

KING & SPALDING

King & Spalding LLP
1180 Peachtree Street
Atlanta, GA 30309
www.kslaw.com

Michael W. Johnston
Direct Dial: 404-572-3581
mjohnston@kslaw.com

March 18, 2016

Mr. Lyle W. Cayce, Clerk
U.S. Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, Louisiana 70130-3408

Re: No. 15-20078; *EEOC v. Bass Pro Outdoor World, LLC*

Dear Mr. Cayce:

By this letter, which should be filed in this case under Federal Rule of Appellate Procedure 28(j) and Fifth Circuit Rule 28.4, Bass Pro seeks to bring a new development to the Court's attention. Thank you for circulating copies to the panel.

The EEOC has flip-flopped on whether it identified any aggrieved individuals before suing Bass Pro. The EEOC's attorney once declared, in an effort to justify to the district court why the agency had not shared any individuals' names with Bass Pro during conciliation, that "it's not that we were trying to hide information from the defendants. We don't have that information either." ROA.10152. In this Court, however, the EEOC's attorney asserted that the agency actually did identify approximately 100 aggrieved individuals before filing suit. Oral Arg. Recording at 17:11–18:12.

The story has changed yet again back in the district court, where the parties continue to fight over discovery. The EEOC's discovery responses failed to identify a single claimant for whom it seeks relief, and the agency contends it is "incapable" of identifying any claimants until it receives discovery from Bass Pro. Letter from Tim Bowne, Senior Trial Attorney, EEOC, to Lovita T. Tandy, CM/ECF Doc. 269-12, *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-3425 (S.D. Tex. Mar. 1, 2016). In short, the EEOC is using discovery as a substitute for

the pre-suit investigation that the agency could not be bothered to perform, notwithstanding Title VII's administrative prerequisites.

This is not the first time that, in the words of the district court, one EEOC attorney has “directly contradict[ed] prior statements by another EEOC lawyer at an earlier hearing.” ROA.9706. It seems that in EEOC litigation, as in life, the only constant is change. This Court should defer to the district court's finding that “no individuals were identified or investigated in the investigation period,” ROA.9706–07, and reject the EEOC's self-serving assertion to the contrary at oral argument, *see* Oral Arg. Recording at 17:11–18:12.

Respectfully submitted,

s/ Michael W. Johnston

Michael W. Johnston

Counsel for Defendants-Appellants

p.s. This letter is being transmitted via the Court's CM/ECF Document Filing System, <https://ecf.ca5.uscourts.gov>; it has been scanned with the most recent version of McAfee VirusScan Enterprise and is free of viruses. An electronic copy is being served on today's date, via the Court's CM/ECF Document Filing System, upon counsel for all parties.



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Tim Bowne
Direct Line: (713) 651-4914

February 12, 2016

Lovita T. Tandy, Esq.
King & Spalding, LLP
1180 Peachtree Street N.E.
Atlanta, GA 30309-3521

VIA EMAIL: ltandy@kslaw.com
and U.S. Mail, First Class

Re: *EEOC v. Bass Pro Outdoor World LLC, et al.*
S.D. Tex. Case 4:11-cv-03425

Dear Ms. Tandy:

This letter responds to your letter dated January 20, 2016, and to some of the matters referenced in your four separate letters dated February 9, 2016.

As stated in the opening line of one of your February 9 letters, "Discovery in this matter appears to be grinding to a halt." EEOC is more than willing to discuss with Defendants the obstacles that have impeded discovery, including the deficiencies in Defendants' responses to EEOC's discovery requests and what Defendants perceive to be deficiencies in EEOC's responses. As you likely have deduced from Mr. Juge's "autoreply" bounce-back e-mail, however, he has been out of the office on leave this week, and will not be available until after Monday's federal holiday, after which time he will advise you of his availability.

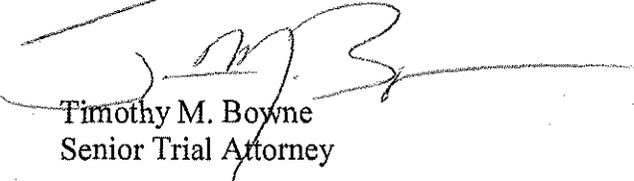
As you know from previous correspondence and telephone conversations, EEOC is puzzled and concerned that Defendants during this litigation have produced virtually no documents apart from some handbooks, while EEOC has produced approximately 267,875 pages of documents from its investigative files. Documents requested by EEOC from Defendants that have not been produced -- including Defendants' hiring database -- are essential for EEOC to be able to determine who may be "stage I" trial witnesses or "claimants" for whom EEOC will seek relief at trial. In instances which Defendants claim that EEOC "has refused to provide substantive responses to Defendants' inquiries" about "claimants" or "stage I witnesses," EEOC is not "refusing" to provide substantive responses, but is incapable of doing so before it receives and evaluates information which it requested months ago.

EEOC also is willing to discuss other matters raised in your various letters, including the form of any privilege logs the parties may exchange, and why EEOC is entitled to invoke the attorney-client privilege concerning communications with alleged victims of discrimination despite its not having a formal attorney-client relationship with the people on whose behalf it seeks relief in litigation. Discussion of these matters on which there is either confusion or dispute [or both] would likely be more productive than the continued exchange of letters and e-mails.

Letter to Lovita T. Tandy, Esq.
February 12, 2016
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After he returns to the office next week, Mr. Juge will contact you to arrange for a mutually agreeable time for the parties to engage in these discussions.

Very truly yours,



Timothy M. Boyne
Senior Trial Attorney

cc: Michael W. Johnston [via electronic mail]
Samuel M. Matchett [via electronic mail]
Ronni D. Solomon [via electronic mail]