UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EEOC, et al.,
Plaintiffs,

- against -

MARJAM SUPPLY COMPANY, INC. and CHOICE LABOR, INC.,
Defendants.

03 CIV 5413 (SCR)(LMS)

Report & Recommendation

TO: THE HONORABLE STEPHEN C. ROBINSON, U.S.D.J.

The EEOC ("Plaintiff") commenced this action against Marjam Supply Company, Inc., and Choice Labor, Inc., on or about July 22, 2003. Three individual intervenor plaintiffs sought to intervene as being true parties in interest, and their applications were granted. After a period of discovery summary judgment motions were filed and argued before Your Honor. Before a decision was rendered on the summary judgment motions, the parties went to mediation. The Clerk's Report regarding mediation, entered March 20, 2008, was that the parties had reached a settlement. It was expected that a Consent Decree would be submitted to the Court to resolve the case. By letter to Your Honor dated October 14, 2008, Plaintiff's counsel sought Your Honor's assistance in resolving a dispute about the content of the Consent Decree. Your Honor then referred this matter to me to seek resolution.

This morning I held a conference in this matter and conferred with counsel. I reviewed a handwritten settlement agreement (three pages in length, on legal size lined paper), a copy of which is appended to this Report and Recommendation as Exhibit A. I also reviewed a multi-

page Consent Decree that has been the subject of dispute between the parties. In particular, the parties are in agreement about all but two provisions of the Consent Decree, set forth in paragraphs 15 and 20. The Plaintiff argues that the Consent Decree simply provides details and specifics in furtherance of the handwritten settlement agreement, and is consistent with the intent, spirit, and purpose of that agreement. The Defendants argue that they had not agreed to the items detailed in paragraphs 15 and 20, and that they are not willing to agree to them. Those paragraphs, as proposed, required Defendants to distribute copies of certain documents and information to each current employee of Defendants within 10 days of the date of the Consent Decree, as well as to all new hires of Defendants. Paragraph 15 referenced documents marked as Exhibits A and B, which have not yet been produced, but which were described to me as containing specific information about the policies and procedures to be followed by Defendants going forward with regard to equal employment opportunity, and the available complaint procedures for any alleged violation of such policies and procedures, respectively. Paragraph 20 referenced a document marked as Exhibit H, which has not yet been produced, but which was described to me as containing information about the toll-free telephone number for complaints to be made of violations of the equal employment policies and procedures.

Defendants argue that they have provided all of this information to their employees by posting it in places where employees are likely to gather in their facilities, as agreed to elsewhere in the Consent Decree, and that they have no objection to providing the information to new hires; Defendants argue that they did not agree to providing this information to existing employees, and that it is burdensome as well as unnecessary; they express some concern that providing these documents to existing employees will result in a flood of new complaints. Plaintiff argues that in order to carry out the spirit of the handwritten settlement agreement it is essential for this

information not just to be posted and distributed to new hires, but that it must also be distributed to existing employees. Defendant Marjam has in excess of 700 employees, in facilities from Maine to Virginia. Defendant Choice Labor is essentially no longer in existence.

Because the parties persist in disagreeing about the inclusions of paragraphs 15 and 20 in the Consent Decree, despite my efforts to assist them in resolving the issue, I permitted Plaintiff to make an oral motion to enforce the handwritten settlement agreement, and also to have Your Honor interpret that settlement agreement in accord with the draft Consent Decree, a copy of which will be provided to Your Honor by Plaintiff.[1]

DISCUSSION

Initially the question to be considered is whether state or federal law applies to the question of enforceability of a handwritten, signed, settlement agreement. The Second Circuit has found "that there is no material difference between the applicable state law or federal common law standard," Ciaramella v. Reader's Digest Ass'n, Inc., 131 F.3d 320, 322 (2d Cir. 1997) (citations omitted), and therefore the choice of law question need not be decided here. See Bowden v. United States, 106 F.3d 433, 439 (D.C. Cir.1997) (declining to decide whether state or federal common law governs the interpretation of a settlement agreement under Title VII where both sources of law dictate the same result).[2]

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[1] In light of my comments to counsel about the likely contents of this Report and Recommendation, Plaintiff's counsel has agreed to modify the Draft Consent Decree to remove reference to exhibit A from paragraph 15, and to change the time periods in paragraphs 15 and 20 from 10 days to 30 days.

[2] The New York Civil Procedure Law and Rules provide: "An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such

"A settlement is a contract, and once entered into is binding and conclusive." Janneh v. GAF Corp., 887 F.2d 432, 436 (2d Cir. 1989), *rev'd on other grounds,* Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863 (1994). "To determine whether a settlement was agreed to, [the Court] look[s] first to the plain language of the agreement." Id. (*citing* Kohl Indus. Park Co. v. County of Rockland, 710 F.2d 895, 903 (2d Cir. 1983)).

The document in question here, although handwritten and not lengthy, was signed by counsel for Plaintiff and counsel for Defendants, and was witnessed by the mediator. The document was created after two separate mediation sessions, months apart, and there is no evidence that it was entered into other than willingly. The agreement contains three basic parts: an agreed upon payment, an agreement to enter into a Consent Decree, and an agreement to determine the status of Choice Labor as a defendant as well as Choice Labor's obligations under the Consent Decree. As noted previously, it was represented to me that Choice Labor is no longer in business, and it was not represented that this open-ended provision was in any way a barrier to completing the Consent Decree.

The second part of the agreement, which anticipated a Consent Decree to be entered into, contains ten separate subparts, detailing the matters to be addressed in detail in the Consent Decree. It is important to note that nowhere in the handwritten agreement is there a reservation of rights, to the effect that the settlement would not be binding until the Consent Decree was in writing and agreed upon. Rather, we have a signed, written settlement agreement which resolves, in general terms, all of the issues in the case (except, as noted, the status of Choice

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stipulation shall be filed by the defendant with the county clerk." N.Y. C.P.L.R. § 2104 (McKinney 2003).

Labor). The plain language of the agreement is that "[t]he parties . . . have agreed to settle this matter on the [stated] terms[.]" Under all of these circumstances I find that there was a meeting of the minds, as memorialized in the handwritten settlement agreement attached hereto as Exhibit A, and that by this signed and written document this case has been settled. Such a settlement agreement is enforceable, and I therefore report and respectfully recommend to Your Honor that Your Honor should "So Order" that settlement agreement.

To the degree that any interpretation of the settlement agreement is required, I further report, and respectfully recommend, that such settlement agreement should be interpreted in accordance with the Draft Consent Decree, which I conclude fairly reflects the understanding and intention of the parties at the time of the entry of the handwritten settlement agreement, except that the time periods in paragraphs 15 and 20 should be modified to 30 days, and paragraph 15 should reference only Exhibit B (referencing complaint procedures), and not Exhibit A (referencing equal employment policies and procedures).

NOTICE

Pursuant to 28 U.S.C. § 636(b)(1), as amended, and Fed. R. Civ. P. 72(b), the parties shall have ten (10) days, plus an additional three (3) days, pursuant to Fed. R. Civ. P. 6(d), or a total of thirteen (13) working days, see Fed. R. Civ. P. 6(a), from the date hereof, to file written objections to this Report and Recommendation. Such objections, if any, shall be filed with the Clerk of the Court with extra copies delivered to the chambers of The Honorable Stephen C. Robinson at the United States Courthouse, 300 Quarropas Street, White Plains, New York, 10601, and to the chambers of the undersigned at the same address.

Failure to file timely objections to this Report and Recommendation will preclude later

appellate review of any order of judgment that will be entered.

Requests for extensions of time to file objections must be made to Judge Robinson.

Dated: November 14, 2008
White Plains, New York

Respectfully submitted,

Lisa Margaret Smith
United States Magistrate Judge
Southern District of New York

Copies of the foregoing Report and Recommendation have been sent to the following:

The Honorable Stephen C. Robinson, U.S.D.J.

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EXHIBIT A