

UNITED STATES DISTRICT COURT  
Western District of Wisconsin

LAURA HILL

Plaintiff,

v.

FOX PUBLICATIONS, and  
ALPHA OMEGA ENTERPRISES, INC.,

Defendants.

**Civil Action No. 10-CIV-1076 (BK)**

**MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendant Alpha Omega Enterprises, Inc. requests that this court grant its motion to dismiss Plaintiff's employment discrimination suit against it for failure to state a claim for which relief can be granted. Alpha Omega Enterprises, Inc. and Defendant Fox Publications share no substantial relationship with one another and as such, Alpha Omega cannot be called to defend itself in this court for the alleged discriminatory employment practices of Fox Publications. In addition, plaintiff has failed to exhaust all pre-litigation administrative remedies required by the Equal Employment Opportunity Commission and, as such, has not satisfied the basic requirement necessary to bring a claim for employment discrimination in this court.

Respectfully submitted,  
Alpha Omega Enterprises, Inc.

By its attorney,

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Michelle A. McCarthy

Dated: February 12, 2010

UNITED STATES DISTRICT COURT  
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Plaintiff,

v.

FOX PUBLICATIONS, and  
ALPHA OMEGA ENTERPRISES, INC.,

Defendants.

**Civil Action No. 10-CIV-1076 (BK)**

**DEFENDANT ALPHA OMEGA ENTERPRISES INC'S MEMORANDUM IN SUPPORT  
OF ITS MOTION TO DISMISS**

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**I. STATEMENT OF THE CASE**

Laura Hill (“Plaintiff”) brought this employment discrimination action against Defendants Fox Publications and Alpha Omega Enterprises Inc. (“Alpha Omega”). Complaint ¶¶ 13-19. Plaintiff alleges that, because she was terminated within four months of being diagnosed with chronic fatigue and immune dysfunction syndrome, Fox Publications engaged in unlawful employment practices as defined by §§ 102 (a) and 102(b)(5) of the Americans with Disabilities Act (“ADA”). 42 U.S.C.A §§ 12112(a) and (b)(5) (West 2009); Compl. ¶ 22. Plaintiff then alleges that because Fox Publication is a subsidiary of Alpha Omega, Alpha Omega should have known about and prohibited Fox Publications from pursuing discriminatory employment practices against her. Compl. ¶ 26. Plaintiff does not allege any direct discriminatory conduct on the part of Alpha Omega.

Prior to bringing this suit, Plaintiff filed a required employment discrimination claim with the Equal Employment Opportunity Commission (“EEOC”) naming her employer, Fox Publications as the sole respondent. Compl. Exhibit A. Alpha Omega was not named as a respondent in Plaintiff’s EEOC claim and no facts are alleged which would support a claim of discrimination as against Alpha Omega. *Id.* Alpha Omega did not receive notice of Plaintiff’s EEOC claim nor did Alpha Omega have an opportunity to participate in conciliation proceedings. Finally, Alpha Omega is a separate corporation from defendant Fox Publications and the two share no meaningful connection with each other.

## **II. STANDARD OF REVIEW**

In evaluating defendant’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) this court must evaluate whether Plaintiff has stated a claim for which it can grant relief. *Carl Sandburg Village Condominium Association No. 1 v. First Condominium Development Co.*, 758 F.2d 203, 207 (7th Cir, 1985). In interpreting this standard the Supreme Court has stated that “a complaint should not be dismissed for failure to state a claim [for which the court can grant relief] unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Seventh Circuit has recently stated that a “complaint must describe the claim in sufficient detail to give the defendant “fair notice of what the ... claim is and the grounds upon which it rests” to survive a 12(b)(6) motion to dismiss. *E.E.O.C. v. Concentra Health Services Inc.* 496 F.3d 773, 776 (7th Cir. 2007) (quoting both *Conley*, 355 U.S. at 47 and *Bell Atlantic Corp. v. Twombly* 550 U.S. 544, 555 (2007)).

## **III. ARGUMENT**

This court is urged to dismiss Plaintiff’s suit against Alpha Omega pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiff’s claim should be dismissed because Alpha Omega was neither

Plaintiff's employer in this action, nor was Alpha Omega responsible for the actions of Defendant Fox Publications. Additionally, Plaintiff failed to name Alpha Omega as a respondent in her original EEOC claim.<sup>1</sup> Since Alpha Omega was never named as a respondent in the plaintiff's EEOC claim, it received no notice of any impending unlawful employment litigation against it, nor was any EEOC investigation made as to its employment practices.

The Plaintiff's ability to bring the present suit is contingent on her having exhausted all administrative remedies with the EEOC. 42 U.S.C.A. § 2000e-1(f)(1) (West 2009); *See, e.g., Olsen v. Marshall & Ilsley Co.*, 267 F.3d 597, 604 (7th Cir. 2001); *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 126 (7th Cir. 1989); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 905 (7th Cir. 1981); *Le Beau v. Libby-Owens-Ford Co.*, 484 F.2d 798, 799 (7th Cir. 1973). Since Plaintiff is in violation of EEOC procedures by failing to pursue *any* administrative remedies against Alpha Omega, she has failed to state a valid claim against Alpha Omega for which this court can grant relief. Thus, this court must grant Alpha Omega's Rule 12(b)(6) motion to dismiss.

**A. ALPHA OMEGA AND FOX PUBLICATIONS ARE DISTINCT CORPORATE ENTITIES WHO ARE NOT IN COMMUNICATION WITH EACH OTHER**

The Seventh Circuit has had several opportunities to address the parent/subsidiary relationship with respect to discrimination claims filed with the EEOC and has found that a plaintiff's failure to name a parent corporation as a respondent in an EEOC claim bars the plaintiff from bring suit against the parent company, unless that parent company had notice of

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<sup>1</sup> Pursuant to EEOC enforcement provisions: "whenever a charge is filed by or on behalf of a person claiming to aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve notice of the charge . . . on such an employer . . . (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof." 42 U.S.C.A. § 2000e-5(b) (West 2009).

the charges against it. *Olsen* 267 F.3d 597 (“Olsen’s failure to name [Defendant] in his EEOC charge is fatal. Under the law of this circuit, a parent organization not named in the plaintiff’s EEOC charge must be dismissed from the suit unless the plaintiff can show that the parent had notice of the claim against it . . . and had a chance to conciliate on its own behalf.”); *See, e.g., Schnellbaecher* 887 F.2d at 127; *Le Beau v.* 484 F.2d at 799. Alpha Omega cannot be held accountable for the actions of Fox Publications because the two corporations are distinct and independent of each other with respect to governance, finances and operating locations. Since Alpha Omega and Fox Publications share only the formalities of a parent/subsidiary relationship, Fox Publications found no need to inform Alpha Omega of plaintiff’s termination and resulting discrimination claim.

Alpha Omega is a large media conglomerate which owns shares in dozens of TV stations, newspapers, and internet companies across the United States. Fox Publications is but one of the many companies that Alpha Omega owns shares in and the relationship between the two is limited to the most minimal of corporate formalities. This minimal relationship can be compared to the relationship described in *Le Beau* between a local union and an international union. *Le Beau*, 484 F.2d at 799. The court in *Le Beau* noted, in the context of jurisdiction, that “the Local was self-governing and autonomous with respect to the matters complained of in the suit” and was therefore not the “agent” of the international union. *Id.* Fox Publication too is an autonomous entity which is not under the direct control or supervision of Alpha Omega and cannot properly be considered the agent of Alpha Omega in any context. Based on the reasoning in *Le Beau* the court must dismiss Plaintiff’s suit against Alpha Omega because Alpha Omega shares no meaningful contact and has no meaningful control over Fox Publications.

Should the court reject the *Le Beau* comparison, there is a distinction to be made between the present suit and the factual and procedural circumstances of the *Schnellbaecher* case. First, *Schnellbaecher* is factually distinct because the suit involved a parent and subsidiary who shared close and meaningful contacts with one another. *Schnellbaecher*, 887 F.2d at 125 (the court noted that the parent dictated the personnel policies of the subsidiary, that the two companies shared council, and that the parent had notice of the EEOC claim against the subsidiary). Second, despite the close relationship between the parent and the subsidiary in *Schnellbaecher*, the court held that the suit against the parent company was properly dismissed in the lower court because the parent company was not named in the plaintiff's original EEOC claim. *Id.* The relationship between the potential defendants in the *Schnellbaecher* case was much more substantial than the relationship between Alpha Omega and Fox Publications yet the court dismissed due to plaintiff's failure to comply with the administrative requirements of the EEOC.

Based on the reasoning of either *Le Beau* or *Schnellbaecher* this court must dismiss Plaintiff's suit against Alpha Omega. Fox Publications is not an agent of Alpha Omega for any legal or practical purposes, nor does Alpha Omega have any control or knowledge of Fox Publications' personnel practices. Alpha Omega and Fox Publications share no meaningful communication with each other whatsoever due to their being fully distinct from one another.

**B. PLAINTIFF FAILED TO NAME ALPHA OMEGA AS A RESPONDANT IN HER ORIGINAL EEOC CLAIM THUS DEPRIVING ALPHA OMEGA OF BOTH NOTICE AND A CHANCE TO PARTICIPATE IN CONCILIATION EFFORTS**

It is well settled in the Seventh Circuit that the purpose of filing a claim with the EEOC is both to give notice to employers that they are being investigated for unlawful employment practices and to allow employers an opportunity to participate in the conciliation process. *Teal v.*

*Potter*, 559 F.3d 687, 691 (7th Cir. 2009) (noting that “[t]he purpose of [the] requirement [of filing a claim with the EEOC] is twofold: to promote resolution of the dispute by settlement or conciliation and to ensure that the sued employers receive notice of the charges against them.”); *See, e.g., Olsen* 267 F.3d at 604; *Schnellbaecher*, 887 F.2d at 126; *Eggleston* 657 F.2d at 905; *Le Beau*, 484 F.2d at 799. Alpha Omega had no notice of any potential employment discrimination charges against it prior to receiving Plaintiff’s complain in this suit and thus had no chance to participate in any conciliation efforts, as inappropriate as those efforts would have been given the nonexistent relationship between Alpha Omega and the Plaintiff.

Since Plaintiff failed to exhaust her administrative remedies with respect to Alpha Omega, Alpha Omega never received any notice of potential charges against it and had no chance to participate in advancing the conciliatory goals of the EEOC. For this reason, the court is again urged to dismiss Plaintiff’s present suit against Alpha Omega.

**C. ALPHA OMEGA DOES NOT MEET ANY OF THE RECOGNIZED EXCEPTIONS TO THE REQUIREMENT THAT A PARTY MUST BE NAMED IN PLAINTIFF’S ORIGINAL EEOC CHARGE IN ORDER TO BE SUED**

While the Seventh Circuit has been clear on interpreting the requirement that a party only bring suit against respondents named in EEOC claims, several exceptions to this requirement have been recognized, most notably in the *Eggleston* case. *Eggleston*, 657 F.2d at 908. As each of the relevant exceptions is addressed in turn, it will become clear that Alpha Omega does not meet these exceptions and therefore cannot be sued in this court.<sup>2</sup>

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<sup>2</sup> The first inquiry that the court in *Eggleston* makes in determining if an exception exists is whether or not “the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint.” *Eggleston*, 657 F.2d at 908. This question will not be addressed since there is nothing in the facts of the case at present that indicates Plaintiff had any knowledge of Alpha Omega or its relationship with Fox Publications at the time of filing her EEOC claim. The court notes however that “no single

Of the three *Eggleston* inquiries that will be addressed here, the first asks “whether, under the circumstances, the interests of a named party are so similar to the unnamed party’s that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed part in the EEOC proceedings. *Id.* As has been stated, the interests of Alpha Omega and Fox Publications are distinct from one another. Fox Publications cannot be considered an agent of Alpha Omega for any purpose and thus could not conciliate with Plaintiff on behalf of Alpha Omega. If Plaintiff did believe that she had been aggrieved by Alpha Omega, it was certainly necessary include Alpha Omega in any proceedings. Plaintiff thus fails to satisfy this prong on the *Eggleston* exception test.

The second inquiry asks “whether . . . [an unnamed party’s] absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party. Since Plaintiff’s right to sue is contingent on being issued a right to sue letter by the EEOC, which indicates that the EEOC has investigated alleged discriminatory conduct by the respondent, bringing a suit against a party not named in an EEOC charge has the potential to indicate to the court that the defendant has been investigated and that such an investigation indicated discriminatory employment practices. 42 U.S.C.A § 2000e-5(f)(1) (West 2009). In this case Plaintiff’s failure to name Alpha Omega has substantially prejudiced the company in that rather than allowing this matter to be quickly and privately cleared up through the conciliation process, Plaintiff has taken the rather public step of bringing this suit in court.<sup>3</sup> Plaintiff has further represented to this court that she has received a right to sue Alpha Omega for alleged employment discrimination when

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prong [of this four prong test] is to be decisive” thus lack of knowledge as to this prong of the inquiry does not harm Alpha Omega. *Id.*

<sup>3</sup> The EEOC states that it will not make charges filed with it public and that it will promptly inform respondent of its findings when it has been determined that the charges filed are not substantiated. 42 U.S.C.A § 2000e-5(b) (West 2009).



she received no such permission from the EEOC. The cumulative result of these actions is prejudice towards Alpha Omega and thus a failure of the second prong of the *Eggleston* exception inquiry.

The final prong of the *Eggleston* exception inquiry asks “[w]hether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.” *Eggleston*, 657 F.2d at 908. Again, as stated above, Alpha Omega has no substantial relationship with Fox Publications beyond the minimal, formalistic contacts that define the parent/subsidiary relationship. Here too the *Eggleston* exception inquiry fails in its final prong to establish that Plaintiff should be entitled to an exception to the requirement that she only bring suit against those parties she named in her original EEOC complaint. Since no grounds for an exception exist, this case should be dismissed based on the reasoning advanced in this Circuit by the *Eggleston* case.

#### **IV. CONCLUSION**

Plaintiff’s complaint against Alpha Omega must be dismissed for failure to state a claim for which this court can grant relief. Plaintiff has not exhausted her EEOC mandated administrative remedies with respect to her claims against Alpha Omega and therefore cannot bring this suit. Additionally there is no substantial relationship between Alpha Omega and Fox Publications nor is there any relationship whatsoever between Alpha Omega and the Plaintiff. Accordingly, Plaintiff’s complaint against Alpha Omega must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted,

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Michelle A. McCarthy

Dated: February 8, 2010