

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

ROBERT E. KINNETT,)
)
 Plaintiff,) Case No. 5:18-cv-00110
)
 v.)
)
 KEY W + SOTERA DEFENSE SOLUTIONS,)
)
 Defendant.)
 _____)

**BRIEF OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION AS AMICUS CURIAE**

Statement of Interest

The U.S. Equal Employment Opportunity Commission (EEOC) is charged by Congress with interpreting, administering, and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (“Title VII”), and other federal civil rights statutes. Title VII requires that a party seeking to bring a claim in federal court first file a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1). This Court’s November 21, 2018, order *sua sponte* raised the question of whether Plaintiff Robert Kinnett’s filing of his Title VII complaint of discrimination with the Department of Labor, Office of Federal Contractor Compliance Programs (OFCCP), satisfied Title VII’s charge-filing

requirement. This Court ordered supplemental briefing on this issue.¹ Resolution of this issue hinges upon an agreement—known as a Memorandum of Understanding (MOU)—between EEOC and OFCCP that addresses the dual-filing of complaints/charges alleging discrimination under Title VII. Because of the EEOC’s strong interest in the proper interpretation of Title VII’s charge-filing requirements and the validity of the MOU, the EEOC offers its views to the Court.

Statement of Facts

Defendant Key W + Sotera Defense Solutions is a federal contracting company. Compl. ¶ 5, ECF No. 1-2. Kinnett worked for Sotera from 2016 until his termination in April 2017. *Id.* at ¶¶ 4, 35; Pro Se 7 Compl. ¶ I.B., ECF No. 1. On October 3, 2017, Kinnett filed a complaint with OFCCP alleging religious and sexual orientation discrimination. Compl. ¶ 12, ECF No. 1-2; OFCCP Compl., pp. 3, 5, ECF No. 1-3. After an investigation, OFCCP concluded that there was insufficient evidence to establish that Sotera violated

¹ The second issue raised by this Court’s order is whether the failure to exhaust administrative remedies deprives the Court of subject matter jurisdiction. Order p. 2, ECF No. 11. The Fourth Circuit has characterized the charge-filing requirement as jurisdictional, but the EEOC (along with the majority of appellate courts) views it as a condition precedent to filing suit that may be subject to judicial estoppel, equitable tolling, and waiver. The Supreme Court recently granted certiorari to resolve the circuit split on this issue. *See Fort Bend Cty. v. Davis*, No. 18-525 (S. Ct.). But because Kinnett’s OFCCP filing satisfied Title VII’s charge-filing requirement, this Court need not await the Supreme Court’s ultimate decision in *Davis* to resolve this matter.

The EEOC takes no position on any other issue raised by Sotera’s motion to dismiss for a failure to state a claim or on the underlying merits of Kinnett’s claims.

its nondiscrimination obligations under Executive Order 11246. OFCCP Letter, ECF No. 1-3, p. 2. On May 22, 2018, OFCCP sent Kinnett a right-to-sue notice informing him of its determination and advising him that he had 90 days in which to file a Title VII lawsuit. OFCCP Letter, ECF No. 1-3, p. 3; Compl. ¶ 12, ECF No. 1-2.

On August 24, 2018, Kinnett filed this Title VII lawsuit. Compl., ECF No. 1-2. Kinnett alleged that he exhausted his administrative remedies by timely filing his complaint of discrimination with OFCCP and receiving his May 22, 2018, right-to-sue notice. Compl. at ¶ 12, ECF No. 1-2; *see* Pro Se 7 Compl. IV, ECF No. 1, p. 5.

Sotera filed a motion to dismiss for failure to state a claim. ECF No. 2. After the motion was briefed, this Court issued an order *sua sponte* questioning whether Kinnett's complaint should be dismissed for a failure to exhaust his administrative remedies because he had not filed a charge with the EEOC. Order at 1, ECF No. 11. This Court noted that Kinnett alleged that he had filed a complaint with OFCCP and had received a right-to-sue letter. *Id.* However, this Court observed, OFCCP is part of the Department of Labor, not the EEOC. *Id.* at 1-2. "Thus, the allegations in the complaint raise serious questions about whether Plaintiff filed a charge with the EEOC prior to initiating the present action." *Id.* at 2 (relying on *Walker v. Novo Nordisk Pharm. Indus.*, No. 99-2015, 2000 WL 1012960 (4th Cir. June 6, 2000), and *NAACP v. Labor Comm. v. Laborers' Int'l Union of N. Am.*, 902 F. Supp. 688, 701-02 (W.D. Va. 1995)). *Id.* Accordingly, this Court ordered additional briefing on whether Kinnett exhausted his administrative remedies.

On December 12, 2018, Kinnett filed his supplemental response. Resp., ECF No. 12. He stated that OFCCP told him it would be “duplicative and was not necessary” to file a charge with the EEOC. *Id.* He further stated that pursuant to the 2011 MOU between the EEOC and OFCCP, his OFCCP complaint constitutes a charge. Finally, he recounted that he had requested that the EEOC address the exhaustion of administrative remedies issue this Court raised. *Id.*

On December 20, 2018, Sotera filed its supplemental response. Sotera Resp., ECF No. 14. Sotera contends that if *Walker* and *NAACP Labor Commission* remain controlling precedent in light of the revised language of the 2011 MOU, then Kinnett’s charge should be dismissed for a failure to exhaust administrative remedies. *Id.* at 3. In the alternative, Sotera urges this Court to dismiss the complaint for the reasons stated in its motion to dismiss for failure to state a claim. *Id.*

Argument

Kinnett exhausted his administrative remedies by filing his Title VII discrimination charge with OFCCP. As this Court noted, Title VII requires that an individual seeking to bring a claim in federal court first file a charge of discrimination with the EEOC. 42 U.S.C. § 2000e-5(e)(1). This charge-filing requirement gives the EEOC the opportunity to conduct an investigation to determine whether reasonable cause exists to believe that the charge is true. 42 U.S.C. § 2000e-5(b). If so, the EEOC attempts to conciliate the charge and, if conciliation is unsuccessful, the EEOC may file an

enforcement action. 42 U.S.C. §§ 2000e-5(b),(f)(1). If the EEOC does not find reasonable cause and dismisses the charge, then it notifies the charging party, who has ninety days in which to file a lawsuit in federal court. 42 U.S.C. § 2000e-5(f)(1).

Title VII explicitly authorizes the EEOC to enter into agreements with other federal agencies with overlapping responsibilities for enforcing anti-discrimination laws to “promote efficiency” and to avoid “duplication” of operations. 42 U.S.C. § 2000e-14; *see also* Executive Order No. 12,067, 43 Fed. Reg. 28967 (1978) at ¶ 1-301(c), (i) (directing the EEOC to develop memoranda of understanding to improve coordination between agencies and minimize duplicative investigations). Executive Order 11246, as amended, prohibits federal contractors from discriminating based on race, color, religion, sex, sexual orientation gender identity, or national origin.² The Secretary of Labor is responsible for the administration and enforcement of this prohibition. *Id.* Section 206 of Executive Order 11246 authorizes the Secretary of Labor to receive and investigate complaints of discrimination by employees of government contractors.³ *Id.* The Secretary may also recommend to the EEOC (or to the Department of Justice, as appropriate) that Title VII proceedings be instituted. *Id.* (Sec. 209(3)).

² Available at <https://www.dol.gov/ofccp/regs/statutes/eo11246.htm>. Executive Order 13672, 79 Fed. Reg. 42971 (July 21, 2014), amended Section 202 to include “sexual orientation, gender identity.”

³ Executive Order 12086, 43 Fed. Reg. 46501 (October 5, 1978), amended Section 206.

Consistent with Title VII and these Executive Orders, the EEOC and OFCCP have entered into five different MOUs since 1970. The Fourth Circuit and other courts have recognized the validity of these MOUs. *See Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663 (4th Cir. 1977) (upholding validity of 1974 MOU, including paragraph providing that complaints filed with OFCCP “shall be deemed charges filed with EEOC”, but not deciding filing issue); *Emerson Elec. Co. v. Schlesinger*, 609 F.2d 898 (1979) (upholding validity of 1974 MOU).

The EEOC and OFCCP entered into the current MOU in 2011. *See Memorandum of Understanding Between U.S. Department of Labor and Equal Employment Opportunity Commission* (11/9/11), available at https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm. The 2011 MOU states that “OFCCP shall act as EEOC’s agent for the purposes of receiving the Title VII component of all complaints/charges.” It further states that all complaints or charges “filed with OFCCP alleging a Title VII basis . . . shall be received as complaints/charges simultaneously dual-filed under Title VII,” and that the applicable filing date is “the date the matter is received by OFCCP, acting as EEOC’s agent[.]”

Here, Kinnett timely filed his Title VII complaint of discrimination with OFCCP, which satisfied Title VII’s charge-filing requirement. Pursuant to the 2011 MOU, OFCCP acted as the EEOC’s agent for purposes of receiving the complaint. *Id.* Consistent with its authority under Executive Order 11246, OFCCP received and

investigated the complaint. Upon completion of the investigation, OFCCP notified Kinnett that he had ninety days in which to file his Title VII lawsuit, which he did.

The Fourth Circuit's unpublished decision in *Walker* does not compel a different result. In *Walker*, the Fourth Circuit held that the plaintiff's filing of a charge with OFCCP did not satisfy Title VII's charge-filing requirement. 2000 WL 1012960, at * 3-4. At the outset, we note that *Walker* was incorrect in stating that Title VII does not "contemplate that filing a complaint with another agency can or should be deemed a filing with the EEOC for purposes of § 2000e-5(e)." *Id.* at *3. To the contrary, as discussed above, § 2000e-14 explicitly contemplates that EEOC will coordinate with other agencies to avoid duplicative operations, and Executive Order No. 12,067 directed EEOC to enter into memoranda of understanding for this exactly this purpose.

In any event, *Walker* is inapposite here because the operative MOU in that case was the 1981 MOU. Focusing on language specific to the 1981 MOU, the Fourth Circuit determined that it "does not dictate that a complaint filed with the OFCCP is tantamount to filing with the EEOC." *Walker*, 2001 WL 1012960, at *4. Rather, the court said, the 1981 MOU "provides only that a charge of discrimination filed with the OFCCP shall be deemed a charge filed jointly with the EEOC if the OFCCP actually refers the complaint to the EEOC," which it had not done. *Id.* Making clear that its holding pertained only to the 1981 MOU, the court noted that the EEOC and OFCCP

entered into another MOU in 1999 and stated, “We express no opinion on whether, under this [1999] MOU, Walker’s complaint would be considered timely[.]” *Id.* at *5 n.*.

Here, in contrast to the 1981 MOU, the explicit terms of the 2011 MOU provide that the filing of a Title VII complaint with the OFCCP “is tantamount to filing with the EEOC[.]” *Id.* at *4. The 2011 MOU accomplishes this by specifying that OFCCP is the EEOC’s “agent for the purposes of receiving the Title VII component of all complaints/charges.” Further, the 2011 MOU provides that the date the complaint is received “by OFCCP, acting as EEOC’s agent,” is the deemed the date of receipt by the EEOC. Thus, Kinnett exhausted his administrative remedies by timely filing his complaint with OFCCP. *See Egelston v. State Univ. Coll.*, 535 F.2d 752, 755 n.4 (2d Cir. 1976) (EEOC charge filed as of date of OFCCP complaint); *see also Reynolds Metals*, 564 F.2d at 669-70 & n.12 (citing *Egelston* with approval but not deciding limitations issue).

The district court decision in *NAACP Labor Committee v. Laborers’ International Union of North America*, 902 F. Supp. 688, 701-02 (W.D. Va. 1995), is similarly inapposite. As with *Walker*, the court in *NAACP Labor Committee* erred in reading Title VII as requiring that charges be filed exclusively with the EEOC. *Id.* at 702. Further, as with *Walker*, the court in *NAACP Labor Committee* was construing an earlier iteration of the MOU. *Id.* at 701 (noting that plaintiffs relied primarily on the 1974 MOU). The circumstances surrounding the OFCCP filing in *NAACP Labor Committee* were also markedly different than the circumstances here. In that case, the NAACP sent the

OFCCP a letter on March 28, 1979. No action was taken by OFCCP until twenty months later when OFCCP relayed the complaint to the EEOC. *Id.* at 701. Here, in contrast, OFCCP—acting as the EEOC’s agent—received Kinnett’s complaint of discrimination, conducted an investigation, and issued him a right-to-sue notice, all in accordance with the 2011 MOU and the administrative process set out in Title VII.

Thus, Kinnett satisfied Title VII’s charge-filing requirement by filing his Title VII complaint with OFCCP.

Conclusion

For the reasons stated above, the EEOC urges this Court to hold that Kinnett exhausted his administrative remedies by timely filing his OFCCP complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I served one copy of the foregoing motion by ECF system this 30th day of January, 2019, to counsel of record.

s/ Anne Noel Occhialino
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