

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION

Civil File No. 99-613 MJD/JGL

Plaintiffs,

v.

**ORDER**

US WEST, INC.,

Defendant.

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Kathleen M. Mahoney, David M. Wilk  
Oppenheimer Wolff & Donnelly, L.L.P.  
On behalf of Defendant/Counterclaimant

Stephanie D. Garner, Jeffrey T. Rosen, Laurie A. Vasichek  
Equal Employment Opportunity Commission  
On behalf of Plaintiff/Counterdefendant

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**INTRODUCTION**

This case is before the court on the Equal Employment Opportunity Commission's (EEOC) motion to dismiss US West's counterclaim for declaratory judgment. In the underlying lawsuit, the EEOC seeks to enjoin US West from attaching a confidentiality statement to information provided to charging parties in EEOC investigations. In the counterclaim, US West seeks a declaration that the EEOC improperly required US West to disclose confidential information to charging parties, and failed to protect the public disclosure of the information, in violation of Title VII, EEOC regulations, the Freedom of Information Act ("FOIA") and the Administrative

Procedure Act. The EEOC moves to dismiss the counterclaim for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12 (b)(1) and 12(b)(6).

### **BACKGROUND**

The Equal Employment Opportunity Commission is the federal agency charged with enforcing federal employment discrimination statutes. Current and former employees of US West have, from time to time, filed discrimination suits against US West. The EEOC occasionally requires US West to submit information contained in its response directly to the party filing the discrimination charges (the "charging party"). Since 1996, US West has attached a "Confidentiality Statement" when it provides a copy of its response directly to the charging parties. These statements say that any evidence submitted by US West as part of the EEOC complaint is confidential, and that the charging party may not discuss the information with anyone other than his/her attorney and the EEOC itself.

The EEOC filed a petition in this court to enjoin US West from attaching the "Confidentiality Statement," on the grounds that the statements constitute retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §2000e et seq.; the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq.; the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621; and the Equal Pay Act ("EPA"), 29 U.S.C. § 206 et seq., because they discourage participation by the charging party in the discrimination claim. The EEOC also claims that the confidentiality statements violate public policy because they impair the EEOC's ability to

investigate fully the discrimination charges.

US West submitted a counterclaim against the EEOC, requesting declaratory judgment that the EEOC improperly required US West to disclose confidential information. US West alleges that by requiring the submission of information contained in its response directly to the charging party, without the accompanying confidentiality statement, the EEOC is violating its duty not to disclose information to the public. In addition, US West claims that by failing to obtain an express agreement from the charging party not to disclose the information, the EEOC is further violating its duty. US West also asserts that the original lawsuit was filed by the EEOC in retaliation for complaining about the EEOC's breach of a settlement agreement in another case.

The EEOC now moves this Court to dismiss the counterclaim for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), and for failure to state a claim upon which relief may be granted under Fed. R. Civ. P. 12(b)(6).

### **Discussion**

#### **1. Subject Matter Jurisdiction**

As a threshold matter, this Court must determine whether it has subject matter jurisdiction to hear the instant case. Federal courts are courts of limited jurisdiction and may only hear a case if authorized to do so by a congressional grant of jurisdiction. Insurance Corp of Ireland, Ltd. v. Compagnie des Bauxites de Guinée, 456 U.S. 694, 702 (1982). US West claims jurisdiction under the anti-discrimination statutes, Leedom v. Kyne, 358 U.S. 184 (1958), and the Fed. R. Civ. P. 13(a). For the reasons stated below, the Court finds that none of these provisions gives this Court jurisdiction over the

counterclaim.

It is well settled that Title VII does not give a federal court jurisdiction over an action concerning the processing of a discrimination claim. §706, §717, U.S.C. §§2000e-5, 2000e-6(b) and 2000e-16; Storey v. Rubin, 976 F.Supp. 1478 (N.D.Ga. 1997), aff'd 144 F.3d 56 (11<sup>th</sup> Cir. 1998); McCottrell v. EEOC, 726 F.3d 350 (7<sup>th</sup> Cir. 1984); Ward v. EEOC, 719 F.2d 311 (9<sup>th</sup> Cir. 1983), cert. den. 466 U.S. 953 (1984); Becker v. Sherwin Williams, 717 F.Supp. 288 (D. N.J. 1989); Newsome v. EEOC, 1998 WL 792502, 2 (N.D. Tex. 1998)(mem.).

Nor can US West avail itself of the ADA, the EPA or the ADEA. The ADA creates remedies co-extensive with that of Title VII. §107, 42 U.S.C. §12117. As Title VII does not provide an express remedy or confer jurisdiction, neither does the ADA. The EPA provides for suits alleging certain types of discriminatory actions by employers. 29 U.S.C. § 216 (b). The EEOC is not being sued in its capacity as an employer, and therefore no express cause of action or jurisdiction is present. Similarly, the ADEA lacks express remedies, and does not provide create jurisdiction, for an employer to sue the EEOC over the investigation and processing of discrimination charges. §7(c), 29 U.S.C. §626(c); §.15(c), 29 U.S.C. §633a(c); Forbes v. Reno, 893 F.Supp. 476, 482 (W.D. Pa. 1995); Becker, 717 F.Supp. at 294.

The "Federal Question" statute gives federal district courts original jurisdiction over matters "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. §1331. As noted, the counterclaim does not "arise under" any federal law. None of the discrimination statutes provides jurisdiction or a cause of action for a suit by an

employer against the EEOC. See 42 U.S.C. §2000e et seq.; 42 U.S.C. §12101 et seq.; 29 U.S.C. §621; 29 U.S.C. § 206 et seq. Without federal law as the basis for the counterclaim, jurisdiction is not satisfied by the mere invocation of §1331.

The Administrative Procedure Act does not provide an independent basis for subject matter jurisdiction permitting federal judicial review of agency decisions. 5 U.S.C. §704; see Califano v. Sanders, 430 U.S. 99, 105 (1977); Defenders of Wildlife v. EPA, 882 F.2d 1294, 1303 (8<sup>th</sup> Cir. 1989)("[The APA] does not provide an independent source of jurisdiction or create a cause of action when none previously existed."); Billops v. Dept. of the Air Force, 725 F.2d 1160, 1163 (8<sup>th</sup> Cir. 1984).

US West argues that, even if the APA does not provide jurisdiction, this case meets the requirements for judicial review of agency action set forth in Leedom v. Kyne, 358 U.S. 184 (1958). In that case, the NLRB was charged with expressly violating the mandate of §9(b)(1) of the National Labor Relations Act, which prohibits the NLRB from including professional and non-professional employees in the same bargaining unit unless the professional employees vote to be included in the unit. The Supreme Court held that the District Court had jurisdiction of an original suit to vacate the determination because it was made in excess of the Board's powers. Id. at 188.

The holding of that case, however, is narrower than US West purports it to be. The agency action being challenged must be "contrary to a specific prohibition in the Act" and must deprive petitioners of a "right assured to them by Congress". Id. Numerous courts have recognized the narrow scope of the holding. Boire v. Greyhound Corp., 376 U.S. 473, 481 (1964)("The Kyne exception is a narrow one...."); Newport

News Shipbuilding & Dry Dock Co. v. NLRB, 633 F.2d 1079, 1081 (4<sup>th</sup> Cir. 1980)("[Kyne is to be narrowly construed..."); Dart v. U.S., 848 F.2d 217, 231 (D.C. Cir. 1988)("[T]he invocation of Leedom v. Kyne jurisdiction is extraordinary; to justify such jurisdiction, there must be a "specific provision of the act which, although it is clear and mandatory, was nevertheless violated") citing Council of Prison Locals v. Brewer 735 F.2d 1497, 1501 (D.C. Cir. 1984); McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the U.S., 83 F.Supp. 2d 135, 159 (D.D.C. 1999).

In this case, US West is unable to point to a specific statutory violation made by the EEOC's requirement that US West provide its charge response directly to the charging party without a confidentiality statement. Because no express violation of a right assured by Congress has been alleged, this case does not fall within the Kyne exception.

US West argues that even if independent subject matter jurisdiction is not found, the counterclaim is compulsory, and therefore under the Federal Rules of Civil Procedure, independent subject matter jurisdiction is not required. Counterclaims are considered compulsory if the claim arises out of the same set of facts and circumstances. Fed. R. Civ. P. 13(a); Hurst v. Toshiba America Information Systems, Inc., slip op. 97-1864 (MJD/AJB).

The counterclaim in this case does not arise out of the same set of facts and circumstances which gave rise to the original matter. The EEOC's complaint seeks to enjoin US West from attaching confidentiality statements to copies of its response

which it submitted directly to the charging parties, at the EEOC's request. The EEOC alleges that the inclusion of the statement constitutes retaliation against the charging party, and has a chilling effect on the investigation. By contrast, US West's counterclaim alleges that the EEOC is violating various anti-discrimination statutes by not requiring that the charging parties agree to keep the information confidential. US West also alleges that the EEOC's claim is made in retaliation against US West for complaining about the EEOC's reach of a settlement agreement in another case. The original claim concerns US West's attempt to silence the charging parties; the counterclaim concerns the EEOC's alleged violation of its duty as an administrative agency. Since the counterclaim concerns a different set of issues, it is not compulsory within the meaning of Fed. R. Civ. P. 13 (a). Subject matter jurisdiction is therefore still required.

Therefore, the counterclaim must be dismissed for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1).

**Order**

ACCORDINGLY, IT IS HEREBY ORDERED THAT

Plaintiff's motion for dismissal of Defendant's counterclaim be GRANTED;  
Defendant's counterclaim is hereby DISMISSED with prejudice.

Dated: Sept 27, 2000

  
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Michael J. Davis  
United States District Court Judge