

**IN THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
URBANA DIVISION**

**U.S. EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION,**

**Plaintiff,**

**v.**

**RENT-A-CENTER EAST, INC.,**

**Defendant.**

**Case No. 16-cv-2222**

**Magistrate Judge Long**

**PLAINTIFF'S TRIAL BRIEF REGARDING  
WHETHER AN AGGRIEVED PERSON IS A PARTY OPPONENT  
AND THE ADMISSIBILITY OF INVESTIGATOR INTERVIEW NOTES**

Pursuant to the Court's January 25, 2018, Order, Plaintiff U.S. Equal Employment Opportunity Commission ("EEOC" or the "Commission") hereby submits its trial brief regarding 1) whether Megan Kerr, the aggrieved person whose charge serves as a condition precedent for this lawsuit, is a party opponent under Rule 801(d)(2); and 2) the admissibility of the EEOC Investigator's interview notes.

**I. Kerr is Not a Party.**

Under Federal Rule of Evidence 801(d)(2), statements of an opposing party, offered against that party, are not hearsay. Fed. R. Evid. 801(d)(2). For the following reasons, Kerr is not a party opponent in this lawsuit: 1) the plain language of Rule 801(d)(2); 2) Kerr is not a "party" or proxies for EEOC; 3) even if Kerr were considered "real party in interest," her general interest in the outcome of the case does not qualify her as a party or party-equivalent; and 4) in other contexts, courts have held that legal principles and Federal Rules relevant to "parties" do not apply to aggrieved individuals in EEOC enforcement actions.

A. Rule 801(d)(2) Is Limited By Its Plain Language To Parties

First, the text of Rule 801(d)(2) clearly limits its application to an “opposing party.” “[T]he Federal Rules of Evidence are to be treated like any other statute; that is, they are to be read with regard to their ‘plain meaning.’” *Pavelic & LeFlore v. Marvel Entm’t Grp.*, 493 U.S. 120, 123 (1989) (“We give the Federal Rules of Civil Procedure their plain meaning.”). As Kerr is not a party to this lawsuit, she cannot be an opposing party.

B. Aggrieved Individuals Are Not Parties

Aggrieved individuals are not parties. *EEOC v. Bd. of Regents of Univ. of Wis. Sys.*, 288 F.3d 296, 305 (7th Cir. 2002) (“the charging parties are not actual parties to this lawsuit”). Moreover, the Supreme Court and the Seventh Circuit have repeatedly emphasized that the EEOC does not merely serve as a proxy for or representative of an aggrieved individual. The Supreme Court has observed that “[t]hese private action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC’s enforcement suits should not be considered representative actions subject to Rule 23.” *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 326 (1980); *see also Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977) (“[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties”).

The EEOC serves different and broader interests than private plaintiffs suing under Title VII: “When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.” *Gen Tel. Co.*, 446 U.S. at 326. “[E]ven after the addition of compensatory and punitive damages to the EEOC’s arsenal of remedies[,] the EEOC does not sue as the representative of the discriminated-against employees who may benefit from the relief it obtains...” *In re Bemis Co., Inc.*, 279 F.3d 419 (7th

Cir. 2002) (citing *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002)). Simply put, “the EEOC does not stand in the employee’s shoes” when it pursues relief on his or her behalf. *Waffle House*, 534 U.S. at 297.

The EEOC pursues monetary relief for aggrieved persons as an incident of its law enforcement function, not because these individuals have asserted claims in their own right or because the EEOC is a mere proxy for class members. The Seventh Circuit explained the relationship between the EEOC and the victims of discrimination as follows: “The EEOC’s primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of defendant’s violation rather than pocketing the money itself and putting them to the bother of suing separately.” *In re Bemis*, 279 F.3d at 421. In other words, the EEOC’s overriding mission is to enforce Title VII and other anti-discrimination laws; pursuing victim specific relief is simply the means by which EEOC carries out its law enforcement function and furthers the public’s interest in deterring employment discrimination. This recognition of the EEOC’s role in enforcing the law shows that aggrieved individuals are not the functional equivalent of a party opponent in an enforcement action such as this one.

C. That Aggrieved Persons May Be “Real Parties In Interest” Is Immaterial

There is no general rule that the prospect of financial gain from a pending lawsuit renders one a party to that suit. *See, e.g., M’Baye v. New Jersey Sports Produc., Inc.*, 246 F.R.D. 205 (S.D.N.Y. 2007) (holding that non-party who paid plaintiff’s legal fees and had agreement to share any damages award could not be compelled to travel more than 100 miles from where he resides for purposes of a deposition). The courts in *Placer ARC*<sup>1</sup>, and *Triangle Catering*<sup>2</sup> rested

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<sup>1</sup> *EEOC v. Placer ARC*, No. 2:13-CV-0577-KJM-EFB, 2016 WL 74032 (E.D. Cal. Jan. 7, 2016).

<sup>2</sup> *EEOC v. Triangle Catering, LLC*, No. 5:15-CV-00016-FL, 2017 WL 818261 (E.D.N.C. Mar. 1, 2017).

their holdings, in part, on the claimants being “real parties in interest.” As explained below, even if aggrieved persons are technically real parties in interest due to their statutory option to intervene, that is not a sound reason to deem them parties to an action they never joined. In any case, it does not appear that the three district courts were using “real parties in interest” pursuant to Rule 17. Instead, they seem to be referring to the claimants’ general interest in each lawsuit, which is also an insufficient ground for transforming claimants into parties.

Rule 17 requires that “[a]n action must be prosecuted in the name of the real party in interest,” and explains that this person is not necessarily “the person for whose benefit the action is brought.” Fed. R. Civ. P. 17(a)(1). However, “[w]hen a federal statute so provides, an action for another’s use or benefit must be brought in the name of the United States,” and the government is the real party in interest. Fed. R. Civ. P. 17(a)(2).

When the courts in *Placer ARC*, and *Triangle Catering* used the term “real parties in interest,” it was apparent they were not using it in this technical sense. The courts did not suggest that the mere fact an individual is a potential intervenor is grounds to treat that person’s statements as party admissions. Rather, they focused just on the claimants’ significant interest in the litigation, suggesting defendants are entitled to rely on statements, perhaps because of some form of estoppel or privity between the EEOC and its claimants. However, a presumed—or even a likely—alignment of interests between the EEOC and the claimants is not enough to transform a nonparty’s statements into party admissions.<sup>3</sup>

For example, a crime victim’s statements would not be admitted under Rule 801(d)(2), because it is the government that is the opposing party, not the crime victim. *See United States*

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<sup>3</sup> It is this alignment of interest—the “common interest rule”—which provides the EEOC attorneys and aggrieved persons privileged communications analogous to the attorney-client

*v. Adams*, 216 F.3d 1073, 2000 WL 777970 at \*3 (2d Cir. 2000) (Table) (victim-witness letters were not admissible under Rule 801(d)(2) “because they do not represent a formal position that the government ever took”); *see generally United States v. James*, 712 F.3d 79, 102 (2d Cir. 2013) (a prosecutor’s statement may be admitted under Rule 801(d)(2)).

Cases concerning the Fair Labor Standards Act (“FLSA”) also illustrate the point that a significant interest alone is not enough to render an individual a “real party in interest” or to qualify her statements as Rule 801(d)(2) party admissions.<sup>4</sup> Specifically, the Fourth, Fifth, and Ninth Circuits have held that, in FLSA cases, individual employees are not real parties in interest. “[T]he Secretary [of Labor] is the real party...” *Donovan v. Crisostomo*, 689 F.2d 869, 876–77 (9th Cir. 1982) (employees’ statements against interest were properly excluded at trial; “[t]he testimony did not fall within Fed. R. Evid. 801(d)(2) because the admissions were not by parties...”); *see Chao v. Virginia Dep’t of Transp.*, 291 F.3d 276, 280 (4th Cir. 2002) (in an

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privilege. The rationale for the rule, that effective representation requires full disclosure of information among those with similar legal interests, is directly applicable to communications between EEOC attorneys and claimants. *See generally, United States v. Schwimmer*, 892 F.2d 237, 243-44 (2d Cir.), *cert. denied*, 112 S. Ct. 55 (1991).

Where Congress has provided for the enforcement of statutes through government suits based on individual claims, its purposes can be achieved only if aggrieved individuals have the same opportunity to engage in confidential communications with the government attorneys litigating the case as they would with a retained private attorney. *See EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, No. 96-1192, slip op. at 6 (C.D. Ill. Oct. 23, 1997) (“an attorney has the right to freely communicate with her client with reference to proposed and pending litigation, and this includes the EEOC when it brings a Title VII action on behalf of certain known persons who have or may claim that they have been sexually discriminated against by their employer.”).

Relatedly, RAC’s suggestion that receipt of legal advice at a deposition transforms a witness into a party to the litigation is incorrect. Any person may receive legal counsel at a deposition; that right is not plainly limited to the parties to an action.

<sup>4</sup> Under the FLSA, individual employees generally—but not always—lose their right to intervene after the Secretary of Labor files suit. 29 U.S.C. § 216(b); *but see Trbovich v. United Mine Workers of Am.*, 404 U.S. 528 (1972) (allowing employees to intervene in an FLSA case brought by the Secretary where it was for a limited purpose).

FLSA action against a state agency, the Secretary of Labor, not the state employees, was the real party in interest; therefore, the state was not protected by sovereign immunity); *Brennan v. Heard*, 491 F.2d 1, 4–5 (5th Cir. 1974) (holding that the district court erred by refusing to award witness fees to employees in a FLSA action; the Secretary of Labor, not the employees, was the real party in interest).

D. In Other Contexts, Courts Have Declined To Treat Aggrieved Individuals As Party Equivalents

Putting aside the terminology of “real party in interest,” courts have, in other contexts, declined to treat the victims of discrimination in EEOC enforcement actions as either the equivalent of parties or interchangeable with the EEOC. For example, in two cases from district courts in other circuits, the courts found that rules specific to “parties” do not apply to EEOC claimants. For example, in *Promens USA*, the Northern District of Illinois considered whether an EEOC claimant was the equivalent of a party who could be required to travel more than 100 miles for her deposition. *EEOC v. Promens USA, Inc.*, No. 10 Civ. 06232 (EEC), 2011 WL 10072350, at \*1 (N.D. Ill. May 26, 2011) (referencing a prior version of Rule 45). The court held that the claimant was “not a ‘party’ to the litigation; rather, the EEOC is the plaintiff and the party bringing the suit.” *Id.*

Similarly, in *Northwest Airlines, Inc.*, the Western District of Washington held that EEOC claimants were not “plaintiffs” and, therefore, were not subject to Rule 37(d) sanctions for a party’s failure to attend his or her own deposition. *EEOC v. Nw. Airlines, Inc.*, No. 85 Civ. 36, 1987 WL 59590, at \*7 (W.D. Wash. Apr. 9, 1987). Even though EEOC had obtained court orders preventing the defendant from communicating directly with aggrieved individuals, this did not transform them into parties. *Id.* at \*8. “No action or position taken by EEOC, of course,

can make individual claimants parties to the lawsuit where the statutory scheme provides otherwise.” *Id.*

Additionally, this court and others in this circuit have held that the doctrine of judicial estoppel does not bar EEOC actions based on claimants’ conflicting statements because the aggrieved persons “are not parties to the EEOC’s present action.” *EEOC v. Celadon Trucking Servs., Inc.*, No. 12 Civ. 00275 (SEB), 2015 WL 3961180, at \*17 (S.D. Ind. June 30, 2015) (EEOC’s recovery on behalf of claimants was not barred by those claimants’ failure to disclose their employment claims in their bankruptcy proceedings); *see EEOC v. Autozone, Inc.*, No. 07 Civ. 1154, 2009 WL 464574, at \*2–5 (C.D. Ill. Feb. 23, 2009) (EEOC was not judicially estopped from bringing an ADA claim based on statements the claimant made to the Social Security Administration about his inability to work; the issue was a “factual contradiction,” “not a contradiction in legal theory or legal conclusions”).<sup>5</sup> “[A]pplying judicial estoppel to the EEOC is inconsistent with the equitable purposes of the doctrine and improperly constricts the agency’s enforcement authority”; the EEOC “does not merely stand in the shoes of individual claimants.” *Celadon Trucking Servs., Inc.*, 2015 WL 3961180, at \*16–17.<sup>6</sup>

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<sup>5</sup> Courts in other circuits have so held, as well. *See EEOC v. Tobacco Superstores, Inc.*, No. 05 Civ. 00218 (WRW), 2008 WL 2328330, at \*8 (E.D. Ark. June 4, 2008) (same; the class members “are not a party to this action”); *EEOC v. Digital Connections, Inc.*, No. 05 Civ. 0710 (RLE), 2006 WL 2792219, at \*3 (M.D. Tenn. Sept. 26, 2006) (same; the claimant “did not file the action, she is not a party to it, and she did not control the EEOC’s decision to bring the action”); *EEOC v. Apria Healthcare Grp., Inc.*, 222 F.R.D. 608, 613 (E.D. Mo. 2004) (same; the claimant “is not a party to this action”).

<sup>6</sup> In a 2-1 decision, the Fourth Circuit held that EEOC was subject to a rebuttal presumption of judicial estoppel based on an ADA claimant’s contrary assertions to the SSA. *EEOC v. Greater Baltimore Med. Ctr., Inc.*, 477 F. App’x 68, 74 (4th Cir. 2012). I believe the majority based this decision on a misreading of *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), which vacated the Fifth Circuit’s application of judicial estoppel in a case involving a private plaintiff, and simply required the plaintiff, on summary judgment, to provide an explanation of the discrepancy sufficient to create a genuine issue of material fact. The dissent

## II. Investigator Mayfield's Notes

Investigator Mayfield's notes fall in to two categories: 1) notes regarding interviews of Kerr; and 2) notes of other witnesses. The Investigator's notes are potentially double hearsay: the interview notes as transcribed by Investigator Mayfield and the various statement contained therein regarding assertion witnesses made during interviews. The Commission is not objecting to the first level of hearsay—i.e. the presentation of the notes as evidence to the extent their contents are not themselves hearsay (or otherwise inadmissible).<sup>7</sup> Therefore, the admissibility of the two types of notes hinges on both their status as hearsay, as well as compliance with the other rules of evidence.

Regarding the interview notes of Kerr, they are not admissible as statements by an opposing party for the reasons discussed above. Therefore, they must be treated like the interview notes of any other witness and some other basis for admissibility would be required for their admission as evidence.

Regarding the interview notes of other witnesses, these are clearly not statements by an opposing party and so do not fall within Rule 801(d)(2)'s exception. Therefore, the admissibility of these interview notes depends on the context for which they are being offered, and subject to, for example, Rules 608, 613(b).

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in *Greater Baltimore* makes the stronger argument, including by noting the “long line of Supreme Court cases refusing to apply estoppel against the government.” *Greater Baltimore Med. Ctr.*, 477 Fed. App'x at 78 (Gregory, J., dissenting).

<sup>7</sup> Consistent with this, the Commission has waived authenticity regarding the notes, and does not object that the Investigator's transcription of interviews as hearsay. Therefore, the Commission believes the Investigator's testimony is unnecessary, as discussed at least twice during the recent final pretrial conference. The Investigator's authentication of the notes would do nothing to cure the legal objections regarding the admissibility of the contents of the notes. The admissibility of the notes thus depends on the particular contents, the use to which they are to be put at trial, including the hearsay rules and or the parameters established by Federal Rules of Evidence 608 and 613.

January 26, 2018

Respectfully Submitted,

s/ Miles Shultz

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**CERTIFICATE OF SERVICE**

I hereby certify that on today's date, I caused the PLAINTIFF'S TRIAL BRIEF to be served upon counsel to Defendant via the court's Electronic Case Filing system, pursuant to Local Rule 5.3(A).

January 26, 2018

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