



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

January 7, 2015

Catherine O'Hagan Wolfe, Clerk of Courts
Office of the Clerk of Courts
Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

Re: EEOC v. Sterling Jewelers, No. 14-1782 (2d Cir.).

Dear Ms. Wolfe:

Pursuant to Federal Rule of Appellate Procedure 28(j), EEOC would like to call the Court's attention to *EEOC v. CRST Van Expedited*, No. 13-3159, 2014 WL 7238024 (8th Cir. Dec. 22, 2014). In pertinent part, the decision addresses the award of attorneys fees and costs resulting from the dismissal of EEOC's sexual harassment suit for failure to investigate and conciliate in good faith. EEOC believes that two aspects of this decision could be helpful to this Court in resolving the above-captioned appeal.

First, the Court held that "the EEOC's compliance with its pre-suit obligations" — charge, investigation, cause finding, and opportunity to conciliate — "provides employers an opportunity to resolve the dispute in lieu of litigation." 2014 WL 7238024 at *10; *cf. id.* at *5 (noting EEOC's obligation to "pursue administrative resolution" of the charges). This accords with EEOC's position in this case that because Congress intended that, if possible, claims should be resolved during the administrative process, courts and Congress place relatively more importance on notice and conciliation than on the investigation especially where the other pre-suit obligations were satisfied. EEOC-Br.37. Here, it is undisputed that Sterling was well aware of its

potential exposure and had ample opportunity to resolve the dispute informally in conciliation/mediation, rather than litigation.

Second, the *CRST* Court held that “Title VII’s pre-suit obligations are not elements of the [underlying discrimination] claim.” 2014 WL 7238024 at *10(adding that dismissal based on EEOC’s failure to satisfy its pre-suit obligations to conciliate and investigate was not a merits determination). This holding is relevant to Sterling’s suggestion that the pre-suit requirements — specifically, the duty to investigate, since no other pre-suit requirement is at issue — are elements of EEOC’s claim. *See Sterling-Br.55* (claim necessarily requires proof of pre-suit obligations). As EEOC pointed out, EEOC’s “claim” is that Sterling violated Title VII by engaging in a nationwide pattern or practice of sex discrimination. Whether EEOC sufficiently investigated the alleged discrimination is not an element of that claim. *See EEOC-Rep.21-22*.

Sincerely,

/s/ Barbara L. Sloan

CERTIFICATE OF SERVICE

I certify that I filed the foregoing FRAP 28(j) letter, containing fewer than 350 words, with the Clerk of the Court this 7th day of January, 2015, by uploading an electronic version of the letter via this Court's Case Management/Electronic Case Filing System (CM/ECF). I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's CM/ECF system.

/s/ Barbara L. Sloan
Barbara L. Sloan