No. 07-60447

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

AGRO DISTRIBUTION, LLC,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Mississippi

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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EEOC, Plaintiff-Appellant v. Agro Distribution, LLC, Defendant-Appellee
No. 07-60447

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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The Equal Employment Advisory Council (EEAC) respectfully submits this brief *amicus curiae* with the consent of the parties. The brief urges the Court to affirm the decision below, and thus supports the position of Defendant-Appellee Agro Distribution, LLC.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to charges of discrimination under the ADA, EEAC's members have a direct and ongoing interest in the issue presented in this appeal concerning the Equal

Employment Opportunity Commission's (EEOC) statutory obligation to engage in good faith conciliation prior to filing suit in federal court, as well as the legal standards that apply to claims of disability discrimination under the ADA.

EEAC seeks to assist the Court by highlighting the impact its decision in this case will have beyond the immediate concerns of the parties to the case. Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by the parties. Because of its experience in these matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers.

STATEMENT OF THE CASE

This is an action brought by the U.S. Equal Employment Opportunity Commission (EEOC) against Agro Distributors, LLC (Agro) alleging the company discriminated against Henry Velez based on disability in violation of the Americans with Disabilities Act (ADA). *EEOC v. Agro Distrib., LLC*, 442 F. Supp.2d 357, 358 (S.D. Miss. 2006). At the recommendation of another employee, Velez was hired by Agro in February 2000 as a truck driver at its Hattiesburg, Mississippi location. *Id.* at 359. Velez voluntarily resigned shortly thereafter in order to care for his mother-in-law, who had begun experiencing health problems. *Id.* He was rehired by Agro as a truck driver in March 2001. *Id.*

Velez reportedly suffers from Anhidrotic Ectodermal Dysplasia, a genetic disorder, which he claims causes him to experience difficulty performing manual labor in temperatures exceeding 80 degrees. *Id.* at 358-59. In an effort to address these difficulties, Velez reportedly employs various "coping techniques," such as taking "frequent breaks, standing in front of a fan, and dousing himself with water." *Id.* at 359.

On July 15, 2002, Will Griffin, Velez's supervisor, directed all staff to report at 6:00 a.m. the following day (whether scheduled to work or not) to load empty feed barrels into a trailer. *Id.* Griffin scheduled the task for the early morning so as to avoid performing the work in high temperatures. *Id.* Velez requested to be excluded from performing the task because he had become ill on one of the prior occasions in which he performed the loading work. *Id.* at 360. Griffin denied his request. *Id.*

The following day, Velez failed to report to work, either at 6:00 a.m. or at his regularly scheduled time, but did call the warehouse manager and asked whether he could make his usual deliveries. *Id.* The warehouse manager conferred with Griffin, who advised that Velez was discharged for failing to report as directed for the loading job. *Id.* Velez filed for and received unemployment compensation benefits, and subsequently secured other employment performing outside landscaping work, where his job duties "include mowing the golf course,

maintaining tractors, movers and trucks. He also picks up and unloads chemicals, fertilizer and other supplies." *Id.*

Velez filed an administrative charge with the EEOC on July 19, 2002. *Id.* Within days, LaQuida Small, the EEOC investigator assigned to the case, categorized the charge as an "A2" charge likely to result in a finding of reasonable cause that discrimination occurred. *Id.* Small conducted an onsite investigation on May 23, 2003 and approximately two weeks later, on June 17, she issued a predetermination notice recommending reasonable cause. *Id.* The company wrote to the EEOC's Area Director requesting reconsideration, but it never received a reply. *Id.* Instead, the agency issued a reasonable cause determination on July 22, 2003, indicating "the evidence obtained during the investigation [] establishes a violation of the Americans with Disabilities Act (ADA)." *Id.*

Accompanying the reasonable cause determination was a proposed conciliation agreement seeking full make-whole relief, including back pay, reinstatement and compensatory damages totaling over $156,000. *Id.* at 360-61. Although Agro attempted several times to reach the EEOC investigator to discuss her findings and possible settlement, the agency claimed to have no record of such attempts and, on August 19, 2003, it deemed conciliation a failure. *Id.* at 361.

On August 22, Agro sent a second letter to the EEOC Area Director, complaining that its request for reconsideration was ignored and no meaningful

conciliation efforts were undertaken in this case. *Id.* In response to that letter, on August 28, the agency withdrew the conciliation failure notice, but advised Agro that "any counter-proposal would have to be consistent with the EEOC's make-whole 'Remedies Policy.'" *Id.* In response, the company once again wrote to the EEOC, this time asking whether an acceptable settlement proposal would have to include an offer of make-whole relief. *Id.* The letter also included a counter-proposal. *Id.* The company heard nothing from the EEOC until ten months later, when an EEOC Regional Attorney advised it that any offer short of reinstatement, full back pay, and some amount representing compensatory damages would be unacceptable. *Id.* The agency filed suit on September 27, 2004.

Agro moved for summary judgment, arguing that the EEOC was barred from bringing suit as it failed to investigate and conciliate in good faith. (DOC 146, p. 13). It also argued that Velez is not an individual with a disability, pointing out among other things that he has never been treated for, or received a diagnosis of, Ectodermal Dysplasia, and believes he suffers from the condition based merely on what he was told by his grandmother. (DOC 146, p. 1). Furthermore, the company contended, even assuming Velez does suffer from Ectodermal Dysplasia, the EEOC nevertheless failed to demonstrate he is substantially limited in one or more major life activities and thus is an individual with a disability. (DOC 146, pp. 19-27).

The district court agreed, granting the company's summary judgment motion. 442 F. Supp.2d at 358. It found that the EEOC failed to engage in good faith conciliation, as it issued an "all-or-nothing proposal based on faulty facts and did not 'respond in a reasonable and flexible manner'" to the company's efforts to resolve the case. *Id.* at 363. It further found that, as to the underlying merits of the claim, the EEOC failed to establish Velez is disabled within the meaning of the ADA. *Id.*

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq.*, and is charged with enforcing, *inter alia*, the Americans with Disabilities Act (ADA) of 1990, which prohibits discrimination against qualified individuals with disabilities. 42 U.S.C. §§ 12101 *et seq*. Patterned upon Title VII's enforcement and remedial scheme, 42 U.S.C. § 12117(a), the ADA authorizes the EEOC to pursue civil action against a respondent believed to have engaged in unlawful discrimination, but only after its efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1). The U.S. Supreme Court repeatedly has acknowledged the federal public policy favoring conciliation, finding that the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in

a federal court." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is "important public policy" intended by Congress to be the "preferred means of enforcing Title VII") (citation omitted).

In *EEOC v. Klingler Electric Corp.*, 636 F.2d 104 (5th Cir. 1981), this Court established minimum standards against which the agency's efforts to comply with its duty to conciliate are to be assessed. It held that the EEOC satisfies its statutory duty to conciliate only if, at a minimum, "it outlines to the employer the reasonable cause for its belief that Title VII has been violated, offers an opportunity for voluntary compliance, and responds in a reasonable and flexible manner to the reasonable attitudes of the employer." 636 F.2d at 107 (citation omitted). Under *Klingler*, the EEOC will not satisfy its duty to conciliate merely by presenting a respondent with a non-negotiable, "take-it-or-leave-it" settlement proposal. In order to fulfill its statutory mandate, the agency's conciliation efforts must be reasonable in light of the facts and circumstances before it. Applying the *Klingler* test to the facts of the instant case, the district court properly ruled that the EEOC failed to fulfill its statutory duty to conciliate prior to commencing federal court litigation.

Permitting the EEOC to neglect its obligation to make a sincere effort to conciliate an administrative charge of discrimination prior to initiating a public

enforcement action unquestionably would encourage the agency to pursue costly and time-consuming litigation instead of promoting mutually acceptable resolutions of employment disputes in a more informal, less adversarial environment. Indeed, sanctioning the EEOC's conduct in this case would disregard the important public policy goals inherent in Congress' stated preference for conciliation of charges of employment discrimination.

The EEOC inexcusably ignored Agro's numerous attempts to discuss factual discrepancies regarding the merits of the case, which led to a wildly inflated – and unjustified – settlement demand. Had the EEOC undertaken any meaningful discussion with Agro regarding the basis for the agency's conciliation position, it would have come to realize there was no basis for proceeding at all, since Agro was prepared to point out that no credible evidence exists of an ADA violation. Not only was it clear at the conclusion of the EEOC's investigation that Velez had never been treated for, or properly diagnosed, with Ectodermal Dysplasia, it also was abundantly obvious that he is not substantially limited in any major life activity – and thus is not an individual with a disability entitled to protection under the ADA. The district court thus properly granted summary judgment in favor of Agro.

ARGUMENT

I. THE DISTRICT COURT RULED CORRECTLY THAT THE EEOC FAILED TO SATISFY ITS STATUTORY DUTY OF CONCILIATION PRIOR TO FILING SUIT IN FEDERAL COURT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq*. In addition to Title VII, the EEOC is charged with enforcing the employment provisions of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq.*, which prohibit discrimination against qualified individuals with disabilities. 42 U.S.C. § 12112(a). The term "discriminate" as it is defined in the ADA includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A).

The ADA's remedial and procedural scheme is patterned after Title VII. Specifically, the ADA provides that

> [t]he powers, remedies, and procedures set forth in sections . . . 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated under . . . [section 12116] concerning employment.

42 U.S.C. § 12117(a).

> Congress has directed the EEOC to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII of the Civil Rights Act of 1964 when it is enforcing the ADA's prohibitions against employment discrimination on the basis of disability. Accordingly, the provisions of Title VII defining the EEOC's authority provide the starting point for our analysis.

EEOC v. Waffle House, Inc., 534 U.S. 279, 285-86 (2002) (citation and footnote omitted); *see also* 29 C.F.R. § 1601.1 ("The regulations set forth in this part contain the procedures established by the Equal Employment Opportunity Commission for carrying out its responsibilities in the administration and enforcement of title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990").

"Title VII sets forth 'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted). Title VII provides, in relevant part:

> Whenever a charge is filed … alleging that an employer … has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge … on such employer … within ten days, and shall make an investigation thereof. … If the Commission determines after such investigation that there is reasonable cause to believe that the charge 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).

When it first was enacted in 1964, Title VII gave EEOC the limited authority to prevent and correct alleged employment discrimination through investigations and "informal methods of conference, conciliation and persuasion." *Id.* In 1972, Title VII was amended, giving the EEOC the right to sue respondents believed to have engaged in unlawful discrimination in its own name, both on behalf of alleged victims and in the public interest.[1] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

While Title VII – and, by extension, the ADA – authorizes the EEOC to pursue a civil action against a respondent believed to have engaged in unlawful discrimination, it may do so only after its efforts "to secure from the respondent a conciliation agreement acceptable to the Commission" have failed. 42 U.S.C. § 2000e-5(f)(1); *see also EEOC v. Shell Oil Co.*, 466 U.S. at 64 (EEOC may sue only where conciliation attempts are "ineffectual"). In its procedural regulations, the EEOC provides further:

> In conciliating a case in which a determination of reasonable cause has been made, the Commission shall attempt to achieve a just resolution of all violations found

[1] The EEOC's right to sue only applies to cases involving private, *i.e.*, non-governmental, respondents. 42 U.S.C. § 2000e-5(f)(1).

> and to obtain agreement that the respondent will eliminate the unlawful employment practice and provide appropriate affirmative relief. Where such conciliation attempts are successful, the terms of the conciliation agreement shall be reduced to writing and shall be signed by the Commission's designated representative and the parties.

29 C.F.R. § 1601.24(a). Only after the agency is "unable to obtain voluntary compliance" *and* has determined "that further efforts to do so would be futile or nonproductive" may it deem conciliation a failure and so notify the parties. 29 C.F.R. § 1601.25.

As the U.S. Supreme Court has observed:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. Unlike the typical litigant against whom a statute of limitations might appropriately run, the EEOC *is required by law to refrain from commencing a civil action until it has discharged its administrative duties*.

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977) (emphasis added). Thus, as a precondition to initiating a public enforcement action, the EEOC first must fulfill its requisite duty to "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b).

In establishing the EEOC, Congress "selected '[c]ooperation and voluntary compliance … as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Ins. Co.*, 432 U.S. at 367-68. (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)). As the Supreme Court pointed out in *Occidental*:

> To this end, Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.' Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act.

Id. (quoting *Gardner-Denver* at 44).

The legislative history of the 1972 amendments to Title VII confirms Congress's preference for conciliation as a means of resolving discrimination claims:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972) (quoted in *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978)) (emphasis added). The Supreme Court acknowledged this

strong federal public policy favoring conciliation in *Occidental*, ruling that the EEOC "whenever possible" must attempt to resolve discrimination charges "before suit is brought in a federal court." 432 U.S. at 368. *See also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 770-71 (1983) (voluntary compliance is an "important public policy" intended by Congress to be the "preferred means of enforcing Title VII").

The EEOC does not satisfy its administrative duties merely by inviting a respondent to participate in conciliation. In order to fulfill its statutory mandate, the agency's conciliation efforts both must be meaningful *and* undertaken in good faith. Indeed, this Court and others have found that the EEOC's right to sue is premised on fulfillment of its conciliation obligation "in good faith, while encouraging voluntary compliance and reserving judicial action as a *last resort*." *EEOC v. Klingler Electric Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (emphasis added); *see also EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) (EEOC "failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort"); *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981) ("patently inadequate" conciliation by EEOC warrants dismissal of action); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178 (4th Cir. 1979) (good faith conciliation a prerequisite to EEOC's power to sue); *EEOC v. Keco Indus., Inc.*, 748 F.2d 1097

(6th Cir. 1984) (same); *EEOC v. Elgin Teachers Ass'n*, 27 F.3d 292 (7th Cir. 1994) (same); *EEOC v. Liberty Trucking Co.*, 695 F.2d 1038, 1042 (7th Cir. 1982) (conciliation is "so important to the statutory scheme that the EEOC may not commence legal action until it has attempted to negotiate voluntary compliance") (citations omitted); *EEOC v. Sherwood Med. Indus., Inc.*, 452 F. Supp. 678, 683-84 (M.D. Fla. 1978) (EEOC "must make a genuine effort to conciliate with respect to each and every employment practice complained of").

In *EEOC v. Klingler Electric Corp.*, 636 F.2d 104 (5th Cir. 1981), this Court established minimum standards for determining whether the EEOC has satisfied its statutory duty to conciliate. It held that the EEOC satisfies this requirement only if, at a minimum, "it outlines to the employer the reasonable cause for its belief that Title VII has been violated, offers an opportunity for voluntary compliance, and responds in a reasonable and flexible manner to the reasonable attitudes of the employer." 636 F.2d at 107 (citing *Marshall v. Sun Oil Co.*, 605 F.2d 1331, 1335-39 (5th Cir. 1979)). The Court found that in determining whether the EEOC has "adequately fulfilled" its Title VII conciliation obligation, "the fundamental question is the reasonableness and responsiveness of the EEOC's conduct under all the circumstances." *Id.* (citing *Sun Oil* at 1335-36).

Applying the *Klingler* test to the facts of the instant case, the district court properly ruled that the EEOC failed to fulfill its statutory duty to conciliate Velez's

disability discrimination charge prior to commencing federal court litigation. First, the agency did not provide Agro with an adequate explanation of the legal and factual basis for its reasonable cause determination, which would have given the company an opportunity to evaluate and refute the specific findings, as well as determine its position with respect to possible conciliation of the charge.

The EEOC's July 22 determination letter provided:

> Respondent was made aware that Charging Party had a medical condition that required accommodations when he performed certain job duties that would expose him to high temperatures. When a non-essential job duty that had to be performed on July 16, [sic] that would have placed the Charging Party in working conditions detrimental to his health, he requested to be excluded. He was denied the exclusion and discharged because he did not report to work. Respondent made no effort to accommodate the Charging Party's request.

(DOC 146, p. 16). The determination letter is vague and confusing on its face. Not only does the letter omit any reference to the presence of an ADA-covered disability, it states that Velez was discharged for failing to report to work, *not* because of such a disability. Thus, the EEOC's determination letter, other than merely notifying Agro that reasonable cause was found, provided the company with no meaningful information on which it reasonably could have relied in assessing its conciliation strategy and position. It is no wonder Agro needed further clarification from the agency as to the basis for its reasonable cause finding.

Yet, the EEOC ignored several of Agro's inquiries and requests to further discuss the issue of liability and potential settlement. Without an understanding of

the *specific* legal and factual underpinnings of the EEOC's case against it, Agro "had no foundation from which to engage in meaningful conciliation discussions or to generate a conciliation proposal." *EEOC v. UMB Bank*, 432 F. Supp.2d. 948, 955 (W.D. Mo. 2006). Thus, in addition to failing to satisfy the first prong of the *Klingler* test, the EEOC also woefully disregarded its obligation under the *second* prong of the test to provide the company a meaningful opportunity for voluntary compliance.

Finally, as the district court ruled correctly, the EEOC failed under the third prong of the Klingler test to respond in a "flexible and reasonable matter" to Agro's efforts to resolve Velez's discrimination charge informally in lieu of litigation. The EEOC's handling of Velez's charge was unreasonable from the beginning. Prior to conducting a single interview of any relevant witnesses, for instance, the EEOC investigator, Ms. Smalls, classified the charge as one involving serious allegations that likely would lead to a reasonable cause determination and consideration for possible litigation. With that in mind, Ms. Smalls conducted an on-site investigation and shortly thereafter issued the anticipated reasonable cause determination with full knowledge that the company had serious questions regarding the sufficiency of her investigation and the basis for her findings.

Compounding its error, the EEOC disregarded Agro's repeated attempts to discuss the basis for the agency's findings and proposed conciliation agreement –

which among other things called on the company to pay Velez over $150,000 in monetary relief – and deemed conciliation a failure after Agro refused to blindly accept the EEOC's settlement terms. While the EEOC subsequently temporarily withdrew the conciliation failure notice, it nevertheless continued to insist upon "make-whole" relief without articulating the legal basis for the demand.

As the district court found:

> The EEOC appears to have issued an all-or-nothing proposal in this case based on faulty facts and did not 'respond in a reasonable and flexible manner to the entreaties of Agro to resolve this matter. It appears that the Commission dealt in an arbitrary manner based on preconceived notions of its investigator and ignored the attempts of Agro's counsel to engage the Commission in settlement discussions. As the Fifth Circuit has stated, "such an all or nothing approach on the part of a commission, one of whose most essential functions is to attempt conciliation, will not do."

442 F. Supp.2d at 363 (citation omitted). Because the EEOC unreasonably failed to provide Agro with an adequate and meaningful opportunity to discuss the case and pursue settlement of Velez's claims, the district court properly concluded that the agency did not satisfy its duty to conciliate in good faith.

II. SANCTIONING THE EEOC'S BAD FAITH CONCILIATION EFFORTS IN THIS CASE WOULD UNDERMINE SOUND ENFORCEMENT POLICIES AND HARMONIOUS EMPLOYEE RELATIONS BY ENCOURAGING, RATHER THAN MINIMIZING, COSTLY AND TIME-CONSUMING LITIGATION

Permitting the EEOC to neglect its obligation to make a genuine effort to conciliate a charge of discrimination prior to initiating a public enforcement action

unquestionably would encourage the agency to pursue costly and time-consuming litigation instead of promoting mutually acceptable resolution of employment disputes in a more informal, less adversarial environment. By making a real effort to conciliate a charge, the EEOC could preserve valuable resources that it otherwise would be required to expend pursuing an action in federal court.[2]

In addition, an employer-respondent managing an EEOC charge investigation has a strong interest, from an employee relations perspective, in preserving goodwill between the company and the charging party, particularly if the

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[2] Theoretically, at least, had the EEOC paid any attention to Agro's requests for further discussion of the facts of the case, it would have reversed its reasonable cause determination and foregone litigation entirely after realizing the discrimination claim had no merit. As this Court observed in related proceedings, however, the EEOC "was aware of or had access to the information that Agro contends made this suit frivolous" well prior to filing suit. *In re: EEOC*, 207 Fed. Appx. 426, 430 (5th Cir. 2006). Thus, the agency clearly was motivated by something other than the truth in aggressively pursuing litigation in this matter. Its actions throughout the case smack of bad faith, as a result of which the district court properly awarded attorney's fees to Agro. Even the EEOC in its own Compliance Manual suggests its conduct in this case warranted an award of fees:

> Prevailing defendants in EEOC litigation may be awarded fees and costs, although such claims usually are denied where EEOC found reasonable cause, pursued administrative remedies, and had sufficient evidence to establish a prima facie case. Courts have awarded fees where … EEOC *should have realized during discovery that its primary contention regarding an employer's allegedly unlawful hiring practices was unfounded* and therefore it could not establish a prima facie case.

EEOC Compl. Man. Vol. 1, *How-to-Use/Overview, EEOC Procedures, Litigation, Judicial Remedies* O:3612, O:3614 (Apr. 2006) (footnotes omitted) (emphasis added).

individual is a current employee. Meaningful efforts to conciliate a discrimination charge by the EEOC, an "outsider" to the dispute between employer and employee, not only serve the agency's aim of preventing and correcting alleged discrimination, but also may help to repair a strained employer-employee relationship, one that may be destroyed irretrievably by the acrimony of litigation. Thus, good faith conciliation can do much to prevent the "hardening of positions" that often may result from protracted litigation.

Not only is the pursuit of good faith conciliation of charges of discrimination in the parties' mutual best interest, it also serves the interest of the judiciary in preventing a logjam of employment discrimination suits that, if properly attended to by the EEOC, could be resolved successfully at the administrative level. Recent federal court litigation statistics show that in the 12-month period ending March 31, 2006, for instance, a total of 34,043 "civil rights" cases were filed, of which 15,408 (or 45%) involved claims of employment discrimination. Administrative Ofc. of the U.S. Courts, Federal Judicial Caseload Statistics, Table C-2 (Mar. 31, 2006).[3]

In this case, the EEOC had the opportunity to postpone, if not forgo, federal court litigation simply by allowing Defendant-Appellee Agro to question the agency about the basis for its findings and proposed conciliation agreement, thereby opening the door to possible settlement of the charge. Despite the practical

[3] *Available at* http://www.uscourts.gov/caseload2006/tables/C02_Mar_06.pdf.

advantages in doing so, the EEOC failed to provide Agro with a meaningful chance to conciliate the charge and instead filed suit in federal district court knowing full well that Agro was interested in further discussing the case. The agency's conduct is particularly disturbing since neither the ADA nor Title VII mandates that the EEOC "conclude its conciliation efforts and bring an enforcement suit within any maximum period of time." *Occidental Life Ins.*, 432 U.S. at 360.

Sanctioning the type of bad faith and inflexibility exhibited by the EEOC in this case would only promote antagonism between employers and employees, as well as between the EEOC and its own stakeholders, by discouraging voluntary compliance and cooperation in favor of time-consuming and costly litigation. As the district court observed, "[i]t is a tragedy that such significant legal and judicial resources have been wasted on this case." *EEOC v. Agro Distrib., LLC*, 2007 U.S. Dist. LEXIS 24583, at *9 (S.D. Miss. Mar. 29, 2007).

III. SUMMARY JUDGMENT WAS PROPER AS THE EEOC FAILED TO ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION OR FAILURE TO ACCOMMODATE UNDER THE ADA

Even if this Court determines the EEOC satisfied its statutory duty to engage in good faith conciliation prior to filing suit, summary judgment nevertheless was warranted in this case as the agency has not demonstrated that Velez is an individual with a disability and thus failed to make out a prima facie case of disability discrimination or failure to accommodate under the ADA. The

employment provisions of the ADA prohibit discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). Thus, in order to fall within the protections of the Act, an individual must show that he or she is a "qualified individual with a disability" and was discriminated against "because of" that disability. *Id.*

Disability as defined under the ADA includes "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102(2); *see also Toyota Motor Mfg., Inc. v. Williams*, 534 U.S. 184, 194 (2002) ("To qualify as disabled under subsection (A) of the ADA's definition of disability, a claimant must initially prove that he or she has a physical or mental impairment"). As the U.S. Supreme Court has observed, however, "[m]erely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity… [and] that the limitation on the major life activity is 'substantial.'" *Id.* at 195.

For purposes of establishing an ADA-covered disability, it is crucial that an individual present credible medical documentation evidencing that he or she

actually suffers from a recognized impairment. In fact, the EEOC instructs its own investigative staff that, in assessing whether an individual has a disability, the investigator "should determine whether the [person's] condition is an impairment." EEOC Compl. Man., Vol. 2, Section 902 – Definition of the Term "Disability," *§ 902.1 Introduction and Summary* 902:0004 (Nov. 2002). It goes on to say:

> When it is unclear whether a charging party has an impairment, the investigator should ask the charging party for medical documentation that describes his/her condition. Medical documentation that describes the charging party's condition or that contains a diagnosis of the condition will help to determine if the charging party has an impairment. In addition, the investigator should ask the respondent to provide copies of relevant medical documentation concerning the charging party's condition that the respondent has in his/her possession. Such documentation should include the results of any medical examination conducted or ordered by the respondent as well as copies of medical documentation that the charging party provided to the respondent.

Id. at *§ 902.2 Impairment* 902:004-05 (Nov. 2002) (footnote omitted).

In this case, the EEOC has asserted that Velez suffers from Ectodermal Dysplasia, which it claims is a medical condition that substantially limits the major life activities of "breathing" and "perspiring." 442 F. Supp.2d at 363. While it may be true Velez has some form of physical impairment, no one – including Velez himself – can be certain it is Ectodermal Dysplasia, since Velez has never received a definitive diagnosis of the disease by any physician or other health care professional. It is worth noting that Velez was required to complete a U.S. Department of Transportation physical examination as a condition of being hired

as a truck driver. Velez completed two medical questionnaires in connection with the DOT examination, both of which asked whether he suffers (or has suffered) from any "illnesses," "injuries," or "disease." Even when prompted in this manner, Velez failed to identify himself as suffering from Ectodermal Dysplasia or any other physical impairment. Brief for Defendant-Appellee, 7-8.

The EEOC's "[c]onclusory allegations, speculation, and unsubstantiated assertions" are thus plainly insufficient to demonstrate that Velez suffers from any recognized physical impairment, much less is substantially limited in a major life activity as a result thereof. *Taylor v. Principal Fin. Group, Inc.*, 93 F.3d 155, 166 (5th Cir. 1996) (citation and internal quotation omitted). "When an employee's own medical affidavits fail to identify and address these crucial issues, the ADA certainly does not require the employer to bear the burden of doing so." *Id.* Given the lack of any medical documentation evidencing that Velez suffers from a physical or mental impairment, he is not an individual with a disability under the ADA. The district court therefore properly granted summary judgment in favor of Agro.

Furthermore, even assuming Velez does suffer from Ectodermal Dysplasia (or some other physical impairment), the EEOC nevertheless has failed to demonstrate that he is substantially limited in any major life activity, including the major life activity of "working," as Velez so contends. By his own admission,

Velez for years successfully has employed various "coping techniques" designed to prevent his condition from interfering with his ability to perform manual tasks at work. 442 F. Supp.2d at 359. These include "frequent breaks, standing in front of a fan, and dousing himself with water." *Id.* "[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures -- both positive and negative -- must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act." *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999). Since Velez's coping strategies have enabled him to successfully counteract any limitations on his ability to perform manual labor due to his alleged impairment, under the U.S. Supreme Court's holding in *Sutton* he is not disabled under the ADA.[4]

Because the EEOC has not demonstrated that Velez is an individual with a disability under the ADA, it failed to make out a prima facie case of disability discrimination or failure to accommodate. Therefore, the district court properly granted summary judgment in Agro's favor.

[4] Since the EEOC cannot show that Velez has a disability, *i.e.*, that he suffers from a physical impairment that substantially limits one or more major life activities, there is no need to address the issue of reasonable accommodations, as that right only extends to qualified individuals with disabilities.

CONCLUSION

For the foregoing reasons, the district court's dismissal of the complaint in this case should be affirmed.

Respectfully submitted,

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November 28, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of November 2007, two (2) true and correct copies and one (1) electronic disk in .pdf format of the foregoing Brief *Amicus Curiae* of the Equal Employment Advisory Council In Support Of Defendant-Appellee And In Support Of Affirmance were served, addressed as follows:

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