UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AARP, Plaintiff, v. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Defendant.	Case No. 1:16-cv-02113 (JDB) Hon. John D. Bates

DEFENDANT'S UNOPPOSED MOTION FOR PARTIAL RECONSIDERATION OF DECEMBER 20, 2017 ORDER

Under the Administrative Procedure Act ("APA"), a district court is empowered to "hold unlawful and set aside agency action, findings, and conclusions" that do not comport with law. *See* 5 U.S.C. § 706(2). This Court concluded in August of last year that the Equal Employment Opportunity Commission ("EEOC") regulations challenged in this case do not comport with law, *see* ECF No. 47, and on December 20, 2017, it ordered them vacated as of January 1, 2019, *see generally* ECF Nos. 55, 56. The EEOC respectfully disagrees with each of these actions, but they were within the power granted to the Court by the APA.

In addition to granting this relief, the Court's December 20, 2017 opinion indicates that an "agency process that will not generate applicable rules until 2021 is unacceptable," ECF No. 55 at 9, and the accompanying order requires that "if EEOC proceeds with any notice of proposed rulemaking consistent with the opinions issued on August 22, 2017 and on this date, it shall issue such notice by not later than August 31, 2018." ECF No. 56 at 2. The Court's order further requires the EEOC to file a status report by "March 30, 2018 informing the Court of EEOC's schedule for its review of the rules, including any further administrative proceedings." *Id.*

The EEOC respectfully seeks reconsideration of these aspects of the Court's order pursuant to Rule 54(b) and/or Rule 59(e).[1] As explained below, there is no basis for the Court to retain jurisdiction over this matter or to require the agency to conduct a new rulemaking on any particular schedule. The EEOC therefore respectfully requests that the Court amend its order of December 20, 2017 to (1) clarify that it is not retaining jurisdiction over this matter; (2) remove any requirement that the EEOC file status reports or engage in any rulemaking on any schedule; and (3) close this case.

On January 12, 2017, counsel for Plaintiff informed counsel for Defendant that Plaintiff will not oppose this motion.

BACKGROUND

This case concerns regulations that the EEOC issued in 2016 under the Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA") to provide that certain incentives are permissible for participation in employee wellness programs. *See* EEOC, Regulations Under the Americans with Disabilities Act, 81 Fed. Reg. 31,126 (May 17, 2016); EEOC, Genetic Information Nondiscrimination Act, 81 Fed. Reg. 31,143 (May 17, 2016). In August 2017, the Court granted summary judgment to Plaintiff, finding that the EEOC had failed to articulate a sufficient explanation for either rule. The Court therefore remanded the rules to the EEOC for further consideration, but it declined to vacate the rules pending remand. *See generally* ECF Nos. 45, 46. The EEOC subsequently filed a status report indicating that its present

[1] Motions for reconsideration of interlocutory orders are governed by Rule 54(b); motions for reconsideration of final judgments are governed by Rule 59(e). *See Cobell v. Jewell*, 802 F.3d 12, 19 (D.C. Cir. 2015). While the Court has questioned whether any of its orders in this case constitute a final judgment, *see* ECF No. 55 at 3 n.1, "the Court need not determine which Federal Rule governs here" because relief is appropriate under either standard of review. *See id.*

intention was to issue a notice of proposed rulemaking by August 2018 and a final rule by October 2019, with any final rule likely not applicable until the beginning of 2021. *See* ECF No. 50.

Plaintiff thereafter filed a motion asking the Court to vacate the challenged regulations pending remand. *See* ECF No. 48. In a reply memorandum filed in support of that motion, Plaintiff agreed that the EEOC's "proposed schedule reflects the complexity of the task" before it. *See* ECF No. 52 at 1-2; *accord id.* at 2 (agreeing that "the agency surely needs time to complete a new rulemaking" and referring to the "infeasibility of a prompt revision of the rules"). Plaintiff therefore did not ask the Court to order the EEOC to issue a new rule on any particular schedule; instead, it asked the Court to vacate the challenged regulations while the EEOC further considered the issue.

On December 20, 2017, the Court entered an opinion and order granting Plaintiff's motion in substantial part, ordering the challenged rules vacated as of January 1, 2019. *See* ECF Nos. 55, 56. The Court's order provides that if the EEOC intends to promulgate new rules in response to the Court's order of August 22, 2017, it must issue a notice of proposed rulemaking by August 31, 2018. *See* ECF No. 56 at 2. It also requires the EEOC to file a status report by "March 30, 2018 informing the Court of EEOC's schedule for its review of the rules, including any further administrative proceedings." *Id.*

STANDARD OF REVIEW

A motion for reconsideration under Rule 59(e) may be granted if "the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). A motion for reconsideration under Rule 54(b) may be granted "as justice requires," *Singh v. George Washington Univ.*, 383 F. Supp. 2d 99, 101 (D.D.C. 2005), including where "the court patently misunderstood the parties, made a decision beyond the adversarial issues

presented, [or] made an error in failing to consider controlling decisions or data." *In Def. of Animals v. Nat'l Inst. of Health*, 543 F. Supp. 2d 70, 75 (D.D.C. 2008) (citation omitted).

ARGUMENT

The Court Should Amend Its Order Of December 20, 2017 Because The Agency Is Not Required To Issue Any Regulations Permitting Incentive-Based Workplace Wellness Programs, Let Alone To Do So On Any Particular Schedule.

It is well established that in all but the most unusual cases, "the function of the reviewing court ends when an error of law is laid bare." *Fed. Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952); *accord, e.g., PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards."). While there are limited exceptions that permit a district court to retain jurisdiction pending remand to an agency (such as where an agency is unreasonably delaying action that it is required by law to take), such circumstances do not exist here. The Court should therefore not require the EEOC to issue a notice of proposed rulemaking by a particular date or otherwise limit its future policy discretion. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 525 (1978).

A. Courts Retain Jurisdiction Pending Remand Only In Extraordinary Cases, Where Necessary To Prevent An Agency From Unreasonably Delaying Action That It Is Required To Take.

This Court has previously explained that while a district court has the authority to "retain jurisdiction over a case pending completion of a remand and to order the filing of progress reports," such action "is typically reserved for cases alleging [1] unreasonable delay of agency action or [2] failure to comply with a statutory deadline, or [3] for cases involving a history of agency noncompliance with court orders or resistance to fulfillment of legal duties." *Baystate Med. Ctr. v. Leavitt*, 587 F. Supp. 2d 37, 41 (D.D.C. 2008) (Bates, J.). Absent such circumstances, the Court

explained, "[t]he norm is to vacate agency action that is held to be arbitrary and capricious and remand for further proceedings consistent with the judicial decision, without retaining oversight over the remand proceedings." *Id.* Any other approach, the Court explained, "comes perilously close to involving the Court in reviewing non-final agency actions." *Id.* at 42.

In assessing whether an agency has unreasonably delayed administrative action, the Supreme Court has held that "a delay cannot be unreasonable with respect to action that is not required," *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 n.1 (2004). This principle has been repeatedly applied by courts in this District, including this Court. *See, e.g.*, *Ctr. for Biological Diversity v. U.S. E.P.A.*, 794 F. Supp. 2d 151, 156 (D.D.C. 2011) ("[A]n unreasonable-delay claim requires that the agency has a duty to act in the first place."); *United Mine Workers of Am., Int'l Union v. Dye*, No. 06-1053, 2006 WL 2460717, at *9 (D.D.C. Aug. 23, 2006) (Bates, J.) ("[E]ven in the context of an unreasonable delay claim, a plaintiff still must establish a clear duty to act under the relevant statute.").

B. The EEOC Is Not Obligated To Issue Any Regulations Permitting Incentive-Based Workplace Wellness Programs, Let Alone To Do So On Any Particular Schedule.

As described above, it could be appropriate for the Court to retain jurisdiction and require the completion of rulemaking by a particular date only if the agency had a legal obligation to conduct further rulemaking in the first place.[2] But the agency does not. Instead, whether to issue regulations providing that certain levels of incentives for participation in wellness programs comport with the ADA and GINA is left to the EEOC's policy judgment. It would also be

[2] Retention of jurisdiction might also be appropriate if the EEOC had "a history of agency noncompliance with court orders or resistance to fulfillment of legal duties." *Baystate*, 587 F. Supp. 2d at 41. The Court did not find such circumstances here, and there would be no basis for such a finding.

permissible for the EEOC to decide never to issue such regulations, or for the EEOC to study the issue for several years before commencing a new rulemaking.

Under established principles of administrative law, an agency "has considerable discretion in responding to requests to institute proceedings or to promulgate rules, even though it possesses the authority to do so should it see fit." *Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977). As the D.C. Circuit has explained:

> An agency's discretionary decision *not* to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution — *e.g.*, internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework. Further, even if an agency considers a particular problem worthy of regulation, it may determine for reasons lying within its special expertise that the time for action has not yet arrived. The area may be one of such rapid technological development that regulations would be outdated by the time they could become effective, or the scientific state of the art may be such that sufficient data are not yet available on which to premise adequate regulations. The circumstances in the regulated industry may be evolving in a way that could vitiate the need for regulation, or the agency may still be developing the expertise necessary for effective regulation.

Natural Res. Defense Council, Inc. v. SEC, 606 F.2d 1031, 1046 (D.C. Cir. 1979) (citations omitted). The Supreme Court has thus explained that while "[r]efusals to promulgate rules are . . . susceptible to judicial review, . . . such review is 'extremely limited' and 'highly deferential.'" *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat'l Custom Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989))). The D.C. Circuit has similarly explained that "an agency's refusal to initiate a rulemaking is evaluated with a deference so broad as to make the process akin to non-reviewability." *Cellnet Commc'n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992); *accord, e.g., Am. Horse Protection Ass'n, Inc. v. Lyng*, 812 F.2d

1, 5 (D.C. Cir. 1987).[3] This is not a case, like *Baystate*, in which the agency was obligated to calculate a particular figure, or determine a level of benefits, pursuant to a statutory obligation.

It is possible that the EEOC will elect, as a matter of policy judgment, to promulgate new regulations. The agency may also decide against doing so, however, and leave the regulations as they stand following vacatur.[4] Or the agency might take a wait-and-see approach, choosing to study the issue further or await the resolution of potential appellate proceedings. Which of these reasonable courses to take is a decision that Congress left for the EEOC.

CONCLUSION

The EEOC respectfully requests that the Court grant this motion and amend its order of December 20, 2017 to (1) clarify that it is not retaining jurisdiction over this matter; (2) remove any requirement that the EEOC file status reports or engage in any rulemaking on any schedule; and (3) close this case.

[3] To be sure, the EEOC is obligated as a general matter to issue regulations "to carry out" both Title I of the ADA and Title II of GINA. *See* 42 U.S.C. § 12116 (ADA); 42 U.S.C. § 1000ff-10 (GINA). EEOC has complied with these directives by filling dozens of sections of the Code of Federal Regulations with regulations implementing those statutes. *See generally* 29 C.F.R. pt. 1630 (ADA); 29 C.F.R. pt. 1635 (GINA). Those provisions remain in the books, as the Court has vacated only two narrow subsections of the EEOC's regulations: 29 C.F.R. § 1630.14(d)(3) (ADA) and 29 C.F.R. § 1635.8(b)(2)(iii) (GINA), each of which provide that workplace wellness programs will not be rendered involuntary by the offering of specific levels of financial incentives.

[4] It bears emphasis that the regulations will still provide "applicable rules," ECF No. 55 at 9, even after the Court's vacatur order takes effect. Even after 29 C.F.R. § 1630.14(d)(3) is struck from the Code of Federal Regulations, for example, the ADA regulation will still require participation in wellness programs to be voluntary, *see* 29 C.F.R. § 1630.14(d); the regulation will simply no longer provide a specific safe harbor for particular levels of incentives. Similarly, even absent 29 C.F.R. § 1635.8(b)(2)(iii), the GINA regulation will still provide that a "a covered entity may not offer an inducement (financial or in-kind), whether in the form of a reward or penalty, for individuals to provide genetic information, except as described in paragraphs (b)(2) . . . (iv)." *Id.* § 1635.8(b)(2)(ii).

Dated: January 16, 2018

Respectfully submitted,

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