UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	:	
Plaintiff	:	No. 3:05cv292 (MRK)
v.	:	
DAVID LERNER ASSOCIATES, INC.,	:	
Defendant	:	

RULING AND ORDER

The Equal Employment Opportunity Commission ("EEOC") brings this action against Lerner Associates ("Lerner") on behalf of several women (the "Charging Parties") and a class of similarly harmed women for sexual harassment suit in violation of Title VII. *See* Compl. [doc. # 1].[1] Presently pending before the Court are Defendant's Motion to Dismiss, or in the Alternative, to Strike [doc. # 12] the EEOC's complaint. Lerner advances two arguments: First, Lerner asserts that the EEOC did not satisfy its duty to engage in good faith conciliation efforts; second, Lerner argues that the EEOC's claims of "unwelcome sexual touching" were not raised by the Charging Parties and therefore should be stricken from the Complaint. The Court rejects both arguments and therefore DENIES Lerner's Motion to Dismiss, or in the Alternative, Strike [doc. # 12].

1. Alleged Inadequate Conciliation Efforts. Once it finds "reasonable cause" to believe discrimination has occurred, the EEOC has a statutory duty to attempt conciliation before

[1] Since the filing of the Complaint and the Motion to Dismiss, several of the Charging Parties have intervened [doc. #23] and filed an Intervenor's Complaint [doc. # 27] against Defendant.

filing a formal complaint. *See* 42 U.S.C. § 2000e-5(b).[2] Conciliation has been described as "a flexible and responsible process which necessarily differs from case to case." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1169 (10th Cir. 1985). "The conciliation period allows the employer and the EEOC to negotiate how the employer might alter its practices to comply with the law, as well as how much, if any, the employer will pay in damages." *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1535 (2d Cir. 1996).

In the Second Circuit, the EEOC "fulfills its duty to conciliate before initiating litigation if it 1) outlines to the employer the reasonable cause for its belief that the employer is in violation of [Title VII], 2) offers an opportunity for voluntary compliance, and 3) responds in a reasonable and flexible manner to the reasonable attitude of the employer." *Id.* at 1534-35. The Second Circuit has cautioned that the EEOC should be given "wide latitude in shaping both the general framework of conciliation and the specific offers made." *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 18 (2d Cir. 1981). Since the form and substance of its conciliation efforts is within the discretion of the EEOC, district courts ordinarily "should only determine whether the EEOC made an attempt at conciliation." *EEOC v. Keco Indus. Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984). The Court is satisfied that the EEOC has satisfied these standards in this case.

After finding reasonable cause to believe discrimination had occurred, the EEOC sent Lerner a Determination Letter, dated August 20, 2004, explaining the nature and extent of the alleged violations, which occurred at Lerner's Darien branch office. *See* Affidavit of Mark Mancher

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[2] As Lerner candidly recognizes, a "stay" of proceedings, rather than dismissal, is ordinarily the preferred remedy for the EEOC's failure adequately to conciliate. *See, e.g.*, *EEOC v. Die Fliedermaus, LLC*, 77 F. Supp. 2d 460, 467 (S.D.N.Y. 1999); *EEOC v. First Midwest Bank, N.A.*, 14 F. Supp. 2d 1028, 1033 (N.D. Ill. 1998). *But cf. EEOC Asplundh Tree Expert Co.*, 340 F.3d 1256,1261 (11th Cir. 2003) (dismissing for failure to engage in conciliation).

("Mancher Affidavit") [doc. #14] Ex. F. The EEOC's determination letter more than satisfied its first obligation under the Second Circuit's standard – that is, to inform Lerner of the basis for its belief that Lerner had violated Title VII. Next, the EEOC provided Lerner with a conciliation proposal. That proposal set out nine different categories of relief sought, including a fund to be set aside to compensate other harmed female employees. Mancher Aff. [doc. #14] Ex. G. By offering an opportunity for voluntary compliance, the EEOC satisfied the Second Circuit's second requirement noted above.

As to the third requirement – the EEOC's obligation to respond in a reasonable and flexible manner to the employer – some further facts are needed. After obtaining an extension of time to respond to the EEOC's offer, Lerner made a counter-offer to the EEOC. However, Lerner's counter-offer addressed only the non-monetary aspects of the relief sought by the EEOC. Lerner offered no specific monetary amount for the Charging Parties or other members of the class of allegedly harmed females; instead, Lerner challenged the propriety of the EEOC's investigation and insisted on further information regarding the damages sought. *Id*. at Ex. H. The EEOC responded that conciliation was designed to avoid litigation-like discovery with its concomitant expense and delay, that Lerner had in its possession sufficient information to evaluate the monetary proposals and that Lerner should make a counter-offer by October 13, 2004. *Id*. at Ex. I. The EEOC also outlined its process for identifying and compensating victims of Lerner's hostile work environment and reiterated that the EEOC had good reason to believe that there were additional victims of sexual harassment. *Id*. at Exs. K, M.

Lerner sought two further extensions of time to respond to the EEOC, and the EEOC granted each of Lerner's requests. In November, Lerner wrote to the EEOC and once again disputed the need

to compensate unidentified and similarly harmed female employees. Therefore, Lerner once again offered no compensation for additional similarly-situated female employees. *Id*. at Ex. L. The EEOC responded to Lerner's letter by clarifying the need for a fund for unidentified victims and reducing the agency's demand for such a fund to one-half the amount of Lerner's potential exposure under the Title VII damage cap. *Id*. at Ex. M. The EEOC again invited Lerner to counter-offer with a specific amount for such a fund. The EEOC's letter expressly stated, "If the Commission does not receive a specific counter-offer toward a fund, in writing by November 17, 2004, your failure to cooperate will result in a failed conciliation."*Id*. at Ex. M. In its response to the EEOC's letter, Lerner again disputed the need for a fund for unidentified victims and made no offer of compensation for that group. Affidavit of Edward Ostolski [doc. #15-1] Ex. B. In reply, the EEOC stated that given the distance between the parties on the issue of compensation for unidentified victims, further efforts at conciliation would be nonproductive. Ostolski Aff. [doc. #15-1] ¶ 4. This lawsuit followed.

The foregoing chronology demonstrates that the EEOC also fulfilled its obligation to respond in a reasonable and flexible manner to the employer. The court in *EEOC v. Dial Corp*., 156 F. Supp. 2d 926, (N.D. Ill. 2001) aptly summed up the situation presented by this case as follows: "Both parties had the opportunity to put their respective proposals on the table before the EEOC determined that conciliation would be futile. Once [Lerner] rejected the EEOC's counter proposal, the EEOC had no further duty at that point to conciliate any further." *Id*. at 942 (internal quotation marks omitted).

Lerner complains that the EEOC never gave Lerner the information it requested regarding each member of the potential victim class and that it needed that information to formulate a monetary offer. The Court disagrees. First, Lerner was fully aware of the number of past and present female

employees at its Darien office during the relevant time period (there were only fourteen), and therefore, Lerner was more than capable of identifying the potential universe of victims and determining an appropriate amount of compensation to set aside for them. Second, the EEOC is rightly concerned about identifying potential victims to employers. Third, the EEOC's conciliation obligation does not require the agency to identify every potential claimant. *See, e.g., Dial Corp.*, 156 F. Supp. 2d at 942; *EEOC v. Rhone-Poulenc, Inc.*, 677 F.Supp. 264, 266 (D.N.J. 1988), *aff'd per curiam*, 876 F.2d 16 (3d Cir. 1989).

Lerner also asserts that the EEOC's actions in this case were "analogous" to several cases in which courts have found the EEOC's conciliation efforts inadequate. *See, e.g., EEOC v. Asplundh Tree*, 340 F.3d 1256; *EEOC v. Die Fliedemaus LLC*, 77 F. Supp. 2d 460, *EEOC v. American Express Pub. Co.*, 681 F. Supp. 216 (S.D.N.Y. 1988). Lerner's attempt at analogy is unpersuasive. The nature and extent of the EEOC's conciliation efforts and whether those efforts are adequate will necessarily vary from case to case. *See, e.g., Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d at1169. As the chronology set forth above shows, the EEOC's conciliation efforts in this case were far more extensive than those presented in the cases relied on by Lerner. Over the course of several months, the EEOC: (1) identified the basis for its charges; (2) made a specific offer that provided an opportunity for voluntary compliance; (3) invited counter-offers from Lerner; (4) granted Lerner extensions of time to respond; (5) revised the agency's original offer in response to Lerner's concerns; and (6) provided Lerner with fair warning that its failure to make any specific monetary proposal for unidentified victims would result in litigation. Title VII requires no more from the EEOC.

2. Motion to Strike. Lerner asserts that the EEOC may not pursue any claims of "unwelcome touching" because those claims were not raised in the initial charges filed with the

EEOC and were not investigated by the EEOC. It is well settled that the EEOC does not act merely as a proxy for a charging party; the agency also acts as an enforcer of Title VII's requirements. *General Telephone Co. v. EEOC*, 446 U.S. 318, 331 (1980); *see also*, *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d. Cir. 1996) ("the EEOC may file suit where a charge was not filed by the affected employee"); *EEOC v. Morgan Stanley & Co., Inc.*,132 F. Supp. 2d 146, 153 (S.D.N.Y. 2000) ("EEOC is not merely a proxy for the victims of discrimination"). As a consequence, the EEOC's enforcement actions are not strictly limited to the allegations that began the EEOC's investigation. To the contrary, the Supreme Court has held that "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Telephone Co.*, 446 U.S. at 331.

Here, while the initial charge did not mention unwelcome touching, the EEOC's investigation of the charge revealed that Lerner's District Manager engaged in at least some physical contact with female employees that could be construed as unwelcome touching. Ostolski Aff. [doc. #15-1] ¶ 7. Moreover, the EEOC's determination letter alleges ongoing "sexual harassment" of and "sexual advances" toward females at the Darien branch office. Unwelcome touching is certainly one variant or form of sexual harassment or advances. Therefore, the Court will not strike the claims of unwelcome touching from the EEOC's complaint.

Accordingly, the Court DENIES Lerner's Motion to Dismiss, or in the Alternative, Strike [doc. #12].

IT IS SO ORDERED,

/s/ Mark R. Kravitz
United States District Judge

Dated at New Haven, Connecticut: **October 27, 2005**.