IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION; Plaintiff, and DORETTA BENALLY, ROXANNE CAHOON, FREDA DOUGLAS, and ELVA BEGAY, Plaintiff-Intervenors, vs. RICHARD O. and SHAUNA KIDMAN, d/b/a RD's Drive In/Exxon, Defendants.	No. CIV 02-1911 PCT SMM **MEMORANDUM OF DECISION AND ORDER**

Pending before the Court is Plaintiff and Intervenors' Motion to Enforce Settlement Agreement. [Doc. No. 130] Having considered the parties' arguments in their briefings and after conducting an evidentiary hearing, the Court now issues the following Memorandum of Decision and Order.

BACKGROUND

Defendants, Richard and Shauna Kidman ("Defendants" or "Kidmans") are the owners of RD's Drive-In, a fast food restaurant in Page, Arizona. The restaurant has been open for

152

over twenty years and employs between 20 - 25 people, approximately 90% of whom are Native American who were members of the Navaho Nation. All employees are fluent in English, many are bilingual, speaking Navajo and English. In 2000, Defendants began receiving complaints from English-only speaking employees that some Navajo speaking employees were speaking rudely or inappropriately to them in the Navajo language.

As a result of the complaints, in May 2000, Defendants asked their son Steve Kidman ("Steve"), to research the legality of English only policies. Steve's research (using the EEOC website, and case law) led Defendants to the conclusion that English only policies were permissible so long as they are necessary for conducting business, the business informs the employees about the policy, and informs employees of the consequences of violating the policy. Steve also found a Ninth Circuit decision which held that preventing conflict and ill-feelings among employees is a valid business reason to implement an English language policy. Therefore, in June 2000, Defendants adopted an English language policy at the restaurant. The policy stated:

> The owner of this business can speak and understand only English. While the owner is paying you as an employee, you are required to use English at all times. The only exception is when the customer can not understand English. If you feel unable to comply with this requirement, you may find another job.

The employees were given a copy of the policy to sign and acknowledge understanding. Employees who refused to sign the policy were required to give a two week notice. Four employees, Doretta Benally, Elva Begay, Freda Douglas, and Roxanne Cahoon ("Intervenors") refused to sign the acknowledgment, and resigned their positions. According to the Intervenors, after they refused to sign the policy, Steve told them to clock out and go home. Defendants claim that the Intervenors were asked to leave because they became insubordinate in voicing their objection to the policy. When the Intervenors received their final paychecks, their hourly wage had been reduced, pursuant to a written policy that would reduce an employee's hourly wage for quitting mid shift or without notice.

Intervenors filed charges with the Equal Employment Opportunity Commission ("EEOC") which issued letters of determination on July 12, 2001. The EEOC, Plaintiff in this action, filed a Complaint in this Court on September 27, 2002 alleging violations of Title VII of the Civil Rights act of 1964, as amended, and Title I of the Civil Rights Act of 1991. A settlement conference was held in Phoenix before Magistrate Judge Morton Sitver on April 4, 2004. On September 3, 2003, the parties participated in a second settlement conference before Magistrate Judge Stephen L. Verkamp.

At the beginning of the second settlement conference, the EEOC presented a proposed Consent Decree for discussion. Counsel for the parties made numerous notations on the proposed Consent Decree and used each subsequent revision to continue negotiations. At the end of the day, Mary Jo O'Neill, counsel for the EEOC, photocopied the marked up version of the Consent Decree and provided copies to all parties. According to the EEOC and the Intervenors, "the parties shook hands . . . [i]t was clear to everyone present that the case was settled." [PSOF at 4] Moreover, the parties announced to Magistrate Judge Verkamp that a settlement agreement had been reached.

On September 5, 2003, Magistrate Judge Verkamp entered a Minute Order indicating that the case had settled and that appropriate settlement documents would be filed with the Court. On September 22, 2003, a status hearing was held during which the parties indicated that the settlement process should be completed within two weeks. In fact, the Court was informed that the only thing left to do was to "dot the i's and cross the t's." On October 20, 2003, another status hearing was held during which the Court found that settlement had not in fact been reached. At that time, the parties were warned that a break down in the settlement process would require the Court to conduct an evidentiary hearing, followed by possible attorney sanctions.

Because of breakdowns in communication between counsel, the parties agreed to another settlement conference before Magistrate Judge Verkamp. However, on October 29, 2003, Magistrate Judge Verkamp declined to conduct the conference stating that the only purpose of the face to face meeting "would be for me to browbeat Mr. Kidman into settling;

I feel I am being asked to advocate the EEOC's position, which I feel is inappropriate and beyond what a judicial officer should be doing."

On January 9, 2004, Plaintiff and Intervenors filed the pending Motion to Enforce Settlement Agreement. Plaintiff and Intervenors argue that there are no disputed issues of material fact in this case regarding the material terms and conditions of the settlement agreement, and that the evidence is undisputed that all parties arrived at a settlement in this case. Defendants deny that an enforceable settlement agreement was in fact reached in this case. According to Plaintiff and Intervenor's, agreement was reached on all material terms, the terms were memorialized in the consent decree used by the parties during negotiations, and all parties agreed, on numerous occasions, that a settlement had been reached during the September 3, 2003 settlement conference. Defendants argue that under Arizona law, settlement agreements must be in writing or read into the record in open court, that there was no intent by either party to be bound by the terms of the alleged agreement, and that there was no mutual assent to the material terms of the agreement. Furthermore, Defendants argue that the agreement is barred by Arizona's statute of frauds.

CHOICE OF LAW

The parties dispute whether federal common law or Arizona law governs enforcement of the settlement agreement at issue here. Generally, the construction and enforcement of settlements are governed by general contract principles under state law. Pac. Bell v. Pac. W. Telecomm, Inc., 325 F.3d 1114, 1128 (9th Cir. 2003); Hisel v. Upchurch, 797 F. Supp. 1509, 1517 (D. Ariz. 1992). Cases determining whether state or federal law applies in a Title VII action to enforce a settlement agreement are inconsistent at best.

There are numerous cases in which courts have applied state law to claims arising under federal statutes. For example, in Hayes v. Nat'l Serv. Indus., 196 F.3d 1252, 1254 (11th Cir. 1999), the Eleventh Circuit applied state law to the enforceability of a settlement agreement arising under Title VII. In so holding, the Court stated that state law applied under the "specific circumstances" of the case, which involved whether Plaintiff's attorney had authority to enter into a settlement agreement on her behalf rather than the existence of the agreement itself. In Resnick v. Uccello Immobilien GMBH, Inc., 227 F.3d 1347, 1350 (11th Cir. 2000), the Eleventh Circuit applied state law in an action to enforce a settlement agreement in an ADA case. As in Hayes, however, the existence of a settlement agreement was not in dispute. Moreover, while looking to state law, the court in Resnick, noted that "because this settlement agreement is between two private parties, federal common law does not apply." 277 F.3d at 548 n. 4, citing Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515, 1519 (11th Cir. 1986), thus inferring that the choice of law depends on whether the United States is a party to the settlement agreement. See also Fed. Dep. Ins. Corp. v. New Hampshire Ins. Co., 953 F.2d 478, 481 (9th Cir. 1991); citing Kennewick Irrigation Dist. v. United States, 880 F.2d 1018, 1032 (9th Cir. 1989).

Defendants cite Makins v. District of Columbia, for the proposition that the Ninth Circuit looks to state law in determining whether a valid and enforceable settlement agreement exists. 277 F.3d 544, 548 (C.A. D.C. 2002) (citations omitted). However, the court in that case actually stated that *perhaps* the Ninth Circuit applied state law in determining whether a valid and enforceable settlement agreement exists. Id. And, the case cited to support the statement that the Ninth Circuit perhaps applies state law concerned whether Plaintiff had ratified a settlement agreement negotiated by her attorney, not whether the agreement existed.

Other courts, including courts in the Ninth Circuit, have held that determining the existence of a settlement is a question of federal law. See e.g. Stroman v. W. Coast Grocery Co., 884 F.2d 458, 461 (9th Cir. 1989) (finding interpretation and validity of a release under Title VII is determined based on federal law); Fulgence v. J. Ray McDermott & Co., 662 F.2d 1207, 1209 (5th Cir. 1981) (applying Federal law to determination of validity of oral settlement agreement in Title VII case); Salmeron v. United States, 724 F.2d 1357, 1361 (9th Cir. 1983) (applying Federal law to validity and interpretation of release of federal right); Jones v. Taber, 648 F.2d 1201, 1203 (9th Cir. 1981) (same). Those cases, are among numerous that have determined that oral settlement agreement of Title VII claims are enforceable under Federal Law because Congress has mandated a policy of settling Title VII claims, and application of State Law would interfere with a significant Federal interest. Fulgence, 662 F.2d at 1209. See also Taylor v. Gordon Flesch Co., Inc., 793 F.2d 858, 862 (7th Cir. 1986) (applying Federal Law to determine whether an oral settlement agreement in Title VII action was in fact reached); Glass v. Rock Island Refining Corp., 788 F.2d 450, 454 (7th Cir. 1986) (same).

In this case, the United States, through the EEOC, is a party to the Settlement Agreement, and the dispute stems from Title VII, a federal law. This Court need not interpret the contract, but must only determine whether the parties in fact reached an agreement. The Court therefore will apply federal law in determining whether to enforce this Settlement Agreement. See Turner v. U.S., 875 F. Supp. 1430, 1434 (D. Nev. 1995).

STANDARD OF REVIEW

A settlement agreement or consent decree constitutes a contract between the parties entering into the settlement. When a party fails to comply with its obligations under a settlement agreement, the opposing party may seek in equity to enforce the terms of the agreement. District courts have equitable power to summarily enforce settlement agreements pending before it. Callie v. Near, 829 F.2d 888, 890 (9th Cir. 1987) (citations omitted). However, the power to enforce a settlement agreement cannot be exercised unless the terms have been agreed to. Id.; Harrop v. W. Airlines, Inc., 550 F.2d 1143, 1144 (9th Cir. 1977).

Formation of an enforceable settlement agreement requires a complete agreement with mutual assent (i.e. a "meeting of the minds" as to all material terms, entered into knowingly and voluntarily. Valdiviezo v. Phelps Dodge Hidalgo Smelter, Inc., 995 F. Supp. 1060, 1063 (D. Ariz. 1997) Fulgence, 662 F.2d at 1209; Doi v. Halekulani Corp., 276 F.3d 1131, 1138 (9th Cir. 2002); Callie, 829 F.2d at 891; RESTATEMENT 2D CONTRACTS § 17. However, "[f]ailure to complete the formal stipulation papers does not mean that a settlement was not in fact reached," as Federal law does not require that the agreement be in writing. Vari-O-

Matic Mach. Corp. v. New York Sewing Mach. Attachment Corp., 629 F. Supp. 257, 259 (S.D. N.Y. 1986); Harrop, 550 F.2d at 1144. "'Assent to the terms of a settlement agreement can be implied from the circumstances, and conduct inconsistent with a refusal of the terms raises a presumption of assent upon which others may rely.'" Ahern v. Cent. Pac. Freight Lines, 846 F.2d 47, 49 (9th Cir. 1988), citing Wong v. Bailey, 752 F.2d 619, 621 (11th Cir.1985). Absent a factual basis rendering it invalid, an oral agreement to settle a Title VII claim is enforceable against a plaintiff who knowingly and voluntarily agreed to the terms of the settlement or authorized his attorney to settle the dispute. Id.; Fulgence, 662 F.2d at 1209. Finally, the Court can enforce the material terms to an agreement but exclude additional boilerplate terms not previously agreed to by the parties. Porter v. Chicago Bd. of Ed., 981 F. Supp. 1129, 1132 (N.D. Ill. 1997).

In Title VII actions, if a party authorizes a settlement agreement but later changes his mind when presented with the settlement documents, that party remains bound by the terms of the agreement. Fulgence, 662 F.2d at 1209; Harrop, 550 F.2d at 1144; Odomes v. Nucare, Inc., 653 F.2d 246, 252 (6th Cir. 1981).

DISCUSSION

As discussed above, the parties indicated to Magistrate Judge Verkamp on September 3, 2003, that a settlement had been reached. Magistrate Judge Verkamp stated as much, on the record in the presence of all parties and their counsel. The terms of agreement were not read into the record but were to be finalized by counsel. The parties also represented to this Court on September 22, 2003, that a settlement had been reached and that all that remained was finalizing the settlement documents. Defendants' attorney referred to the remaining work as "dotting i's and crossing t's." Now, there is dispute as to whether the terms of the agreement constitute the agreement alleged to have been entered. The parties left the settlement conference intent on finalizing the terms of a settlement agreement. All parties had a copy of the initial agreement along with extensive handwritten notations from both counsel, and an additional section to the agreement drafted by counsel for Defendants.

However, according to Defendants, there was no mutual consent to the terms of the agreement Plaintiff-Intervenors now seek to enforce. Defendants point out several inconsistencies from the final marked up version of the consent decree received by the parties at the September 3, 2003 conference and the clean version sent to Defendants for signature.

According to Defendants, the handwritten notes on the marked up consent decree indicate that the parties agreed that Defendants would pay $7400 to Plaintiffs as "a gesture of good will" while the final document stated that the payment was "back wages and compensatory damages." From the exhibits received by the Court, this appears to be true. The proposed language originally stated that individual Plaintiff's would receive $7400 as back pay and compensatory damages. During the negotiations, this language was apparently crossed out. However, after the conference, counsel for the EEOC placed those terms back into the agreement. Indeed, Ms. O'Neill put the editorial comment "stet" in the margin next to the crossed out language. Stet is commonly used as an editorial comment that means to retain a previously omitted portion. Plaintiffs did not address this aspect of the monetary language. Rather they argue that the material portion of the monetary award was agreed to by the parties. That is, the $7400 payment. How that payment was to be made was not a material part of the agreement. Later drafts of the consent decree included the "gesture of good will" language.

Defendants also dispute the inclusion of the language that "judgment is entered in favor of the Commission and Intervenors and against Defendants." Defendants main goal in resolving this case by settlement was to prevent further harm to the name of their family, and of RD's Drive In. The judgment language was included in the same section as the above referenced monetary language. Although the judgment language was crossed out, the draft consent decree posed by Plaintiff includes the language in Plaintiff's marked up version but also includes additional language, including the "judgment" language. Plaintiff's October 23 version does not include the "judgment" language.

Next, Defendants argue that Plaintiff's September 4 consent decree includes a requirement that Defendants attend a semester-long class on the Navajo Language that they did not agree to take. The word "no" is written next the provision yet it is included in the September 4 decree. Defendants contend that the discussions were clear the that the Kidman's did not agree to take the class. According to counsel for Plaintiff in a telephone conversation on September 4, inclusion of the language class was a "deal breaker." The October 23 version omits the language class provision.

The September 4 version of the Consent Decree also proposes a symposium to be jointly organized sponsored by all parties. Defendants do not dispute that symposium but argue that Plaintiff changed the deadline to organize and participate in the symposium from six months to nine months without consulting Defendants. This is immaterial and was ultimately agreed upon by all parties because the originally proposed deadline was unrealistic. Defendants now argue that because of the Kidmans' distrust of the EEOC, that they do not agree to help organize the symposium. That is irrelevant. The agreement was for the parties to organize and conduct a symposium. How the parties follow through on conducting this symposium is not material to the fact that the parties agreed to plan and conduct the symposium. The EEOC has agreed to sponsor the symposium. The planning and actual conduct of the symposium should be left to the parties who matter in the Page community--Defendants and Intervenors.

Defendants also assert that they indicated a desire to add a separate general release as an attachment to the consent decree but that the Plaintiffs' September 4 version of the Consent Decree states that "Defendants shall not condition the receipt of individual relief . . . on Claimants' agreement to: . . . waive the statutory right to file a charge with any federal or state anti-discrimination agency." According to Defendants, Plaintiff crossed out Defendant's counsel's hand written note to make a separate general release without first discussing that with Defendants.

Next, Plaintiff's September 4 Consent Decree provides that "Defendants agree to hold quarterly all-employee shift meetings . . ." Defendants contend that they did not agree to "all-employee" meetings. However, in their September 24, 2003 proposed Consent Decree, Defendants include the "all-employee" language. Furthermore, Mrs. Kidman testified that the dispute with this provision simply logistic in nature because of the difficulty of getting all of RD's Drive In employees to the restaurant at the same time. There was no dispute with actually conducting the meetings, as there are already shift meetings conducted on a daily basis.

After much bickering between the parties and counsel, on September 24, 2003, Defendants sent a revised proposed settlement agreement to Plaintiffs' counsel. Defendant's version removed the provisions that were originally slated for deletion on the marked up copy of the consent decree, such as the "back wages and compensatory damages" and "judgment" language. However, other aspects of the agreement were also significantly different in wording than the previous drafts. For example in the September 24 revised Consent Decree, Defendants add provisions such as "Nothing in this injunction expands the obligations of Defendants under the law, nor shall this injunction subject Defendants to jurisdiction under Title VII during any time period that they would otherwise not be subject to EEOC jurisdiction . . ." Defendants made changes to the training requirements, altering the "annual training for two years" language to provide "one half day of training." Defendants also added a provision that "Nothing in this Consent Decree restricts the right of Defendants to implement an English-language policy in the future to the full extent permitted by EEOC Guidelines, statutes and court decisions applicable at the time in question." That paragraph was not contemplated during negotiations and is redundant, as the requirements for reinstating an English-only policy is separately addressed in both parties' proposed settlement documents. Finally, the September 24 proposed Consent Decree contained a new Exhibit B. Exhibit B to the proposed settlement documentation suggested a proposed "Handbook

Section Regarding Language." This policy was not discussed in the settlement negotiations except to the extent that any English-only policy was subject to EEOC approval.

Finally, as discussed above, Plaintiffs sent a final revision of the Consent Decree on October 23, 2004. This version was substantially similar to that which was contained in the marked up copy of the consent decree that was agreed to by the parties at the settlement conference. However, by this point, the process of finalizing documents–"dotting i's and crossing t's" had turned from bad to worse and the Kidmans were no longer willing to settle under those terms. Apparently, the whole settlement process left the Kidmans unwilling to continue working with the EEOC as would be required under the proposed Consent Decrees.

While the Court does not discount the Kidmans distrust of the EEOC or their desire not to be forced into an ongoing relationship with the EEOC, the Court must enforce the terms of a settlement agreement where there is an agreement on the material terms. Even if the Kidmans later changed their minds as to the material terms and their desire to enter into the agreement. Fulgence, 662 F.2d at 1209. It is clear that Mr. Selden had authority to settle this matter on behalf of the Kidmans. Mr. Kidman's testimony to the contrary is not credible. The Kidmans were present during the entire day of the settlement conference. Mr. Selden kept the Kidmans apprized of the entire process and the proposed terms. More importantly, the Kidmans were present when, on two occasions, the parties and counsel represented to the Court that a settlement had been reached. First, before Magistrate Judge Verkamp, and later before Judge McNamee. The Kidmans cannot now say that they were unaware of what was going on when it is clear that they were.

Based on the foregoing, and having presided over an evidentiary hearing and judging the credibility of the witnesses, the Court finds that the following material terms were agreed upon by the parties and are therefore enforceable.

1. The matter would resolve with a settlement agreement filed with this Court and not a consent decree.

2. Defendants would pay intervenors $7400 over a period of sixteen (16) months. How

the payments are denominated is in the purview of the Defendants.

3. A general injunctive paragraph enjoining Defendants from discrimination or retaliation.

4. Defendants agreed to rescind their current English Language policy.

5. The parties agreed to organize and participate in a community symposium within nine months of entry of the decree.

6. The parties agreed to sign a "joint statement" concerning the resolution.[1]

7. Each party agreed to pay their own fees.

8. Defendants agreed to post a notice at RD's Drive In concerning discrimination and retaliation.

9. Defendants agreed to conduct quarterly staff meetings to discuss issues, problems, policies and employee concerns.

The Court also finds that there was specifically no agreement to the following terms:

1. Defendants did not agree to take Navajo language classes.

2. Defendants did not agree that the $7400 monetary payment was to be characterized as "back pay" or "compensatory damages."

3. Defendants did not agree to language reflecting that Judgment was being entered in favor of Plaintiff and Intervenors, and against Defendants.

4. Defendants did not agree that there agreement would be in the form of a "consent decree."

The manner in which the above provisions are executed is between the Defendants and Intervenors. What is key to the issue before the Court is that the parties did indeed agree on the above specified material terms. These terms do not suggest that Defendants must maintain an ongoing relationship with the EEOC except to the extent that they, along with every employer, must comply with federal employment policies.

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[1] Defendants assert that Jennifer Kidman never agreed to sign the Joint Statement. However, this is immaterial, as Jennifer is not a party to this case.

The Court must point out that this case does not reach a high water mark of civili[illegible] among lawyers. The EEOC, on more than one occasion, attempted to put terms into th[illegible] agreement that clearly were not agreed to. It is clear from the documents and witnesses before the Court that certain terms were clearly negotiated out of the settlement agreement, only to be reinserted by the EEOC. Furthermore, everyone present at the settlement conference knew that Mr. Selden was going on vacation the very next day after the conference. The parties and attorneys could easily have waited two weeks to finalize the settlement documents. The Court does not find persuasive, the argument that secretaries were not in the office and that the EEOC could not get the draft document to Mr. Selden any sooner than it did. It is equally likely that the EEOC delayed sending the documents as a strategic move to disadvantage Mr. Selden. At the hearing, counsel for the Intervenors admitted that the tenor of his letters were more incendiary than professional or helpful.

Finally, the Court notes, that if counsel for the parties had not resorted to unreasonable demands and ultimatums, and if counsel for the EEOC had not continually reinserted terms that were specifically negotiated out of the agreement, the parties would likely have concluded this matter in a manner favorable to both parties. Dotting i's and crossing t's in a case that should have settled long ago, should not result in such bickering. Perhaps counsel should heed the advice of former President Abraham Lincoln, recently quoted in an article in Maricopa Lawyer, published by the Maricopa County Bar Association:

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser–in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good [person].

Mark A. Winsor, *Lincoln advised lawyers to discourage litigation, become peacemakers*, MARICOPA LAWYER, August 2004, at 15.

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CONCLUSION

For the foregoing reasons,

IT IS ORDERED that Plaintiff and Intervenors' Motion to Enforce Settlement Agreement is GRANTED in part as noted in this Memorandum of Decision and Order, thus terminating this action.

IT IS FURTHER ORDERED that:

1. The matter shall resolve with a settlement agreement filed with this Court.
2. Defendants shall pay intervenors $7400 over a period of sixteen (16) months. How the payments are denominated is in the purview of the Defendants.
3. Defendants are generally enjoined from engaging in discrimination or retaliation.
4. Defendants shall rescind their current English Language policy.
5. The parties shall organize and participate in a community symposium within nine months of entry of this decree.
6. The parties shall sign a "joint statement" concerning resolution.[2]
7. Each party shall bear their own attorneys' fees.
8. Defendants shall post a notice at RD's Drive In concerning discrimination and retaliation.
9. Defendants shall conduct quarterly staff meetings to discuss issues, problems, policies and employee concerns.

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[2] Defendants assert that Jennifer Kidman never agreed to sign the Joint Statement. However, this is immaterial, as Jennifer is not a party to this case.

IT IS FURTHER ORDERED that counsel appear before this Court on Friday, October 8, 2004 at 4:00 p.m., before the Honorable Stephen M. McNamee, in Courtroom 605, United States District Courthouse, Phoenix, Arizona, for the purpose of a status conference.

DATED this 10 day of September, 2004.

Stephen M. McNamee
Chief United States District Judge