Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 16-1535

MARIA L. DUFAU,

Appellant

v.

SYLVIA MATHEWS BURWELL, Secretary,
U.S. Department of Health and Human Services,

Appellees

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT GREENBELT

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: /s/ Alan R. Kabat Date: August 12, 2016

Counsel for: Metropolitan Wash. Empl. Lawyers

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I certify that on August 12, 2016 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 330 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes.

MWELA respectfully submits this amicus brief to aid this Court in addressing whether it is appropriate for a district court judge to deny a motion brought under Fed. R. Civ. P. 56(d), and grant summary judgment, in an employment discrimination case brought by a federal employee where no discovery or hearing had been conducted at the administrative level because the employer, a federal agency, compiled an investigative report. The disposition of this issue could have an important effect on the ability of federal employees to enforce their statutory rights to bring discrimination complaints in the federal district courts.

For these important reasons, MWELA respectfully submits this amicus brief.

Statement Pursuant to Rule 29(c), Fed. R. App. P.

Pursuant to Rule 29(c), Fed .R. App. P., *amicus* states that:

(A) *Amicus* alone authored the entire brief, and no attorney for a party authored any part of the brief;

(B) Neither any party nor any party's counsel contributed money that was intended to fund preparing or submitting the brief, exclusive of the dues counsel on appellant's side have paid for their membership in *amicus* MWELA; and

(C) No person, other than the *amicus curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Where a federal employee opted to file a complaint in federal district court rather than request a hearing before the Equal Employment Opportunity Commission ("EEOC") immediately following the agency's investigation of her formal complaint of discrimination, is it appropriate for the trial judge to grant summary judgment and deny a Fed. R. Civ. P. 56(d) motion when the employee was afforded no opportunity for discovery, either before the EEOC or the trial court, or an administrative hearing, because the agency alone (as required by the EEOC's regulations) compiled an investigative report?

SUMMARY OF FACTS RELEVANT TO *AMICUS* BRIEF[1]

Dufau, a Principal Investigator at the National Institutes for Health ("NIH or Agency") who has run her own laboratory for over 30 years, filed a formal complaint of age discrimination, and a subsequent complaint of age-based harassment and retaliation, against the Agency. Among her claims were that the Agency took adverse employment actions when it cut her budget, removed her support personnel, and subjected her to harassing comments based on her age. Following the Agency's investigation of her formal complaint, Dufau elected to file a complaint in the federal district court instead of requesting a hearing before the EEOC or requesting a Final Agency Decision ("FAD").

[1] This highly distilled factual summary is based on the appellant's brief, and so contains no individual record citations.

In response to Dufau's complaint, the government filed a Motion to Dismiss or, in the alternative, for Summary Judgment prior to the commencement of discovery. Dufau then filed a Motion to Deny or Defer Consideration of Defendant's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 56(d) simultaneously with her opposition to the government's motion. In her Rule 56(d) motion, Dufau explained that because she filed a complaint in the district court upon the Agency's issuance of its Report of Investigation ("ROI") of her first complaint, there is no ROI for her second complaint, and no discovery had been conducted for either complaint. Her counsel explained in the motion and in an attached affidavit the particularized need for discovery, including obtaining comparator evidence and evidence concerning how the Agency's actions affected the terms and conditions of Dufau's employment.

The trial judge held oral arguments to resolve the motions, during which he ruled that because the case had "a paper trail before it got here," which had been "reviewed extensively by the E.E.O. office at N.I.H.," "I do not think this is one of those cases where I have virtually no ability on the part of the plaintiff to articulate and tell her side of the story without discovery." Thus, despite the fact that the nonmoving party had no opportunity for discovery, the trial judge found Dufau did not suffer an adverse employment action and failed to provide evidence permitting

an inference of unlawful discrimination, and therefore, denied Dufau's Rule 56(d) motion and granted the government's motion for summary judgment.

SUMMARY OF ARGUMENT

In evaluating a Rule 56(d) motion for discovery before summary judgment, this Court has held that such motions must be granted where the nonmoving party has not had the opportunity to engage in discovery. This principle must apply in cases of employment discrimination regardless of whether the complaint was brought by a federal-sector or private-sector employee.

It is well established that federal-sector employees and private-sector employees are entitled to equal treatment in the federal courts when bringing claims of discrimination, despite that the administrative remedies available to each differ procedurally. In the federal sector, the EEOC's regulations require federal agencies to conduct an internal investigation into a formal complaint of discrimination and produce a Report of Investigation. The EEOC recognizes that these investigative files are often incomplete and that discovery is required to cure the deficiencies, even at the administrative level.

In this case, Dufau proceeded to federal court without the benefit of any discovery, nor the benefit of an administrative hearing. In cases such as this, the trial judge must evaluate the Rule 56(d) motion on its face, and where, as here, there was no opportunity for depositions or cross examinations, not be influenced because of the

mere presence of an agency prepared investigative file in the record.

ARGUMENT

I. It Is Critical that Federal-Sector and Private-Sector Employees Receive Equal Treatment in the Federal District Courts.

Forty years ago, the Supreme Court established, in *Chandler v. Roudebush*, 425 U.S. 840, 847 (1976), that federal district courts must allow trials *de novo* by aggrieved federal employees who have received prior administrative hearings. The Supreme Court discussed the legislative history of the Equal Employment Opportunity Act of 1972, and highlighted Congress' focus on "the theme of remedial disparity throughout the floor debates, arguing for equal treatment of private-sector and federal-sector complainants." *Id*. at 857. It was Congress' intent that since the private-sector complainants "were entitled to plenary adjudication of their claims by a federal district court, rather than mere appellate review on a substantial-evidence basis following agency adjudication . . . [federal-sector complainants] should be treated similarly." *Id*.

All employees, whether private-sector or federal-sector, alleging discrimination in violation of Title VII and several other federal statutes must exhaust their administrative remedies before exercising the right to file a civil action. *See Laber v. Harvey*, 438 F.3d 404, 415–16 (4th Cir. 2006) (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989), *superseded by statute on other grounds by* 42 U.S.C. § 1981(b) (private-sector employees);

Brown v. Gen. Servs. Admin., 425 U.S. 820, 832 (1976) (federal employees)). With regard to federal employees, the EEOC's regulations provide that a complainant is authorized under Title VII, the ADEA, and the Rehabilitation Act to file a civil action in the appropriate United States District Court if any of the following conditions are met: "(a) Within 90 days of receipt of the final action on an individual or class complaint if no appeal has been filed; (b) After 180 days from the date of filing an individual or class complaint if an appeal has not been filed and a final action has not been taken; (c) Within 90 days of receipt of the Commission's final decision on an appeal; or (d) After 180 days from the date of filing an appeal with the Commission if there has been no final decision by the Commission." *See* 29 C.F.R. § 1614.407.

Therefore, the Commission's regulations plainly contemplate that after 180 days from the filing of the formal complaint, the very day of the agency's deadline to produce a Report of Investigation (ROI) pursuant to 29 C.F.R. § 1614.108(f), complainants may opt to file a civil action rather than proceed with the administrative hearing process. This means that in cases like Dufau's, where she elected to proceed to district court rather than to an administrative hearing, it is implicit that she is entitled to proceed despite that she will neither have engaged in discovery or a hearing process, where she would be entitled to cross-examine agency witnesses.

Amicus MWELA is unaware of any case by this Court denying a Rule 56(d) motion in a discrimination case brought by a private-sector employee solely on grounds that the employer conducted an internal investigation, which was produced to the plaintiff during the EEOC's investigation process. Instead, it is generally recognized that an employer's internal investigations, while including relevant evidence, some of which may support the employee's claim, are typically conducted with an eye toward defending against any complaints, and are not intended to be neutral. There is no basis for the Court to conclude that an ROI prepared solely by a federal agency being accused of discrimination is any different.

II. A Federal Agency's Internal Investigation of a Discrimination Complaint is Not an Adequate Substitute for Discovery.

The EEOC's regulations, at 29 C.F.R. § 1614, set forth the administrative process for federal employees who are subjected to discrimination. The process begins with an informal complaint stage, during which the complainant is required to report any discriminatory actions he or she wishes to challenge to the attention of an EEO Counselor. If the informal complaint is unresolved, either through the efforts of the EEO Counselor or mediation, the agency issues the employee a notice of right to file a formal complaint of discrimination with the agency. If the employee opts to file a formal complaint, the agency then reviews the complaint,

and either accepts the complaint for investigation or dismisses the complaint, or in some cases accepts portions of the complaint while dismissing other portions.

Pursuant to 29 C.F.R. § 1614.108(f), agencies are afforded 180 days from the date of the filing of a formal complaint of discrimination to investigate the complaint. During this investigation, the agencies appoint an investigator, who is frequently contracted by the agency, although is sometimes even an employee of the agency, who then collects documentary and testimonial evidence. The investigator can request that the agency provide documents the investigator believes are relevant, and can opt to interview the witnesses the investigator deems relevant or request that they respond to written interrogatories. In some cases, the investigator will provide the complainant with the opportunity to provide a rebuttal statement to the statements by the agency officials who made the decisions regarding the adverse employment actions (also known as Responsible Management Officials). However, aside from these statements, which are often provided in summary form, the complainant does not otherwise have access to any documents or statements produced during the investigation until the agency issues the investigative file, or ROI, to the complainant.

While 29 C.F.R. § 1614.108(b) specifies that during the investigation the agencies are to "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint," the Commission's

regulations themselves, as well as its case law, demonstrate the Commission's acknowledgment that this rarely occurs. In *Petty v. Dept. of Defense*, EEOC Appeal No. 01A24206, at *10–11 (July 11, 2003), the Commission explained:

> . . . the administrative judge must be certain that the investigative record has been adequately developed. Unlike the typical civil employment discrimination trial in federal court, an EEOC hearing is not strictly judicial in nature - it is a quasi-investigatory exercise, as well. It is specifically designed as "an adjudicatory proceeding *that completes the process of developing a full and appropriate record.*" EEO MD-110, at 7-1 [emphasis added]; *see also* 29 C.F.R. § 1614.109(a) (stating that once a complainant requests a hearing and an EEOC administrative judge is appointed, the administrative judge assumes "full responsibility for the adjudication of the complaint, including overseeing the development of the record"); *cf.* EEO MD-110, at 7-7 (explaining that "[t]he Commission intends that the [a]dministrative [j]udge will take complete control of the case once a hearing is requested"). Agencies are initially responsible for conducting thorough and complete investigations of complaints of discrimination brought against them. *See* 29 C.F.R. § 1614.108(b) (instructing agencies to "develop an impartial and appropriate factual record upon which to make findings on the claims raised by the written complaint"); and EEO MD-110, at 6-1 (noting that an "appropriate factual record is one that allows a reasonable fact finder to draw conclusions as to whether discrimination occurred"). However, Commission rules recognize that agencies will not always meet their regulatory burden to conduct such comprehensive investigations.
>
> The rules thus clarify that "where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the [a]dministrative [j]udge." EEO MD-110, at 7-7.
>
> A hearing is often indispensable in this endeavor. It "provides the parties with a fair and reasonable opportunity to explain and

> supplement the record and, in appropriate instances, to examine and cross-examine witnesses." EEO MD-110, at 7-1.
>
> For this reason, the hearing is considered to be "part of the investigative process" itself. *See* 29 C.F.R. § 1614.109(e). Accordingly, an administrative judge may not issue a decision without a hearing if he or she has concluded that holding an actual hearing would aid in the development of an appropriate factual record (*i.e.*, one which contains all the information necessary to enable an accurate adjudication of the complaint on its merits). *See, e.g., Brown v. United States Postal Service*, EEOC Appeal No. 01992087 (Sept. 13, 2002).

See also Michaud v. Dept. of Veterans Affairs, EEOC Appeal No. 01913761, at *4 (Feb. 28, 1992) ("The Commission notes that in a civil action, the parties have had a chance, prior to trial, to participate in the discovery process, and have had the opportunity to depose opposing witnesses. In the administrative process, however, a complainant reaches the hearing stage without having had significant control over the evidence contained in the investigative file."). Here, of course, there was no hearing at all, so that the bilateral discovery contemplated by the EEOC did not take place with respect to Dufau's claims.

At the oral argument held in this case to resolve the outstanding motions, the trial judge stated his belief that an ROI is different than a typical private-sector employer's internal investigation because it is created and reviewed by an agency's EEO office:

> THE COURT: Are you saying that every report of investigation is insufficient or that this one is?

> [Dufau's counsel]: I will actually argue both. A report of investigation is created by the agency and counsel for the plaintiff is not actually able to participate in any true substantive matter during the creation of that report. So it is an agency or, excuse me, it is a defendant created document and there is –
>
> THE COURT: Well, it's a document created by the EEO officials of the agency. Correct?
>
> [Dufau's counsel]: Correct. Who are employees of the agency.
>
> THE COURT: I understand that.
>
> * * *
>
> THE COURT: But their mission is a little bit different than the scientists. Their mission is to see to it that E.E.O. laws are complied with. . . .

Transcript, p. 32-33. The trial judge later noted that the ROI has "been reviewed extensively by the E.E.O. office at N.I.H." Transcript, p. 68.

In stating this, the trial judge neglected to recognize the dual roles of agency EEO offices. As the EEOC's Management Directive for 29 C.F.R. § 1614 (MD-110), as revised August 5, 2015, explains:

> Some may view the agency's investigative process as inherently biased because the agency accused of discrimination is the same agency that is charged with administering the EEO investigative process. Nevertheless, the statute requires that an agency comply with rules, regulations, orders and instructions which shall include the issuance of a "final action" on a complaint of discrimination . . . Moreover, as the Commission's regulations make clear, and as this management directive reinforces, a federal agency head is obligated to protect both the integrity of the agency's EEO process ***and the legal interests of the agency.***

MD-110, Ch. 1(IV) (emphasis added) (the Commission's newly revised MD-11 can be found at https://www.eeoc.gov/federal/directives/md110.cfm).

III. This Court Has Recognized that In Deciding a Rule 56(d) Motion, the Need for Discovery is Paramount.

As this Court has recently held, a Rule 56(d) motion must be granted "where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *McCray v. Md. Dep't of Transp., Md. Transit Admin.*, 741 F.3d 480, 483-84 (4th Cir. 2014) (citing *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). "Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray*, 741 F.3d at 483. The rule "is intended as a safeguard against a premature grant of summary judgment ... thus, [courts] should construe the rule liberally[.]" *King v. Cooke*, 26 F.3d 720, 726 (7th Cir. 1994); *see also Harrods*, 302 F.3d at 245 n.18 (discussing with approval sources in favor of applying the rule liberally). Such requests should be denied only "if the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment." *Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006) (internal quotation marks omitted).

This Court has visited this specific issue with respect to federal employees in both *Works v. Colvin*, 519 F. App'x 176 (4th Cir. 2013) and *Amirmokri v.*

Abraham, 266 F. App'x 274 (4th Cir. 2008). In both cases, the plaintiff elected to proceed through the EEOC's administrative process, including participating in multi-day hearings before Administrative Judges at the EEOC. *Works*, 519 F. App'x at 187; *Amirmokri*, 266 F. App'x at 281-82. This Court overturned the district court's decision in *Works* denying a Rule 56(d) motion, finding an abuse of discretion, concluding that unlike in *Amirmokri, supra* at 282, where "the central participants" were all deposed and thoroughly questioned at the administrative level, several of the key witnesses in *Works* had not been deposed. *Works*, *supra* at 187.

Given that reasoning, in a case with a procedural history like the instant case, where Dufau elected to file a civil action instead of requesting a hearing before the EEOC, meaning no discovery occurred at the administrative level, the trial judge must recognize that the ROI, regardless of its "volume," is not a substitute for discovery. Instead, the inquiry under Rule 56(d), as it is in any other type of case, including discrimination cases brought by private-sector employees, should be on whether discovery could aid Dufau in establishing her claim.

In denying Dufau's Rule 56(d) motion at the oral argument, the trial judge explained:

> . . . this is again a case where the matter does not come before the court on a completely clean slate because this has been the subject of a massive investigation which the document on the C.D. was over 800 pages. I mean this is not a case that does not have a paper trail before

> it got here. It's been reviewed extensively by the E.E.O. office at N.I.H., a report of investigation made, major documents put before me. So I do not think this is one of those cases where I have virtually no ability on the part of the plaintiff to articulate and tell her side of the story without discovery.

Transcript, p. 68.

In so stating, the trial judge failed to recognize that Dufau set forth in the Affidavit attached to her Rule 56(d) motion legitimate requests for discovery that could very well "contradict the assertion[s]" made by the Agency to the district court, including the Agency's uncorroborated explanations for some of the actions at issue. *Ingle v. Yelton,* 439 F.3d 191, 195 (4th Cir. 2006) (internal quotation marks omitted). Further, because the deciding officials (the Responsible Management Officials) were not deposed, either at the administrative level or at the district court level, nor had they testified at an administrative hearing, and hence were never cross-examined by Dufau, there is a "real possibility that [Dufau] was prejudiced by the denial" of her discovery request. *Id.*

CONCLUSION

In cases where federal employees proceed to federal court with an employment discrimination claim prior to discovery or an administrative hearing, the mere existence of a Report of Investigation created by a federal agency should not be determinative on a Rule 56(d) motion where the motion otherwise meets the standard.

Respectfully submitted,

/s/ Alan R. Kabat

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Dated: 08/12/2016

/s/ Alan R. Kabat
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August 2016, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

Michael L. Vogelsang, Jr. R. Scott Oswald EMPLOYMENT LAW GROUP, PC 888 17TH Street, NW, Suite 900 Washington, DC 20006 *Counsel for Plaintiff-Appellant*	Alex S. Gordon Office of the U.S. Attorney 6500 Cherrywood Lane, Suite 200 Greenbelt, MD 20770 *Counsel for Defendant-Appellee*

I further certify that I caused the required bound copies of the foregoing brief to be filed with the Clerk of the Court by placing them in a postage pre-paid envelope addressed to the clerk and depositing that into a U.S. Postal Service mailbox for pickup on August 15, 2016.

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