UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHRISTIAN C. BROWN,

Plaintiff,

v.

KENNETH Y. TOMLINSON,

Defendant.

Civil Action No. 03-1376 (PLF)

BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OR TO ALTER OR AMEND THE JUDGMENT SUBMITTED BY *AMICUS CURIAE* METROPOLITAN WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

INTRODUCTION

This Court's recent summary judgment decision in this case extended the "exhaustion of remedies" doctrine beyond its traditional bounds in federal sector cases. Dismissal for failure to exhaust should not be predicated on the plaintiff completing a step that was unnecessary for him to pursue in the first place. After the plaintiff in this case apparently exhausted administrative remedies before the employing agency during the investigative stage, Plaintiff chose to have his claim adjudicated at a hearing before an Administrative Judge. Requesting a hearing, however, is merely an optional step in the administrative process, and the request can be withdrawn at any time, even after the hearing has started, without affecting the plaintiff's requirement to exhaust and without prejudice to his right to a hearing *de novo*.

In essence, this Court's summary judgment opinion held that a federal employee can, by contrast, forfeit his right to a *de novo* trial in court merely because he or she chose to abandon the administrative hearing process, something otherwise explicitly permitted under the rules and regulations of the EEOC. The opinion discusses in detail the plaintiff's apparent flouting of

discovery deadlines and the AJ's discovery orders (which conduct *amicus* does not defend), but the unfortunate impact of the holding might be read to have transformed what has always been an optional process into a mandatory one.

Federal employees have the option of filing in court at various points in the administrative EEO process, which are listed in the statute and regulation. 42 U.S.C. § 2000e-16(c); 29 C.F.R. 1614.408. When a federal employee meets any of the four pre-requisites to suit, she is entitled to a *de novo* hearing in federal district court, unburdened by any adverse administrative decisions. *Chandler v. Roudebush*, 425 U.S. 840 (1976) (right to a *de novo* trial).

The logic of this Court's recent decision appears to transform the request for a hearing into an irrevocable election that must be carried through to completion, or else be deemed a failure to exhaust administrative remedies. Such an approach, however, would represent a substantive change in the current law. Both the statutory and regulatory text define explicitly what a federal employee is required to do to exhaust administrative remedies, and completing the hearing process is not one of them.

Nonetheless, the language of this Court's recent opinion may be interpreted as elevating this hitherto optional step into a mandatory exhaustion requirement for all federal employees as a necessary precondition to *de novo* proceedings in federal court. Because this result is contrary to the statutory text and prior holdings of the D.C. Circuit, *amicus* hereby requests that the Court alter or amend that portion of its summary judgment opinion to clarify that no such requirement exists.

To be sure, the conduct of the plaintiff and/or his counsel during the discovery phase of the administrative hearing and the failure to meet deadlines was troubling, and *amicus* does not defend it. Yet this may be a case of bad facts inviting an unwarranted extension of the law.

Regardless of the outcome in the EEOC hearing process, a complainant has a right to a *de novo* trial in federal court. This is equally true whether the complainant loses on the merits, is dismissed on procedural grounds, loses on summary judgment, or voluntarily withdraws the request for hearing. Accordingly, as a strictly legal matter, plaintiff is entitled to a trial *de novo* regardless of whether his case completed the hearing process or not.

Finally, this Court's reliance on *Rann v. Chao*, 346 F.3d 192, 197 (D.C. Cir. 2003) is misplaced because the administrative hearing process is an adversarial, court-like process that is distinctly different than the investigative process. *Rann* dealt only with the complainant's failure to cooperate with the agency's investigation of the complaint and the refusal to provide a sworn statement in support of the complaint, and *amicus* is unaware of any allegation that Plaintiff Brown did not fully cooperate and participate in that agency investigative process. A plaintiff's failure to cooperate at the investigative stage and consequential failure to exhaust (as in *Rann*), however, is in a completely different setting from the plaintiff who complainant fails, either negligently or intentionally, to prevail in an adjudicative hearing process, as is at issue here. Circuit precedent does not make successful completion of the hearing process a necessary predicate for filing in court, and to so hold would represent a stark departure from current governing law.

ARGUMENT

The logic of this Court's summary judgment decision dismissing for failure to exhaust administrative remedies implied that one of two propositions must be true; either (a) a federal employee must seek an administrative hearing before an AJ or else be deemed to have not fully exhausted his remedies; or (b) a federal employee need not request an AJ hearing, but once such a hearing is requested, he must pursue that hearing until a final decision on the merits is rendered. Neither proposition was explicitly stated in the opinion, and it is entirely possible that

neither the parties nor this Court affirmatively considered these premises. Nevertheless, *amicus* submits that the holding of a failure to exhaust suggests that one of these two propositions is true. If neither of these two propositions was explicitly considered or intended, that provides a basis for this Court to reconsider or amend its prior opinion. While *amicus* recognizes the apparently egregious flouting of discovery deadlines that occurred below, such bad facts do not provide a legal predicate for transforming an optional hearing process into a mandatory one.

I. A FEDERAL EMPLOYEE HAS FULLY EXHAUSTED ADMINISTRATIVE REMEDIES WHEN HE SATISFIES ANY OF THE STATUTORY REQUIREMENTS; HE NEED NOT PURSUE ALL AVAILABLE OPTIONS

In contrast to other exhaustion situations, the statute and regulation explicitly state when a federal employee may take her discrimination complaint to federal court. The starting point in this analysis is to examine the statute and regulations which grant federal employees the right to file a civil action because they specifically define the administrative remedies which must be exhausted before filing suit.

The right of federal employees to file a civil action against the government is provided by section 717(c) of Title VII, 42 U.S.C. § 2000e-16(c). The regulation interpreting this statute is 29 C.F.R. 1614.408. Both the statute and the regulation allow federal employees to file a civil action after meeting any one of four pre-requisites:

> (1) within 90 days of a final agency determination on any issue covered by Title VII;
> (2) after 180 days have elapsed after filing a Title VII complaint with the agency where there has been no agency determination;
> (3) within 90 days of a final decision from the EEOC if an administrative appeal was filed; or
> (4) after 180 days have elapsed after filing an administrative appeal with the EEOC where there has been no final decision.

29 C.F.R. 1614.408. The language of 42 U.S.C. 2000e-16(C) is longwinded, but the meaning is the same as § 1614.408. The relevant language states:

> Within 90 days of receipt of notice of final action taken by a department, agency, or unit . . ., or after one hundred and eighty days from the filing of the initial charge . . . an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

These provisions are clear and unambiguous. While a federal employee is free to request a hearing before an AJ, she is not required to do so. These are optional, not mandatory, alternatives for a federal employee to pursue her claim of discrimination.

In *Wilson v. Peña*, 79 F.3d 154, 157 (D.C. Cir. 1996), the Court of Appeals reviewed these same provisions and held that an employee had the option of electing various routes, and need not exhaust all available administrative options as a pre-requisite to filing in court. The Court affirmed this principle in *Saksenasingh v. Secretary of Educ.*, 126 F.3d 347, 350-51 (D.C. Cir. 1997). In *Saksenasingh*, the district court granted summary judgment based in part on a failure to exhaust remedies. While this case also involved a breach of a settlement agreement, the provisions are analogous, and the District of Columbia Circuit held that the complainant had fully exhausted her remedies by filing after 180 days, notwithstanding the fact that she had other administrative remedies available to her (such as an immediate administrative appeal to the EEOC Office of Federal Operations):

> . . . she had only to exhaust her administrative remedies regarding the original complaint by applying to the Department itself and awaiting either final agency action, 29 C.F.R. § 1614.408(c), **or** the passage of 180 days without final agency action, 29 C.F.R. § 1614.408(d). *See Wilson*, 79 F.3d at 157, 167. Saksenasingh filed her original complaint with the agency on February 22, 1991; she filed suit on October 13, 1994. The statutory 180 days had elapsed, and exhaustion of administrative remedies had occurred with respect to the original complaint.

(emphasis added).

Many other courts have held that a complainant need only satisfy one of the four statutory preconditions to suit in order to adequately exhaust administrative remedies. *See, e.g.,*

Miller v. Dept. of Interior, 827 F. Supp. 636, 638 (D.Nev. 1993) (employee not required to pursue all available administrative options to completion); *Kannapel v. Hudson*, 12 F.3d 205 (Table), No. 93-1160, WESTLAW: 1993 WL 498234, n.9 (4th Cir. 1993) (". . . exhaustion of administrative remedies does not require the complainant to appeal an adverse determination by the employer. Instead, after the employer rejects a complaint, the complainant may seek judicial relief [without further administrative review]."); *Tsai v. Helfer*, 940 F. Supp 597, 601 (S.D.N.Y. 1996) (employee permitted to file suit after any one of the statutory prerequisites is filed, and need not pursue available but optional administrative remedy of appeal); *Adams v. EEOC*, 70 FEP Cases 1357, 1358 No. 95-CV-8088 (E.D.Pa. May 8, 1996) (similar); *Robbins v. Bentsen*, 41 F.3d 1195, 1197, 1198-99 (7th Cir. 1994) (recognizing that complainants have the option of either pursuing an appeal to the EEOC or filing a suit in federal court); *Bohac v. West*, 85 F.3d 306, 310 n.3 (7th Cir. 1996) (similar).

The summary judgment opinion in the instant case seemed to imply that a complainant, having started with the hearing process, must complete it. This is contrary to the statute and regulations, which do, in fact, impose such a requirement for an administrative appeal, but not for the hearing. That is, a federal employee whose complaint is dismissed or rejected on the merits may *either* go to federal court or file an administrative appeal to the EEOC headquarters. In the event that the employee chooses to file an administrative appeal, she must allow 180 days to elapse before again having the opportunity to file in federal court. See 29 U.S.C. § 1614.408. In other words, the regulations explicitly require complainants to allow for certain elections (such as an administrative appeal) to play out, at least for 180 days. But those regulations do not require the complainant to let an AJ complete the hearing, even once that process is started.

Accordingly, it is clear that a federal employee has fully exhausted his administrative

remedies by waiting 180 days from the filing of his formal EEO complaint, even though he may have additional administrative options, such as a hearing, available to him. Nothing more is required as a pre-requisite to file suit in federal court. *Saksenasingh*, 126 F.3d at 350-51.

II. A REQUEST FOR A HEARING BEFORE AN ADMINISTRATIVE JUDGE IS NOT AN IRREVOCABLE ELECTION TO SEE THE PROCESS THROUGH TO FINAL DECISION

Given that a federal employee is not required to request a hearing to get a trial *de novo*, the issue becomes whether a hearing request, once made, imposes additional exhaustion requirements on a federal employee. In fact, such a request does not alter the statutory pre-requisites.

The hearing process before an AJ is an adversarial process similar to a suit in court. There is apparently no dispute that a federal employee is entitled to a trial *de novo* if he went to a hearing and received a decision against him on the merits. Nor is it disputed that a federal employee is entitled to trial *de novo* if his complaint was dismissed on summary judgment,[1] for being untimely, or for any other procedural or substantive reason given by the AJ, *see, e.g.,* 29 C.F.R. § 1614.109(b) (authorizing AJs to dismiss cases for any reason listed in § 1614.107).

Critically, a complainant need not pursue the administrative process to completion, but may instead voluntarily withdraw his request for a hearing at any point. EEOC Management Directive 110, Chap. 7 ("Hearings"), Part I ("Generally, an Administrative Judge will conduct a hearing on the merits of a complaint unless: 1) . . .; 2) the hearing request is otherwise voluntarily withdrawn;") Upon the request of a complainant, the AJ will remand the case back to the agency for further processing or the issuance of a final agency decision. In practice, there are many reasons for a complainant to withdraw a hearing request, including such issues as lack

[1] In addition to discovery, the administrative process now includes a full-fledged motions practice including motions for summary judgment. 29 C.F.R. § 1614.109(g) (AJ can render a decision without a hearing if there is no dispute of material fact).

of representation, lack of resources, or adverse rulings on discovery issues or motions. For example, a complainant who has had a partial summary judgment granted against him may choose not to proceed with a hearing on the remaining issues but to start over in court. Similarly, a complainant can withdraw his request even after the hearing itself; the AJ normally has 180 days after the hearing to issue a decision, and can extend that time. A complainant may decide that she has waited long enough, and go to court notwithstanding the fact that the hearing has already been held. None of these preclude a trial *de novo*.

It is difficult to make a legal distinction between the way that Christian Brown's administrative case ended and any of these other possibilities, at least not a distinction that justifies the dismissal for a failure to exhaust. For example, when faced with a complainant's failure to comply with discovery obligations, the AJ has a variety of remedies she can impose, including adverse inferences, sanctions and dismissal:

> (3) When the complainant, or the agency against which a complaint is filed, or its employees fail without good cause shown to respond fully and in timely fashion to an order of an administrative judge, or requests for the investigative file, for documents, records, comparative data, statistics, affidavits, or the attendance of witness(es), the administrative judge shall, in appropriate circumstances:
>
> (i) Draw an adverse inference that the requested information, or the testimony of the requested witness, would have reflected unfavorably on the party refusing to provide the requested information;
>
> (ii) Consider the matters to which the requested information or testimony pertains to be established in favor of the opposing party;
>
> (iii) Exclude other evidence offered by the party failing to produce the requested information or witness;
>
> (iv) Issue a decision fully or partially in favor of the opposing party; or
>
> (v) Take such other actions as appropriate.

29 C.F.R. § 1614.109(f) (emphasis added). If the AJ below had, instead of dismissing Christian Brown's case, chosen to proceed with the hearing but draw an adverse inference, exclude evidence, or impose a monetary sanction, there would be no basis to find a failure to exhaust and deny him the right to trial *de novo*. Because there is no material legal distinction between the

various sanctions of 1614.109(f), there is no basis to preclude trial *de novo* in only one of those circumstances, *i.e.*, dismissal by the AJ.

Normally, prejudice is not a factor when considering a failure to exhaust. Either the plaintiff was required to pursue an administrative action, or she was not. But even if prejudice to the defendant should be considered—and it should not be—it is impossible for the defendant to show that it suffered greater prejudice from having plaintiff's complaint dismissed, on the agency's own motion, on a procedural ground than if the complaint had proceeded to a full hearing and the agency prevailed on the merits. In nearly every case, the agency would incur far more inconvenience and expense by producing witnesses and participating in a multi-day hearing than in prevailing on a motion for sanctions.

Logically speaking, it would be just as much a "failure to exhaust" for a complainant to withdraw his request for an EEOC hearing as it is to get dismissed for discovery violations. While the plaintiff who is dilatory is unsympathetic, the legal principle implied by this Court's decision would reach many other cases where plaintiffs were not guilty of any such behavior. Accordingly, there is no added penalty to a complainant who loses his case in front of an AJ on a procedural matter rather than on a substantive issue.

III. FAILURE TO COOPERATE HAS DIFFERENT CONSEQUENCES IN THE INVESTIGATIVE STAGE THAN IN THE HEARING STAGE

In holding that plaintiff Brown failed to exhaust administrative remedies, this Court relied upon the "failure to cooperate" language in *Rann v. Chao*, 346 F.3d 192, 197 (D.C. Cir. 2003), but that case is inapplicable to a case where the agency's investigation has been completed.

There are different stages to a federal employee's EEO complaint. He must first initiate contact with an EEO counselor. When the EEO counselor completes her work, the complainant

must then file a timely "formal" complaint if he wishes to pursue the matter. After the formal complaint, the agency has 180 days to investigate and complete the Report of Investigation. These reports usually include the relevant documents and sworn statements from the relevant witnesses. 29 C.F.R. § 1614.108.

An agency cannot determine the merits of a complaint if the complainant himself refuses to provide requested information, especially an affidavit setting forth the basis of his complaint. The plaintiff in *Rann* failed to respond to repeated requests for basic information that would permit the agency to conduct its investigation. In this context, Rann's refusal to provide even the most basic information is tantamount to an abandonment of the claim or a failure to prosecute. Such conduct inhibits the agency from evaluating the claim or remedying the problem, which are the basic principles underlying the requirement of exhaustion. *Loe v. Heckler*, 768 F.2d 409, 420 (DC Cir. 1985). All of the conduct at issue in *Rann*, in sum, involved the proceedings before the Agency prior to the commencement of any adjudicative, administrative hearing.

In contrast, once an AJ is appointed, the process becomes an adversarial one, much like a case in court. And, like a case in court, the tribunal retains power to punish violations of its orders or deadlines. But conduct at the hearing stage does not deprive the agency from the ability to evaluate and remedy discrimination; the agency had the opportunity to gather all the information that it believed necessary at the investigative stage. For that reason, shortcomings in the hearing stage—even egregious ones—do not impact the basic requirement of exhaustion.

In this case, and unlike the challenge to the plaintiff's actions in *Rann*, *amicus* does not understand the defendant here to have challenged in any manner the plaintiff's conduct during the investigative proceedings before the Agency. That is, Plaintiff Brown apparently invoked the informal discrimination complaint process, later formalized his Agency complaint, cooperated

with the Agency investigation and submitted an affidavit in support of his complaint, and otherwise allowed the Agency investigation to proceed to a Report of Investigation. In short, unlike the plaintiff in *Rann*, there is no issue as to Plaintiff Brown's conduct at the investigative stage. After he later chose to file his complaint before an administrative judge, Plaintiff Brown then remained free to allow that process to go to decision, to withdraw his complaint, or to allow 180 days to elapse and still be accorded a trial *de novo*.

To evaluate the legal principle at stake, it is worth considering its application in other situations. Undersigned counsel are aware of cases where complainants voluntarily withdrew their request for a hearing in the following circumstances: shortly after filing the request for a hearing (after finding counsel and deciding to file in court); after it became clear that complainant would need to engage in substantial discovery at considerable cost to oppose an agency's summary judgment motion; after the AJ dismissed essential parts of the case; after the AJ ordered the complainant to submit to an intrusive (and possibly unwarranted) psychiatric examination; and after the hearing when no decision was forthcoming. In some respects, all of these situations short-circuit the hearing process, yet they are permitted by the statute and regulations, and do not, as a matter of law, constitute a failure to exhaust so long as the statutory requirements are met. 42 U.S.C. § 2000e-16(c); 29 C.F.R. 1614.408.

Accordingly, the logic of this Court's prior ruling may deprive plaintiff's who have fully complied with the rules of their legal right to trial *de novo*. *See Chandler v. Roudebush*, 425 U.S. 840 (1976).

CONCLUSION

For the reasons stated herein, *amicus* MWELA respectfully requests that this Court alter or amend the language in its summary judgment opinion that may be interpreted as imposing upon a plaintiff the legal obligation to pursue an administrative hearing to final adjudication as a pre-requisite to trial *de novo*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was served on August 29, 2005, via first class mail, postage pre-paid, on:

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