

**IN THE UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT**

VERMONT YANKEE NUCLEAR POWER)
CORPORATION and DR. GEORGE)
IDELKOPE,)

Plaintiffs,)

v.)

Docket No. 1:00cv254

UNITED STATES EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION and)
WILLIAM SORRELL, ATTORNEY GENERAL)
OF THE STATE OF VERMONT,)

Defendants.)

**DEFENDANT U.S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION'S MOTION TO DISMISS**

Pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, defendant U.S. Equal Employment Opportunity Commission (EEOC) respectfully moves this court to dismiss this declaratory judgment action on the grounds that the court lacks subject matter jurisdiction and that plaintiffs have failed to state a claim upon which relief can be granted.

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MEMORANDUM OF LAW

I. STATEMENT OF FACTS

A former employee of the Vermont Yankee Nuclear Power Corp. filed a charge of employment discrimination dated October 28, 1999, with the Vermont Attorney General's Office, Civil Rights Division, and the Equal Employment Opportunity Commission alleging discrimination based on disability under the Americans with Disabilities Act (ADA) and the Vermont Fair Employment Practices Act (FEPA). Complaint ¶ 18. In accordance with the deferral procedures contained in section 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) and 29 C.F.R. § 1601.13(b), EEOC suspended further federal proceedings while the Vermont Attorney General's Office investigated for violations of the state fair employment practices law. The Vermont Attorney General's Office initiated an investigation of the charge, sending an Information and Document Request to Vermont Yankee. The Vermont Attorney General's Office subsequently issued Civil Investigative Demands for the same information pursuant to its authority under the Vermont FEPA. Complaint ¶¶ 22 and 24. Vermont Yankee has refused to comply with the Civil Investigative Demands. On July 18, 2000, Vermont Yankee filed this action against EEOC and the Vermont Attorney General seeking a declaratory judgment that there is no prima facie case of disability discrimination in the charge, a preliminary injunction prohibiting defendants from enforcing the Civil Investigative Demands or taking any other action against it, and requesting that the court restrain the defendants from any enforcement of the charge of employment discrimination filed against it.

Vermont Yankee pleads that the Nuclear Regulatory Commission's (NRC) fitness for duty regulations, contained in 10 C.F.R. Part 26, "pre-empt any claim of disability discrimination." Complaint ¶ 27. In addition, plaintiffs assert that the confidentiality provisions contained in the Nuclear Regulatory Commission's regulations prohibit it from releasing the information requested by the Vermont Attorney General's Office. Complaint ¶ 29.

Vermont Yankee's complaint against EEOC fails for a number of reasons. Vermont Yankee has not identified, nor can it identify, the section of 10 C.F.R. Part 26 that states that the regulations of the NRC pre-empt federal and state anti-discrimination statutes.¹ Moreover, the EEOC has not taken any action with respect to the charge of discrimination at issue. The charge was filed with the Vermont Attorney General's Office and deemed dual filed with EEOC. EEOC has not exercised jurisdiction over the charge, and will not do so in the normal course until the Attorney General's Office has completed its investigation. Hence, plaintiffs' claims with respect to EEOC are not ripe for review. In addition, none of the statutes cited by plaintiffs provide this court with subject matter jurisdiction. Finally, plaintiffs fail to state a claim against EEOC under the Administrative Procedure Act or the Americans with Disabilities Act. Plaintiffs' complaint against EEOC must be dismissed for lack of subject matter jurisdiction and failure to state a claim on which relief may be granted in accordance with Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

¹ Because the arguments presented in this motion do not require a discussion of the scope of the Nuclear Regulatory Commission's regulations, the government does not address them here.

II.

THIS COURT LACKS SUBJECT-MATTER JURISDICTION OVER PLAINTIFFS' COMPLAINT

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 draws its content both from the constitutional limitation that federal courts have jurisdiction only over actual “cases” or “controversies,” and from the judiciary’s self-imposed prudential restraints upon the exercise of its jurisdiction. Duke Power Co. v. Carolina Environmental Study Group, 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 Laboratories, supra, 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 Laboratories, 387 U.S. at 149; Toilet Goods Association, 387 U.S. at 162-63. Failure to meet any one of the criteria for fitness renders a cause of action unripe. Toilet Goods Association, 387 U.S. at 162-63.

To be deemed fit for judicial review the action of an administrative agency must be final and not dependent on future contingencies, no further agency actions may be contemplated and,

more than purely legal questions must be presented. Id. at 149; Toilet Goods Association v. Gardner, 387 U.S. 158, 162-163 (1967). Failure to meet each of these criteria renders a matter unripe for judicial review. Id. Applying these standards to the present case, it is clear that this controversy is not ripe for judicial review.

Plaintiffs are asking the court to declare that no discrimination occurred when Vermont Yankee fired its former employee, and simultaneously, to enjoin the defendants from undertaking any investigation of the former employee's charge. Under the first prong of the ripeness test, these issues are not fit for review. EEOC has not done so much as send a letter to plaintiffs about the charge of discrimination. Thus, there is no action of EEOC to review; any EEOC action concerning the charge of discrimination is prospective and will be based on future contingencies. Even in cases where EEOC has investigated a charge and issued a determination as to whether there is reasonable cause to believe that discrimination occurred, courts have found such actions to lack the element of finality necessary to make a case ripe for review. See Federal Trade Commission v. Standard Oil of California, 449 U.S. 232 (1980).

The Americans with Disabilities Act incorporates the "powers, remedies and procedures" of Title VII of the Civil Rights Act of 1964 for charges brought alleging discrimination based on disability. 42 U.S.C. § 12117(a). Title VII provides that EEOC's administrative proceedings begin with the filing of a charge of discrimination by an aggrieved individual with EEOC. 42 U.S.C. §§ 2000e-5(b). Title VII also provides that if a charging party files a charge under state law with a state fair employment practice agency (FEP agency), there is a longer period of time in which to file the charge with EEOC. 42 U.S.C. § 2000e-5(e)(1). If the state FEP agency has authority to grant or seek relief, EEOC must defer jurisdiction over the charge for at least 60

days while the FEP agency acts. 42 U.S.C. § 2000e-5(c). Title VII also requires EEOC, in issuing its determination under Title VII, to accord substantial weight to the findings of the FEPA agency. 42 U.S.C. § 2000e-5(b). EEOC certifies certain FEP agencies based upon the past satisfactory performance of those agencies. Certification means that EEOC accepts the findings and resolutions of designated FEP agencies with respect to most charges processed under contracts with these agencies without individual case-by-case substantial weight review, except that the parties have the right to request an individual substantial weight review by EEOC if they are dissatisfied with the FEP agency finding. 29 C.F.R. §§ 1601.75 and .76.

The Vermont Attorney General's Office, Civil Rights Division, is a certified FEP agency. 29 C.F.R. § 1601.80. In accordance with work-sharing agreements entered into by EEOC and FEP agencies, some charges that are dual filed with a state or local agency and EEOC are investigated by EEOC and others are investigated by the FEP agency, as in this case. The charge against Vermont Yankee was filed with the Vermont Attorney General's Office and is being investigated by that office. The Attorney General will issue findings as to whether there has been a violation of the Vermont FEPA. The Vermont Attorney General's Office's actions with respect to charges filed with it are limited to the authority granted it by the Vermont FEPA. The Vermont Attorney General's Office does not issue recommendations to EEOC. However, EEOC ordinarily does not investigate charges handled by designated FEP agencies. Since the Vermont Attorney General's Office is a certified FEP agency, EEOC will automatically give substantial weight to its findings unless one of the parties requests EEOC review. EEOC will then issue a corresponding determination and notice of right to sue in federal district court.

If EEOC finds that there is not reasonable cause to believe that the charge is true, it will dismiss the charge. 42 U.S.C. § 2000e-5(b). If 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, EEOC may bring suit in federal district court to enforce the ADA or Title VII. 42 U.S.C. § 4000e-5(f)(1). Any such court action filed by EEOC is a de novo proceeding in which EEOC’s findings are not binding upon the court. McDonnell Douglas Corp. v. Green, 415 U.S. 36, 44 (1974).

Because the EEOC has no adjudicative power over plaintiffs under the Americans with Disabilities Act or Title VII, any actions that could be taken by the Commission in the future in connection with the charge against Vermont Yankee, 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 Commission, 592 F.2d 765, 768 (4th Cir. 1979). See also, 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). Moreover, “[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 Laboratories, 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 Association, 387 U.S. at 164. Here too, plaintiffs’ claim fails.

EEOC has taken no action with respect to the plaintiffs. Nevertheless, even the mere possibility that EEOC could bring an enforcement action against Vermont Yankee could have no present effect on plaintiffs. EEOC has not and cannot order Vermont Yankee to take remedial action. Only a federal district court has authority to make such an order. Threat of possible legal action does not constitute sufficient hardship to meet the second prong of the ripeness test. See Federal Trade Commission v. Standard Oil of California, 449 U.S. 232, 244(1980) (expense of litigation is not irreparable harm).

Plaintiffs’ complaint is premature and their cause of action unripe. EEOC has not taken any action with respect to plaintiffs, nor does EEOC have the authority to take administrative action that would have determinate consequences over plaintiffs. Plaintiffs bear no hardship if the court refuses judicial review at this time. Therefore, the court lacks subject matter jurisdiction over plaintiffs’ complaint and the case should be dismissed.

B. None of the Statutes Cited by Plaintiffs Provide this Court with Subject Matter Jurisdiction

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). Plaintiffs allege jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2201; 28 U.S.C. §§ 1331, 1346 and 1367; the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq.; the Americans with Disabilities Act, 42 U.S.C. § 12111, et seq.; and the Administrative Procedure Act, 5 U.S.C. § 701 et seq. None of these statutes gives this court jurisdiction over this action.

The Declaratory Judgment Act, 28 U.S.C. § 2201, 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 (1950); Nashoba Communications Ltd. Partnership v. Town of Danvers, 893 F.2d 435, 437 (1st Cir. 1990).

Maintaining an action under the Declaratory Judgment Act in this matter depends on whether a federal question exists that is sufficient to support the exercise of federal court subject matter jurisdiction. 12 Moore's Federal Practice 57.14 (3d ed. 1997). There is authority for the view that “[i]n declaratory judgment cases, the well-pleaded complaint rule dictates that jurisdiction is determined by whether federal question jurisdiction would exist over the presumed suit by the declaratory judgment defendant.” GNB Battery Techs. v. Gould, Inc., 65 F.3d 615, 619 (7th Cir. 1995); see also, Franchise Tax Board of California v. Construction Laborers Vacation Trust, 463 U.S. 1, 10, n. 9 (1983). That principle, however, does not trump the jurisdictional requirement that there be an “actual,” *i.e.*, ripe, controversy between the parties. Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians, 94 F.3d 747, 752 (2d Cir. 1996)(no federal question jurisdiction over a complaint seeking declaratory relief absent a “live controversy”); People of State of Illinois v. Archer Daniels Midland Co., 704 F.2d 935, 940-43

(7th Cir. 1983)(no jurisdiction over declaratory judgment action where there was “only a potential controversy that will become actual if and when [the government] prosecutes”). As discussed, there was no “ripe” controversy at the time plaintiffs filed this lawsuit or at any time since.

Section 1331 gives federal district courts original jurisdiction over actions "arising under the Constitution, laws or treaties of the United States." 28 U.S.C. § 1331. The federal question jurisdiction statute confers jurisdiction only when a question arises under federal law. Ellis v. Cassidy, 625 F.2d 227, 229 (9th Cir. 1980). As a result, in order to acquire federal jurisdiction under 28 U.S.C. § 1331, plaintiffs "must assert a colorable right to a remedy under a particular federal statute." Carlson v. Coca Cola Co., 483 F.2d 279, 280 n.1 (9th Cir. 1973). An action does not “arise under” federal law where a plaintiff fails to state a claim under the Constitution or a federal statute. See General Committee v. Missouri-Kansas-Texas Railway Co., 320 U.S. 323, 337 (1943); Carlson, 483 F.2d at 280, n.1. As demonstrated below, the plaintiffs fail to show an entitlement to any federal remedy and thus the court lacks subject matter over plaintiffs’ statutory claims under 28 U.S.C. § 1331.

Likewise, 28 U.S.C. §§ 1346 and 1367 grant federal courts original jurisdiction over certain claims against the U.S. and supplemental jurisdiction over nonfederal claims that are sufficiently related to federal claims. The subject-matter jurisdiction created by each of these statutes is derivative. That is, the exercise of the jurisdiction created by each is expressly predicated on either the Constitution or some Act of Congress. As explained below, none of the statutes cited by plaintiffs confers subject matter jurisdiction on this Court to hear plaintiffs’ Complaint.

Plaintiffs cannot rely on the Administrative Procedure Act (APA) to provide this court with jurisdiction because the Supreme Court has held that the APA is not a jurisdictional statute and does not contain any “implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.” Califano v. Sanders, 430 U.S. 99, 107 (1977). While a plaintiff may rely on 28 U.S.C. § 1331 together with the APA to provide subject matter jurisdiction over claims challenging final agency action, such jurisdiction is premised on the plaintiff’s ability to state a claim under the APA. “If there is no ‘final agency action,’ as required by the [APA], a court lacks subject matter jurisdiction.” Veldhoen v. U.S. Coast Guard, 35 F.3d 222, 225 (5th Cir. 1994); Federal Power Commission v. Metropolitan Edison Co., 304 U.S. 375, 383-85 (1938). As is demonstrated below, plaintiffs fail to state a claim against EEOC under the APA, and, therefore, this court lacks subject matter jurisdiction over the complaint.

Plaintiffs also cite the Americans with Disabilities Act as conferring jurisdiction in this court over their claims against defendants. As noted earlier, the ADA is enforced through the remedies and procedures of Title VII. 42 U.S.C. § 12117(a) (incorporating sections 705, 706, 707, 709 and 710 of Title VII, 42 U.S.C. §§ 2000e-4, -5, -6, -8 and -9). 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 the court 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 EEOC by an employer.

Finally, plaintiffs rely on the Vermont Fair Employment Practices Act, 21 V.S.A. § 495, et seq. and the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq. It is undisputed that an agency of the federal government is not susceptible to suit under state law. Such actions are barred by the doctrine of sovereign immunity. In addition, plaintiffs have not identified any section of the Atomic Energy Act that creates a cause of action against the EEOC, nor can they identify such a section.

In sum, none of the statutes relied on by plaintiffs as granting this court jurisdiction over their anticipatory lawsuit confer jurisdiction. Plaintiffs claims as to EEOC must, therefore, be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure.

III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST THE EEOC

A. Plaintiffs Fail to State a Claim Under the Administrative Procedure Act

Plaintiffs fail to state a claim against EEOC under the Administrative Procedure Act (APA). The APA provides judicial review for “[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court....” 5 U.S.C. § 704. First, there is no statute that provides directly for judicial review of EEOC actions. Second, EEOC has not yet taken any action, let alone final agency action, concerning the charge of discrimination at issue in this case. As was noted earlier, the charge was filed with the Vermont Attorney General’s Office and is being investigated by that office. At the conclusion of the investigation, the Vermont Attorney General’s Office will issue findings as to whether there has

been a violation of the Vermont FEPA. EEOC will automatically give substantial weight to those findings unless one of the parties requests EEOC review. EEOC will then issue a corresponding determination and notice of right to sue in federal district court.

Since EEOC has not taken any action against Vermont Yankee, it is undisputed that judicial review under the APA is not available in this case. Even if EEOC were investigating the charge of discrimination, instead of the Vermont Attorney General's Office, actions taken by EEOC during its administrative process under the Americans with Disabilities Act and Title VII do not rise to the level of reviewable final action. See FTC v. Standard Oil Company of California, 449 U.S. 232 (1980)(FTC complaint issued against several oil companies averring that agency had reasonable cause to believe they had violated the Federal Trade Commission Act held not final agency action subject to judicial review under the APA); Veldhoen v. U.S. Coast Guard, 35 F.3d 222 (5th Cir. 1994)(obligation to defend oneself before an agency is not type of obligation that creates final agency action); Georator v. Equal Employment Opportunity Commission, 592 F.2d 765 (4th Cir. 1979)(EEOC reasonable cause determination is not final agency action; it does not fix obligation or imposes liability, but is merely preparatory to further proceedings).

Finally, plaintiffs have an adequate remedy at law. In the event that Vermont Yankee is sued by the charging party or the Commission, at some future time, it will have available all of the defenses provided by the Americans with Disabilities Act to any employer defending a de novo employment discrimination cause of action.. As the case law rejecting attempts to litigate the validity of EEOC enforcement actions cited above makes clear, the only appropriate time and

place to defend enforcement actions brought by EEOC or a charging party is in those actions themselves.

B. Plaintiffs Fail to State a Claim under the Americans with Disabilities Act

Plaintiffs cannot state a claim against the EEOC under the ADA or Title VII. To state a claim plaintiffs must show that Congress granted a right of action against EEOC "either expressly or by clear implication." See Warth v. Seldin, 422 U.S. 490, 501 (1975). Plaintiffs clearly cannot do so. The courts of appeals, including the Second Circuit, 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). 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.

IV. PLAINTIFFS’ CLAIMS AGAINST EEOC ARE BARRED BY THE DOCTRINE OF SOVEREIGN IMMUNITY

“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). [A] waiver of the traditional sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” United States v. Testan, 424 U.S. 392, 399 (1976)(quoting United States v. King, 395 U.S. 1, 4 (1969)). None of the statutes relied upon in plaintiffs’ complaint provides a waiver of sovereign immunity for the claims against the EEOC, an agency of the federal government. While the Administrative Procedure Act provides a limited waiver of sovereign immunity for non-monetary claims brought under that statute, the waiver is limited to claims cognizable under the APA. Randall v. United States, 95 F. 3d 339, 346 (4th Cir. 1996). For example, just as the Federal Torts Claims Act (FTCA) contains a waiver of sovereign immunity for claims brought under the FTCA, the APA contains a waiver for non-monetary claims brought under the APA. As demonstrated above, plaintiffs completely fail to state a claim against EEOC under the APA and cannot purport to state a claim, since EEOC has taken no action with respect to the charge of discrimination at issue in the complaint.

Plaintiffs have not cited, and we are unaware of, any other statute providing a waiver of sovereign immunity for this type of claim against the federal government.

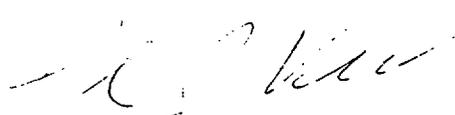
For each of these reasons, we respectfully request that the Commission's Motion To Dismiss this action be granted.

Dated at Burlington, in the District of Vermont, this 22^d day of September, 2000.

Respectfully submitted,

UNITED STATES OF AMERICA

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UNITED STATES DISTRICT COURT
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Docket No. 1:00cv254

CERTIFICATE OF SERVICE

I, Jeanine M.W. Blais, do hereby certify that I have served the foregoing DEFENDANT U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S MOTION TO DISMISS on the parties by mailing a copy thereof to: Timothy E. Copeland, Esq., downs, Rachlin & Martin, PLLC, PO Box 9, Brattleboro, VT 05302, and to Katherine A. Hayes, Assistant Attorney General, Office of the Attorney General, 109 State Street, Montpelier, VT 05609, this 28 day of September, 2000.



JEANINE M.W. BLAIS
Secretary to the USA & Civil Chief