2000 WL 381426
United States District Court, S.D. New York.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,
v.
GOLDEN LENDER FINANCIAL GROUP, Defendant.

No. 99 Civ. 8591(JGK). | April 13, 2000.

Opinion

OPINION AND ORDER

KOELTL, J.

***1** This is an action brought by the Equal Employment Opportunity Commission ("EEOC") alleging that the defendant, the Golden Lender Financial Group ("Golden Lender"), engaged in discrimination on the basis of sex, race and national origin and retaliation in violation of Sections 703(a) and 704 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2(a) and 2000e–3. The defendant moves to dismiss the action pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I.

On a motion to dismiss, the allegations in the complaint are accepted as true. *See Grandon v. Merril Lynch & Co.,* 147 F.3d 184, 188 (2d Cir.1998). In deciding a motion to dismiss, all reasonable inferences must be drawn in the plaintiff's favor. *See Gant v. Wallingford Bd. of Educ.,* 69 F.3d 669, 673 (2d Cir.1995); *Cosmas v. Hasset,* 886 F.2d 8, 11 (2d Cir.1989). In deciding the motion, the Court may consider documents referenced in the complaint and documents that are in the plaintiff's possession or that the plaintiff knew of and relied on in bringing suit. *See Brass v. American Film Technologies, Inc.,* 987 F.2d 142, 150 (2d Cir.1993); *Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 47–48 (2d Cir.1991); *I. Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc.,* 936 F.2d 759, 762 (2d Cir.1991); *Skeete v. IVF America, Inc.,* 972 F.Supp. 206, 208 (S.D.N.Y.1997). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden,* 754 F.2d 1059, 1067 (2d Cir.1985). Therefore, the defendant's motion to dismiss should only be granted if it appears that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *See Conley v. Gibson,* 355 U.S. 41, 45–46 (1957); *Grandon,* 147 F.3d at 188; *see also Goldman,* 754 F.2d at 1065.

Summary judgment may not be granted unless "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); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986); *Gallo v. Prudential Residential Servs., Ltd. Partnership,* 22 F.3d 1219, 1223 (2d Cir.1994). In determining whether summary judgment is appropriate, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Antis, Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986) (citing *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962)); *see also Gallo,* 22 F.3d at 1223. Summary judgment is improper if there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party. *See Chambers v. TRM Copy Ctrs. Corp.,* 43 F.3d 29, 37 (2d Cir.1994). "In considering the motion, the court's responsibility is not to resolve disputed issues of fact but to assess whether there are factual issues to be tried." *Knight v.. U.S. Fire Ins. Co.,* 804 F.2d 9, 11 (2d Cir.1986). On a motion for summary judgment, once the moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party must come forward with specific facts to show there is a factual question that must be resolved at trial. *See* Fed.R.Civ.P. 56(e); *see also Cornett v. Sheldon,* 894 F.Supp. 715, 724 (S.D.N.Y.1995) ("[T]he plaintiff, to avoid summary judgment, must show a genuine issue by presenting evidence that would be sufficient, if all reasonable inferences were drawn in his favor, to establish the existence of that element at trial.") (citing *Celotex,* 477 U.S. at 322–23). The non-moving party must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Ying Jing Gan v. City of New York,* 996 F.2d 522, 532 (2d Cir.1993); *see Scotto v. Almenas,* 143 F.3d 105, 114–15 (2d Cir.1998) (collecting cases); *Wyler v. United States,* 725 F.2d 156, 160 (2d Cir.1983); *Cornett,* 894 F.Supp. at 724.

II.

***2** The complaint in this action arises out of the EEOC's investigation of charges by three former employees of Golden Lender: a March 5, 1998 charge by Gloria Grijalva alleging sexual harassment of her and other female employees by Golden Lender's President, Vice President, and Account Executive (*see* Charge of Discrimination dated March 5, 1998, attached as Ex. C to Affidavit of Lawrence R. Sandak dated Oct. 8, 1999 ("Sandak Aff.")); a March 10, 1998 charge by Maritza Rivera alleging sexual harassment and national origin discrimination by Golden Lender's President, Vice President, and unnamed others (*see* Charge of Discrimination dated March 10, 1998, attached as Ex. A to Sandak Aff.); and an April 24, 1998 charge by Debra Popolow alleging sexual harassment and discrimination on the basis of color by four individuals (*see* Charge of Discrimination dated April 24, 1998, attached as Ex. B to Sandak Aff.).

On March 24, 1999 the EEOC sent Golden Lender a Determination letter with respect to each of these three charges, in each instance stating that there was evidence of unlawful discrimination and inviting Golden Lender to engage in conciliation to resolve the charge. (*See* Determination letters dated March 24, 1999, attached as Exs. D, E & F to Sandak Aff.) On April 21, 1999, the EEOC sent to Golden Lender's counsel a list of eight terms which the EEOC considered an appropriate remedy for the three discrimination charges. (*See* Letter from Joan Marchese dated April 21, 1999, attached as Ex. G to Sandak Aff.) These terms included back pay and compensatory damages for Grijalva, Rivera, and Popolow and other affected employees, sensitivity training, and adoption of an effective policy against harassment. (*See id.*) The EEOC advised Golden Lender to notify it if Golden Lender would be willing to enter into a conciliation agreement in accordance with the listed terms, or to provide a reasonable written counterproposal by April 29, 1999. (*See id.*) On April 21, 1999, Golden Lender's counsel telephoned the Senior Investigator at the New York District Office of the EEOC to discuss the terms of the conciliation. (*See* Memorandum by Joan Marchese ("Marchese Mem.") dated April 29, 1999, attached as Ex. I to Declaration of Andree M. Peart ("Peart Decl.") dated Oct. 22, 1999; Sandak Aff. ¶ 12.) During the course of their discussions, Golden Lender's counsel offered specific amounts of compensation for the three charging individuals; he requested that the EEOC identify other alleged victims of discrimination for whom compensation was sought and the amount of their alleged damages; and he agreed to the other terms requested by the EEOC. (*See* Marchese Mem., Sandak Aff. ¶ 12–14.) The EEOC investigator agreed to get back to Golden Lender's counsel on this issue. (*See* Marchese Mem., Sandak Aff. ¶ 14.) The next day, however, the EEOC notified Golden Lender that it had determined that efforts to conciliate the charges had been unsuccessful and that no further efforts would be made to that end. (*See* Letter of Spencer H. Lewis Jr. dated April 30, 1999, attached as Ex. H to Sandak Aff.) On May 11, 1999 Golden Lender wrote the EEOC expressing surprise at this outcome and stating that it desired to reach conciliation, and reiterating that it had made specific offers to compensate the three charging individuals and agreed to the other conciliation terms, but that it required specific information about other alleged victims of discrimination and their damages before it could agree to compensate them in any specific amounts. (*See* Letter of Lawrence R. Sandak dated May 11, 1999, attached as Ex. I to Sandak Aff.) There is no evidence of any further communications between Golden Lender and the EEOC and the EEOC filed this action on August 3, 1999.

III.

***3** The defendant argues that any claims in this action alleging a pattern and practice of discrimination should be dismissed because an EEOC Commissioner did not first file a charge outlining the alleged pattern and practice.

The timely filing of an EEOC charge is a prerequisite to commencing a Title VII action. *See* 42 U.S.C. § 2000e–5(e) & (f). An EEOC charge may be filed by aggrieved individuals or by members of the Commission. *See* 42 U.S.C. § 2000e–5(b). Whether filed by an individual or by a Commissioner, the charge must be in writing and under oath or affirmation and "contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e–5(b). When a charge has been filed against an employer, "the Commission shall serve a notice of the charge (including the date, place and circumstances of the unlawful employment practice) on such employer ... within ten days, and shall make an investigation thereof." *Id.* The EEOC has promulgated a regulation that requires a charge to contain "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3). In the context of a pattern-and-practice charge filed by a Commissioner, the Supreme Court has held that the regulation requires that

> [i]nsofar as he is able, the Commissioner should identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been

practiced.

EEOC v. Shell Oil Co., 466 U.S. 54, 73 (1984). *See also EEOC v. Superior Temporary Services, Inc.,* 56 F.3d 441, 446 (2d Cir.1995).

A district court only has jurisdiction to hear claims which are either raised in the EEOC charge or are reasonably related to the EEOC charge. *See Shah v. New York State Dep't of Civil Serv.,* 168 F.3d 610, 613–14 (2d Cir.1999); *Butts v. City of New York Dep't of Hous.,* 990 F.2d 1397, 1402 (2d Cir.1993). The Court of Appeals for the Second Circuit has recognized three different instances where claims not alleged in an EEOC charge are sufficiently related to provide jurisdiction: (1) where the claim concerns conduct which would fall within the reasonable scope of the EEOC investigation; (2) where the claim alleges retaliation for filing the EEOC charge; and (3) where the plaintiff alleges further incidents of discrimination carried out in precisely the same manner alleged in the EEOC charge. If the claims raised in a complaint are not reasonably related to those made in the charge, dismissal of the unrelated claims is required. *See Butts,* 900 F.2d at 1403 (dismissing claims of discrimination in terms and conditions of employment not specifically made in EEOC charge); *Buckvar v. City of New York,* No. 98 Civ. 3016, 2000 WL 274195, at *5 (S.D.N.Y. March 13, 2000) (dismissing claim of a pattern of discrimination and a continuing violation where charge only alleged a failure to promote an individual and his forced retirement); *Nweke v. Prudential Ins. Co. of America,* 25 F.Supp.2d 203, 214–15 (S.D.N.Y.1998) (dismissing claims of discriminatory policy and practice and disparate impact where EEOC charge only alleged discriminatory discharge and retaliation against individual); *Gilliard v. New York Public Library System,* 597 F.Supp. 1069, 1078–79 (S.D.N.Y.1984) (dismissing pattern and practice claim where EEOC charge alleged only discriminatory discharge of individual).

***4** The complaint in this action alleges not merely that the three charging individuals were victims of unlawful discrimination but that Golden Lender has engaged in a pattern and practice of discrimination based on sex, race, and national origin. Even recognizing that an EEOC charge does not require the same specificity in pleading as a formal complaint, *see Butts,* 990 F.2d at 1402, the claims made in the complaint of a discriminatory pattern and practice of race and national origin discrimination are plainly not related to the EEOC charges filed in this action. The only charges filed with the EEOC were those of the three individual employees. None of those charges make any allegation at all that any other employees were subjected to discrimination because of their race or national origin, or any allegation of a pattern or practice of race or national origin discrimination. The only allegations in these charges pertaining to race or national origin are an allegation in Maritza Rivera's charge that she, individually, was the target of ethnic slurs, and a statement in the charge filed by Debra Poplow that she believed that harassment directed at her was motivated by her skin color. Because these charges, even broadly construed, involve only individual allegations of racial discrimination directed towards the charging individuals, they are not reasonably related to the claims made in the complaint of a pattern and practice of racial and national origin discrimination. *See Buckvar,* 2000 WL 274195, at *5; *Nweke,* 25 F.Supp.2d at 215; *Gilliard,* 597 F.Supp. at 1078–79. The claims of a pattern and practice of race and national origin discrimination are therefore dismissed.

The claim of a pattern and practice of discrimination based on sex is, however, reasonably related to the EEOC charges. The charges filed by Gloria Grijalva and Maritza Rivera specifically allege that other women at Golden Lender were subjected to sexual harassment. Rivera alleged specifically in her charge that such harassment occurred on a "continuing basis" and that "[m]any complaints by myself and others were made and nothing was done." Grijalva alleged in her charge that officers at Golden Lender "were in the habit of making sexually explicit comments to female employees." Because these charges were not limited to individual instances of discrimination against the charging individuals, a claim of a pattern and practice of sexual discrimination involves conduct which would fall within the reasonable scope of the EEOC's investigation of the charges. The claim of a pattern and practice of sex discrimination in the complaint is therefore reasonably related to the EEOC charges. *See Sidor v. Reno,* No. 95 Civ. 9588, 1997 WL 582846, at *9 (S.D.N.Y. Sept. 19, 1997) (allegation that other deaf employees were also discriminated against related to pattern and practice claim). Moreover, in this case three women employees of Golden Lender filed charges of sexual harassment within a two-month period, naming specific officers of Golden Lender, and in two instances alleging sexually offensive comments directed at female employees. That the EEOC would investigate a pattern and practice of discrimination is wholly reasonable under these circumstances. Further, "[i]n the absence if any indication of delinquency on the part of the investigating agency, the scope of the actual investigation conducted is strongly suggestive of what could reasonably be expected to grow out of the administrative charge." *Sidor,* 1997 582846, at *10. Here, the EEOC's investigation, as evidenced by the Determination letters of March 24, 1999, involved inquiry into other victims of sexual harassment. The scope of the investigation conducted by the EEOC therefore also supports the conclusion that the claim of a pattern and practice of sex discrimination is reasonably related to the charges filed in this case. The defendant's motion to dismiss this claim is therefore denied.

IV.

***5** The defendant also argues that the entire action should be dismissed because the EEOC failed to make sufficient efforts to conciliate before bringing the action.

Under Title VII, if the EEOC determines that there is reasonable cause to believe that a charge of an unlawful employment practice 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). This requirement to attempt conciliation is met if the EEOC "outlines to the employer the reasonable cause for its belief that the employer is in violation of the Act, ... offers an opportunity for voluntary compliance, and ... responds in a reasonable and flexible manner to the reasonable attitude of the employer." *EEOC v. Die Fliedermaus, L.L.C.,* 77 F.Supp.2d 460, 466 (S.D.N.Y.1999) (quoting *EEOC v. Colgate–Palmolive Co.,* No. 81 Civ. 8145, 1983 WL 621, at *5 (S.D.N.Y.1983). *See also EEOC v. Johnson & Higgins, Inc.,* 91 F.3d 1529, 1534 (2d Cir.1996); *EEOC v. New Cherokee Corp.,* 829 F.Supp. 73, 80 (S.D.N.Y.1993); *EEOC v. Dover Employment Agency, Inc.,* No. 91 Civ. 3796, 1992 WL 295979, at *5 (S.D.N.Y. Oct. 9, 1992); *EEOC v. KDM School Bus Co.,* 612 F.Supp. 369, 374 n. 17 (S.D.N.Y.1985) (Weinfeld, *J.*). "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." *Johnson & Higgins,* 91 F.3d at 1535.

Here, the EEOC outlined in its Determinations the reasonable cause for its belief that Golden Lender was in violation of Title VII and the EEOC provided Golden Lender an opportunity for voluntary compliance. However, the EEOC plainly did not meet the third requirement for conciliation. Golden Lender's request for specific information about other affected individuals and the extent of their alleged damages was a reasonable inquiry about the nature of the conciliation terms proposed by the EEOC. Golden Lender's attitude was plainly reasonable: it had agreed to the other terms proposed by the EEOC and it had made a specific offer of compensation for the three charging individuals, but it sought additional information as to compensating other alleged victims. The EEOC did not respond reasonably and flexibly to Golden Lender's inquiry. Indeed, the EEOC's only response was to advise Golden Lender that conciliation had failed and then to file this lawsuit. The EEOC did not meet its statutory duty to attempt conciliation under these circumstances. *See Die Fliedermaus,* 77 F.Supp.2d at 467.

However, dismissal of this action is not warranted on this basis.

> [I]f the EEOC is found not to have fulfilled its statutory duty to conciliate, the preferred remedy is not dismissal but instead a stay of the action to permit such conciliation. Where the EEOC has made absolutely no efforts dismissal is appropriate, but where conciliation efforts have been abbreviated, the case should be stayed to allow sufficient time for the parties to engage in more serious conciliation discussions.

***6** *New Cherokee Corp.,* 829 F.Supp. at 81. *See also EEOC v. Sears, Roebuck & Co.,* 650 F.2d 14, 19 (2d Cir.1981). Here, it cannot be said that the EEOC has made absolutely no efforts to conciliate. Dismissal is therefore not warranted. The defendant's motion to dismiss the complaint for failure to conciliate is therefore denied but the action is stayed for thirty days to permit the parties to engage in serious conciliation discussions.

CONCLUSION

For the foregoing reasons, the claims of a pattern and practice of race and national origin discrimination are dismissed. The defendant's motion to dismiss the claim of a pattern and practice of sex discrimination is denied. The case is stayed for thirty days to permit the parties to engage in conciliation.

SO ORDERED.

Parallel Citations

82 Fair Empl.Prac.Cas. (BNA) 1253