a motion for summary judgment, admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. See Fed. R. Civ. P. 56(e). Declarations on "information and belief" are inappropriate to demonstrate a genuine issue of fact. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

B. Analysis

Defendant firm brings this Motion to Dismiss for Lack of Subject Matter Jurisdiction on the ground that the EEOC failed to meet certain jurisdictional requirements before filing a Title VII employment discrimination suit. Defendant firm also moves this Court on the ground that the EEOC's suit is barred by laches because the EEOC took more than three years from the opening of this claim to the time that it filed suit and thus, severely prejudiced Defendant firm.

1. EEOC Has Satisfied the Jurisdictional Prerequisite and Has Subject Matter Jurisdiction to Bring Suit

After three and a half years of litigation and a trip to the Ninth Circuit, Defendant firm now moves to dismiss on jurisdictional grounds, alleging

that the EEOC's investigation and conciliation efforts were inadequate.[4] "Genuine investigation, reasonable cause determination and conciliation are jurisdictional conditions precedent to suit by the EEOC . . . ." EEOC v. Pierce Packing Co., 669 F.2d 605, 608 (9th Cir. 1982) ("Pierce Packing"). Conciliation first contemplates charge, notice, investigation and determination of reasonable cause. 42 U.S.C. § 2000e-5(b); Pierce Packing, 669 F.2d at 608.

Defendant firm argues that the EEOC failed to satisfy the statutorily mandated jurisdictional prerequisites to filing a Title VII suit. 42 U.S.C. § 2000e-5. In support of this proposition, Defendant firm relies exclusively on Pierce Packing and EEOC v. Asplundh Tree Expert Company, 340 F.3d 1256, 1260 (11th Cir. 2003) ("Asplundh"). However, besides not being legally compelling to Defendant firm's position, both cases are distinguishable on its facts.

In Pierce Packing, the EEOC sought to enforce a pre-investigation settlement agreement. Pierce Packing, 669 F.2d at 607. The EEOC had not conducted an investigation, had not found reasonable cause and had not engaged in conciliation efforts before entering into a settlement agreement. Id. The EEOC later learned that the employer had failed to comply with the terms of the settlement agreement, and brought suit attempting to enforce the terms of the

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[4] The EEOC first contends that "[a]lthough the Court of Appeal's order did not explicitly address the jurisdictional issue raised in the appellate briefs, it necessarily implied that the EEOC satisfied its statutory duties to investigate and conciliate and that the district and appellate courts had jurisdiction." Thus, the EEOC contends this should apply as law of the case. However, since this is the first motion to dismiss by Defendant firm for lack of subject matter jurisdiction due to EEOC's alleged failure to engage in good-faith conciliation and since the Ninth Circuit decision reversing summary judgment and the attorney fees award did not contain any mention, discussion, or finding on the issue of whether the EEOC's alleged failure to conciliate defeated subject matter jurisdiction, this Court will visit and address this issue in this Order.

agreement. Id. at 605. The Ninth Circuit affirmed the district court's dismissal, holding that investigation, reasonable cause determination and conciliation were jurisdictional prerequisites to the EEOC bringing suit. Id. at 608. Thus, as interpreted by other courts, Pierce Packing stands for the proposition that "the EEOC must initiate some investigation of the charge" before bringing suit. EEOC v. The Nestle Co., 1982 WL 234, *1 (E.D. Cal. 1982).

Here, unlike in Pierce Packing, the EEOC never entered into a settlement agreement. Instead, the EEOC, relying on its investigation and its expertise in these matters, concluded that it had reasonable cause upon which to base a determination that Defendant firm had engaged in sexual and pregnancy discrimination and thus, engaged in conciliation before filing suit.

In Asplundh, a racial discrimination case, the defendant did not retain counsel until the EEOC presented its proposed conciliation agreement, at which point the newly-retained defense counsel sent a facsimile to the EEOC requesting a telephone meeting and an extension of time to review the matter and respond to the proposed agreement. Asplundh, 340 F.3d at 1258. The EEOC did not respond, except to send a letter the following day sating that conciliation efforts had been unsuccessful. Id. at 1258-59. Defense counsel again tried to contact the EEOC's investigator, who informed him that the matter was "out of her hands" and indicated that defense counsel should contact the EEOC's regional attorney. Id. at 1259. Two days later, the EEOC filed suit. Id.

Here, Defendant firm's counsel had the opportunity to respond to the EEOC's invitation to conciliate and did, stating that Defendant firm was "not in the position to accept the settlement proposal set forth in [the] July 5, 2000 letter." Defendant firm provided no counter-offer and did not ask to meet with the EEOC to discuss the matter further. On August 3, 2000, the EEOC notified Defendant

firm that conciliation had failed and that the matter would be referred to the legal department. Thereafter, the EEOC waited almost two months before filing suit, during which time Defendant firm had ample opportunity to approach the EEOC and continue the conciliation process.

a. Charge and notice

Defendant firm first argues that there was no charge and no notice as to the EEOC's sexual harassment claim.[5] This is because no employee filed an EEOC charge alleging sexual harassment against Defendant firm. The only charge that was filed with the EEOC was by Judith Ignacio Quilaton, filed August 11, 1997, for pregnancy discrimination. Defendant firm now claims that the EEOC later tried to improperly enlarge Quilaton's pregnancy discrimination charge into a sexual harassment charge. This Court disagrees.

To the extent that Defendant firm argues that the sexual harassment claims impermissibly exceed the scope of the original charge made to the EEOC, this is clearly controlled by EEOC v. Occidental Life Ins. Co. of California, 535 F.2d 533 (9th Cir. 1976), aff'd on other grounds, 432 U.S. 355 (1977) and EEOC v. Hearst Corp., 553 F.2d 579, 580 (9th Cir. 1977). In both of those cases, the Ninth Circuit allowed the EEOC to litigate claims of discrimination that came to its attention during the investigations into charges of other types of discrimination.

In Occidental Life, the original charge alleged that Occidental refused, on account of sex, to provide the charging party with maternity leave, other pregnancy benefits, insurance, vacation benefits and seniority rights. In the course of its investigation, the EEOC discovered evidence of, among other things, discrimination against male employees in the administration of the retirement

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[5] Defendant does not challenge the adequacy of the pregnancy discrimination investigation.

system. Occidental Life, 535 F.2d 540-41. In Hearst, the original charge alleged discrimination against an individual white male but, during the course of the investigation, the EEOC uncovered evidence of discrimination against women and minorities. Hearst, 553 F.2d at 581. In both cases, the EEOC had given the employer notice of the new types of discrimination uncovered during the administrative investigation so that defendant's right to notice was met. Occidental Life, 535 F.2d at 542; Hearst, 553 F.2d at 581.

The Fourth Circuit in General Electric was one of the many circuits that rejected the argument Defendant firm advances here (that the investigation is limited to the allegations contained in the discrimination charge), stating:

> The charge merely provides the EEOC with a jurisdictional springboard to investigate whether the employer is engaged in any discriminatory practices .... If the EEOC uncovers during that investigation facts which support a charge of another discrimination than that in the filed charge, it is neither obligated to cast a blind eye over such discrimination nor to sever those facts and the discrimination so shown from the investigation in process and file a Commissioner's charge thereon, thereby beginning again a repetitive investigation of the same facts already developed in the ongoing investigation.

EEOC v. General Electric Co., 532 F.2d 359, 365 (4th Cir. 1976).[6] The Supreme Court, in General Telephone, approved the approach allowing the EEOC to proceed on other discrimination discovered during its investigation:

> [T]he Courts of Appeal have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. Th[is] approach is far more consistent with the EEOC's role in the enforcement of Title VII than in imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

General Telephone v. EEOC, 446 U.S. 318, 331 (1980).

Accordingly, the EEOC may litigate claims of discrimination discovered during the investigations into charges of other types of discrimination.

b. Genuine investigation and reasonable cause determination

Next, Defendant firm argues that the EEOC did not engage in a "genuine investigation" of the sexual harassment claim because investigator Barnes interviewed only one of nine women for whom it later sought relief. However, as the EEOC points out, Defendant firm cites no authority for the

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[6] *Accord*, EEOC v. Delight Wholesale Co., 973 F.2d 664 (8th Cir. 1992) (original charge only stated discriminatory demotion, investigation uncovered evidence of wage discrimination and constructive discharge); EEOC v. Bookhaven Bank & Trust Co., 614 F.2d 1022 (5th Cir. 1980) (original charge stated discriminatory failure to hire (race), investigation uncovered evidence of job segregation); EEOC v. St. Michael Hosp., 6 F.Supp. 2d 809 (E.D. Wis. 1998) (original charge only stated discriminatory discipline, transfer and discharge, investigation uncovered evidence of retaliation and hostile environment).

proposition that the EEOC must interview every potential class member prior to finding reasonable cause and attempting conciliation.

On the other hand, the EEOC cites to two opinions which support their position: EEOC v. Nestle Co., 1982 WL 234 (E.D. Cal. 1982) and EEOC v. New Cherokee Corp., 829 F.Supp. 73 (S.D.N.Y. 1993). In Nestle Co., the EEOC focused its investigation on gender discrimination in "blue-collar" positions, but also discovered that the employer employed no women in "white-collar" positions. Based upon that information, the EEOC concluded that it had sufficient data upon which to base a determination that the employer engaged in sex discrimination in those positions. The Nestle Co. court rejected defendant's partial summary judgment motion challenging the adequacy of the investigation, noting:

> Nestle has not cited any authority for the proposition that the EEOC is obligated to undertake a separate investigation of each sort of employment discrimination that will be the basis for its complaint. Nor have any cases been cited which set a discernible standard as to what constitutes an 'adequate' investigation by the EEOC . . . .

The Nestle Co., 1982 WL 234 at *1.

Similarly, in New Cherokee, the Court rejected defendant's motion to dismiss based upon the alleged inadequacy of the EEOC's investigation into an age discrimination charge. New Cherokee, 829 F.Supp. at 78. There, as here, defendant argued that the EEOC had not interviewed certain witnesses. The court noted that EEOC regulations require it to "receive information . . . not to investigate every possible witness who may have some knowledge . . . . Movant has cited to no case where a court has dismissed an EEOC enforcement action because of an inadequate investigation." Id.

Here, in the course of its investigation into the Quilaton pregnancy discrimination charge, the EEOC received information regarding sexual harassment at Defendant firm. The EEOC, via Barnes, conducted an investigation by submitting an additional request for information from Defendant firm concerning sexual harassment issues, interviewing Jacobson and two other individuals whom the investigator believed might have information concerning the alleged harassing conduct. Based upon that information, the EEOC, relying on its expertise in these matters, found reasonable cause to believe that Reeves had harassed female employees.[7] As noted above, the EEOC was entitled to investigate the sexual harassment information that came to light, and its decision not to interview every individual should not stand as a jurisdictional bar to bringing suit.

d. Conciliation

Defendant firm next claims that there was no good faith effort to conciliate before filing suit. Specifically, Defendant firm alleges that EEOC's conciliation effort was deficient because it consisted of a single letter with no facts or law showing any violation of Title VII, yet demanding reinstatement and an

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[7] Defendant firm argues that since the EEOC's Determination letter did not outline any facts or law to support a prima facie pregnancy discrimination or sexual harassment claim, the EEOC must not have made a reasonable cause determination as to its claims. However, Defendant firm cites to no authority mandating that the EEOC's reasonable cause determination be outlined in their letter of determination, or that the lack thereof must necessarily indicate that the EEOC made no reasonable cause determination. Here, the EEOC has provided sufficient evidence that they made a reasonable cause determination before bringing suit.

illegal payment of $100,000 for "any identified aggrieved individuals."[8] The conciliation letter identified only one person, Judith Ignacio Quilaton. As noted above, Defendant firm relies heavily on Asplundh, which this Court earlier distinguished on its facts. Defendant claims that as the EEOC did in Asplundh, the EEOC's purported conciliation was an "all or nothing" approach toward Defendant firm because the EEOC's demands were impossible to fulfill. However, this Court disagrees and finds that the facts in Asplundh are significantly different from the facts at bar. There, a newly-retained defense counsel sent a facsimile to the EEOC requesting a telephone meeting and an extension of time to review the matter and respond to the proposed agreement, but the EEOC did not respond and instead, sent him a letter the following day stating that conciliation efforts had been unsuccessful. When defense counsel again tried to contact the EEOC investigator, he was told that the matter was "out of her hands" and was referred to contact the EEOC's regional attorney. Two days later, the EEOC filed suit.

Here, although Defendant firm alleges that EEOC's demands were impossible to fulfill, Defendant firm did not indicate any willingness to resolve the matter out of court or ask to meet with the EEOC to discuss the matter further. It provided no counter-offer. Instead, Defendant firm indicated in its responsive letter that it had insufficient information with which to respond to EEOC's allegations and the firm's own investigation revealed no supporting facts, and for these and other reasons, Defendant firm was "not in the position to accept the settlement proposal set forth in [the] July 5, 2000 letter."

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[8] The $100,000 per aggrieved individual was twice the statutory cap. However, Barnes declares and admits this was an error and claims they made every effort to cure the defect.

If "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action . . . ." 42 U.S.C. § 2000e-5(f)(1); see also EEOC v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534-35 (2nd Cir. 1996) ("If the defendant refuses the invitation to conciliate or responds by denying the EEOC's allegations, the EEOC need not pursue conciliation and may proceed to litigate the question of the employer's liability for the alleged violations"). Unlike in Asplundh, there is no indication that the EEOC curtailed the conciliation process in order to rush to the court. The suit here was filed almost two months after the EEOC issued its conciliation failure later. During that time, Defendant could easily have contacted the EEOC and re-initiated conciliation had it had any interest in doing so.[9]

Defendant argues that the conciliation effort was fatally defective because the EEOC did not identify all of the class members or specifically state the discriminatory practices or events. However, the EEOC contends that it has no duty to identify victims during conciliation. See EEOC v. Dial Corp., 156 F.Supp. 2d 926, 942 (N.D. Ill. 2001) ("I simply am not convinced that the EEOC['s] failure to identify every class member during the conciliation process rendered [] its efforts to conciliate inadequate."); EEOC v. Jordan Graphics, Inc., 769 F. Supp. 1357, 1361 (W.D.N.C. 1991) ("It is immaterial that the EEOC did not specifically state in the determination letter all of the alleged discriminatory practices and all of the class members. What is material is whether Defendant was provided with an opportunity to concilliate."). The EEOC argues that requiring them to identify victims before litigation is approved runs the risk of needlessly inviting retaliation

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[9] Defendant suggests that the fact that the EEOC issued a press release upon filing suit somehow indicates bad faith. The EEOC, however, claims that it routinely issues press releases upon filing suit and the fact that it does so is not evidence of bad faith conciliation.

and overlooks the fact that, in class cases, discovery is a tool by which the EEOC learns the identity of many discrimination victims.

As for the standard of review of the adequacy of EEOC's conciliation effort, several courts, including those within the Ninth Circuit which have addressed the issue, have deferred to the EEOC's discretion. The EEOC argues that the "good faith" conciliation requirement is properly limited to a good faith effort to allow an out of court settlement, rather than a good faith effort to meet defendant on its own terms. See EEOC v. KECO Industries, Inc., 748 F.2d 1097, 1100 (6th Cir. 1984) ("The district court should only determine whether the EEOC made an attempt at conciliation. The form and substance of those conciliations is within the discretion of the EEOC as the agency created to administer and enforce our employment discrimination laws and is beyond judicial review"); EEOC v. Canadian Indemnity Co., 407 F.Supp. 1366 (C.D. Cal. 1976) (where defendant did not agree to all terms in EEOC's conciliation offer, EEOC was within its discretion to reject counteroffer and proceed to litigation); EEOC v. St. Anne's Hosp., 664 F.2d 128, 131 (7th Cir. 1981) (conciliation prerequisite satisfied where EEOC invites defendant to conciliate).

Here, this Court concludes that at a minimum, the EEOC gave Defendant firm an opportunity to conciliate before filing suit nearly two months after and thereby, satisfied its good faith conciliation requirement toward Defendant firm. Defendant firm, on the other hand, did not engage in any settlement discussions or make any counter-offers to continue the conciliation process despite their knowledge that the EEOC would eventually file suit. It has been three and a half years since the filing of the Complaint and this case has still not settled or conciliated. If the parties have a true interest in conciliation, they must understand that it is not a one-way avenue, and even two extreme positions

can be reconciled if both parties are willing. Thus, this Court concludes that although the conciliation process was unsuccessful before the commencement of this suit and remains unsuccessful until today, it was nevertheless sufficiently attempted by the EEOC in this action before bringing suit against Defendant firm.

Accordingly, the EEOC has met the jurisdictional prerequisites before filing a Title VII employment discrimination suit, and thus, this Court need not dismiss this action for lack of subject matter jurisdiction. Interestingly, during the course of litigation in the within case, this Court conducted a settlement conference with all parties in attendance. At this settlement conference, it was determined that this case could have been settled for a total payment by Defendant firm to the EEOC for less than $25,000. Unfortunately, Defendant firm refused the settlement demand and made a conscious decision to litigate.

2. Laches Does Not Bar EEOC's Suit

Defendant firm also brings a summary judgment motion on its equitable affirmative defense of laches. Defendant firm argues that the EEOC's suit is based on extremely stale allegations of wrongdoing and has forced Defendant firm to incur substantial attorney fees trying to defend under circumstances where much of the defense evidence has been lost due to (1) the EEOC's more than three year delay in bringing suit and (2) the EEOC relying on informants who have now been adjudged to have intentionally destroyed much of Defendant firm's computer files, documents, and other information.

The Supreme Court has stated "there seemed to be general agreement that courts can provide relief to defendants against inordinate delay by the EEOC." National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122, n. 9 (2002). In order to prevail on a laches claim, Defendant firm has the burden to prove: (1) the EEOC both unreasonably and inexcusably delayed in filing this lawsuit; and (2)

the EEOC's delay caused substantial prejudice to the Defendant firm. Bratton v. Bethlehem Steel, 649 F.2d 658, 667 (9th Cir. 1980); Couveau v. American Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000). Since the findings of delay and prejudice required for laches are to be made in the context of Defendant firm's Summary Judgment Motion, Defendant firm must also meet its burden of showing that there is no genuine issue as to any material fact. EEOC v. Massey-Ferguson, Inc., 622 F.2d 271, 276 (7th Cir. 1980). In so doing, this Court must view the record and the inferences to be drawn from facts disclosed in the record in the light most favorable to the party opposing the summary judgment (i.e. the EEOC). Id. (*citing* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157-160 (1970). Once delay and prejudice are established, the district court may, in its discretion, apply the doctrine of laches to bar certain claims or an entire complaint. Id.

As a preliminary matter, the EEOC argues that Defendant never met and conferred on its equitable affirmative defense of laches prior to bringing this Summary Judgment Motion, in violation of Local Rule 7-3. For that reason alone, the EEOC asks this Court to decline consideration of Defendant firm's Motion regarding laches.[10] Although this Court may reject Defendant firm's laches defense for not complying with Local Rule 7-3, this Court will decide Defendant firm's Motion on the merits. However, Defendant firm is hereby forewarned that it should follow all applicable Local Rules in the future or suffer the consequences.

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[10] Local Rule 7-3 provides, in relevant part: "[C]ounsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated motion and any potential resolution." L.R. 7-3.

a. No unreasonable or inexcusable delay

Defendant firm reargues the facts from above and specifically focuses in on the time delay between Quilaton's August 11, 1997 Charge for pregnancy discrimination and the EEOC's filing suit thirty-seven months later, on September 29, 2000. Defendant firm further argues that this problem caused by the EEOC's unreasonable delay in filing suit was exacerbated because even after filing suit, the EEOC continued to intentionally withhold the identity of its "claimants" and interfere with Defendant firm's efforts to preserve witness testimony.

The EEOC contends that the delay from the date the Charge was filed to the day it filed suit does not, by itself, demonstrate that the EEOC's actions were inexcusable or unreasonable. For support, the EEOC cites to EEOC v. North Hills Passavant Hospital, 544 F.2d 664 (3rd Cir. 1976), where the Third Circuit upheld that Commission's right of action was timely, even though three years and three months had passed between the filing of the original charge with the Commission and the Commission's institution of the suit. There, it was undisputed that the investigation and conciliation efforts continued throughout the period, the Commission filed suit within 10 months of failure of conciliation, and that the company was fully informed of the charges it had to defend. Under those facts, the court concluded that the company had failed to establish inexcusable delay or lack of diligence on the part of the Commission.[11] Defendant firm has not

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[11] See EEOC v. Great Atlantic & Pacific Tea Co., 735 F.2d 69 (nine and a half years between the filing of the original charge and filing of the suit did not constitute undue delay where the case was a complex pattern and practice matter and defendant had resisted the Commission's investigation); EEOC v. North Central Airlines, 475 F. Supp. 667, 671 (D. Minn 1979) (5 year, 10 month delay between filings "not so inordinate as to warrant dismissal"); EEOC v. Am. Nat. Bank, 574 F.2d 1173, 1174-75 (4th Cir. 1978) (Title VII: total 80 months between charge and suit); EEOC v. Jacksonville Shipyards, Inc., 690 F.Supp. 995, 999

cited to any case holding that such a three year delay is unreasonable. Defendant firm merely argues that "[u]nlike virtually every case the EEOC relies on to argue that its three year delay was not unreasonable, the EEOC here produced no evidence showing continued activity and diligence in its pursuit of either the pregnancy discrimination or harassment claim." This Court disagrees.

In reading the record in the light most favorable to the EEOC, this Court concludes that the EEOC has demonstrated continued activity in pursuing its claims. Moreover, where, as here, there is a class of several affected individuals, investigations naturally take longer to complete than where there is only one individual involved. Accordingly, given the EEOC's heavy workload and limited resources and the strength of case law supporting its position, the EEOC's three year and one month delay in filing suit cannot be considered inexcusable or unreasonable as a matter of law.

b. Defendant firm cannot show prejudice stemming from the EEOC delay

Since this Court has already concluded that EEOC's delay cannot be considered inexcusable or unreasonable, laches are not warranted and this Court need not address the second element of laches (i.e. whether Defendant has made a sufficient showing of prejudice). However, for the sake of thoroughness, this Court will address the alleged prejudice suffered by Defendant firm.

To make a sufficient showing of prejudice, Defendant firm "must establish with such clarity as to leave no room for controversy that it has been substantially and unduly prejudiced in its ability to defend the lawsuit because of

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(M.D. Fla. 1988) (70 months between charge and suit); EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979) (four year, four month delay was not unreasonable); EEOC v. Warshawsky and Co., 768 F.Supp. 647, 657 (N.D.Ill. 1991) (four year, two month delay was not unreasonable).

the EEOC's delay." EEOC v. Westinghouse Elec. Corp., 592 F.2d 484, 486 (8th Cir. 1979).

Defendant firm claims that on June 30, 1999, attorneys Hanlon and Greene, two of the people who provided the EEOC with declarations on behalf of Defendant firm, left the firm suddenly, during which they allegedly erased thousands of pages of information from the firm's computer system, and took many firm documents, files, employees and clients with them. Several months before their departure, Hanlon and Greene had also disconnected the computer backup system so that no backup tapes were made of the information and data on the firm's computer system. Defendant firm now contends that "[d]ocuments that *could have been helpful* to [Defendant firm] have been lost or stolen or intentionally destroyed" as a result.

On the other hand, the EEOC contends that Defendant firm has produced 3,527 pages of documents in the course of discovery. Defendant firm argues that, had the computer files not been sabotaged, it might have recovered evidence that some of the claimants had e-mailed or downloaded offensive material themselves. However, it is highly speculative that such documents ever existed. Even if they did, the likelihood that those documents critical in defeating EEOC's claims being lost or destroyed is remote. Moreover, the destruction of Defendant firm's computer files and documents cannot be attributable to EEOC's delay. Hanlon and Greene left Defendant firm on June 30, 1999. The sabotaging, if it occurred at all, must have taken place prior to June 30, 1999. Barnes, the EEOC investigator, received information about the sexual harassment at Defendant firm on June 7, 1999. Barnes declared that she did not know beforehand that Hanlon and Greene were intending to secretly leave Defendant firm and destroy computer files until she learned about it on June 30, 1999.

Defendant firm received notice that the EEOC was expanding its investigation into sexual harassment on August 10, 1999. Accordingly, this Court concludes that any prejudice arising from Hanlon and Greene's destruction of computer files cannot be attributable to delay on the EEOC's part.

Defendant firm further contends that its ability to defend against the EEOC's claims has been detrimentally affected "because employees *who may have witnessed* alleged events have terminated their employment, left the country, and/or forgotten details of events that allegedly occurred over three years ago." However, such generalized speculations are insufficient and do not rise to the level of material prejudice necessary to justify dismissal of an action on the ground of laches. The only individuals that Defendant firm specifically identifies are Defendant firm's two HR personnel during the period in question, Carbone and Wang, who now both live outside of the country and are not available witnesses. Defendant firm does not identify how either of their testimonies would be significant. At any rate, Carbone has been deposed about her knowledge of facts pertaining to sexual harassment and Defendant firm can introduce her deposition testimony at trial if necessary. As for Wang, she worked for Defendant firm until about April of 2001, well after the institution of this action. Thus, Defendant firm could have taken her deposition to preserve her testimony had it wanted to.

Finally, Defendant argues that the EEOC's delay continued into the civil litigation period when it refused to identify the claimants. However, such alleged conduct does not bear on the issue of laches delay, which is determined by the time between filing of the charge and filing of the lawsuit. Once litigation had commenced, such information was available through civil discovery.

Accordingly, this Court concludes that Defendant firm cannot prove either unreasonable delay or prejudice and, accordingly, it is not entitled to summary judgment on its laches affirmative defense.

III. Conclusion

In light of the foregoing, this Court **denies** Defendant's Motions for Dismissal for Lack of Subject Matter Jurisdiction and/or Summary Judgment pursuant to Fed. R. Civ. P. 12(b)(1), 12(b)(6) and 56.

IT IS SO ORDERED.

DATED: 3/22/04

DICKRAN TEVRIZIAN

Dickran Tevrizian, Judge
United States District Court