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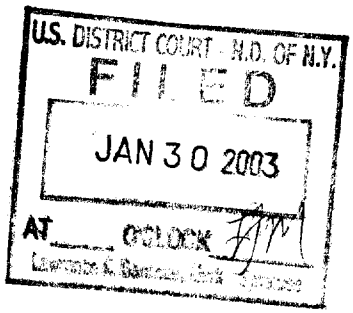
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

-v- 5:02-CV-0820 (NPM/DEP)

STATE UNIVERSITY OF NEW YORK UPSTATE MEDICAL UNIVERSITY,

Defendant.

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NEAL P. McCURN, SENIOR U.S. DISTRICT JUDGE

MEMORANDUM-DECISION AND ORDER

The Equal Employment Opportunity Commission ("EEOC") filed this civil suit against State University of New York Upstate Medical University ("Upstate") pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.

§2000e et seq. ("Title VII"), in order to enforce a settlement agreement it mediated between Upstate and one of Upstate's employee's, Mark Polly. The agreement was entered into to resolve an unlawful employment practice charge made by Mr. Polly against Upstate. Presently before the court is a motion to dismiss, which presents an issue of first impression, to wit, whether the EEOC has the authority to file a civil suit in federal court against a governmental entity seeking enforcement of a pre-reasonable cause determination settlement ("PDS") agreement.[1] Defendant moves this court for dismissal of the action pursuant to Fed. R. Civ. P. 9(a) for lack of the EEOC's authority to sue herein, and in the alternative, for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff opposes this motion. Oral argument was heard on November 8, 2002 in Syracuse, New York and decision was reserved. Because the court finds that the EEOC does not have the authority to sue in the present circumstance, it now grants the motion to dismiss pursuant to Fed. R. Civ. P. 9(a), and having so held, declines to address the arguments presented on 12(b)(6) grounds.

Factual and Procedural Background

More than thirty days prior to the commencement of this lawsuit, Mr. Polly filed a charge with the EEOC against Upstate alleging violations of the Americans

[1] Plaintiff identifies the agreement involved in the present case as a mediation agreement. However, the court hereinafter refers to it as a pre-reasonable cause determination settlement ("PDS") agreement. The procedural posture of the settlement agreement, a significant factor contributing to the court's decision regarding the present motion, is more accurately defined by this term.

with Disabilities Act[2] ("ADA"). See Compl., at ¶ 6. Subsequent to this filing, the EEOC mediated a settlement agreement between Polly and Upstate. See id., at ¶ 7, Ex. A. As part of said settlement, Polly agreed to undergo a functional capacity test in exchange for, among other things, Upstate placing him in the position of Nursing Station Clerk in the Medical Cardiology Department. See id. When Upstate allegedly breached the agreement, EEOC filed the present suit requesting specific performance of the same and monetary damages to Polly resulting therefrom. See id., at ¶¶ 7, A-C.

Presently before the court is Upstate's motion to dismiss this action based upon plaintiff's lack of authority to sue pursuant to Fed. R. Civ. P. 9(a) and for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

Analysis

I. Rule 9(a) Standard

Fed. R. Civ. P. Rule 9(a) provides that "[w]hen a party desires to raise an issue as to the . . . authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue must do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge." A party who fails to raise the issue of lack of authority to sue at an early stage of the litigation, either by responsive pleading or pre-judgment motion,

[2] The Americans with Disabilities Act of 1990 is codified at 42 U.S.C. § 12101, et seq.

waives the defense.[3] See De Saracho v. Custom Food Machinery, Inc., 206 F.3d 874, 878 (9th Cir. 2000); Matson by Kehoe v. Anctil, 979 F. Supp. 1031, 1038 (D. Vt. 1997); Asbestos Workers Syracuse Pension Fund v. M.G. Indus. Insulation Co., 875 F.Supp. 132, 137 (N.D.N.Y. 1995). Here, defendant's challenge of plaintiff's authority to sue is brought at the earliest possible stage of litigation, in a pre-answer motion to dismiss. Therefore, the court will entertain the motion.

II. Authority to Sue

Defendant Upstate argues, pursuant to Fed. R. Civ. P. 9(a), that the EEOC does not have legal authority to bring this lawsuit. In its complaint, plaintiff EEOC claims that it has authority to sue "pursuant to Section 107(a) of the [ADA], codified at 42 U.S.C. § 12117(a), which incorporates by reference sections 706(f)(1) and (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a." See Compl., at ¶ 1. According to Upstate, however, the plain meaning of §

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[3] As an initial matter, the court disposes of EEOC's argument that Upstate waived any defense it may have under Rule 9(a) when it signed the settlement agreement, which by its terms gives EEOC the authority to enforce said agreement through legal action. See Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss, at 5-6; Compl., at Ex. A. The cases EEOC cites to support its argument, however, refer to the fact that a Rule 9(a) defense will be waived if a party fails to raise it at an early stage in the litigation, not as plaintiff here advances, that the defense can be contractually waived. See id., at 5-6. The court finds that defendant Upstate did not contractually waive its right to raise the issue of plaintiff's authority to enforce the settlement agreement by civil suit. A private party cannot give the EEOC authority to take action that Congress itself has not authorized. See EEOC v. Waffle House, Inc., 534 U.S. 279, 301-302, 122 S.Ct. 754, 768 (2002). Thus, because this court finds that Title VII does not authorize EEOC suits against governmental entities to enforce PDS agreements, see 18 infra, any clause in the Upstate-EEOC agreement which purports to allow such a suit would be void.

2000e-5(f)(1) bars the EEOC from filing a civil suit against governmental entities such as Upstate, which is a division of the State University of New York, a governmental agency. Section 2000e-5(f)(1) states that if the EEOC is unable to secure an acceptable conciliation agreement from the respondent employer after a charge is filed against it, the EEOC "may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge." See 42 U.S.C. § 2000e-5(f)(1). If the respondent is a governmental agency, the EEOC must "take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court." See id. A summary of the statutory provisions and EEOC regulations governing the appropriate procedures for the agency's prevention of unlawful employment practices, including provisions for pre-conciliation measures, may be instructive at this point. See 42 U.S.C. § 2000e-5; 29 C.F.R. §§ 1601.6-1601.29.

Congress empowered the EEOC "to prevent any person from engaging in any unlawful employment practice". See 42 U.S.C. § 2000e-5(a). Initially, a person claiming to be aggrieved by an unlawful employment practice, such as discrimination based on disability, may file a charge with the EEOC against the offending party. See § 2000e-5(b); 29 C.F.R. § 1601.7. The EEOC, upon receipt of a charge, is given the power to investigate the alleged unlawful employment practice, by such means as, among other things, taking statements from the aggrieved party or parties, assembling a fact finding conference, and issuing subpoenas. See 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.15, 1601.16. Should the EEOC find, for example, that the charge fails to state a claim or if the person aggrieved fails to provide the necessary information, the EEOC has the power to

dismiss the charge. See 29 C.F.R. § 1601.18. If, upon the completion of its investigation, the EEOC finds that there is no reasonable cause to believe that an unlawful employment practice occurred, it may issue such written determination to all parties. See § 1601.19; 42 U.S.C. § 2000e-5(b). Further, prior to issuing a reasonable cause determination, the EEOC may encourage settlement among the parties on mutually agreed terms. See 29 C.F.R. § 1601.20. If the EEOC is unable to bring about a settlement, upon completion of an investigation, it may issue a determination of reasonable cause to believe that an unlawful employment practice has occurred, if it so finds. See § 1601.21. Upon a reasonable cause determination, the EEOC shall "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." See 42 U.S.C. § 2000e-5(b). See also 29 C.F.R. § 1601.24. Finally, if a conciliation agreement cannot be reached, the EEOC may initiate "a civil action against any respondent not a government, governmental agency, or political subdivision". See 42 U.S.C. § 2000e-5(f)(1). See also 29 C.F.R. § 1601.27. Where the respondent is a governmental entity, the EEOC must refer the case to the Attorney General with a recommendation to sue, instead of itself bringing suit. See 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.29.

This case presents a set of circumstances where the EEOC has not yet made an investigation or reasonable cause determination. It received a charge from Mark Polly of an alleged unlawful employment practice against Upstate. Thereafter, the EEOC negotiated a settlement agreement between the parties pursuant to 29 C.F.R. § 1601.20. At that time, the EEOC had not yet conducted an investigation, nor had it made a reasonable cause determination. Section 2000e-5(f)(1) refers to situations where the EEOC "has been unable to secure a conciliation agreement", which must

necessarily follow a determination of reasonable cause. See 29 C.F.R. § 1601.24. Therefore, the plain language of § 2000e-5(f)(1) would seem inapplicable to the facts of this case, where the EEOC had not yet reached the point of conciliation. To be sure, neither the statute nor the regulations expressly provide for judicial action against any respondent, whether a governmental entity or not, upon the breach of a PDS agreement. See EEOC v. Henry Beck Co., 729 F.2d 301, 303 (4th Cir. 1984); EEOC v. Pierce Packing Co., 669 F.2d 605, 607-608 (9th Cir. 1982), (citing 42 U.S.C. § 2000e-5(f)(1); 29 C.F.R. § 1601.20(a))). Thus, the court must look to judicial interpretation of the statute and regulations for guidance.

The issue of whether Title VII should be interpreted to authorize EEOC enforcement of PDS agreements by civil action in federal court is one of first impression in the Second Circuit. Cf. Pierce, 669 F.2d at 608 (Ninth Circuit holding that there is no basis under Title VII for an EEOC suit against a private entity seeking enforcement of a PDS agreement); EEOC v. Liberty Trucking Co., 695 F.2d 1038 (7th Cir. 19682) and EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983) (both allowing EEOC enforcement of post determination conciliation agreements against private entities in federal court); Beck, 729 F.2d at 306 (Fourth Circuit reversing a district court decision granting a motion to dismiss for lack of subject matter jurisdiction, thereby allowing the EEOC to file a civil suit against a private entity to enforce a PDS agreement). Moreover, whether Title VII should be interpreted to authorize such suits against a governmental entity is one of first impression in all of the United States Courts. Cf. U.S. Equal Employment Opportunity Commission v. Illinois Tollway Auth., 800 F.2d 656 (7th Cir. 1986) (allowing EEOC enforcement of an investigative subpoena against a governmental entity in federal court). Therefore, the court's decision in the present case will be

guided by the legislative intent of Title VII as well as the informed reasoning of Courts of Appeal that have examined similar issues regarding EEOC enforcement. See Pierce, 669 F.2d 605; Beck, 729 F.2d 301; Illinois Tollway, 800 F.2d 656.

a. Authority to Enforce PDS Agreements Against Private Entities

In 1982, the Ninth Circuit held that breach of a PDS agreement cannot be the basis of a civil suit filed by the EEOC against a private entity pursuant to Title VII. See Pierce, 669 F.2d 605, 608. In Pierce, several women filed charges with the EEOC alleging sex discrimination regarding pay, job bids, and harassment against their employer, a private company. See Pierce, 669 F.2d at 606. While the EEOC did not conduct its own investigation, it received the results of an investigation conducted by the Department of Labor ("DOL"), and thereafter entered into a settlement agreement with Pierce and the aggrieved female employees. See id. Included in the agreement were Pierce's promises to post job vacancies, allow women to bid on jobs, transfer seniority to women who switched jobs, and implement an affirmative action program. See id. After a signatory to the settlement agreement complained that there had been a breach, the EEOC conducted an "on-site compliance review" and found that Pierce had engaged in "continued sex discrimination". See id. An exchange of correspondence between the EEOC and Pierce followed, resulting in the EEOC filing a complaint in federal court which charged Pierce with unlawful employment practices and an alleged failure to conciliate. See id., at 607.

The district court granted Pierce's motion for dismissal of the lawsuit, and the Ninth Circuit thereafter affirmed that decision, concluding that "[g]enuine investigation, reasonable cause determination and conciliation are jurisdictional

conditions precedent to suit by the EEOC which are conspicuously absent here."[4] See id. at 608. The Court noted that there is an important distinction between settlement and conciliation in that the latter "contemplates charge, notice, investigation, and determination of reasonable cause." See id. Therefore, the court determined, breach of a PDS agreement cannot be grounds for an EEOC suit in the same way that failure of conciliation can, as outlined by statute and regulation. See id., citing 42 U.S.C. § 2000e-5; 29 C.F.R. § 1601.20(a). In reaching its conclusion, the court borrowed a Third Circuit district court's interpretation of the philosophy behind Title VII: "It is difficult to believe that Congress directed the [EEOC] to make a determination of reasonable cause on the merits of a charge and nevertheless contemplated that [it] could institute such litigation before it makes such a determination." See id., (citing EEOC v. E.I. DuPont de Nemours and Co., 373 F.Supp. 1321, 1333 (D. Del. 1974), aff'd, 516 F.2d 1297 (3d Cir.1975)). The main concern expressed by the court in Pierce was that the EEOC was attempting to "leapfrog" the jurisdictional requirements of Title VII by entering into a settlement agreement and upon breach of said agreement, filing a complaint against the employer on the merits of the underlying charge of an unlawful labor practice, prior to conducting an investigation or making a determination of reasonable cause. See id., at 608-09. The Ninth Circuit therefore affirmed the district court's decision to dismiss the EEOC's complaint. See id., at 608.

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[4] The Ninth Circuit found no basis for EEOC's allegation of a failure of conciliation, finding that "[t]he exchange of letters between Pierce and the EEOC was inadequate to constitute legitimate conciliation." See Pierce, 669 F.2d at 608. Here, the EEOC does not argue in its opposition papers that its correspondence with Upstate's Associate Counsel, Molly Zimmerman, which took place after the alleged breach of the settlement agreement, constitutes attempts at conciliation. See Aff. of Robert D. Rose in Supp. of Pl.'s Opp'n to Def.'s Mot to Dismiss, Sept. 23, 2002, Ex. 2-4.

Two years later, however, the Fourth Circuit held that the EEOC may seek to enforce a PDS agreement against a private entity by civil action in federal court. See Beck, 729 F.2d at 305. Beck involved a charge of race discrimination filed against a private company. See id., at 302. According to the terms of the settlement agreement mediated by the EEOC between Beck Co. and the aggrieved employee, Beck Co. would reserve the next available secretarial position for said employee for six months after execution of the agreement. See id. The EEOC later filed suit against Beck Co., asserting breach of the settlement agreement and demanding injunctive relief as well as back and front pay. See id., at 302-03.

In reaching its conclusion that Title VII allowed such suits, the court took notice of two opinions, written after the Ninth Circuit decided Pierce, which allowed judicial enforcement of EEOC conciliation agreements. See id., at 304, citing EEOC v. Liberty Trucking Co., 695 F.2d 1038 (7th Cir. 1982); EEOC v. Safeway Stores, Inc., 714 F.2d 567 (5th Cir. 1983). In both Liberty Trucking and Safeway Stores, the courts recognized that although EEOC enforcement of conciliation agreements is not explicitly authorized by the language of the statute, a holding that such agreements could not be enforced in federal court would be contrary to Congress' emphasis on conciliation as the primary role of the EEOC. See id., at 304, citing Liberty Trucking, 695 F.2d at 1044; Safeway Stores, 714 F.2d at 573. By comparison, according to the court in Beck, PDS agreements are "no less effective in facilitating the [EEOC's] role as a mediator than conciliation agreements." See id., at 305. In fact, the court noted, PDS agreements save litigation costs, further the goal of voluntary compliance and encourage early resolution of charges. See id. The goal of early resolution, according to the court, distinguishes PDS agreements from conciliation agreements, and this distinction is

what led the Ninth Circuit in Pierce to hold that PDS agreements may not be enforced by the EEOC in federal court. See id.; Pierce, 669 F.2d at 608. The court in Beck distinguished on its facts the Ninth Circuit's holding in Pierce, where there the employer agreed to take more broad ranging actions as part of the settlement agreement at issue, and where the EEOC sued on the merits of an intentional unlawful employment practice after the alleged breach of that agreement. See id. In comparison, Beck involved a settlement agreement which included a commitment by the employer that was limited in its benefit to the aggrieved employee who was a party to that agreement. See id., at 302. Likewise, the EEOC did try to "leapfrog" the jurisdictional requirements of Title VII in Pierce by filing a complaint alleging an unlawful employment practice, whereas in Beck, the EEOC sought specific performance of the settlement agreement, without addressing the merits of the underlying charge of discrimination. See id., at 305; Pierce, 669 F.2d at 608.

The facts of the case presently before the court are more comparable to those of Beck than Pierce. Here, as in Beck, the EEOC is seeking specific enforcement of the settlement agreement, unlike in Pierce where suit was brought on the merits of the underlying unlawful employment practice charge. See Beck, 729 F.2d 301, 302-303; Pierce, 669 F.2d 605, 607. Further, the defendant in this case, like the defendant in Beck, limited its obligations in the settlement agreement to actions that would benefit only the aggrieved employee, in this case, Mark Polly. However, in Pierce, the settlement agreement included promises by the employer that would benefit a broader class of persons beyond just the aggrieved employees. Due to the nature of the promises made by Pierce in the settlement agreement and the basis for suit in that case, the Ninth Circuit expressed concern that the EEOC was attempting to leapfrog the jurisdictional requirements of Title VII. However, those

considerations are lacking in this case as they were in Beck where the Fourth Circuit, distinguishing Pierce, found no danger of the EEOC "leapfrogging" Title VII's jurisdictional requirements because the issue before the court there, as here, was not, as in Pierce, whether an unlawful employment practice had in fact occurred, but whether a voluntary settlement agreement, the mediation of which is an important role of the EEOC, was breached.

The court's inquiry cannot end here, however, since both Pierce and Beck involved EEOC suits against private entities, unlike in the present case where the defendant is a state governmental agency.

b. Authority to Sue Governmental Entities

Upstate argues that because § 2000e-5(f)(1) bars suits by the EEOC against governmental entities upon failure of conciliation, suits against governmental entities to enforce PDS agreements are likewise barred. In response to this argument, the EEOC cites a Seventh Circuit case where the court allowed EEOC enforcement of another type of pre-reasonable cause determination document, a subpoena, against a governmental entity through civil action in federal court. See Illinois Tollway Auth., 800 F.2d 656 (7th Cir. 1986).

In Illinois Tollway the aggrieved employee filed a religious discrimination and retaliatory discharge claim with the EEOC against her employer, a governmental entity. See id., at 657. After its requests for documents and interviews were ignored, the EEOC served subpoenas duces tecum upon the Tollway Authority. See id. When the Tollway Authority refused to comply with the subpoenas, the EEOC filed an application for an Order to Show Cause why the they should not be enforced. See id. The Tollway Authority challenged the EEOC's authority to bring

the action, which prompted the court to review the legislative history behind § 2000e and the intent of Congress in limiting suits by the EEOC against governmental entities. See id., at 658-59. The court found that the intent of Congress was to have the EEOC control the investigatory stage of an unlawful employment practice charge against a governmental entity, and to have the Attorney General perform an adjudicatory role. See id., at 660. The purposes behind this framework are to (1) allow state and local governments to encourage equal employment opportunity through informal and voluntary procedures, and (2) "reduce friction between State and Federal governmental agencies." See id., at 659. Although, as the Tollway Authority argued, Title VII requires that the Attorney General, not the EEOC, litigate all civil actions against governmental entities, the court found that the term "civil action" was not defined in the statute. See id. Further, while the broadest reading of the term would encompass an action to enforce a subpoena, the court found that such a reading "would be inapposite both to the purposes of having the EEOC control the investigatory stage and the Attorney General perform the adjudicatory role." See id., at 660. The court concluded that, in keeping with the legislative intent of Title VII, the term "civil action" refers to suits brought on the merits of an unlawful employment practice charge under Title VII and therefore, the EEOC could enforce its investigative subpoenas against a governmental entity in federal court.[5] See id., at 660.

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[5] Upstate cites as alternative authority a Sixth Circuit case which affirms a district court holding that the Attorney General has no authority to bring a "pattern or practice" suit under 42 U.S.C. § 2000e-6(c) against a governmental entity absent a referral by the EEOC. See United States v. Bd. of Ed. of Garfield Heights, 435 F.Supp. 949, 953 (N.D.Oh. 1976), aff'd, 581 F.2d 791 (6th Cir. 1978). In dicta, the district court stated that § 2000e-5(f)(1) explicitly foreclosed the possibility "that the EEOC can itself bring lawsuits in the federal courts against governmental bodies." Given the non-dispositive

c. Authority to Enforce PDS Agreements Against Governmental Entities

The parties in the present case have advanced several arguments regarding whether this court should extend the Seventh Circuit's holding in Illinois Tollway to allow EEOC enforcement of a PDS agreement against a governmental entity in federal court. First, defendant Upstate cites several cases for the proposition that § 2000e-5(f)(1) "clearly authorizes only the Attorney General, and not the EEOC, to bring a civil action against a government defendant". See Mem. of Law in Supp. of Def.'s Mot. to Dismiss, at 2 (emphasis in original). However, these cases involved suits filed on the merits of unlawful employment practice claims and not, as here, a suit where the EEOC seeks enforcement of a PDS agreement. See EEOC v. Am. Fed'n of Teachers, 761 F.Supp 536 (N.D. Ill. 1991), citing EEOC v. Oak Park Teachers' Assoc., 45 Fair Empl. Prac. Cas. (BNA) 444 (N.D. Ill. 1985); EEOC v. Elgin Teachers' Assoc., 45 Fair Empl. Prac. Cas. (BNA) 446 (N.D. Ill. 1985). Since the plain language of § 2000e-5(f)(1) requires a referral to the Attorney General where the EEOC has been unable to secure an acceptable conciliation agreement from the respondent governmental agency, by definition, investigation and a determination of reasonable cause are presumed to have occurred. See 29 C.F.R. § 1601.24. Here, the EEOC had not yet commenced an investigation at the time of mediation, and thus could not have made a reasonable cause determination, precluding applicability of the language at issue in § 2000e-5(f)(1). Therefore, the

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nature of the statement and the fact that the Court of Appeals affirmed the holding, not the dicta of the district court's decision, as well as the fact that other Circuit Courts of Appeal have thereafter given more in depth analysis to the issue of whether the EEOC may file civil suits against a government entity, Garfield Heights is given limited weight in deciding the present motion. See Illinois Tollway, 800 F.2d 656; United States v. Fresno United Sch. Dist., 592 F.2d 1088 (9th Cir. 1979).

cases cited by Upstate do not support its proposition that the EEOC is unable to enforce a PDS agreement against a governmental entity absent referral to the Attorney General.

The EEOC's argument that the Department of Justice ("DOJ") interprets the statute and regulations to prohibit them from filing suit against a governmental entity until the EEOC makes a determination that conciliation efforts have failed is of questionable efficacy to its position in the present motion. The letter from DOJ upon which the EEOC bases its argument refers to a case, not unlike the present one, where there was an alleged breach of a PDS agreement by a governmental entity, but no EEOC determination of reasonable cause or failure of conciliation, and where the EEOC attempted to refer said case to DOJ for adjudication. See Aff. of Robert D. Rose, Sept. 23, 2002, at Ex. 5. The letter states that based upon said circumstances, the case should be returned to the EEOC for "proceedings or disposition as the parties to the settlement agreement, or any of them, may deem appropriate." See id., citing, e.g., Eatmon v. Bristol Steel & Iron Works, 769 F.2d 1503 (11th Cir. 1985); Beck, 729 F.2d 301; Ruedlinger v. Jarrett, 106 F.3d 212 (7th Cir. 1997); EEOC v. Cleveland State Univ., 1982 WL 439 (N.D. Ohio). While courts should generally defer to an agency's construction of the statutes and regulations it administers, see Chevron, Inc. v. Natural Res. Def. Council, 467 U.S. 837, 104 S. Ct. 2778 (1984), a DOJ letter written over one year ago regarding procedure to be followed in a particular case, albeit with similar circumstances to the one presently before the court, does not constitute that agency's position on all such cases. Moreover, it is questionable whether the EEOC's interpretation of DOJ's construction is accurate, since the letter does not explicitly state that DOJ does not have the authority to bring suit prior to a reasonable cause and failure of

conciliation determination. See Aff. of Robert D. Rose, Sept. 23, 2002, at Ex. 5. Nor does the letter explicitly state that the EEOC has authority to file a civil action to enforce the settlement agreement, but instead simply refers the case back to the EEOC for "such proceedings or disposition as the parties to the settlement agreement, or any one of them, may deem appropriate." See id. In any event, should this court accept the DOJ letter as evidence of its official construction of § 2000e-5(f)(1) that it has no authority to sue prior to a failure of conciliation determination by the EEOC, but that instead the EEOC has authority to sue a governmental entity to enforce a PDS agreement, Chevron analysis would yield the conclusion that such construction is impermissible .

In Chevron, the Supreme Court held that where, as here, Congress has not directly addressed the issue at hand, but is silent or ambiguous regarding the issue, the court must determine whether the agency's interpretation is "based on a permissible construction of the statute" before it imposes its own construction. See Chevron, 467 U.S. at 842-843, 104 S.Ct. at 2781-2782. Congress clearly intended that pursuant to Title VII, where the respondent is a governmental entity, the EEOC should perform an investigatory role and DOJ should be responsible for adjudication in certain matters where conciliation efforts have failed. See Illinois Tollway, 800 F.2d at 659, citing 118 Cong. Rec. 7166, 7167-7168, reprinted in Legislative History of the Equal Opportunity Employment Act of 1972, 92d Cong., 2d Sess. at 1847. Therefore, to the extent DOJ interprets § 2000e-5(f)(1) to limit its authority to sue until the EEOC makes a determination that conciliation efforts have failed, this court finds such interpretation to be a permissible construction. However, to make the assumption that the EEOC is thereby given authority to sue a governmental entity to enforce a PDS agreement that was entered into prior to any

efforts of investigation of the charge by the EEOC is an impermissible construction of the statute.[6] Therefore, even if the EEOC's argument that DOJ's construction of § 2000e-5(f)(1) supports its position in defending against the present motion, the court finds that such a construction would not pass muster under Chevron and should not be given judicial deference.

Upstate next argues that it is inefficient for the EEOC to file a lawsuit to enforce the agreement, when it can simply continue to follow its regulatory procedures to investigate Polly's charge, make a determination of reasonable cause, attempt conciliation, and ultimately if necessary, refer the case to the Attorney General for enforcement. See Reply Aff. of Senta Siuda, Sept. 23, 2002, at ¶ 15; 29 C.F.R. §§ 1601.15, 1601.21, 1601.24, 1601.29. Moreover, Upstate asserts in its moving papers and at oral argument that should the court deny its motion to dismiss this action and allow the EEOC to attempt to enforce the settlement agreement at issue, Upstate will effectively be foreclosed from ever litigating the merits of the underlying Title VII unlawful employment practice charge. The court finds the latter argument to be dubious in nature, since Upstate was within its rights not to negotiate nor sign the agreement initially, and having done so in good faith must have anticipated that either party might attempt to enforce it, whether or not they

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[6] Here is where the present case is wholly distinguishable from Illinois Tollway. In that case, the EEOC had begun efforts at investigation, to wit, issuance of subpoenas. This goes to the heart of EEOC's primary role as assigned to it by Congress. Had the court in Illinois Tollway held that the EEOC could not enforce an investigatory subpoena, the intent of Congress would have been thwarted and the EEOC would have essentially been stripped of its power to investigate any unlawful employment practice charge against a governmental entity. In the present case, however, the EEOC had not yet commenced an investigation of Mr. Polly's charge. Therefore, a dismissal of the present action will not leave the EEOC without recourse, as would have been the case in Illinois Tollway.

were actually legally able to do so. Nonetheless, the former argument is essentially the policy reasoning behind this court's decision to grant the present motion. While the EEOC argues that there are important policy interests at stake in protecting the integrity of its mediation process, see Pl.'s Mem. of Law in Opp'n to Def.'s Mot. to Dismiss, at 12, and that these policy interests weigh heavily against dismissing the present case, the court finds that the intent of Congress in legislating limits on the EEOC's ability to file a civil suit against a governmental respondent overrides the EEOC's interest in negotiating PDS agreements. To be sure, the Ninth Circuit in Beck pointed out that there are important policy interests which are protected by enforcement of negotiated settlement agreements, to wit, the preservation of resources that might otherwise be consumed if the EEOC were to head straight into litigation, furtherance of the goal of voluntary compliance, and enhancement of rapid resolution of disputes by "encouraging resolution before the [EEOC] is required to expend time in investigations and reasonable cause determinations". See Beck, 729 F.2d at 305. However, the court is also mindful that the respondent in Beck was a private entity, not a governmental agency as is the case in the present motion. Thus, the interests of Congress referred to by the court in Illinois Tollway regarding the importance of limiting the EEOC's enforcement authority where the respondent is a governmental entity are given more weight by this court and militate in favor of granting the present motion.[7]

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[7] The court also gives weight to the fact that § 2000e-5(f)(1) is silent as to EEOC negotiation of settlement agreements. While the regulations provide for such negotiations "[p]rior to the issuance of a determination as to reasonable cause", see 29 C.F.R. § 1601.20, there is no mention of EEOC enforcement of a negotiated settlement agreement in neither the statute nor the regulations.

Conclusion

The court grants defendant's motion to dismiss the present action pursuant to Fed. R. Civ. P. 9(a) due to plaintiff's lack of authority to sue. Having so held, the court declines to address defendant's motion to dismiss on Fed. R. Civ. P. 12(b)(6) grounds for failure to state a claim upon which relief may be granted.

IT IS SO ORDERED.

DATED: January 30, 2003
Syracuse, NY

Neal P. McCurn
Senior U.S. District Judge