UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- against -

THE HOME DEPOT U.S.A., INC.,

Defendant.

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MEMORANDUM AND ORDER

1:05-CV-04486-ENV-CLP

VITALIANO, D.J.

The Equal Employment Opportunity Commission ("EEOC") brings this action against defendant The Home Depot U.S.A., Inc. ("Home Depot") alleging that it engaged in employment discrimination against Glenford Edwards ("Edwards"), and a class of similarly situated employees, on the basis of national origin in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a. Home Depot now moves for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, or, in the alternative, for a 60-day stay of proceedings to permit the parties to conduct further conciliation. For the reasons set forth below, Home Depot's motion for partial summary judgment is denied, but its request for alternative relief in the form of a 60-day stay of proceedings is granted.

I. Factual Background

The facts essential to a determination of this motion are undisputed. Edwards, a black male of Jamaican descent, began working for Home Depot as an hourly sales associate in 1997,

but, in January 2003, was terminated from its Hamilton Avenue, Brooklyn location after he was observed using a false scanning number to purchase an item for less than its stated price. *See* Mirengoff Aff., Ex. A, C. On September 13, 2003, Edwards filed a Charge of Discrimination with the EEOC alleging that Home Depot had subjected him to discriminatory treatment on the basis of his race and national origin and that his discharge was retaliatory. Mirengoff Aff., Ex. B. After an investigation, the EEOC issued, on February 22, 2005, a Determination finding reasonable cause to believe 1) that Home Depot had subjected Edwards and a class of similarly situated employees to a hostile work environment on the basis of their national origins,[1] and 2) that Home Depot had terminated Edwards in retaliation for filing a complaint of racial discrimination with Home Depot's Human Resources Department. Mirengoff Aff., Ex. C.

As is mandated by law, *see* 42 U.S.C. § 2000e-5(b), the EEOC then entered into a conciliation process with the parties. On March 7, 2005, the EEOC sent a letter to Home Depot suggesting 13 remedial steps. These proposals, in large part, revolved around securing guarantees from Home Depot that it would comply in the future with Title VII's mandates, provide further sensitivity training for all employees, and prominently post EEOC notices in all Home Depot stores in the New York City and Long Island areas. The letter also requested that Home Depot pay Edwards a total of $155,160 to settle the charge. This demand included $32,800 in back pay, $39,360 in front pay, $75,000 in compensatory damages, and $8,000 in attorneys' fees and costs. Mirengoff Aff., Ex. D.

Home Depot responded to the EEOC's conciliation proposals in a letter, dated March 15,

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[1]More specifically, the EEOC charged that two assistant managers at Home Depot had, on occasion, "made fun" of employees who had foreign accents. Mirengoff Aff., Ex. C at 3. However, the Determination did not identify any of the complaining employees, with the exception of Edwards, by name. *Id.*

2005, noting its desire to "resolve this matter through the conciliation process" and expressing its willingness to abide by most of the EEOC's requests. Nonetheless, it balked at the prospect of paying $155,160 to Edwards, arguing that this demand was "not reasonable based on the facts of the charge." Home Depot argued that, in addition to the fact that Edwards was only making $15 per hour as a lower-level sales associate, he had not submitted any documentation, *inter alia*, 1) evidencing his efforts to mitigate his damages by finding a comparable job, 2) demonstrating that he was not collecting unemployment benefits, or 3) supporting his demand for $75,000 in compensatory damages. It then offered to settle the matter for $15,440, a figure that included $7,440 for back pay and $8,000 for attorneys' fees. Mirengoff Aff., Ex. E.

Later that month, the EEOC provided Home Depot with additional information regarding Edwards' claims via two forwarded letters from Edwards' attorney, Philip Akakwam ("Akakwam"). In the first letter, dated March 15, 2005, Akakwam asserted that $75,000 would be necessary to compensate Edwards for the "mental anguish" he suffered as a result of Home Depot's conduct. He also stated that although Edwards had submitted numerous employment applications, he had been unable to secure a comparable position. Mirengoff Aff., Ex. G. In the second letter, dated March 21, 2005, Akakwam clarified that, even though Edwards had obtained employment as an "environmental worker" at an hourly rate of $14.00 shortly after being terminated by Home Depot, this position was not "comparable" because it offered fewer benefits and no overtime.[2] Mirengoff Aff., Ex. H.

[2]In contrast, Akakwam claimed that Edwards had often worked up to 80 hours a week - - thus securing him 40 hours of overtime pay - - while employed by Home Depot. Mirengoff Aff., Ex. H.

The EEOC did not respond in writing to Home Depot's counteroffer until May 13, 2005,[3] when it informed Home Depot via letter that Akakwam, on behalf of his client, had rejected Home Depot's "present offer."[4] The EEOC also asserted that it had "identified at least eight (8) individuals who were subjected to discrimination" while employed by Home Depot for whom it wanted to obtain compensation. The letter concluded by stating that "the Commission would like to continue the conciliation process and give Home Depot the opportunity to outline the monetary relief it will be offering the class and any additional monetary relief it is willing to offer Charging Party [Edwards]." Mirengoff Aff., Ex. It followed up with another letter, dated May 20, 2005. In this letter, the EEOC reiterated that Akakwam's demand for Edwards stood at $155,160. The EEOC also announced that it was seeking an additional $120,000 in compensation for the eight as-yet unidentified class members also allegedly discriminated against on the basis of national origin, thus bringing the total demand to $275,160. Mirengoff Aff., Ex. K.

Home Depot replied to this communication on June 1, 2005, indicating its willingness to conciliate in good faith but requesting information regarding documentation from Edwards and any response by him to Home Depot's counteroffer as well as information relating to the allegations and settlement demands of other class members. *See* Mirengoff Aff., Ex. L. The

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[3]The EEOC claims that, in late March 2005, an EEOC representative had orally advised Home Depot that its March 15, 2005 counteroffer was inadequate in part because Home Depot needed to provide monetary relief for "other class members." *See* Mirengoff Aff., Ex. I; Pl.'s Rule 56.1 Stmt. ¶ 11. Home Depot disputes this assertion. Indeed, it contends that it did not receive any form of notice that the EEOC intended to pursue monetary relief for anyone besides Edwards until it received the EEOC's May 13, 2005 letter. *See* Def.'s Mem. in Supp. at 3-4.

[4]By this stage, Home Depot had added an additional $3,500 in compensatory damages to its original offer of $7,440 in back pay and $8,000 in attorneys' fees, for a total counteroffer of $18,940. *See* Mirengoff Aff., Ex. F, J; Pl.'s Rule 56.1 Stmt. ¶ 11.

EEOC responded on June 14, 2005, asserting that it "also remain[ed] interested in resolving the above referenced Charge of Discrimination with the Home Depot." Yet, dodging Home Depot's specific request, the letter contained no further documentation supporting Edwards' monetary demand or information regarding the identities or specific allegations of the other class members. Instead, the EEOC simply stated that Edwards was unwilling to reduce his demand for $155,160 and that an additional payment of $120,000 would be necessary to resolve the claims of the class. The EEOC then gave Home Depot until June 22, 2005 "to outline the additional monetary relief it is willing to offer to resolve this matter with all parties involved." Mirengoff Aff., Ex. M.

Home Depot answered the EEOC's June 14, 2005 letter on June 22, 2005. It began by reaffirming that it remained "willing to conciliate in good faith with the EEOC." Home Depot argued, however, that it had not yet been provided with even "minimal, basic information" from which to formulate a reasonable counteroffer for any of the complainants' monetary demands. Specifically, with respect to Edwards, Home Depot complained that his request for $155,160 seemed "grossly excessive" in light of the facts that he 1) had not complained of any form of discrimination until his termination, 2) had secured a comparable entry-level position only a few months after this termination,[5] and 3) had provided only minimal supporting documentation for his claim of $75,000 in emotional damages. With respect to the class members, Home Depot complained that it had not been provided with any information whatsoever regarding their identities, "dates of employment; job titles; the nature, severity, or pervasiveness of any alleged

[5]In this regard, Home Depot stressed that Edwards' claim to the EEOC that he had often worked "up to 40 hours of overtime per week" while employed by Home Depot was not grounded in fact since its own records revealed that Edwards had "worked a total of approximately twenty-five hours of overtime during the *entire* two-year period prior to his termination." Mirengoff Aff., Ex. F (emphasis in original).

acts of harassment; or whether or not any of the individuals complained." Mirengoff Aff., Ex. F.

This time, to Home Depot's apparent surprise, the response of the EEOC, on June 23, 2005, was to declare that the conciliation process had been "unsuccessful" and further conciliation efforts would cease. Mirengoff Aff., Exs. N-P. Then, the EEOC, on September 22, 2005, filed the instant action on behalf of Edwards and "a class of similarly situated employees." The complaint asserts, as forewarned, that 1) Edwards and the class were subjected to a hostile work environment on the basis of their national origins, and 2) that Edwards was discharged in retaliation for complaining about this discrimination.

Home Depot now moves for partial summary judgment as to all charges brought by the EEOC that do not relate specifically to Edwards ("the class claims") on the ground that the EEOC failed to adequately fulfill its statutory duty under Title VII to conciliate these claims prior to filing the instant complaint, or, in the alternative, for a 60-day stay of proceedings pending an order by this Court to engage in further conciliation of the class claims.[6] Of course, on a motion such as this seeking summary judgment by a party asserting a failure on the part of the EEOC to satisfy its statutory duty to conciliate, the Court "is to assume the truth of the matters alleged in the complaint and in the affidavits of EEOC's counsel and the exhibits attached thereto in order to ascertain whether the EEOC met its obligation to conciliate [under the relevant statute]." *E.E.O.C. v. New Cherokee Corp.*, 829 F. Supp. 73, 80 (S.D.N.Y. 1993)(citing *E.E.O.C. v. KDM School Bus Co.*, 612 F. Supp. 369, 373 (S.D.N.Y. 1985))(further noting that this standard "is nothing more than the basic legal standard [] applicable to all motions . . . for summary judgment.").

[6]Although the EEOC did not provide the names of the individual class members in its complaint, it ultimately provided them during discovery after being ordered to do so by Magistrate Judge Cheryl Pollak. Home Depot's records reflect that, of the eight class members, seven had already left the employ of Home Depot by the date conciliation had commenced. *See* Bryant Decl., Ex. 1-7.

II. Discussion

Title VII requires that the EEOC must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" before it initiates a lawsuit to enforce compliance. 42 U.S.C. § 2000e-5(b); *see also* E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 63-64 (1984). This "duty to conciliate is at the heart of Title VII," E.E.O.C. v. Asplundh Tree Expert Co., 340 F.3d 1256, 1260 (11th Cir. 2003), because, as one court has explained:

> [I]t is clear that Congress placed great emphasis upon private settlement and the elimination of unfair practices without litigation . . . on the ground that voluntary compliance is preferable to court action . . . . Indeed, it is apparent that the primary role of the EEOC is to seek elimination of unlawful employment practices by informal means leading to voluntary compliance.

Hutchings v. United States Indus., 428 F.2d 303, 309 (5th Cir. 1970)(internal citations omitted). As such, courts have stressed that "[n]othing less than a 'reasonable' effort to resolve with the employer the issues raised by the complainant[s]" will suffice to satisfy the EEOC's duty of conciliation prior to any commencement of litigation. Asplundh, 340 F.3d at 1260; *see also* Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974)(noting that Title VII's conciliation requirement obligates the EEOC to engage in "strong, affirmative attempts . . . to effect compliance before resorting to legal action").

For a court conducting an inquiry into whether the EEOC has failed to adequately fulfill this statutory mandate, "the fundamental question is the reasonableness and responsiveness of the [EEOC's] conduct under all the circumstances." E.E.O.C. v. Klingler Elec. Corp., 636 F.2d 104, 107 (5th Cir. 1981). In the Second Circuit, the EEOC's duty to conciliate is thus held to be satisfied if, before initiating the action, the EEOC 1) outlines to the employer the reasonable

basis for its belief that the employer is in violation of Title VII, 2) offers the employer an opportunity for voluntary compliance, and 3) responds in a reasonable and flexible manner to the reasonable attitude of the employer. E.E.O.C. v. Johnson & Higgins, Inc., 91 F.3d 1529, 1534 (2d Cir. 1996); E.E.O.C. v. Die Fliedermaus, L.L.C., 77 F. Supp. 2d 460, 466 (S.D.N.Y. 1999); New Cherokee Corp., 829 F. Supp. at 80.[7]

Here, the EEOC has clearly fulfilled its duties under the first and second steps of this analysis. The EEOC's "determination" letter of February 22, 2005 plainly satisfies the first step in that it sets out, albeit briefly, the reasonable basis for the EEOC's belief that Edwards and the other class members had been subjected to a hostile work environment based on their national origins. *See* Mirengoff Aff., Ex. C at 3 (stating that the EEOC had obtained "statements from independent sources . . . that [two supervisors had] made fun of [Edwards and] other employees who had foreign accents"). The second step - - providing an employer with an opportunity for voluntary compliance with Title VII - - was also fulfilled by this letter, *see id.* at 4 (inviting the parties to join in a "collective effort towards a just resolution of this matter" via the conciliation process), as well as by the EEOC's subsequent letter in which it suggested 13 remedial steps to be taken by Home Depot during the conciliation process. *See* Mirengoff Aff., Ex. D; *see also* Die Fliedermaus, 77 F. Supp. 2d at 467 (finding that a similar EEOC letter outlining "conciliation terms" satisfied the second step obligation).

Analysis of third step compliance by the EEOC yields a different result. From the

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[7]At the same time, however, if the defendant categorically "refuses the invitation to conciliate or responds by [simply] denying the EEOC's allegations, the EEOC need not pursue conciliation [at all] and may proceed to litigate the question of the employer's liability for the alleged violations." Johnson & Higgins, 91 F.3d at 1535. This is clearly not such a case.

uncontested facts, it is clear that the EEOC did not "respond in a reasonable and flexible manner to the reasonable attitude of the employer." *Johnson & Higgins*, 91 F.3d at 1534.

As an initial matter, the formal response of Home Depot following the EEOC's formal announcement[8] of its intent to pursue compensatory damages on behalf of the unidentified class members cannot in any way be characterized as unreasonable. Notably, Home Depot did not simply deny the class's allegations or state that it would not be amenable to resolving them in conjunction with the complaint of Edwards. Instead, and significantly, it reiterated its continuing desire to resolve the entire matter "in good faith" via the conciliation process and in that connection requested that the EEOC provide it with "information concerning the allegations of the 8 potential class members." Such basic information, Home Depot indicated, would be helpful in its formulation of the reasonable counteroffer the EEOC had, in its May 20, 2005 letter, specifically requested Home Depot to provide. *See* Mirengoff Aff., Ex. L.

The EEOC, however, refused to accommodate this request. Instead, it summarily demanded, on June 14, 2005, that Home Depot pay $120,000 to resolve the class claims, or, in the alternative, to submit a "reasonable counteroffer." If Home Depot did not acquiesce in this demand, the EEOC warned, it would "infer that further efforts to conciliate this matter [would] be futile." Mirengoff Aff., Ex. M. Home Depot was thus faced with the unenviable choice of either acceding to the EEOC's monetary requests regarding the class, despite not being provided with any basis whatsoever for ascertaining whether these claims were reasonable, or risking costly federal litigation if it did not.

Understandably, with no substantial reply from the EEOC, Home Depot responded on

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[8]For purposes of this motion, whether this intention was communicated in March 2005, as the EEOC contends, or in May 2005, as Home Depot contends, *see* footnote 3, *supra*, is of no consequence.

June 22, 2005 by again requesting information regarding the allegations of the class. It pointed out that, without "minimal, basic information" regarding these claims, such as "dates of employment," "job titles," or "the nature, severity, or pervasiveness of any alleged acts of harassment," it was "impossible for the Company to provide a meaningful response" to the EEOC's $120,000 demand to settle the class claims. Mirengoff Aff., Ex. F. It was at this stage, of course, that the EEOC inexplicably called off conciliation, stating only that its efforts to conciliate to date had been "unsuccessful" and that any future conciliation regarding *any* of the claims would be "futile or non-productive." Mirengoff Aff., Ex. N.

There can be no reasonable dispute that the record as set out above clearly establishes, with respect to the class claims, that the EEOC did not respond "in a reasonable and flexible manner to the reasonable attitude of the employer," *Johnson & Higgins*, 91 F.3d at 1534, and thus did not fulfill its statutory duty to conciliate before initiating litigation. With no admissible evidence proffered with the complaint, or by affidavit or exhibits to the contrary, it is clear that Home Depot had been cooperative throughout the conciliation process; it had promptly agreed to all of the EEOC's nonmonetary demands, and had simply requested more information regarding the claims of the class in order to formulate the reasonable counteroffer the EEOC had asked it to provide. Considering the fact that, at this stage, the EEOC had provided Home Depot with absolutely no information regarding the identities or claims of the eight class members - - with the exception of the rather vague allegation that, on unspecified dates, two Home Depot managers had "made fun" of them because of their accents - - Home Depot cannot be faulted for making this reasonable inquiry. The EEOC's response - - refusing to provide such basic information while, at the same time, threatening litigation if Home Depot did not pay up - - was unreasonable. Indeed, even recognizing the fact that "[c]onciliation is . . . a flexible and

responsive process which necessarily differs from case to case," *E.E.O.C. v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985), the EEOC's conduct in the instant case with respect to the class claims "smacks more of coercion than of conciliation." *E.E.O.C. v. Pet, Inc., Funsten Nut Div.*, 612 F.2d 1001, 1002 (5th Cir. 1980).

Die Fliedermaus is directly on point. There, the EEOC presented the employer with five "conciliation terms" during the conciliation process. The employer promptly agreed to the first three of these terms, which provided for sensitivity training, the posting of remedial notices, and the adoption of an anti-harassment policy. But, when the employer requested more information about the class members and their allegations prior to responding to the fourth and fifth terms, both of which involved monetary compensation, the EEOC refused to provide the employer with the requested information. Instead, as in the instant case, it declared conciliation a failure and filed suit. The court found that, by calling off negotiations while the other party was still expressly amenable to conciliation, the EEOC had clearly failed to fulfill its statutory duty under Title VII to conciliate the claims prior to instituting litigation. *See Die Fliedermaus*, 77 F. Supp. 2d at 467-68; *see also E.E.O.C. v. Golden Lender Financial Group*, 2000 WL 381426, at *5 (S.D.N.Y. Apr. 13, 2000)(the EEOC failed to meet the third requirement by refusing to provide requested information).

Because the conciliation requirement of 42 U.S.C. § 2000e-5(b) is a jurisdictional prerequisite to suit, *see Prudential*, 763 F.2d at 1169, "[w]here the EEOC has made absolutely no efforts [to conciliate] dismissal is appropriate." *New Cherokee Corp.*, 829 F. Supp. at 81. On the other hand, where, as here, the EEOC has made at least a cursory effort to conciliate a claim, the "preferred remedy is not dismissal but a stay of the action to permit such conciliation." *Id.*; *see also Die Fliedermaus*, 77 F. Supp. 2d at 468 (granting a stay of proceedings to allow the parties

to engage in further conciliation); *Golden Lender*, 2000 WL 381426 at *6 (same). It is this relief that the Court will order.

III. Conclusion

For the foregoing reasons, this case shall be stayed for a period of 60 days from the date of this Memorandum and Order to facilitate the required further good faith efforts by the parties to conciliate the class claims. Home Depot's motion is otherwise denied.

SO ORDERED.

DATED: Brooklyn, New York
July 19, 2007

ERIC N. VITALIANO
United States District Judge