IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

SPARTANBURG DIVISION

Equal Employment Opportunity Commission, Plaintiff, vs. Travelers' Petroleum, Inc., Defendant.	Civil Action No. 7:98-2556-13AK **REPORT OF MAGISTRATE JUDGE**

This matter is before the court on the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). In its complaint, the plaintiff, the Equal Employment Opportunity Commission ("EEOC"), alleges sexual discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, Title 42, United States Code, Section 2000e, *et seq.*, and Title I of the Civil Rights Act of 1991, Title 42, United States Code, Section 1981a. The suit was brought on behalf of current and former employees of the defendant Travelers' Petroleum, Inc. ("Travelers'").

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(A), and Local Rule 73.02(B)(2)(g), D.S.C., all pretrial matters in employment discrimination cases are referred to a United States Magistrate Judge for consideration.

For the reasons set forth below, the defendant's motion should be denied.

FACTS PRESENTED

The plaintiff filed this action seeking relief for three charging parties (Paula Tolbert, Beulah Couch, and Laura Praytor) and a class of women, including six identified class members (Faith Dalton, Amy Hall, Danielle Jones, Vivian Horne, Sara Amaker, and

Dana Watson). The complaint alleges that the defendant subjected its female employees to sexual harassment, constructive discharge, and/or retaliation. The three charging parties filed charges of discrimination, retained counsel, and commenced lawsuits in state court. The defendant removed the cases to federal court. The Tolbert/Couch lawsuit was filed on October 3, 1997, and was removed to this court on November 7, 1997. Faith Dalton was also a named plaintiff in that action. The Praytor lawsuit was filed on November 12, 1997, and was removed to this court on December 5, 1997. Amy Hall sued the defendant in state court on November 3, 1997, and Danielle Jones and Dana Watson sued the defendant in state court on November 12, 1997. Their cases were also removed to this court.

By separate orders, the Honorable William B. Traxler, Jr., then United States District Judge, dismissed the Tolbert/Couch/Dalton, Praytor, and Jones cases. Def. mem., ex. H, I, J. Judge Traxler dismissed the state court actions after removal because the class members failed to meet the jurisdictional prerequisites under federal law of filing a charge with the EEOC or receiving right-to-sue letters. *Id.*, ex. H at 8, I at 6, J at 7. Further, the claims were not recognized under South Carolina common law. *Id.* Judge Traxler remanded the Hall and Watson cases to state court. *Id.*, ex. K, L.

APPLICABLE LAW

The defendant first argues that because of the individuals' prior lawsuits, the EEOC is estopped from bringing this action. Def. mem. at 4-6; reply at 2-6. However, the cases in this circuit cited by the defendant for the proposition that the EEOC cannot sue subsequent to the institution of a private civil action do not concern instances where, as here, the individuals filed state court actions prior to the EEOC bringing suit under Title VII. *See EEOC v. Pic Pac Supermarkets, Inc.*, 689 F. Supp. 607 (S.D.W.Va. 1988). The private suits were filed under South Carolina state law. Pl. mem., ex. A, B, D, E, F. The class members have steadfastly maintained that they did not bring their private suit claims under

Title VII, but rather under state law. *Id.*, ex. 4-8. The defendant has admitted that the class members "have not pled for relief pursuant to Title VII." *Id.*, ex. 9-13. Judge Traxler dismissed the state court actions after their removal to federal court because the class members failed to meet the jurisdictional requirements for filing Title VII actions. *Id.*, ex. H at 8; I at 6; J at 7; L at 2. Dismissal for lack of subject matter jurisdiction is not judgment on the merits and, therefore, has no claim preclusive or *res judicata* effect. *Dee. v. U.S.*, 923 F.Supp. 98, 100 (W.D.Va. 1996). The defendant argues that the EEOC was required to intervene in private actions filed by the class members rather than file its own Title VII action. Def. mem. at 4-6. However, as discussed above, there is no pending Title VII action in which the EEOC can intervene. The charging parties and class members did not file Title VII suits, and their state law claims were dismissed or remanded upon their removal to federal court. The cases cited by the defendant involve private actions based on right-to-sue letters issued by the EEOC. Based upon the foregoing, the defendant's motion to dismiss should be denied.

Next, the defendant argues that if the plaintiff's complaint is not dismissed, at a minimum, the claims for compensatory damages, punitive damages, and trial by jury should be stricken. Def. mem. at 6-8. The defendant argues that the plaintiff's allegations of unlawful patterns or practices of discrimination do not entitle it to the relief afforded in Title 42, United States Code, Section 1981a. Section 1981a provides for the right of trial by jury and compensatory and punitive damages in cases of "unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) ...." 42 U.S.C. §1981a (1994).

In its complaint, the plaintiff alleges that the discriminatory practices "were done with malice or with reckless indifference to the federally protected rights of Paula Tolbert, Beulah Couch, Laura Praytor and a class of similarly situated female current and former employees of Defendant ...." Complaint at ¶11. According to the defendant, the

"[p]laintiff cannot have it both ways." Def. mem. at 7. According to the plaintiff, its claims are for intentional disparate treatment, not disparate impact. The plaintiff alleges that the defendant subjected female employees to a pattern and practice of sexual harassment. Pl. mem. at 12; complaint at 3-5. As noted by the plaintiff, a "pattern or practice" theory can apply to cases of intentional discrimination. *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 (1977). *See also Stastny v. Southern Bell Telephone and Telegraph Co.*, 628 F.2d 267, 274 n. 10 (4th Cir. 1980) (noting that "pattern or practice" disparate treatment claims must be based upon a specific intent to discriminate).

Therefore, the defendant's motion for summary judgment on this issue should be denied.

Based on the foregoing, it is recommended that the defendant's motion to dismiss be denied.

William M. Catoe
United States Magistrate Judge

January 25, 1999

Greenville, South Carolina