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DEC 18 2002
CLARENCE MADDOX
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 02-14139-CIV-PAINE/LYNCH

UNTIED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

GLORIA FARINA, M.D.,

Intervenor-Plaintiff,

vs.

EMERGENCY MEDICINE ASSOCIATES, INC.,

and

INDIAN RIVER MEMORIAL HOSPITAL, INC.,

Defendants.
_______________________________________/

ORDER ADOPTING THE REPORT AND RECOMMENDATION ON DEFENDANT INDIAN RIVER MEMORIAL HOSPITAL, INC.'S MOTION TO DISMISS (DE# 6) AND DEFENDANT EMERGENCY MEDICINE ASSOCIATES, INC.'S, MOTION TO DISMISS, OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT (DE# 8)

This matter is before the court upon the Report and Recommendation (DE# 21) on Defendant Indian River Memorial Hospital, Inc.'s Motion to Dismiss (DE# 6) and Emergency Medicine Associates Inc.'s ("EMA") Motion to Dismiss, or, in the alternative, Motion for Summary Judgment (DE# 8). The Report and Recommendation was issued on October 16, 2002. Indian River Memorial Hospital, Inc. filed its objection to the Report and Recommendation on October 29, 2002 (DE# 23), and Emergency Medicine Associates, Inc. filed its objection October on 28, 2002 (DE# 22). Thereafter, on November 13, 2002 Gloria Farina MD filed a response to the Objections (DE# 24),

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and the EEOC filed its consolidated response to the objections (DE# 25).

Upon careful scrutiny of the multitude of submissions, including a de novo review of the portions of the report and recommendation to which the Defendants Indian River Memorial Hospital, Inc., and Emergency Medicine Associates, object, the court agrees with Magistrate Judge Lynch's conclusions.

BACKGROUND

The United States Equal Employment Opportunity Commission ("EEOC") filed the complaint in the present case, no. 02-14139-Civ-Paine/Lynch, on May 1, 2002. The complaint alleges that the Defendants subjected Dr. Farina and similarly situated women to a sexually hostile working environment, failed to promote Dr. Farina, and terminated her because of her sex and in retaliation for protesting the harassment. On July 3, 2002, Defendant Indian River Memorial Hospital, Inc. filed its Motion to Dismiss (DE# 6), and on July 8, 2002, Defendant Emergency Medicine Associates filed its Motion to Dismiss, or in the alternative Summary Judgment (DE# 8).[1] Thereafter on July 10, 2002, an order was issued granting Dr. Farina's Motion to Intervene .

DISCUSSION

The Report and Recommendation recommends this court deny the Motions to Dismiss (DE# 6 and DE# 8), without prejudice. The Report and Recommendation finds that it is premature to rule upon a motion to dismiss or a motion for summary judgment which asks the District Court to make factual determinations while discovery is still ongoing. The Defendant Indian River Memorial

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[1]The Defendants seek dismissal of this case based upon the argument that there is no subject matter jurisdiction for the Plaintiff to proceed against either Defendant, they allege they are not a single employer pursuant to Title VII.

Hospital Inc. objects to the Magistrate's recommendation requiring the parties to permit any discovery by the EEOC, because:

> The EEOC has already had the benefit of ten months of "discovery" as to the jurisdictional issues during its investigation of the underlying Charge of Discrimination. In the alternative, Indian River Memorial Hospital, Inc. Objects to the Magistrate's recommendation that the parties engage in full discovery regarding the EEOC's and Intervenor Plaintiff's multiple claims when the question of subject matter jurisdiction has yet to be resolved. Indian River Memorial Hospital, Inc. requests that if the court decides it needs additional information before ruling on the Motion to Dismiss, that discovery initially be limited to the issues of subject matter jurisdiction for a period of four months. (DE# 23)

Emergency Medicine Associates, Inc. filed similar objections stating that:

> The EEOC has not only a duty to conduct an investigation, but the extensive power to require compliance by the alleged employer which can include the issuance of subpoenas, the examination and copying of documents and the taking of testimony. See 42 U.S.C. §§2000e-(b), 2000e-8(a), 29 C.F.R. § 1601.16(a). The EEOC has therefore, already had its opportunity to obtain evidence on the question of subject matter jurisdiction and independent contractor status, defenses raised by EMA during the Plaintiff's investigation. In the alternative, EMA object to the Report and Recommendation which permits discovery to proceed on the merits as well as the jurisdictional defenses. EMA seeks a ruling limiting discover to the issues of subject matter jurisdiction and Farina's status as an independent contractor. Until this court first determines whether it has power to hear this case EMA should not be put to the expense of full discovery on all issues. (DE# 22)

In a factual attack upon subject matter jurisdiction a court is allowed to proceed as it never could under Rule 12(b)(6) or Fed.r.Civ.P. 56. Scarfo v. Ginsber, 175 F.3d 957, 960 (11th Cir. 1999)[2]. It is a clear abuse of discretion for a district court not to allow a plaintiff an opportunity to benefit

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[2][I]n a factual attack upon subject matter jurisdiction the trial court may proceed as it never could under 12(b)(6) or Fed.R.Civ.P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction, it's very power to hear the case, there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Scarfo v. Ginsber, 175 F.3d 957, 960-61 (11th Cir. 1999).

from reasonable discovery before dismissing the plaintiff's claim for lack of subject matter jurisdictions. Majd-Pour v. Georgiana Community Hospital, Inc., 724 F.2d 901, 903 (11th Cir. 1984). In view of the large volume of complaints before the Commission and the non-adversary character of many of its proceedings, court actions under Title VII are de novo proceedings. Mcdonnell Douglas Corp. v. Green, 411 U.S. 792, 799 (1973).

Scarfo clearly sets forth the standard of review in this case, however this court cannot ignore all other binding precedent which affords a plaintiff an opportunity to benefit from reasonable discovery before dismissing the plaintiff's claim for lack of subject matter jurisdiction. The complaint in this case was filed on May 1, 2002, approximately two months later, the Defendants filed their respective Motions to Dismiss, July 3, 2002, and July 8, 2002. The Defendants argue that the EEOC has had the benefit of ten months of discovery as to the jurisdictional issue during its investigation of the underlying Charge of Discrimination. While this may be the case, as previously stated, court actions under Title VII are de novo proceedings. Furthermore, Gloria Farina, M.D. who was permitted to intervene in this cause of action on July 9, 2002, is entitled and shall be afforded the opportunity to conduct and benefit from reasonable discovery.

The Defendants further argue that discovery should be limited to the issues of subject matter jurisdiction. Indian River Memorial Hospital, Inc. contends that it would not "be just, speedy, nor inexpensive to allow discovery as to the many issues raised in this case outside of subject matter jurisdiction prior to this court's determination of its jurisdiction because, there will be much time and effort spent requesting and interpreting contracts and documents, ferreting out the unnamed witnesses in Dr. Farina's verified complaint, interviewing and deposing witnesses, and engaging expert witnesses (DE# 23)". Similarly, Emergency Medicine Associates, Inc. argues that "discovery

should be limited because, until this court firs determines whether it has the power to hear this case Emergency Medicine Associates, Inc. should not be put to the expense of full discovery on all issues." (DE# 22) Emergency Medicine Associates, Inc., further contends that, "Farina's Intervening Complaint contains eight counts. The EEOC Complaint alleges sexual harassment, gender discrimination and retaliation. Discovery on these claims will be extensive, complex and expensive. While the EEOC may have an unlimited budget to engage in such wholesale discovery, Emergency Medicine Associates, Inc. does not (DE# 22)."

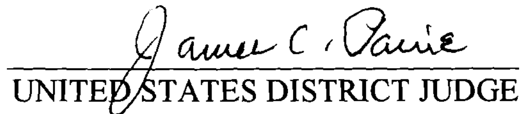
On the other hand, both the EEOC and Gloria Farina, MD, contend that bifurcating discovery would require the same witnesses to be deposed twice and would result in countless disagreements regarding the scope of the questioning. It would prove highly problematic and extremely difficult to delineate the scope of questioning as to each witness (DE# 24). The EEOC further contends that, "it would be more efficient to examine the witnesses once regarding the full scope of their knowledge, rather than arrange for all parties to meet back several months later for further questions. This is especially true here where jurisdictional questions will overlap with the substantive claims of the case, during the course of depositions (DE# 25)." Though Federal court may limit the scope of discover, this court finds that in the present case, bifurcation of discovery would not lead to judicial economy. Therefore, it is hereby

ORDERED AND ADJUDGED that United States Magistrate Judge Frank J. Lynch, Jr.'s Report and Recommendation (DE# 21) is Affirmed and Adopted and made the order of this Court. Accordingly, it is

ORDERED AND ADJUDGED that Defendant Indian River Memorial Hospital, Inc.'s Motion to Dismiss (DE# 6) and Defendant Emergency Medicine Associates, Inc.'s Motion to

Dismiss or for Summary Judgment (DE# 8) is DENIED without prejudice to be raised again after discovery has been concluded should the facts so warrant the filing of a renewed motion.

DONE AND ORDERED at West Palm Beach, Florida, this 16th day of December, 2002.



UNITED STATES DISTRICT JUDGE

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