UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

STANDING ROCK HOUSING AUTHORITY Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	)	Civil Action No. 1:08-CV-052-DCH-CSM

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S LEGAL MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

REQUESTED RELIEF

The Complaint should be dismissed with prejudice because this pre-emptive lawsuit seeks to bypass the administrative and judicial enforcement schemes of the federal anti-discrimination statutes by prematurely seeking court intervention in the EEOC's administrative enforcement procedure. Plaintiff's remedy with respect to the EEOC's subpoena, if any, arises in its right to defend a subpoena enforcement action filed by the EEOC in federal district court.

The EEOC has not sought judicial enforcement of this subpoena in this district or any other. The dispute is currently in an administrative forum only, that is, the EEOC is trying to

investigate whether SRHA falls within the "employer" definition of Title VII of the Civil Rights Act of 1964. The Plaintiff did not cite, nor can it cite any statute or rule that gives this Court jurisdiction to quash EEOC's administrative subpoena when the EEOC has not even sought enforcement of the subpoena. Therefore, SRHA's claim is not ripe for review and the Complaint should be dismissed.

In the alternative, the Complaint should be dismissed for failure to state a claim and lack of subject matter jurisdiction in accordance with Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure.

LEGAL ARGUMENT SUPPORTING MOTION TO DISMISS

I. THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFF'S MOTION

A. The Case is Not Ripe for Review

It is well established that a federal court will not exercise jurisdiction over an action unless it presents a case or controversy that is "ripe" for judicial review. *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). The ripeness doctrine is based on both the constitutional limitation that federal courts have jurisdiction only over actual "cases" or "controversies," and the judiciary's self-imposed prudential restraints upon the exercise of its jurisdiction. *Duke Power Co.*

v. Carolina Envtl. Study Group, Inc., 438 U.S. 58, 81 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 139 (1974). The rationale for the doctrine is:

> ...to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Lab., 387 U.S. at 148-149. The determination of whether a case is ripe for judicial review depends upon (1) the fitness of the issues involved for judicial resolution and (2) the hardship to the parties of withholding court consideration. *Abbott Lab.*, 387 U.S. at 149; *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162-63 (1967). Failure to meet either criteria renders a cause of action unripe for judicial review. *Toilet Goods Ass'n*, 387 U.S. at 162-63.

Fitness for review in this type of case is dependent upon (1) whether the agency action is final, (2) whether further administrative proceedings are contemplated, and (3) whether only purely legal questions are presented. *Abbott Lab.*, 387 U.S. at 149; *Toilet Goods Ass'n*, 387 U.S. 162-163. Applying these standards to the present case, it is clear that this controversy is not fit for judicial review.

Plaintiff is asking this Court to enjoin the EEOC's from

asking a federal court to enforce the EEOC's administrative subpoena, arguing that Title VII does not apply to SRHA. In short, Plaintiff requests that this Court intervene on its behalf in the EEOC's administrative investigation of charges brought against it. Under the first prong of the ripeness test, this issue is not fit for review. The EEOC's processing of the charges at issue, including issuing an administrative subpoena for certain evidence, lacks the element of finality necessary to render the case ripe for review. Courts have found that such agency actions lack the finality necessary to make a case ripe for review, even in cases where an agency has investigated a charge and issued a determination as to whether there is reasonable cause to believe that discrimination occurred. *See F.T.C. v. Standard Oil Co.*, 449 U.S. 232 (1980).

Title VII provides that the EEOC's administrative proceedings begin with the filing of a charge of discrimination by an aggrieved individual with the EEOC. 42 U.S.C. §§ 2000e-5(b). If the EEOC finds that there is no reasonable cause to believe that the charge is true, it will dismiss the charge. 42 U.S.C. § 2000e-5(b). If the EEOC finds that there is "reasonable cause" to believe that discrimination occurred, it must attempt to eliminate the alleged discrimination through conciliation and persuasion. 42 U.S.C. § 2000e-5(b). If conciliation efforts fail, the EEOC may bring suit in federal district court to

enforce Title VII. 42 U.S.C. § 2000e-5(f)(1). Any such court action filed by the EEOC is a *de novo* proceeding in which the EEOC's findings are not binding upon the court. *McDonnell Douglas Corp. v. Green,* 415 U.S. 36, 44 (1974).

As numerous cases recognize, the EEOC has no adjudicative power over any non-federal employer under Title VII, so any administrative actions by the Commission regarding a charge are not final agency action.

> Standing alone, [EEOC's determination] is lifeless, and can fix no obligation nor impose any liability on the plaintiff. It is merely preparatory to further proceedings. If and when the EEOC or the charging party files suit in district court, the issue of discrimination will come to life, and the plaintiff will have the opportunity to refute the charges.

Georator v. Equal Employment Opportunity Comm'n, 592 F.2d 765, 768 (4th Cir. 1979). *See also, Borg-Warner Protective Serv.'s v. EEOC,* 245 F.3d 831, 836 (D.C. Cir. 2001); *EEOC v. Recruit U.S.A., Inc.*, 939 F.2d 746, 755, n. 10 (9th Cir. 1991); *Ward v. EEOC,*719 F.2d 311 (9th Cir. 1983); *Stewart v. EEOC,* 611 F.2d 679, 682-4 (7th Cir. 1979); *Mississippi Chemical v. EEOC,* 786 F.2d 1013, 1019 (11th Cir. 1986). As noted by the Eighth Circuit, "[b]y allowing the administrative process to be completed the issues may well be disposed of without the necessity of Federal court action." *EEOC v. Chrysler Corp.*, 567 F.2d 754, 755 (8th Cir. 1977).

The second prong of the ripeness test requires a plaintiff to demonstrate that hardship will result if judicial review is withheld. *Abbott Lab.*, 387 U.S. at 149. "[T]he test of ripeness...depends on the degree and nature of the [agency action]'s present effect on those seeking relief." *Toilet Goods Ass'n,* 387 U.S. at 164. Here too, SRHA's Complaint fails. The EEOC's investigative requests and subpoena do not have any present effect upon Plaintiff because the EEOC proceedings are not binding on SRHA. Plaintiff is not obligated to comply with the EEOC's subpoena or concur with its determinations. Only a federal district court has authority to order SRHA to comply with the EEOC's subpoena. The mere threat or possibility that the EEOC might seek enforcement of its subpoena by a federal district court does not constitute sufficient hardship to meet the second prong of the ripeness test. *See F.T.C. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) (even the expense of litigation is not irreparable harm). Thus, withholding judicial review will not cause SRHA any hardship because it will have ample opportunity to defend against the subpoena or the charge if the EEOC or the charging party files suit in district court. *Georator,* 592 F.2d at 768-69.

This action is similar to *General Fin. Corp. v. F.T.C.*, 700 F.2d 366 (7th Cir. 1983), in which three companies sought a declaratory judgment and injunction to bar the Federal Trade

Commission from investigating their insurance activities. At the time the lawsuit was filed, the FTC had denied the companies' petitions to quash administrative subpoenas but had not sought to enforce the subpoenas in federal district court. The court found that absent enforcement of the subpoenas by court order, there were no sanctions for failing to comply with the administrative subpoenas. *Id.* at 367-68. The court held that the case was not ripe because the agency's actions had not created an immediate injury to the plaintiffs. *Id.* at 371. The court observed that the plaintiffs could prevent any hardship caused by the subpoenas by mounting a successful defense in an enforcement action brought by the FTC. Accordingly, the plaintiffs could not satisfy the hardship criterion of the ripeness test. *Id. See also F.T.C. v. Standard Oil Co.*, 449 U.S. 242-43 (1980) (burden of responding to administrative investigation is not subject to review when it had no legal force or practical effect on plaintiff's business).

Numerous courts have applied the preceding principle in factual situations that are indistinguishable from the case at bar, clearly establishing that an anticipatory action to challenge the validity of an administrative subpoena before an agency seeks judicial enforcement is not ripe for review. *See e.g., Reisman v. Caplin*, 375 U.S. 440 (1964); *Anheuser-Busch Inc. v. F.T.C.*, 359 F.2d 487 (8th Cir. 1966); *Shea v. Office of Thrift Supervision*, 934 F.2d 41, 45-46 (3d Cir. 1991); *In re Ramirez*,

905 F.2d 97, 98 (5th Cir. 1990); *Wearly v. F.T.C.*, 616 F.2d 662, 665-67 (3d Cir. 1980); *Dresser Indus., Inc. v. United States*, 596 F.2d 1231, 1235-36 (5th Cir. 1979); *Atlantic Richfield Co. v. F.T.C.* , 546 F.2d 646, 648-49 (5th Cir. 1977); *See generally*, 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction 2d § 3532.6 (1990).

In summary, SRHA will not face hardship if its Complaint is dismissed because the EEOC does not have the authority to enforce the subject subpoena or take any other action that would have determinate consequences on the Plaintiff. SRHA has the opportunity to raise all appropriate defenses if the EEOC seeks federal court enforcement of its administrative subpoena, so the Complaint is premature and SRHA's cause of action unripe. The Court therefore lacks subject matter jurisdiction over Plaintiff's Complaint which should be dismissed pursuant to Rule 12(b)(1), Fed.R.Civ.Proc.

B. There is No Statute Giving This Court Jurisdiction Over Plaintiff's Claim

Federal courts have limited jurisdiction, possessing only that power granted by the Constitution or authorized by Congress. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). A district court may hear a case only if it is authorized to do so by a congressional grant of subject matter jurisdiction. *See Insurance Corp. of Ireland v. Compagnie des*

Bauxites de Guinee, 456 U.S. 694, 701-02 (1982). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens For A Better Env't,* 523 U.S. 83, 94-95(1998) (citation omitted).

The Plaintiff cites 28 USC sec. 2201 (the Declaratory Judgment Act) and Federal Rules 57 and 65 as the basis for this action (Complaint, par. 3), but those authorities do not grant this Court jurisdiction to hear SRHA's Complaint against the EEOC. None of those authorities are jurisdictional provisions; they all address remedies that a federal court may order if that court possesses jurisdiction through another appropriate jurisdictional statute.[1]

More specifically, the Declaratory Judgement Act states that a federal district court may declare the rights and legal relations of any interested party "in a case of actual controversy *within its jurisdiction, ...*" (emphasis supplied). It does not, by itself, create a basis for federal jurisdiction. Thus, a request for declaratory relief will not confer jurisdiction on the federal courts if jurisdiction would not otherwise exist. *Skelly Oil Co. v. Phillips Petrol. Co.,* 339 U.S. 667, 671

[1]Rule 57, Fed.R Civ.Proc, sets forth simply that the federal rules of civil procedure apply to declaratory judgment actions, while Rule 65, Fed.R.Civ.Proc., provides procedures for certain aspects of injunctive proceedings. Neither rule contains any jurisdictional grants.

(1950). The Declaratory Judgment Act provides only a remedy; it is not intended to expand federal jurisdiction, *International Ass'n of Entrepreneurs v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995), so a party seeking declaratory judgment must independently satisfy federal subject matter jurisdiction requirements. *Skelly Oil*, supra, 339 U.S. at 671-72.

Similarly, courts have confirmed that Rule 65 is a procedural rule, not a jurisdictional grant. *Citizens Concerned for Separation of Church & State v. City of Denver*, 628 F.2d 1289, 1299 (10th Cir. 1980). A complaint must allege a specific statutory basis for the court's subject matter jurisdiction before injunctive relief may be considered. *Arkansas Peace Ctr. v. Dept. of Pollution Control*, 999 F.2d 1212, 1216-19 (8th Cir. 1993)(environmental groups unable to establish jurisdiction under federal environmental statute to support injunctive relief).

The Complaint also references Title VII, although not as a jurisdictional allegation. Regardless of Plaintiff's intent, however, Title VII does not grant subject matter jurisdiction for an injunctive action against the EEOC. Title VII provides federal courts with three specific grants of jurisdiction, none of which confers jurisdiction over claims against the EEOC in its capacity as an enforcement agency. First, section 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), grants jurisdiction over actions brought against respondent employers, employment agencies and labor

organizations accused of discriminatory employment practices. Second, section 707(b), 42 U.S.C. § 2000e-6(b), grants jurisdiction over actions brought by the EEOC against persons engaged in a pattern or practice of resistance to the goals of Title VII. Finally, section 717, 42 U.S.C. § 2000e-16, grants jurisdiction over suits by federal employees or applicants for employment against the head of the federal agency accused of discriminatory employment practices. None of these sections authorizes anticipatory causes of action against the EEOC by an employer.

The Eighth Circuit has dismissed for lack of jurisdiction similar pre-enforcement claims against federal investigative agencies. In *Great Plains Coop v. CFTC*, 205 F.3d 353 (8th Cir. 2000), the court held that the district court lacked jurisdiction to enjoin or otherwise interfere with the administrative proceedings of the Commodities Futures Trading Commission. The court held that the plaintiff's complaint seeking injunctive relief, a writ of mandamus or of prohibition against the administrative proceedings, and/or a declaratory judgment that the plaintiff was not subject to the agency's jurisdiction was inappropriate. The court stated:

> Great Plain's complaint is an impermissible attempt to make an "end run" around the statutory scheme. Allowing the target of an administrative complaint simply to file for an injunction in a federal district court would defeat the purpose of [the Commodity Exchange Act]. It would create two avenues of judicial

> review and would allow the plaintiff to short-circuit the administrative review process and the development of a detailed factual record by the agency.

205 F.3d at 355. Plaintiff in the instant action similarly seeks an "end run" around the statutory scheme of Title VII.

In sum, this Court does not have jurisdiction over this anticipatory Motion. Plaintiff's Motion must, therefore, be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

C. PLAINTIFF'S CLAIM AGAINST THE EEOC IS BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

Plaintiff's Complaint against the EEOC is barred by the doctrine of sovereign immunity. The EEOC is an agency of the United States. 42 U.S.C. § 2000e-4. The United States cannot be sued unless sovereign immunity has been waived by statute. *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). The doctrine applies to suits in which the United States is the named defendant, as well as suits in which a federal agency or its officials are the named defendants. *Dugan v. Rank*, 372 U.S. 609, 620 (1963).

A waiver of sovereign immunity cannot be implied; it must be unequivocally expressed. *Mitchell*, 445 U.S. at 538; *United States v. King*, 395 U.S. 1 (1969). "Waivers of sovereign immunity must be construed strictly in favor of the sovereign . .

. and not enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) (citations omitted). Plaintiff has not cited, and we are unaware of any statute that provides a waiver of sovereign immunity for SRHA's claim against the EEOC.

II. PLAINTIFF FAILS TO STATE A CLAIM AGAINST THE EEOC UNDER TITLE VII

Title VII is the only substantive statute referenced by the Complaint, but SRHA cannot state a claim against the EEOC under Title VII. To state a claim Plaintiff must show that Congress granted a Title VII right of action against the EEOC "either expressly or by clear implication." *See Warth v. Seldin*, 422 U.S. 490, 501 (1975). Plaintiff clearly cannot do so. The courts of appeals have consistently held that "[i]t is settled law . . . that Title VII does not provide either an express or implied cause of action against the EEOC to challenge its investigation and processing of a charge." *McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984); *Smith v. Casellas*, 119 F.3d 33 (D.C. Cir. 1997)(joining sister circuits in holding there is no cause of action against EEOC for alleged malfeasance in processing charge).

In *Baba v. Japan Travel Bureau Int'l, Inc.*, 111 F.3d 2, 6 (2d Cir. 1997), the court found that "several district courts within this Circuit and (apparently) every court of appeal that

has considered the issue agree that Title VII provides no cause of action–either express or implied–against the EEOC for claims of procedural defects." The Second Circuit quoted the Tenth Circuit in *Scheerer v. Rose State College:*

> "The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim." *Peavey v. Polytechnic Inst.*, 749 F. Supp. 58, 58 (E.D.N.Y. 1990), *aff'd*, 940 F.2d 648 (2d Cir. 1991); *see, e.g., McCottrell v. EEOC*, 726 F.2d 350, 351 (7th Cir. 1984); *Ward v. EEOC*, 719 F.2d 311, 313 (9th Cir. 1983), *cert. denied*, 466 U.S. 953, 104 S. Ct. 2159, 80 L.Ed.2d 544(1984); *Francis-Sobel v. University of Maine*, 597 F.2d 15, 17-18 (1st Cir.), *cert. denied*, 444 U.S. 949, 100 S. Ct. 421, 62 L.Ed.2d 319 (1979); *Georator Corp. v. EEOC*, 592 F.2d 765, 767-69 (4th Cir. 1979); *Gibson v. Missouri Pac. R.R.*, 579 F.2d 890, 891 (5th Cir. 1978), *cert. denied*, 440 U.S. 921, 99 S. Ct. 1245, 59 L.Ed.2d 473 (1979).

111 F.3d at 6, (quoting *Scheerer*, 950 F.2d 661, 663 (10th Cir. 1991)). In agreeing with these decisions, the Second Circuit stated,

> [L]ike the court in *Ward* (for example), we think that "[i]mplying a cause of action against the EEOC contradicts [Title VII's] policy of individual enforcement of equal employment opportunity laws and could dissipate the limited resources of the [EEOC] in fruitless litigation with charging parties." *Ward*, 719 F.2d at 313. We therefore hold that Title VII provides no express or implied cause of action against the EEOC for claims that the EEOC failed properly to investigate or process an employment discrimination charge.

111 F.3d at 6. The same rationale applies to actions against EEOC brought by dissatisfied employers. For these reasons, plaintiff's Motion fails to state a claim against EEOC.

CONCLUSION

For all of the foregoing reasons, the EEOC's Motion to Dismiss should be granted, thereby dismissing the Complaint with prejudice.

Dated this 3rd day of June, 2008.

Respectfully submitted,

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION

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