No. 16-1340

In the United States Court of Appeals
for the Tenth Circuit

Equal Employment Opportunity Commission,
Plaintiff–Appellant,

v.

CollegeAmerica Denver, Inc.,
Defendant–Appellee.

On Appeal from the United States District Court
for the District of Colorado, No. 1:14-cv-01232
Judge Lewis T. Babcock

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

ORAL ARGUMENT REQUESTED

P. David Lopez
General Counsel

Jennifer S. Goldstein
Associate General Counsel

Margo Pave
Assistant General Counsel

Paul D. Ramshaw
Attorney
Equal Employment
Opportunity Commission
Office of General Counsel
131 M St., NE, Room 5SW26H
Washington, DC 20507
paul.ramshaw@eeoc.gov
(202) 663-4737

Table of Contents

Table of Authorities

Page(s)

Cases

Statutes

Other Authorities

Statement of Related Cases

There are no prior or related appeals.

Statement of Jurisdiction

The Equal Employment Opportunity Commission ("EEOC" or "Commission") brought this lawsuit to enforce the Age Discrimination in Employment Act, 29 U.S.C. §§ 621–34 ("ADEA"). The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(4), and 1345. *See also* 29 U.S.C. §§ 626(b) and 216(c).

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because the district court entered a final judgment that disposed of all claims raised by the parties. R-137.[1] The district court entered a final judgment on June 23, 2016, R-137, and the EEOC filed a timely notice of appeal on August 22, 2016, R-154, within the sixty days allowed by Fed. R. App. P. 4(a)(1)(B).

Statement of the Issue

The EEOC's complaint alleged that CollegeAmerica interfered with Debbi Potts's right to file charges and participate in EEOC proceedings and with the EEOC's right to receive information from her. Did the district court err in dismissing this claim as moot?

[1] "R-137" refers to entry 137 on the district court docket sheet.

Statement of the Case

The ADEA prohibits an employer from retaliating against an employee because the employee has filed a charge or otherwise participated in an EEOC proceeding, and it prohibits employers from using waiver agreements to interfere with the protected right of an employee to file charges and participate in EEOC proceedings. 29 U.S.C. §§ 623(d) (retaliation), 626(f)(4) (interference). The Commission brought its interference claim after learning that: (1) CollegeAmerica had entered into an agreement with Potts that barred her from contacting any government agency and from giving the EEOC any information that disparaged the company; and (2) the company had sued Potts in state court after she filed her first charge and had alleged in that state action that she was violating the agreement by filing charges with the EEOC. The factual setting that gave rise to these violations is as follows:

The defendant, CollegeAmerica, operates a number of campuses in several states. The charging party, Debbi Potts, was the director of the company's Cheyenne, Wyoming, campus from January 2009 until she

resigned on July 16, 2012. 1TT-37.[2] After resigning, Potts applied for and was awarded unemployment benefits, but CollegeAmerica appealed that award. 2TT-49; App-44.[3] Potts also filed a claim with the Wyoming Department of Workforce Services for $7,000 in unpaid bonuses she had earned while working for CollegeAmerica. 2TT-53. Asserting it did not owe Potts any compensation, CollegeAmerica also contested this claim. 1TT-83.

Eric Juhlin, the defendant's chief executive officer, contacted Potts in late August 2012 suggesting that they discuss settlement of the two pending state administrative proceedings (one on unemployment benefits and one on her bonus claim). 1TT-78; Ex. A. On August 31 and September 1, Juhlin and Potts communicated by phone and email and exchanged two preliminary drafts of an agreement. 2TT-54–58, 62–63; Ex. 1 at 3; Ex. 3. On September 1, they agreed on a final draft and signed it. 1TT-99–100; App-44. CollegeAmerica agreed to pay Potts $7,000, withdraw its appeal of and opposition to her unemployment-

[2] "1TT-37" refers to page 37 of the first volume of the trial transcript.

[3] "App-44" refers to page 44 of the appendix.

benefits award, and hold her harmless for any agency contact she had initiated before the date of the agreement. App-44. Potts in turn agreed to three provisions. First, she agreed to "refrain from . . . contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica." App-44. Second, she agreed to "direct any complaints or issues against CollegeAmerica . . . that may arise with disgruntled staff, students, or the public at large to CollegeAmerica's toll free complaint number." App-44. Third, she agreed to "not intentionally with malicious intent (publicly or privately) disparage the reputation of CollegeAmerica." App-44.

In early December 2012, Potts exchanged several private online messages via LinkedIn with Kenneth Barnhart, a former CollegeAmerica student and employee. 1TT-37–38; App-45–46. Potts included in those messages a number of comments critical of CollegeAmerica and its top executives. App-45–46. Later that month, Barnhart forwarded a copy of these messages to CollegeAmerica. 1TT-38.

Juhlin testified that he believed that Potts's statements in these messages violated the promise she made in their September 2012 agreement not to disparage the company. 1TT-117. According to his testimony, he decided in late December to get the $7,000 back, including by suing her if necessary. 3TT-398.

On January 11, 2013, Matthew Gerber, the defendant's general counsel, sent Potts a demand letter. App-47. Gerber quoted passages from the LinkedIn messages and labeled them "clear violations" of the agreement. App-47. He demanded that she return the $7,000 within thirty days and warned her that CollegeAmerica would sue her if she failed to meet that deadline. App-47.

On January 23, Potts filed a charge with the EEOC and the Wyoming Fair Employment Program. App-48–49. She alleged that CollegeAmerica had discriminated against her on the basis of her age by constructively discharging her and giving her a less desirable severance package than the defendant gave younger employees. App-48–49. Potts also claimed that the September 2012 agreement

violated the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f)(1). App-49.

On February 1, 2013, the Wyoming agency notified CollegeAmerica that Potts had filed a charge against it, but that notice did not require the company to respond in any way. 1TT-38–39; Ex. 8 at 1–2. On March 18, CollegeAmerica received a notice of the charge from the EEOC that asked the company to respond to Potts's charge by submitting a position statement and answering the attached request for information. 1TT-39; Ex. 53. One week later, on March 25, CollegeAmerica sued Potts in state court. App-50–51. The company's complaint alleged breach of contract for violating the 2012 agreement's non-disparagement clause and sought as relief return of the $7,000. App-50–51.

Between August and October 2013, CollegeAmerica repeatedly took the position in its state court action that any disparaging statements Potts made to the EEOC, whether in a discrimination charge or not, violated the September 2012 agreement, and that the company therefore had the right to discover any documents Potts submitted to the Commission.

On August 12, 2013, for example, in opposing Potts's motion to dismiss CollegeAmerica's state court lawsuit, the company stated that Potts had violated the 2012 agreement "through her filing of additional administrative claims against the College, including multiple charges with the EEOC, alleging federal age discrimination." App-64. CollegeAmerica maintained this position even after Potts warned the company that its position was unlawful. On August 16, Potts responded to the statement just cited by quoting portions of the EEOC's guidance on employer interference with an employee's rights under the anti-discrimination statutes, including the statement: "An employer may not interfere with the protected right of an employee to file a charge, testify, assist, or participate in any manner in an investigation, hearing, or proceeding" under the ADEA. App-18 (quoting EEOC's "Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission Enforced Statutes," available at https://www.eeoc.gov/policy/docs/ waiver.html). Even after receiving this information, CollegeAmerica sought discovery of all communications Potts had with the EEOC, implying that the non-disparagement clause

in the September 2012 agreement applied to anything Potts said to the Commission's staff in connection with its investigation of her charges. App-67–70, App-72–74.

The Commission sent CollegeAmerica a letter of determination on December 20, 2013, finding that the company's state lawsuit was retaliatory. App-75–76. The letter also stated that the company was violating the ADEA by interpreting the 2012 agreement to bar Potts from filing charges with the EEOC or participating in its investigations. App-76.

CollegeAmerica's initial response suggested that the company recognized the problems with the 2012 agreement's language. It informed Potts and the Commission in early January 2014 that "the College does not currently allege and will not allege at any time in the future that Ms. Potts is liable for breaching the [2012] contract based on the filing of her charges with the Commission." App-78, App-80. In February 2014, the company filed an amended complaint in its state action disavowing the assertion that Potts violated the 2012 agreement

by filing EEOC charges. App-82 n.1. Finally, in August 2014, Gerber stated in an affidavit:

> The College does not and will ***never*** assert that the Agreement constitutes a waiver of Ms. Potts's ADEA claims or waives her otherwise unfettered right to file charges of discrimination and cooperate in any proceeding conducted by the EEOC or [state anti-discrimination agencies], whether that proceeding is based on a charge filed by Potts or anyone else."

App-89–90.

The Commission sued CollegeAmerica on April 30, 2014. R-1. The complaint contended that the defendant had violated the ADEA by: (1) interfering with Potts's right to file charges with the EEOC and participate in its investigations, and with the EEOC's right to receive and investigate such charges; (2) using form separation and release agreements that, when applied to other employees leaving the company, interfered with those same rights; and (3) retaliating against Potts by suing her because she had filed a charge. App-22–24.

CollegeAmerica moved to dismiss. R-6. It initially argued that the Commission's first claim had never presented a justiciable controversy or at least had become moot. R-6 at 2–4. In its reply brief the company additionally argued that the EEOC did not have initial standing to

bring the claim. R-11 at 2–6. The company filed in support of its assertions an affidavit signed by its general counsel (Gerber) in August 2014—after the Commission sued.

The district court did not address the EEOC's standing to bring the claim but instead ruled on mootness grounds. It applied the rule that when a defendant argues that a lawsuit has become moot because it has voluntarily stopped the allegedly unlawful conduct, the defendant must show that it is absolutely clear that the unlawful conduct cannot reasonably be expected to recur. App-34–35. Relying on the company's two January 2014 letters, its February 2014 amended state court complaint, and Gerber's August 2014 affidavit, the district court held that CollegeAmerica met that standard. App-34–36.

The district court also dismissed the Commission's second claim, relating to CollegeAmerica's form severance agreements, ruling that the EEOC had failed to notify the company of this allegation and to attempt to resolve it in conciliation. App-36–41.[4]

[4] The District Court erroneously ruled that the notice and conciliation requirements are jurisdictional prerequisites to bringing suit under the ADEA. App-37–38. Referring to the requirements as jurisdictional,

The district court denied CollegeAmerica's motion to dismiss the EEOC's retaliation claim, App-42–43, and that claim proceeded to trial. R-121, R-124, & R-126. In the February 2016 pre-trial order in this action, CollegeAmerica reversed itself on how it would interpret the 2012 agreement. Notwithstanding its earlier assurances that it would not rely on the language of the 2012 agreement—on the basis of which the district court had granted the company's motion to dismiss the EEOC's interference claim—CollegeAmerica took the position that Potts violated the 2012 agreement by filing charges and giving the Commission information without giving the company prior or contemporary notice of her allegations. App-91–92; 1TT-110–11.

The jury found for the defendant, R-136, and the district court entered judgment on that verdict, R-137.

Summary of Argument

The district court erred in dismissing the EEOC's interference claim. CollegeAmerica moved to dismiss that claim on the grounds that it

---

rather than simply as pre-suit obligations, is incorrect, as made clear by the Supreme Court in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). *See also Gad v. Kan. State Univ.*, 787 F.3d 1032, 1035–38 (10th Cir. 2015).

presented no case or controversy, arguing both that it had become moot and that the EEOC lacked standing when it filed its complaint. The district court ruled solely on the grounds of mootness. The court recognized that the mootness alleged by College America had been created by CollegeAmerica and that the voluntary cessation doctrine accordingly applied. The district court erred, however, in ruling that the company's statements met the doctrine's high standard, especially since the company engaged in repeated violations and never acknowledged that its actions had been unlawful.

Although the district court did not address the standing issue asserted by the company, the EEOC had standing to raise the interference claim. The EEOC showed that both Potts and the EEOC itself had suffered injuries caused by CollegeAmerica's interpretation of the 2012 agreement, injuries that would likely be redressed by a favorable decision. The EEOC therefore had standing to raise the claim.

Argument

The district court erred in dismissing the EEOC's claim that CollegeAmerica interfered with the EEOC's and Potts's rights under the ADEA.

A. The district court erred in ruling that the EEOC's interference claim was moot.

The district court improperly dismissed the EEOC's interference claim on the grounds of mootness. The court erred in ruling that CollegeAmerica met its heavy burden to show that the company could not reasonably be expected to use the 2012 agreement to interfere with the Commission's and Potts's rights under the ADEA. Mootness is jurisdictional, and this Court accordingly reviews the district court decision de novo. *WildEarth Guardians v. Pub. Serv. Co. of Colo.,* 690 F.3d 1174, 1181 (10th Cir. 2012).

Article III of the Constitution authorizes federal courts to address only cases and controversies. *Brown v. Buhman*, 822 F.3d 1151, 1163 (10th Cir. 2016). The courts enforce that limitation on their jurisdiction through the standing and mootness doctrines. *Id.* The plaintiff bears the burden of establishing standing by showing that when it filed its complaint, it was suffering an injury in fact that was caused by the

challenged action and will probably be redressed by a favorable judicial decision. *Id.* at 1164. If something happens after the filing of the complaint that might render the case moot, the defendant bears the burden of establishing that mootness. *WildEarth Guardians*, 690 F.3d at 1182–83.

Thus CollegeAmerica bore the "'heavy burden'" here of persuading the court that "'the challenged conduct cannot reasonably be expected to start up again.'" *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1116 (10th Cir. 2010) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). The company had to show that "'it is clear that the defendant has not changed course simply to deprive the court of jurisdiction.'" *Id.* at 1115 (quoting *Nat'l Advert. Co. v. City of Miami*, 402 F.3d 1329, 1333 (11th Cir. 2005) (per curiam)). It is too easy for a defendant to stop its unlawful activity temporarily in order to avoid an adverse judgment and then resume the activity after the enforcement action has been terminated. As this Court recognized in *Brown*, "'voluntary cessation of challenged conduct does not ordinarily render a case moot because a

dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.'" 822 F.3d at 1166 (quoting *Knox v. Serv. Emps. Int'l Union Local 1000*, 132 S. Ct. 2277, 2287 (2012)).

The district court relied on several statements by CollegeAmerica in ruling that the Commission's interference claim was moot: the letters that the company's attorney sent the EEOC and Potts in January 2014, the footnote in the company's February 2014 amended state court complaint, and the affidavit that Gerber signed in August 2014. App-34–36. None of these statements render the EEOC's interference claim moot.

Even if the court were justified in relying on the January 2014 letters and the February 2014 amended complaint as trustworthy guarantees of a new and enduring attitude on the company's part toward Potts's protected activity, the statements did not eliminate the interference that the Commission was challenging. They addressed only whether Potts violated the 2012 agreement by filing charges with the EEOC. They said nothing about the Commission's concern that the

agreement interfered with Potts's right to participate in protected activity in other ways besides filing charges, including by giving the EEOC information during the agency's investigation of her or others' charges. Indeed, the record suggests that CollegeAmerica did not understand the breadth of the Commission's interference claim. The defendant's motion to dismiss the first claim as moot addressed only whether the 2012 agreement waived Potts's right to file a charge alleging a substantive violation of the ADEA. R-6 at 2–3. It did not discuss at all whether the agreement's promises applied to the other ways Potts might participate in an EEOC investigation beyond filing a substantive age charge.

The affidavit that Gerber signed in August 2014, after the Commission sued, went somewhat further than the college's January and February statements. The affidavit stated:

> The College does not and will ***never*** assert that the Agreement constitutes a waiver of Ms. Potts's ADEA claims or waives her otherwise unfettered right to file charges of discrimination and cooperate in any proceeding conducted by the EEOC or [state anti-discrimination agencies], whether that proceeding is based on a charge filed by Potts or anyone else.

App-89–90.

The question thus is whether Gerber's August 2014 affidavit met CollegeAmerica's burden to show that the challenged conduct cannot reasonably be expected to recur. The district court erred in ruling that Gerber's affidavit was sufficient to meet the company's heavy burden. *See Kifafi v. Hilton Hotels Ret. Plan*, 701 F.3d 718, 725 (D.C. Cir. 2012) (defendant's promise to refrain from violating the statute in the future did not moot the claim). The timing of the affidavit was suspicious, as it was filed with the defendant's reply memorandum in support of its motion to dismiss. R-11, Ex. A. "Courts should keep in mind . . . that 'reform timed to anticipate or blunt the force of a lawsuit offer[s] insufficient assurance that the practice sought to be enjoined will not be repeated.'" *NAACP v. City of Evergreen, Ala.*, 693 F.2d 1367, 1370 (11th Cir. 1982) (quoting *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 354–55 (5th Cir.1977)).

One key factor in assessing a claim of mootness based on voluntary cessation is "whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice." *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir.

2007). Here the company in its state action continued to interfere with Potts's right to participate in protected activity even after having been informed that such conduct was unlawful. Potts quoted the EEOC's guidance on non-waivable rights, reminding CollegeAmerica that employers "may not interfere with" an employee's protected rights under the ADEA, App-18, but the company responded by two times seeking to discover the information that Potts had given the EEOC. App-68, App-70, App-73–74. Moreover, "a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability." *Sheely*, 505 F.3d at 1187. Counsel for CollegeAmerica never acknowledged that its interference with Potts's rights was unlawful. The district court therefore should have followed the rule that "a court will not dismiss a case as moot if . . . the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time." *Ind v. Colo. Dep't of Corr.*, 801 F.3d 1209, 1213 (10th Cir. 2015).

The wisdom of the voluntary cessation doctrine is illustrated well in this case. CollegeAmerica secured dismissal of the Commission's

interference claim by having its general counsel assure the district court that the company would "***never***" assert that the 2012 agreement waived Potts's "unfettered right to file charges of discrimination and cooperate in any proceeding conducted by the EEOC . . . , whether that proceeding is based on a charge filed by Potts or anyone else." App-89–90. After securing that dismissal, CollegeAmerica then reversed course by arguing (in the pretrial order regarding Potts's retaliation claim) that Potts violated the 2012 agreement by filing charges with the EEOC and giving the EEOC information without having given the company prior or simultaneous notice of her allegations. App-91–92; 1TT-110–11.

B. The EEOC had standing to bring the interference claim.

While the district court ruled solely on the ground that the case had become moot, CollegeAmerica argued in its reply memorandum that the EEOC lacked standing at the outset. In the event the company renews this argument on appeal, it should be rejected because the Commission had standing to enforce the ADEA in the public interest and to protect its access to the information necessary for its investigations. The

standard of review is again de novo. *WildEarth Guardians*, 690 F.3d at 1181.

Congress has expressly authorized the Commission to sue to enforce the ADEA. Section 626(b) of the ADEA directs the EEOC to enforce the ADEA "in accordance with the powers, remedies, and procedures provided in sections . . . 216 (except for subsection (a) thereof) and 217" of the Fair Labor Standards Act ("FLSA"), and section 216(c) of the FLSA empowers the Secretary of Labor to bring "an action in any court of competent jurisdiction" to enforce the FLSA. 29 U.S.C. §§ 626(b), 216(c). Thus, the claim here is expressly authorized by statute. *Cf. FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 484 (1985) (statute expressly authorized the FEC to bring its action).

Congress has directed the EEOC to enforce the federal anti-discrimination statutes by investigating and conciliating charges and by bringing enforcement actions in appropriate cases. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (Title VII case); *EEOC v. Am. & Efird Mills, Inc.*, 964 F.2d 300, 303–04 (4th Cir. 1992) (ADEA case). The Commission receives information about potential violations

from the charges people file and the interviews the agency conducts when investigating those charges. The principal purpose of the anti-retaliation and anti-interference provisions in the anti-discrimination statutes is to protect that flow of information from employees to the Commission. These provisions enable the EEOC to carry out its statutory duties; they also protect individual employees by maintaining their "'unfettered access'" to the remedies those statutes provide. *See Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997)); *EEOC v. Shell Oil Co.,* 466 U.S. 54, 69 (1984) ("[I]t is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired.").

In *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 741–42 (1st Cir. 1996), for example, the defendant employer had provisions in agreements with some of its employees that prevented them from cooperating with the EEOC in its investigations of Title VII charges. The court upheld an injunction barring the employer from enforcing those provisions. The First Circuit agreed with the EEOC that "if victims of or witnesses to

sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered." *Id.* at 744. The court concluded that "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest." *Id.*

Thus, when the Commission sues an employer alleging retaliation or interference, it often does so to protect the public interest in having the EEOC perform its statutory functions as well as to vindicate the statutory rights of the victim. *See EEOC v. Outback Steakhouse of Fla., Inc.*, 75 F. Supp. 2d 756, 761 (N.D. Ohio 1999) (EEOC had standing to sue for retaliation to "vindicate the public interest" even after the retaliation victim settled her claim).

The Commission therefore had standing to bring its interference claim against CollegeAmerica. The company entered an agreement with Potts that prevented her from contacting any government agency, including the EEOC, to file a complaint against the company. App-44. Potts filed a charge with the EEOC, and the company then sued her for

violating that agreement. App-48–51. In its lawsuit, CollegeAmerica alleged that one of the ways Potts was violating the agreement was by filing charges with the Commission. App-64. The EEOC thus had standing to sue CollegeAmerica for interference both to protect the Commission's access to the information it needs to enforce the ADEA and to vindicate Potts's right to file charges and participate in EEOC proceedings without facing retaliation or interference. *See Outback Steakhouse*, 75 F. Supp. 2d at 761.

As argued *supra* pp. 15–16, the company's January 2014 letters and its February 2014 amended complaint, even if fully credited, disavowed only a portion of the company's unlawful activity. They accordingly did not deprive the Commission of standing to bring its interference claim. *See Donovan v. Cunningham*, 716 F.2d 1455, 1461 (5th Cir. 1983) (settlement of parallel action did not moot Secretary of Labor's claim for breach of fiduciary duty because it did not render all relief sought by the Secretary unnecessary).

Conclusion

The district court erred in ruling that CollegeAmerica met its heavy burden of showing that its voluntary cessation rendered the EEOC's interference claim moot. The Commission therefore respectfully urges this Court to reverse the order dismissing that claim.

Respectfully submitted,

P. David Lopez
General Counsel

Jennifer S. Goldstein
Associate General Counsel

Margo Pave
Assistant General Counsel

s/ Paul D. Ramshaw
Attorney

Equal Employment
Opportunity Commission
Office of General Counsel
131 M St., NE, Room 5SW18K
Washington, DC 20507
Paul.Ramshaw@eeoc.gov
(202) 663-4737

Statement on Oral Argument

Oral argument is necessary because no appellate court has addressed the standing and mootness issues raised by an EEOC lawsuit seeking to enforce the ADEA's anti-retaliation and anti-interference provisions in the public interest.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Lewis T. Babcock, Judge

Civil Action No. 14-cv-01232-LTB-MJW

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

v.

COLLEGEAMERICA DENVER, INC., n/k/a CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., d/b/a COLLEGEAMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER

Babcock, J.

This case is before me on Defendant CollegeAmerica Denver, Inc's ("CollegeAmerica") Motion to Dismiss Complaint [Doc # 6]. After consideration of the motion, all related pleadings, and the case file, I grant CollegeAmerica's motion in part and deny it in part.

I. Background

This action arises out of Charging Party Debbi Potts' ("Potts") employment as campus director for CollegeAmerica's Cheyenne, Wyoming campus from January 9, 2009 until her resignation on July 16, 2012. Complaint, ¶ 6. On September 1, 2012, after her resignation, Potts and CollegeAmerica entered into an agreement (the "Agreement") which provides in pertinent part as follows:

> CollegeAmerica ... agree[s] to:
>
> 1.) Pay Potts $7,000.00.
>
> ...
>
> 3.) Hold Potts harmless for initiating contact with agencies prior to September 1, 2012.
>
> Potts agrees to:
>
> 1.) ... refrain from personally (or though the use of any third party) contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to CollegeAmerica ....
>
> ...
>
> 3.) To not intentionally with malicious intent (publicly or privately) disparage the reputation of CollegeAmerica....

See Ex. 1 to Complaint.

By letter dated January 11, 2013, CollegeAmerica notified Potts that it considered emails she had exchanged with another of its former employees to be in violation of the Agreement's non-disparagement clause and demanded the return of its $7,000 payment to her. Complaint, ¶14. On January 25, 2013, Potts filed the first of three charges of discrimination against CollegeAmerica with the EEOC. Complaint, ¶ 15. CollegeAmerica received notice of Potts' first charge on March 18, 2013 and filed suit against Potts alleging breach of the Agreement's non-disparagement clause in state court on March 25, 2013 (the "State Court Action"). Complaint, ¶¶ 16 & 17.

Potts filed her second and third charges of discrimination against CollegeAmerica with the EEOC on April 8, 2013 and December 18, 2013, respectively. Complaint, ¶¶ 18 & 23. In connection with Potts' discrimination charges, CollegeAmerica provided the EEOC with four

Separation and Release Agreements (the "Separation Agreements") that it has routinely used since 2012. Complaint, ¶ 24. All of these agreements include a release of claims provision and a non-disparagement clause. Complaint, ¶¶ 25-31.

On December 20, 2013, the EEOC issued a Letter of Determination finding reasonable cause to believe that CollegeAmerica had engaged in unlawful employment practices in violation of the Age Discrimination in Employment Act (the "ADEA"). Complaint, ¶ 33. The parties efforts to resolve the matter through conciliation were unsuccessful. Complaint, ¶ 34.

On April 30, 2014, the EEOC filed this action and asserted three claims against CollegeAmerica: (1) a claim asserting that CollegeAmerica, through the Agreement, denied Potts the full exercise of her rights under the ADEA and interfered with the statutorily assigned responsibility of the EEOC and state Fair Employment Practices Agencies' ("FEPAs") to investigate charges of discrimination in violation of Section 7(f)(4) of the ADEA, 29 U.S.C. § 626(f)(4), Complaint ¶¶ 38-39; (2) a claim asserting that CollegeAmerica, through the Separation Agreements, denied other employees the full exercise of their rights under the ADEA and interfered with the statutorily assigned responsibility of the EEOC and FEPAs to investigate charges of discrimination in violation of Section 7(f)(4) of the ADEA, Complaint ¶¶ 41-42; and (3) a claim asserting the CollegeAmerica retaliated against Potts by filing the State Court Action in violation of Section 4(d) of the ADEA, 29 U.S.C. § 623(d), Complaint ¶¶ 44-46.

College America seeks the dismissal of all of the EEOC's claims arguing that the Court lacks jurisdiction to hear the EEOC's first two claims and that all of the EEOC's claims fail to state a claim upon which relief may be granted.

II. Standard of Review

A. Rule 12(b)(1)

In seeking dismissal under Fed. R. Civ. P. 12(b)(1), a party may go beyond the allegations in the complaint and challenge the facts upon which subject matter jurisdiction is based. *Holt v. United States*, 46 F.3d 1000, 1003 (10th Cir. 1995). In such instances, a court has wide discretion to allow affidavits and other documents without converting the motion to dismiss into a motion for summary judgment. *Id.* Once subject matter jurisdiction is challenged, the party claiming jurisdiction bears the burden of proving it by a preponderance of the evidence. *United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1160 (10th Cir. 1999).

B. Rule 12(b)(6)

Under Rule 12(b)(6), "[d]ismissal is appropriate only if the complaint, viewed in the light most favorable to plaintiff, lacks enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Conner v. Salina Regional Health Center*, 543 F.3d 1211, 1217 (10th Cir. 2008) (quotations and citations omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Burnett v. Mortg. Elec. Registration Sys., Inc.*, 706 F.3d 1231, 1235 (10th Cir. 2013) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, supra* (citation omitted).

Although plaintiffs need not provide "detailed factual allegations" to survive a motion to dismiss, they must provide more than "labels and conclusions" or "a formulaic recitation of the

elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). *See also Iqbal*, 556 U.S. at 678 (a complaint will not suffice if it tenders "naked assertions devoid of further factual enhancement"). Furthermore, allegations that are conclusory are "not entitled to be assumed true." *Iqbal*, 556 U.S. at 681.

"[I]n general, a motion to dismiss should be converted to a summary judgment motion if a party submits, and the district court considers, materials outside the pleadings." *Prager v. LaFaver*, 180 F.3d 1185, 1188 (10th Cir. 1999). Under Rule 12(b)(6), however, a court may properly consider materials subject to judicial notice such as court files and matters of public record and documents referred to the complaint if the documents are central to the plaintiff's case and their authenticity is not in dispute. *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1278 n.1 (10th Cir. 2004) (citations omitted); *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002).

III. Analysis

A. The EEOC's Claim Based on the Agreement

The EEOC's First Claim for Relief based on the Agreement is brought pursuant to Section 7(f)(4) of the ADEA which provides that "[n]o waiver agreement may affect the [EEOC's] rights and responsibilities to enforce this chapter ...[or]... be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the [EEOC]." 29 U.S.C. § 626(f)(4). The EEOC requests declaratory and injunctive relief to void the Agreement and enjoin CollegeAmerica from enforcing its unlawful terms. *See* Complaint, Prayer for Relief.

CollegeAmerica first argues that there is no justiciable controversy because it has never asserted and will never assert that Potts waived her ADEA rights via the Agreement. In support of this argument, CollegeAmerica provides evidence that it did not assert such a waiver in connection with Potts' EEOC charges or in its complaint in the State Court Action, all of which pre-date the filing of this case by the EEOC. *See* Exhibits 3, 4, 6, 7 & 8 to Motion. CollegeAmerica also provides an affidavit from Matthew Gerber, its general counsel, in which he states that CollegeAmerica does not and will never assert that the Agreement constitutes a waiver of Potts' ADEA rights to file a charge or cooperate in any proceeding involving the charge of another. *See* Exhibit A to Reply to Motion.

In response, the EEOC cites a pleading in the State Court Action in which CollegeAmerica asserted that Potts violated the Agreement by filing charges with the EEOC. *See* Exhibit 2 to Response to Motion. CollegeAmerica subsequently amended its complaint in the State Court Action to include a footnote sating that it was not asserting that the Agreement constitutes a waiver of discrimination claims or that Plaintiff violated the Agreement by filing EEOC charges. *See* Exhibit 8 to Motion. CollegeAmerica's amended complaint was filed after the EEOC issued its Letter of Determination but before this case was filed.

The EEOC also acknowledges that the Court only has jurisdiction over "live controvers[ies]," *see Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007), but argues that its first claim is viable because it falls under the exception for cases in which a defendant voluntarily ceases allegedly improper behavior but is free to resume it once the case is dismissed. *See Knox v. Serv. Employees Int'l Union, Local 1000*, – U.S. –, 132 S.Ct. 2277, 2287 (2012). This exception is based on the principle that " a party should not be able to evade judicial

review, or to defeat a judgment, by temporarily altering questionable behavior." *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010) (citations omitted).

Because it arises out of the doctrine of mootness, the voluntary cessation exception cited by the EEOC is applicable when the behavior in question ceases after suit is filed. *See WildEarth Guardians v Pub. Serv. Co. of Colo.*, 690 F.3d 1174, 1185 (10th Cir. 2012). The party asserting mootness "bears the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Rio Grande Silvery Minnow*, 601 F.3d at 1116 (citations and internal quotations omitted). Conversely, when the behavior in question ceases prior to the time suit is filed, it is a question of redressability, and the burden of proof is on the plaintiff. *WildEarth Guardians, supra.*

The first determination I must make is whether CollegeAmerica's argument that there is no justiciable controversy is one of mootness or redressability. While the evidence shows that CollegeAmerica did not assert that Potts waived her ADEA rights via the Agreement on several occasions prior to the filing of this case, College America is also relying on the affidavits of its general counsel dated after the filing of this case to establish that it does not and will never assert a waiver of Potts' ADEA rights via the Agreement. I conclude then that the jurisdictional question before me regarding the EEOC's First Claim for Relief is one of mootness. CollegeAmerica therefore bears the burden of showing that "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have totally completely and irrevocably eradicated the effects of the alleged violation." *Rio Grande Silvery Minnow*, 601 F.3d at 1115 (citation omitted).

Based on the affidavits of its general counsel and its most recent representation in the State Court Action, I conclude that CollegeAmerica has met its burden of demonstrating that there is no reasonable expectation that it will use the Agreement to interfere with the ADEA rights of Potts or the EEOC. To the extent that CollegeAmerica previously used the Agreement in this manner, any resulting effects have been eradicated by CollegeAmerica's recent representations and assurances. The EEOC's First Claim for Relief based on the Agreement is therefore moot and must be dismissed for lack of jurisdiction. In the absence of jurisdiction, I need not address the CollegeAmerica's alternative argument that the EEOC's First Claim for Relief fails to state a claim upon which relief amy be granted.

B. The EEOC's Claim Based on the Separation Agreements

Like its claim based on the Agreement, the EEOC's Second Claim for Relief based on the Separation Agreements is brought pursuant to Section 7(f)(4) of the ADEA. College America first argues that the Court lacks jurisdiction over this claim because the EEOC failed to provide it with notice that the Separation Agreements purportedly violate the ADEA or to engage in conciliation with respect to these Agreements. *See* 29 U.S.C. § 626(b) ("Before instituting any action under this section, the EEOC shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."); 29 U.S.C. § 626(d)(2) ("Upon receiving ... a charge, the EEOC shall promptly notify all persons named in such charge ... and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.").

In response, the EEOC first argues that notice and conciliation are not jurisdictional prerequisites to suit under the ADEA pursuant to *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). In *Arbaugh*, the Supreme Court addressed whether Title VII's definition of "employer" to include only those having fifteen or more employees was an issue of subject-matter jurisdiction or an essential element of a Title VII claim. *Id.* at 503. The Supreme Court held that Title VII's threshold number of employees was an element of a Title VII claim, not a jurisdictional issue, and adopted a bright line test that a threshold limitation on a statute's scope is jurisdictional only when Congress clearly states that it is. *Id.* at 514-516. Significant to the Supreme Court's decision was the fact that Title VII's threshold number of employees was in a definitions provision separate from Title VII's jurisdictional provision that "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." *Id.* at 515 (citation omitted).

Since *Arbaugh*, the Tenth Circuit has held that the exhaustion of administrative remedies remains a jurisdictional prerequisite to bringing suit under Title VII or the ADEA. *Logsdon v. Turbines, Inc.*, 399 Fed. Appx. 376, 378 (10th Cir. 2010). In so holding, the Tenth Circuit acknowledged the bright line test adopted by the Supreme Court in *Arbaugh* but concluded that it was bound to follow other Tenth Circuit authority specifically holding that the exhaustion of administrative remedies is a jurisdictional prerequisite to discrimination claims "absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *Id.* at 378 n. 2 (citation omitted). Other Tenth Circuit cases have followed the holding in *Logsdon*. *See Pretlow v. Garrison*, 420 Fed. Appx. 798, 802 n. 4 (10th Cir. 2011); *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171, 1174 n. 3 (D. Colo. 2013).

The Tenth Circuit did not perceive its holding in *Logsdon* to be at odds with the bright line test adopted by the Supreme Court in *Arbaugh*, and I decline to conclude otherwise based not only on this precedent but the different statutory framework at issue in this case. Specifically, unlike the definitions provision at issue in *Arbaugh*, the ADEA's exhaustion requirements are set forth in the same statutory section as its jurisdictional mandate though under different subsections. *See* 29 U.S.C. § 626(b)(c) &(d). Furthermore, the question of whether administrative exhaustion is jurisdictional is dispositive only when a defendant employer would have otherwise waived or forfeited the issue by failing to raise it in a timely manner. *Logsdon*, 399 Fed. Appx. at 378 n. 1. *See also Arbaugh*, 546 U.S. at 504 (because 15 employee minimum requirement of Title VII is not jurisdictional, it could not be asserted defensively after the conclusion of the trial on the merits). I will therefore analyze CollegeAmerica's argument regarding notice and conciliation pursuant to Rule 12(b)(1) based on the entire record before me. *See Holt, supra.*

1. Notice Relating to the Separation Agreements

In its Letter of Determination, the EEOC advised CollegeAmerica of its findings that CollegeAmerica had discriminated against Potts in violation of the ADEA and sought to use an unlawful and invalid waiver to interfere with Potts' protected rights under the ADEA. *See* Ex. 5 to Motion, p. 2. The EEOC requested that CollegeAmerica enter into a consent decree agreeing to, among other things, toll the charge-filing period for employees who signed the same or similar severance agreements and to revise its form severance agreement to comply with the ADEA and make it clear that employees retain the right to file charges and cooperate with the EEOC. *Id.*

CollegeAmerica argues that the EEOC's Letter of Determination was insufficient notice that the EEOC considered the Separation Agreements to be in violation of the ADEA because these agreements are distinguishable from Potts' post-termination Agreement referenced in the letter. *Compare* Ex. 1 to Complaint to Exs. 2-5 to Complaint. CollegeAmerica also asserts that it provided copies of the Separation Agreements to the EEOC after the EEOC issued its Letter of Determination to clarify that the Agreement was not CollegeAmerica's form severance agreement as the EEOC mistakenly believed. *See* Ex. 7 to Motion. After receiving the Separation Agreements, the EEOC did not revise or supplement its findings or otherwise notify CollegeAmerica that the scope of its investigation had expanded beyond Potts' Agreement.

In response, The EEOC argues that a charge of discrimination serves as a "jurisdictional springboard" for it to investigate whether the employer has engaged in any discriminatory practices. *See EEOC v. Gen Elec.Co.,* 532 F.2d 359, 364 (4th Cir. 1976). The EEOC acknowledges that it must nonetheless include any additional charges in its letter of determination, *see Gen Elec. Co.*, 532 F.2d at 366, but argues that it satisfied this requirement by the language in its Letter of Determination referring to employees other than Potts who signed the same or similar agreements. The EEOC also argues that CollegeAmerica knew the Separation Agreements were "on the table" because it provided them to the EEOC and knew that they, like Potts' Agreement, contained language attempting to restrict its former employees' rights under the ADEA.

One issue with the EEOC's arguments regarding notice is the chronology of events. At the time the EEOC issued its findings in the Letter of Determination, it was unaware of the existence or terms of the Separation Agreements. Thus, this letter could not serve as notice to

CollegeAmerica that the EEOC was alleging that the Separation Agreements violated the ADEA. I am also unpersuaded by the EEOC's argument that CollegeAmerica's actions in providing copies of the Separation Agreements automatically made them a subject of investigation despite no indication from the EEOC that this was the case. However, because notice may also be established through the conciliation process, *see EEOC v. Amer. Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1976 (adequate notice was provided to defendant-employer through investigation and attempted conciliation), I will analyze this ADEA requirement before determining whether there was sufficient notice to support the EEOC's claim relating to the Separation Agreements.

2. Conciliation Relating to the Separation Agreements

CollegeAmerica's general counsel states in his affidavit that he attended the conciliation meeting between CollegeAmerica and the EEOC and that the EEOC did not raise any concerns regarding the Separation Agreements at this meeting. *See* Motion, Gerber Declaration, ¶¶ 16 & 17. Mr. Gerber further states that the focus of the conciliation meeting was squarely on Potts, the Agreement, and the Sate Court Action and that CollegeAmerica was unaware that the EEOC was challenging the legality of its Separation Agreements prior to receiving the EEOC's Complaint. *Id.* at ¶¶ 18 & 20. CollegeAmerica also notes that the letter it received from the EEOC following the conciliation meeting specifically references Potts' charges of discrimination and states that efforts to conciliate "these charges" have been unsuccessful. *See* Ex. 9 to Motion.

Although the EEOC bears the burden of proving that it engaged in conciliation relating to the Separation Agreements, it provides no evidence to counter Mr. Gerber's affidavit. Instead, the EEOC cites its statement in its Letter of Determination that it had begun conciliation in accordance with 29 U.S.C. § 626(b). Any conciliation attempts reflected in this letter, however,

were necessarily unrelated to the Separation Agreements since the EEOC was unaware of their existence or terms at this time.

The EEOC also argues that it is Tenth Circuit law that if there has been any effort to conciliate, a case cannot be dismissed for lack of conciliation. This is an overstatement of Tenth Circuit law. Instead, the Tenth Circuit has said that it is appropriate to stay proceedings for further conciliation efforts where the EEOC makes a sufficient initial effort "by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements." *EEOC v. Prudential Fed. Savings & Loan Assoc.*, 763 F.2d 1166, 1169 (10th Cir. 1985) (internal quotations and citation omitted). *See also Marshall v. Sun Oil Co. of Pa.*, 592 F.2d 563, 566-67 (10th Cir. 1979) (Labor Department made "substantial initial effort to effect voluntary compliance" in ADEA case where it informed defendant of specific allegations of misconduct and what actions were required for compliance with ADEA); *EEOC v Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (EEOC's "good faith" in its conciliation efforts is relevant to whether court should entertain claim or stay proceedings).

Here, there is no evidence that the EEOC made any effort to conciliate its allegations that the Separation Agreements violate the ADEA so as to justify a stay of the proceedings. By failing to make such an effort, the EEOC also failed to cure its initial failure to provide CollegeAmerica with notice of its allegations relating to the Separation Agreements. The EEOC's Second Claim for Relief must therefore be dismissed for lack of jurisdiction as a result of the EEOC's failure to satisfy the jurisdictional prerequisites of notice and conciliation. In the absence of jurisdiction, I need not address CollegeAmerica's alternative argument that the EEOC's Second Claim for Relief fails to state a claim upon which relief may be granted.

C. The EEOC's Claim for Retaliation

In order to establish a prima facie case of retaliation under the ADEA, the EEOC must show that (1) Potts engaged in protected activity; (2) CollegeAmerica took a subsequent materially adverse action against Potts; and (3) a causal connection exists between Potts' protected activity and the adverse action taken by CollegeAmerica. *Timmerman v. U.S. Bank, N.A.*, 483 F.3d 1106, 1122-23 (10th Cir. 2007). CollegeAmerica argues that the EEOC cannot establish the third element of its retaliation claim as a matter of law. I disagree.

As relevant to its claim for retaliation, the EEOC's Complaint alleges:

> (1) On December 1 and 2, 2012, Potts and another former employee of CollegeAmerica ...exchanged emails. Complaint, ¶ 12.
>
> (2) By letter dated January 11, 2013, CollegeAmerica, through its general counsel, advised Potts that the emails were a violation of the Agreement's non-disparagement clause and demanded return of its $7,000 payment to her. Complaint, ¶ 14.
>
> (3) On January 25, 2013, Potts filed her first charge of discrimination with the EEOC. Complaint, ¶ 15.
>
> (4) On March 25, 2013, seven days after it received notice of Potts' first charge of discrimination, CollegeAmerica filed the State Court Action. Complaint, ¶¶ 16 & 17.

CollegeAmerica argues that there can be no causal connection between Potts' January 25, 2013 charge of discrimination and its filing of the State Court Action because its January 11, 2013 letter specifically advised Potts that CollegeAmerica would file claims against her for breach of contract, defamation, and other causes of action if she failed to return the $7,000 payment within 30 days. *See* Ex. 2 to Motion. As the EEOC notes though, CollegeAmerica did not file the State Court Action immediately after Potts failed to return the $7,000 within 30 days of its January 11, 2013 letter. Instead, CollegeAmerica filed the State Court Action 43 days after

the 30 day deadline had passed but a mere 7 days after it received notice of Potts' first charge of discrimination. In addition, CollegeAmerica raised issues relating to the charges Potts filed with the EEOC in the State Court Action. *See* Complaint, ¶¶ 19-21.

Under these circumstances, I conclude that the EEOC has pled sufficient facts to support the reasonable inference that CollegeAmerica filed the State Court Action in response to the first charge of discrimination that Potts filed with the EEOC. CollegeAmerica is therefore not entitled to the dismissal of the EEOC's Third Claim for Relief for failure to state a claim upon which relief may be granted.

IV. Conclusion

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Defendant CollegeAmerica's Motion to Dismiss Complaint [Doc # 6] is GRANTED IN PART and DENIED IN PART;

2. Defendant CollegeAmerica's Motion is GRANTED with respect to the EEOC's First and Second Claims for Relief, and these claims are hereby DISMISSED for lack of subject matter jurisdiction; and

3. Defendant CollegeAmerica's Motion is DENIED with respect to the EEOC's Third Claim for Relief.

Dated: December 2, 2014 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock
LEWIS T. BABCOCK, JUDGE

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

[x] this brief contains 4,196 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

[ ] this brief uses a monospaced typeface and contains <state the number of> lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font, or

[ ] this brief has been prepared in a monospaced typeface using <state name and version of word processing program> with <state number of characters per inch and name of type style>.

Date: Nov. 17, 2016

s/ Paul D. Ramshaw

Paul D. Ramshaw
Attorney for Appellant EEOC
131 M St., NE, Room 5SW26H
Washington, DC 20507
paul.ramshaw@eeoc.gov
(202) 663-4737

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that with respect to the foregoing:

(1) all required privacy redactions have been made per 10th Cir. R. 25.5;

(2) the ECF submission is an exact copy of the hard copies that will be delivered to the clerk;

(3) the digital submissions have been scanned for viruses with the most recent version of a commercial virus scanning program, Trend Micro OfficeScan, version 11.0.6054, Service Pack 1, last updated Nov. 17, 2016, and according to the program are free of viruses.

s/ Paul D. Ramshaw

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to the following:

Raymond W. Martin
Craig Ruvel May
Wheeler Trigg O'Donnell
370 17th St., Ste. 4500
Denver, CO 80202

Date: November 17, 2016

s/ Paul D. Ramshaw

Paul D. Ramshaw

Attorney for Appellant EEOC

Equal Employment
Opportunity Commission
131 M St., NE, Room 5SW26H
Washington, DC 20507
paul.ramshaw@eeoc.gov
(202) 663-4737