IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	**No. 09 C 5291**
TRUDI MOMSEN,	)	**Judge Robert M. Dow, Jr.**
Plaintiff-Intervenor	)	**Magistrate Judge Schenkier**
v.	)	
UNITED PARCEL SERVICE, INC.,	)	
Defendant.	)	

EEOC'S REPLY IN SUPPORT OF MOTION FOR 1292(b) CERTIFICATION

Defendant's Response to EEOC's motion attempts to distract the Court from the issue here: namely, what more must EEOC plead in a complaint when seeking relief on behalf of unidentified qualified individuals with a disability who were subjected to the same nationwide discriminatory policy, having identified how two specific victims were harmed by the application of this policy.

Defendant devotes much of its brief to arguing that the law on this issue is clear and that numerous courts in similar cases agree with Defendant. But though it purports to rely on many ADA cases and many EEOC cases, Defendant does not and cannot cite to any *EEOC ADA* cases holding that what EEOC did here was insufficient to satisfy the pleading requirements of Rule 8. The reason is simple: until now, no court has ever done so. As EEOC stated in its opening brief, because whether the EEOC can challenge the application of a *common policy* under the ADA without identifying all of the victims in its Complaint is a controlling legal question of first impression, EEOC respectfully requests 1292(b) certification.

I. DEFENDANT MISCHARACTERIZES EEOC'S ARGUMENT

Defendant first argues that EEOC has mischaracterized the Court's ruling, which Defendant identifies as holding "that EEOC must plead with sufficient detail to establish the plausibility of *its claim in this case that the unidentified class members were each qualified individuals with disabilities* who could have performed his/her job with or without reasonable accommodation." (Response at p. 2) (emphasis added). But, as EEOC has said repeatedly, this is not EEOC's claim. EEOC's claim is that Defendant inflexibly and illegally applied its leave policy to qualified individuals with disabilities. In its Complaint, EEOC stated that the policy was applied nationwide, and then identified and described in detail how this policy was applied to two individuals with disabilities who were ultimately terminated pursuant to this policy. The allegations in the Complaint therefore make it plausible that Defendant illegally discriminated against *other* disabled employees as well and that EEOC is entitled to relief.

II. EEOC SATISFIES THE STATUTORY CRITERIA FOR THE GRANT OF A SECTION 1292(B) PETITION

A. <u>The Adequacy of EEOC's Complaint is a Controlling Question of Law</u>

In arguing that the adequacy of EEOC's Complaint is not a controlling question of law, Defendant glosses over the incontrovertible fact that "[p]leading standards in federal litigation are in ferment after *Twombly* and *Iqbal,* and therefore an appeal seeking a clarifying decision that might head off protracted litigation is within the scope of sections 1292(b). . . . [and] [d]ecisions holding that the application of a legal standard is a controlling question of law within the meaning of section 1292(b) are numerous." *In re Text Messaging Antitrust Litigation,* 630 F.3d 622, 626-27 (7th Cir. 2010) (citations omitted). This case, which requires that a court apply the pleading standards as articulated in recent Supreme Court precedent in a new context, an ADA

action brought by the EEOC on behalf of identified and unidentified victims of the same policy, likewise presents the Court with a controlling question of law. [1]

B. <u>The Issue is Contestable</u>

Defendant next argues that this issue is not contestable because the law is already well-settled in Defendant's favor. Defendant tries to prove its point by citing several cases in which an ADA plaintiff's complaint is dismissed. *See* Response at 9-10. None of the cases cited by Defendant, however, are EEOC cases or involve the allegation of a common violation with many victims. The reason is simple: As EEOC pointed out in its opening brief, there are relatively few ADA cases that discuss the pleading standard post-T*wombly* and *Iqbal*, and there are ***no*** post-*Twombly/Iqbal* cases that require an ADA plaintiff alleging a common violation to state a *prima facie* case for each class member in order to survive a motion to dismiss.

EEOC can cite to a plethora of cases that recognize that EEOC is not required to identify all of the claimants on whose behalf the agency is seeking relief. *See* EEOC Mem. at 8 n.1. Most recently, in *EEOC v. U.S. Steel Corp.*, No. 10-1284, 2012 WL 3017869 (W.D. Pa. July 23, 2012), EEOC filed a pattern or practice ADA case challenging U.S. Steel's policy of subjecting its probationary employees to random breath alcohol tests. Defendant moved to dismiss EEOC's complaint, arguing, in part, that EEOC's complaint was insufficient under *Iqbal* and *Twombly* because EEOC failed to name any of the presently unidentified aggrieved employees. After extensive analysis, the *U.S. Steel* court held that "*Iqbal* and *Twombly* do not require the EEOC to

[1] Unable to dispute that fact, Defendant focuses heavily on the irrelevant issue of which party files more of these kinds of motions. Although it may be true that most interlocutory appeals concern orders denying motions for summary judgment and are filed by defendants, some, like this one, are filed by plaintiffs. *See, e.g., Weintraub v. Board of Educ. Of City School Dist.,* 593 F.3d 196, 200-01 (2d Cir. 2010); *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 720-21 (11th Cir. 1987), cited in *In re Text Messaging*, 630 F.3d at 626. And which party files the motion certainly *is not* a factor in whether or not it should be granted.

name all of the potential class members in its Amended Complaint." *Id.* at *10. While that case did not involve consideration of whether the class members were all qualified individuals with a disability, it did involve a common policy violation, like that alleged here.

The Court in *Twombly* and *Iqbal* explained that the plausibility standard is a flexible one – that the level of necessary factual detail varies according to the nature of the claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007); *Ashcroft v. Iqbal*, 566 U.S. 662, 679 (2009). Accordingly, as in *U.S. Steel*, EEOC should not be made to identify and describe all or some specific number of aggrieved individuals in its complaint when making a claim concerning the illegality of a nationwide policy or practice.

C. Resolution of this Issue Would Speed Litigation

Next, Defendant claims that resolution of this issue would not speed litigation because if EEOC is successful, the parties would be litigating a case with numerous claimants instead of a case focused on two. But Defendant is looking at this issue too narrowly. If this Court does not reconsider its decision or certify this issue for appellate review, the parties will go through discovery twice – first in the context of the two individuals who remain in the case and again, on behalf of a class of individuals, if the decision is overturned on appeal. Either way, EEOC will be seeking extensive discovery on all aspects of Defendant's policy and how it was implemented. In addition, as EEOC explained in its opening brief, this issue has far-reaching implications regarding the agency's use of its resources, and the resulting burden on the resources of the companies it investigates, as well as on the courts which will doubtless be fielding more subpoena enforcement actions during EEOC investigations. Indeed, the implications of this decision are so significant that, if the decision remains undisturbed, EEOC will be forced to take this case to trial in order to be able to appeal it. In this way, the parties are

precluded from the possibility of settlement - the most common and effective method for resolving litigation short of trial. Dismissing EEOC's Second Amended complaint will therefore prolong this litigation.

D. <u>EEOC Did Not Delay in Filing this Request</u>

There is no statutorily imposed time frame for filing a petition for interlocutory review with the district court, only that such a request must be "filed within a *reasonable time* after the order sought to be appealed." *Ahrenholz v. Bd. of Trs. Of the U. of Ill.*, 219 f.3d 674, 675 (7th Cir. 2000) (emphasis in original). Defendant incorrectly claims that EEOC waited 10 months to file its request for interlocutory review with "no explanation why it could not have sought leave at the time of the order." Defendant did so by selecting the Court's September 28, 2011 Order as the date for the clock to start running. Defendant fails to point out, however, that the September 28, 2011 Order gave EEOC the opportunity to seek leave to file a second amended complaint. *See* Doc. Nos. 56-57. EEOC promptly sought leave to file its Second Amended Complaint. *See* Doc. No. 59. EEOC should not be barred from seeking interlocutory review simply because it followed the Court's instructions.

The appropriate date for the clock to start is July 5, 2012 – the date of the order denying EEOC's motion for Leave to File the Second Amended Complaint. *See* Doc. Nos. 70-71. EEOC filed the instant motion just *two weeks* after the July 5, 2012 Order. *See* Doc. No. 72. Courts in this district have consistently held that two weeks is a reasonable amount of time for a party to wait to seek interlocutory appeal with the district court. *Van Straaten v. Shell Oil Products Co. LLC*, 813 F.Supp.2d 1005, 1019 (N.D. Ill. 2011) (J. Manning) (Three weeks is reasonable); *Leff v. Deutsche Bank AG*, No. 07 CV 733, 2009 WL 4043375, *6 n.6 (N.D. Ill., Nov. 20, 2009) (J. Dow) (Less than two months deemed reasonable); *In re Ocwen Fed. Bank FSB Mortgage*

Servicing Litigation, No. 04 C 2714, 2006 WL 1371458, *3 (N.D. Ill. May 16, 2006)(J. Norgle) (Sixteen days is reasonable).[2] Consequently, there can be no real dispute that EEOC filed its motion within a reasonable amount of time.

CONCLUSION

For the reasons set forth herein and in EEOC's Motion for 1292(b) Certification, EEOC respectfully requests that this Court certify for review its September 28, 2011 and July 3, 2012 decisions to dismiss EEOC's claim for relief on behalf of unidentified victims.

Respectfully submitted,

Dated: September 6, 2012

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[2] EEOC need not distinguish the cases cited by Defendant as they all involved, among other things, the moving party delaying its request for interlocutory review far longer than EEOC took here.

CERTIFICATE OF SERVICE

Jeanne B. Szromba, an attorney, hereby certifies that she caused a copy of the foregoing Plaintiff EEOC's Motion for 1292(b) certification, to be served via the court's electronic filing system, to counsel of record at the following address:

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Dated: September 6, 2012

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