IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.	:	CIVIL ACTION
v.	:	
BIG WAY, INC., et al.	:	NO. 05-4217

ORDER

AND NOW, this 3rd day of February, 2006, upon consideration of defendant's motion to dismiss and/or for summary judgment[1] (docket entry #9) and plaintiff EEOC's response

[1] The Court may grant a motion to dismiss under Rule 12(b)(6) "only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In other words, we will not grant such a motion "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

If a defendant brings a motion under Rule 12(b)(6) and presents matters outside the pleadings (as defendants have done here), then Rule 12(b) permits us to treat the motion as one for summary judgment, to be disposed of under Rule 56. See Fed. R. Civ. P. 12(b). Plaintiffs have had a chance to respond with materials relevant under Rule 56, as evidenced by the exhibits attached to their response. Therefore, we shall treat this as a motion for summary judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the

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thereto, and the Court finding that:

(a) On or about February 23, 2004, Joyce Fishel filed a charge of discrimination with the EEOC against her former employer Big Way, Inc. t/a Valley Green Inn alleging sexual harassment, a hostile work environment, and constructive discharge, see Def.'s Mem. in Supp. of Mot. to Dismiss ("Def.'s Mem.") Ex. E;

(b) On March 9, 2005, George Marinucci, the EEOC Investigator assigned to Fishel's case, sent Big Way a letter describing the case and stating that the EEOC found probable cause to believe Fishel's charges of sexual harassment, hostile work environment, and constructive discharge, and although the evidence did not support her contention that she had been deprived of company benefits given to male co-workers, it did support her claim that she was paid less than a male performing the same job, see id. Ex. A;

(c) On or about March 30, 2005, Big Way obtained new counsel, Patricia Collins, who requested and received from the EEOC a fifteen-day extension to respond to the March 9, 2005 letter, see id. at 2;

(d) On April 14, 2005, Big Way sent a letter to the EEOC addressing each of Fishel's claims, attaching additional witness statements refuting her claims, and concluding that they

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[1](...continued)
jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

were not actionable under Title VII or the Equal Pay Act, see id. Ex. B;

(e) On June 2, 2005, the EEOC issued a Determination letter finding "reason to believe that violations have occurred," seeking compensatory and punitive damages and "costs incurred by the Charging Party and the affected female employees," and requesting that Big Way "accept, reject, or submit a counteroffer to the conciliation proposal which will be forthcoming," id. Ex. C at 6;

(f) On June 8, 2005, the EEOC mailed to Big Way a letter, with an attached Conciliation Agreement, seeking $111,400 for Joyce Fishel ($26,000 in back pay at the manager's pay rate, $23,400 in front pay, $12,000 in attorney fees, and $50,000 in compensatory damages) and $50,000 each for Colleen Quinn and Allison McHale in compensatory damages, and giving Big Way until noon on June 20, 2005 to contact the EEOC with its decision, see id. Ex. D;

(g) According to Marinucci, the claims of Quinn and McHale, two other Big Way employees, came to light during the investigation, and when he interviewed them, they purportedly gave examples of sexual harassment, "including the allegations in [Fishel's complaint]" see Pl. EEOC's Opp'n to Mot. to Dismiss and/or Partial Summ. J. ("Pl.'s Opp'n") Ex. B, Marinucci Aff. ¶ 4;

(h) Quinn and McHale did not file charges of discrimination with the EEOC;

(i) Big Way's counsel contends that she left Marinucci two voicemail messages on June 15, 2005, and that she called him on June 20 and 21, 2005, seeking information about Quinn's and McHale's claims so that she might evaluate them in reviewing the EEOC's conciliation proposal, see Def.'s Mem. 3;

(j) Collins also states that she discussed the matter with George King, Marinucci's supervisor, who told her he would find out the basis of those claims and give her that information, see id. 3;

(k) Collins claims that King never contacted her again, see id., a contention that the EEOC simply does not address in its response to Big Way's motion;

(l) Marinucci informed Collin's via voicemail that, as a matter of policy, the EEOC did not produce witness statements during its investigation period,[2] see Pl.'s Opp'n Ex. B ¶ 4; Def.'s Mem. Ex. F;

(m) On June 17, 2005, Collins faxed and mailed a letter to Marinucci stating, in part:

> Although I will issue a Freedom of Information Act request for the statements and any other information relating to Ms. Quinn and Ms. McHale, I will not have that information by Monday, the deadline you have set for response to the proposed Conciliation Agreement.
>
> Please note that my client wishes to participate in settling its dispute with Ms. Fishel. However, I am a little distressed by the Commission's inclusion of two "additional class members" in the Conciliation Agreement. . . .

[2] The record is unclear on whether Collins received Marinucci's voicemail before or after she is said to have spoken with King.

> . . . Valley Green Inn remains motivated to resolve Ms. Fishel's claims. However, Valley Green Inn will not offer any funds to resolve the time-barred claims of Ms. McHale or Ms. Quinn.
>
> Before Valley Green Inn responds to your proposed conciliation of Ms. Fishel's claims, it needs to know whether the EEOC will insist upon resolution of Ms. Fishel's claims and the time-barred claims as a term of conciliation. Please inform me as soon as possible whether the EEOC will work with the parties to resolve Ms. Fishel's claim only.

Def.'s Mem. Ex. F;

(n) Big Way contends that "[t]he EEOC never contacted counsel for Valley Green Inn to respond to this request," id. at 3;

(o) However, Marinucci states that he spoke with Collins on the telephone on June 21, 2005, at which time he says he told her that Quinn's and McHale's claims were not time-barred; that he would not give her their statements, though he shared with her "the nature of their claims;" and that all three claims would need to be resolved to conciliate, Pl.'s Opp'n Ex. B ¶ 13;

(p) Marinucci contends that Collins "did not indicate that Valley Green would be interested in making a counter-offer for monetary relief, or otherwise," id., but, tellingly, Marinucci does not assert that Collins suggested her client wanted to abandon the conciliation process;

(q) On June 28, 2005, the EEOC issued a Notice of Conciliation Failure, see id. ¶ 14;

(r) On August 9, 2005, the EEOC filed this lawsuit;

(s) Under Title VII of the Civil Rights Act of 1964:

> If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b);

(t) Our Court of Appeals has emphasized that "[c]onciliation rather than formal court proceedings remains the preferred method of settling disputes," Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 398 (3d Cir. 1976); see also Moteles v. University of Pennsylvania, 730 F.2d 913, 917 (3d Cir. 1984) (discussing Congress's assumption that administrative tribunals are better suited to addressing the complicated issues in employment discrimination cases, particularly since such complexities heavily tax the judicial resources of already overburdened federal district courts) (citing H.R. Rep. No. 238, 92d Cong., 2d Sess. 2 reprinted in 1972 U.S. Code Cong. & Ad. News 2137, 2146);

(u) Conciliation is a "flexible and responsive process" that accounts for the facts of each case, EEOC v. Equicredit Corp. of America, No. 02-CV-844, 2002 WL 31371968, at *3 (E.D. Pa. Oct. 8, 2002), and must include:

> (1) informing the violator of ways in which he can bring himself into compliance with the Act;
> (2) telling him that terminated employees may recover back pay;
> (3) notifying him that the Department may institute legal action; and
> (4) assuring him that he may respond to the violations, in light of the possible remedy.

EEOC v. Rhone-Poulenc, Inc., 677 F. Supp. 264, 266 (D.N.J. 1988) (citing EEOC v. Chrysler Corp., 546 F. Supp. 54, 62 (E.D. Mich.

1982), aff'd 733 F.2d 1183 (6th Cir. 1984));

(v) If the EEOC has made a good faith attempt to conciliate and an employer rejects the attempt, the EEOC has no duty to pursue further conciliation efforts and is permitted to file suit under Title VII, EEOC v. Equicredit Corp. of America, 2002 WL 31371968, at *4 (E.D. Pa. Oct. 8, 2002) (citing EEOC v. Keco Industries, Inc., 748 F.2d 1097, 1101-02 (6th Cir. 1984));

(w) On this record before us, we cannot find that the EEOC made a good faith attempt to conciliate;

(x) While Marinucci claims he called Collins the day after the June 20, 2005 EEOC deadline, Big Way unequivocally denies that anyone from the EEOC ever contacted Collins after Marinucci's voicemail informing her that Big Way could not see the statements of McHale or Quinn;

(y) Even if we accept Marinucci's account, that still leaves Collins's troubling assertion -- left unanswered by the EEOC -- that King promised her information about the claims at issue and then never followed up with her;

(z) Whether the EEOC was obligated to provide the requested information is not an issue we decide here, but rather we find that if Collins had been awaiting promised-for information from King -- information that Big Way deemed relevant to its decision making -- then Big Way may well have been surprised by the Notice of Failure of Conciliation;

(aa) Here, the course of action most consistent with Congress's intent in passing Title VII is to stay proceedings and

allow the parties to make a good faith effort at conciliation,[3] see EEOC v. Prudential Federal Sav. & Loan Ass'n, 763 F.2d 1166, 1169 (10th Cir. 1985) (explaining that if the EEOC has failed to exhaust its duty to conciliate, the district court, rather than dismissing the case, should stay proceedings to allow further conciliation); EEOC v. Pet, Inc., Funsten Nut Division, 612 F.2d 1001, 1002-1003 (5th Cir. 1980) (per curiam) (holding that where conciliation was "attempted in good faith, though prematurely aborted. . . . [a] better course would have been for the court to have ordered the stay permitted by 42 U.S.C. Section 2000e-5(f)(1), insuring that . . . suit would be as Congress intended the last and not the first resort"); EEOC v. Sears, Roebuck & Co., 504 F.Supp. 241, 262 (D.C. Ill. 1980) ("The sufficiency of the conciliation effort presents a question of whether the court should stay the proceeding for further conciliation, not whether it has jurisdiction over the cause."); see also Moteles, 730 F.2d at 917; Ostapowicz, 541 F.2d at 398; and

(bb) To be clear, we expect all parties to negotiate with the utmost good faith,

It is hereby ordered that:

1. Defendant's motion is DENIED;

2. This action is STAYED while the parties undertake good faith conciliation efforts;

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[3] Big Way has made other arguments for summary judgment. We will not address those arguments until the parties have complied with Title VII's requirements. If good faith negotiations fail, there will be ample time for Big Way to reassert its other contentions.

3. On March 1, 2006, and on the first business day of each month thereafter, the parties shall jointly REPORT BY FAX (215-580-2156) on the status of their conciliation efforts; and

4. The Clerk shall TRANSFER this case from our Active Docket to our Civil Suspense Docket.

BY THE COURT:

/s/ Stewart Dalzell, J.