

IN THE SUPREME COURT OF OHIO

STATE OF OHIO EX REL, :  
AMERICAN LEGION POST 25, : Case No. 06-2263  
: :  
Relator-Appellee, :  
: :  
v. : On Appeal from the  
: Fayette County  
: Court of Appeals,  
OHIO CIVIL RIGHTS COMMISSION : Twelfth Appellate District  
AND OHIO ATTORNEY :  
GENERAL MARC DANN : Court of Appeals Cast  
: No.: 2006-01-005  
Respondents-Appellants. :

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Brief of Amicus Curiae

THE OHIO EMPLOYMENT LAWYERS' ASSOCIATION

In Support of

RESPONDENTS-APPELLANTS OHIO CIVIL RIGHTS  
COMMISSION AND OHIO ATTORNEY GENERAL MARC DANN

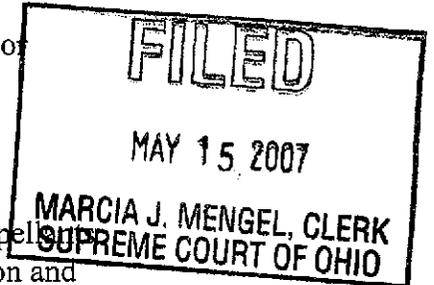
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***Appellant’s Proposition of Law No. 2:***

The Commission does not fail to engage in conciliation under R.C. 4112.05(B), and consequently lose jurisdiction over a claim of unlawful discriminatory conduct, when in the course of its investigation it refuses to issue a subpoena at respondent’s request.

***Proposition of Law of Amicus Curia:***

Relator-Appellee has an adequate remedy at law under R.C. Section 4112.06 to challenge the Commission’s investigative procedures and alleged jurisdictional defects.

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**IN THE SUPREME COURT OF OHIO**

<b>STATE OF OHIO EX REL,</b>	:	
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<b>Relator-Appellee,</b>	:	
	:	<b>On Appeal from the</b>
<b>v.</b>	:	<b>Fayette County</b>
	:	<b>Court of Appeals,</b>
<b>OHIO CIVIL RIGHTS COMMISSION</b>	:	<b>Twelfth Appellate District</b>
<b>AND OHIO ATTORNEY</b>	:	
<b>GENERAL MARC DANN</b>	:	<b>Court of Appeals Cast</b>
	:	<b>No.: 2006-01-005</b>
<b>Respondents-Appellants.</b>	:	

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**On Appeal from the Fayette County Court of Appeals  
Twelfth Appellate District  
Case No. CA2006-01-006**

**Brief of Amicus Curiae**

**THE OHIO EMPLOYMENT LAWYERS' ASSOCIATION**

**In Support of Respondent-Appellants**

**Ohio Civil Rights Commission and Ohio Attorney General Marc Dann**

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**Statement of Interest of Amicus Curiae**

The Ohio Employment Lawyers Association (OELA) is the state-wide professional membership organization in Ohio comprised of lawyers who represent employees in labor, employment and civil rights disputes. OELA is the only state-wide affiliate of the National Employment Lawyers Association (NELA) in Ohio. NELA and its 67 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. OELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of

individuals in the workplace. OELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

As an organization focused on protecting the interests of workers who are subjected to unlawful discrimination, OELA has an abiding interest in protecting the jurisdiction of the Ohio Civil Rights Commission (the “Commission”) from collateral attacks on the adequacy of its conciliation attempts.

### **Statement of the facts**

The amici adopt the statement of the facts contained in the Merit Brief of Respondent-Appellant Commission.

### **Propositions of Law**

#### ***Appellant’s Proposition of Law No. 1:***

The Commission’s subpoena statute, R.C. 4112.04(B), does not create a clear legal duty upon the Commission to issue a subpoena at a respondent’s request during a preliminary investigation. Accordingly, the Commission rules that authorize issuance of a subpoena for a respondent only after a complaint is filed - OAC 4112-3-12(A) and 4112-3-13(B) - are consistent with the subpoena statute’s requirements.

#### ***Appellant’s Proposition of Law No. 2:***

The Commission does not fail to engage in conciliation under R.C. 4112.05(B), and consequently lose jurisdiction over a claim of unlawful discriminatory conduct, when in the course of its investigation it refuses to issue a subpoena at respondent’s request.

***Proposition of Law of Amicus Curia:***

Relator-Appellee has an adequate remedy at law under R.C. Section 4112.06 to challenge the Commission's investigative procedures and alleged jurisdictional defects.

**Introduction**

The Twelfth Appellate Judicial District erred in *State ex rel. American Legion Post 25 v. OCRC et al.*, 2006 Ohio App. LEXIS 5492 by issuing a writ of mandamus where Relator-Appellant had an adequate remedy under 4112.06 to appeal the Commission's decision to decline its application for a subpoena. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Com.*, 6 Ohio St. 3d 426, 428-429 (Ohio 1983) (writ of prohibition denied to challenge the manner in which the Commission "conducted its investigation" since an appeal under R.C. § 4112.06 provided an adequate remedy). This challenge is "properly raised on appeal which is available to appellant pursuant to R.C. 4112.06." *Id.* Since "mandamus is not available to a relator who has a right of appeal," the Twelfth District erred by granting Relator-Appellant a writ of mandamus in this case. *State, ex rel. Webb*, 10 Ohio St. 3d at 217, citing *State, ex rel. Cinnamon Lake Utility, v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 79.

**Argument**

To uphold the writ of mandamus issue against the Commission in this case, Relator-Appellant must prove by a preponderance of evidence that:

1. It has a clear legal right to a pre-complaint subpoena;
2. The Commission is under a clear legal duty to issue a pre-complaint subpoena;  
and
3. Relator-Appellant has no plain and adequate remedy in the ordinary course of the law.

*State ex rel. Westbrook v. Ohio Civil Rights Com.*, (1985) 17 Ohio St. 3d 215, citing *State, ex rel. Harris, v. Rhodes* (1978), 54 Ohio St. 2d 41, 42; *State, ex rel. Heller, v. Miller* (1980), 61 Ohio St. 2d 6 paragraph one of the syllabus; *State, ex rel. Westchester, v. Bacon* (1980), 61 Ohio St. 2d 42, paragraph one of the syllabus; *State, ex rel. Berger, v. McMonagle* (1983), 6 Ohio St. 3d 28, 29.

The Commission demonstrated beyond question in its Merit Brief that Relator-Appellant does not (and should not) have a clear legal right to a pre-complaint subpoena. Similarly, the Commission has shown the absence of a clear legal duty to issue one. These points need no further argument in this brief except to make the historical note that, in the 38 years since the General Assembly added the subpoena provisions at issue here, this is the first reported case claiming a right to an investigative subpoena. 1969 Am. H.B. 432, 1969 Ohio Laws 2710. If the right to an investigative subpoena was so “clear” for so long, surely someone other than Relator-Appellant would have attempted to exercise it before now.

#### **Relator-Appellant has an Adequate Remedy under R.C. § 4112.06**

More fundamentally for correcting the error in this case, however, Relator-Appellant has a plain and adequate remedy at law to challenge the “manner in which (the Commission) conduct[ed] its investigation.” *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Com.*, 6 Ohio St. 3d 426, 428-429 (Ohio 1983). Specifically, this challenge is “properly raised on appeal which is available to appellant pursuant to R.C. 4112.06.” *Id.*<sup>1</sup> Since “mandamus is not available to a relator who has a right of appeal,” the Twelfth District erred by granting Relator-

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<sup>1</sup> Section 4112.06 allows “[a]ny complainant, or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, (to) obtain judicial review thereof . . . in a proceeding as provided in this section.”

Appellant a writ of mandamus in this case. *State, ex rel. Webb*, 10 Ohio St. 3d at 217, citing *State, ex rel. Cinnamon Lake Utility, v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 79.<sup>2</sup>

**This Court has Consistently Denied Writs Challenging the Commission's Procedures and Jurisdiction because of the Adequacy of a Remedy under R.C. § 4112.06.**

In 1975 this Court allowed its one and only writ of prohibition to prevent the Commission from continuing with further proceedings for lack of jurisdiction. *State, ex rel. Republic Steel Corp., v. Ohio Civil Rights Comm.*, (1975), 44 Ohio St. 2d 178. The complaint in *Republic Steel* stated that conciliation efforts were not completed with respect to one respondent and had not begun with respect to the remaining respondents. This Court concluded that “pursuant to R.C. 4112.05(B), a completed and unsuccessful attempt by the Commission to eliminate unlawful discriminatory practices by conference, conciliation or persuasion is a jurisdictional prerequisite to the issuance of a complaint by the Commission.” *Id.* at 183. Since the complaint acknowledged that the Commission had not completed conciliation, the Commission did not have jurisdiction to proceed. The relator thus had no adequate remedy at law and the Court allowed the writ of prohibition.

In the 32 years since *Republic Steel* this Court has four times considered and rejected petitions for an extraordinary writ attacking the Commission's jurisdiction under *Republic Steel*. This Court rejected each petition because, among other reasons, the relator had an adequate remedy to an appeal under R.C. 4112.06.

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<sup>2</sup> Mandamus is not available to a relator who has a right of appeal except in “special circumstances” that are not present here. *See State, ex rel. Cody, v. Toner* (1983), 8 Ohio St. 3d 22, 24. There, in the case of an indigent, *pro se* litigant denied a court appointed counsel in an action to terminate his parental rights, this Court found that the appeal from the order denying him counsel would be so ineffective that it would deprive him of his constitutional right to equal protection of the laws. In this case, Relator-Appellant cannot claim that it lacks effective representation by counsel such that it will be deprived of equal protection of the laws.

**A. A Relator has an Adequate Remedy pursuant to R.C. § 4112.06 to Challenge the Adequacy of the Commission's Conciliation Attempt**

In the most direct application of *Republic Steel*, an employer sought a writ of prohibition on the basis that it did not receive timely notice of the meeting to conciliate the charge. *State ex rel. East Mfg. Corp. v. Ohio Civil Rights Com.*, (1992) 63 Ohio St. 3d 179, 180. This Court rejected that writ, finding that:

The commission, in this case, did not expressly acknowledge failure to comply with the jurisdictional requirement that the commission must attempt conciliation before it may issue a complaint, as it had in the case upon which East Manufacturing relies, *State, ex rel. Republic Steel Corp., v. Ohio Civil Rights Comm.* (1975), 44 Ohio St.2d 178. To the contrary, the commission, according to the evidence, appears to have complied with this conciliation prerequisite. \* \* \* This *jurisdictional question, moreover, can be raised on appeal* under R.C. 4112.06, and, thus, East Manufacturing has an adequate remedy at law.

*State ex rel. East Mfg. Corp.*, 63 Ohio St. 3d at 180 (emphasis added).

The jurisdictional question of whether the Commission completed a conciliation attempt was also properly brought as an agency appeal under EEOC conciliation practice, which practice this Court relied upon in *Republic Steel* for its holding there. *EEOC v. World Kitchen, Inc.*, 2006 U.S. Dist. LEXIS 36099, 1-4 (D. Pa. 2006)(attached). In *World Kitchen*, the employer argued that the EEOC did not conciliate in good faith because of limited time and the lack of an EEOC response to the a supplemental conciliation agreement. The court was unpersuaded.

Although the EEOC's requested response times were minimal, the EEOC demonstrated a willingness to extend the deadlines and there is no indication that it would not have done so if World Kitchen had so requested with the supplemental conciliation agreement.

*Id.* Importantly for the discussion here, the *World Kitchen* court held that even a “mistaken belief that conciliation failed” did not divest the EEOC of jurisdiction over a complaint. *Id.* at note 1;

(emphasis added). Rather, “it resulted in the premature end to EEOC's conciliation efforts.” *Id.* Further, “the EEOC's initial effort at conciliation was sufficient for jurisdictional purposes.” *Id.* at note 2. The court thus found that the proper remedy was “further conciliation (as) required for the EEOC to fulfill its statutory duty.” *Id.* (“Summary judgment is far too harsh a sanction to impose on the EEOC even if the court should ultimately find that conciliation efforts were prematurely aborted.”)

Relator in this case has an adequate remedy under R.C. § 4112.06 to challenge the denial of its application for a subpoena, as well as to challenge the extent of the conciliation efforts. Since this Court likewise held that R.C. § 4112.06 is also available to challenge a) the Commission's conduct of its investigation, b) the Commission's decision not to issue a probable cause finding and c) the Commission's determination that it has jurisdiction over a non-resident charging party, Relator cannot prove the lack of an adequate remedy at law.

**B. A Relator has an Adequate Remedy pursuant to R.C. § 4112.06 to Challenge the Commission's Conduct of its Investigation**

In *State Farm* the respondent sought a writ of prohibition to prevent the Commission from issuing a complaint following an investigation conducted by the Equal Employment Opportunity Commission (“EEOC”) rather than the Commission itself. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Ohio Civil Rights Com.*, 6 Ohio St. 3d 426, 428-429 (Ohio 1983). The respondent in *State Farm* argued that *State, ex rel. Republic Steel Corp.* deprived the Commission of jurisdiction. This Court rejected that argument, explaining that such reliance on *Republic Steel* was misplaced:

In *Republic Steel*, we allowed a writ of prohibition to prevent the commission from continuing with further proceedings upon its complaint which noted that

conciliation efforts were not completed with respect to one respondent and had not begun with respect to the remaining respondents.

In the case at bar, the complaint alleged, and the record demonstrates, that conciliation efforts were completed and unsuccessful. Accordingly, we find appellant's reliance on Republic Steel misplaced.

In substance, appellant's arguments do not deny that the necessary conciliation efforts were undertaken, but contest the authority of appellee to rely on investigations conducted by the EEOC as a reference in beginning conciliation efforts. These arguments do not present a challenge to appellee's jurisdiction, but rather, allege error as to the manner in which appellee conducted its investigation. These issues are properly raised on appeal which is available to appellant pursuant to R.C. 4112.06.

*Id.* at 428. In a similar vein, even where the Commission failed to perform its clear legal duty with respect to a subpoena duces tecum alleged to be "overly broad and burdensome," mandamus would not lie because the relator has a right to an administrative appeal under *RC § 4112.06*. *State ex rel. Toledo Metro Fed. Credit Union v. Ohio Civil Rights Comm'n*, 1996 Ohio App. LEXIS 3098 (1996).

**C. A Relator has an Adequate Remedy pursuant to R.C. § 4112.06 to Challenge the Commission's Denial of a Probable Cause Finding**

In *State ex rel. Westbrook v. Ohio Civil Rights Com.*, this Court rejected a charging party's petition for a writ of mandamus ordering the Commission to issue a probable cause determination in his case. *State ex rel. Westbrook v. Ohio Civil Rights Com.*, (1985) 17 Ohio St. 3d 215, 217. There, the Commission accepted the respondent's conciliation offer to remedy the alleged discrimination. The charging party, dissatisfied with the remedy, argued that a conciliation required his consent and sought a writ to compel the Commission to find probable cause and issue a complaint.

This Court rejected the writ because the relator “failed to prove the third requirement for a writ of mandamus because relator has the right of appeal which is an adequate remedy at law.”

*Id.* In addition, the Court noted that the Commission’s only jurisdictional obligation is:

to attempt, by informal methods of persuasion and conciliation, to induce compliance with Chapter 4112. of the Revised Code. *That is exactly what the commission did in the instant case.* The commission determined that relator's employer had offered relator employment that would accommodate relator's situation and that relator refused to accept this accommodation.

*State ex rel. Westbrook v. Ohio Civil Rights Com.*, (1985) 17 Ohio St. 3d 215, 217 (emphasis added).

**D. A Relator has an Adequate Remedy pursuant to R.C. § 4112.06 to Challenge alleged Jurisdictional Defects**

In *State ex rel. Natalina Food Co. v. Ohio Civil Rights Com.*, (Ohio 1990) 55 Ohio St. 3d 98, 99-100, an employer sought an extraordinary writ on the theory that the Commission lacked jurisdiction to issue a complaint on behalf of a non-resident employee. This Court rejected that theory. The Court held that the Commission:

has basic statutory authority to consider (the charging party’s) charge of discrimination because Natalina is an “employer” and (charging party) is an “employee” as those terms are used in R.C. §§ 4112.02(A) and 4112.05(B). Having determined this, we must further hold that the Commission is not completely without jurisdiction to proceed with a hearing on the Commission complaint and, thus, that the appeal made available by R.C. 4112.06 is sufficient to defeat Natalina’s request for a writ of prohibition.

*Id.*

**The Commission in this Case has Jurisdiction sufficient for Relator to Appeal the Denial of Preliminary Investigation Subpoena pursuant to R.C. § 4112.06**

The Commission obtained jurisdiction over the complaint of unlawful sexual harassment in this case upon the occurrence of following two conditions:

1. The Commission failed “to effect the elimination of an unlawful discriminatory practice by informal methods of conference, conciliation and persuasion . . . and to obtain voluntary compliance with this chapter;” *ORC* 4112.05(B); and
2. The Commission issued a complaint “within one year after the complainant filed the charge” with respect to the alleged discriminatory practice. *ORC* 4112.05(B)(7)

Both conditions occurred in this case. The appellate court first found that the Commission issued a complaint within a year after the complainant filed her charge. *See State ex rel. American Legion Post 25 v. OCRC et al., 2006 Ohio App. LEXIS 5492* at paras. 2 and 7 (charge filed on August 18, 2005 and complaint filed on December 15, 2005) .

Second, the appellate court chronicled the Commission’s completed attempt to conciliate the charge:

The Commission and [Relator-Appellant] *repeatedly communicated* about reaching a conciliation; . . . [Relator-Appellant] informed the Commission that *conciliation was meaningless* because of the unequal playing field (allegedly caused by the Commission’s failure to issue a subpoena). The Commission replied by continuing to run the statutory period of conciliation.

*After* concluding that the informal methods of conference, conciliation, and persuasion were fruitless, the Commission, on December 15, 2005, filed a complaint against appellant pursuant to R.C. 4112.05(B)(5).

*Id.* at paras. 26 and 27 (emphasis added). *See also Id.* at para 7, (the Commission “fail[ed] to resolve the matter through the informal methods of conference, conciliation and persuasion.”)

The Commission in this case engaged in efforts to complete conciliation that met or exceeded those considered by this Court in its decisions following *Republic Steel. Cf. East Mfg. Corp., supra* (Commission’s notice of a conciliation meeting was a sufficiently complete attempt despite relator’s claim that it had not received the notice). Similarly, no lower court has found that the Commission lacked jurisdiction based on conciliation efforts similar to those shown here.

In *Voiers Enterprises, Inc., v. Ohio Civil Rights Comm.*, 156 Ohio App. 3d 195 (4<sup>th</sup> Appellate Jud. Dist. 2004), for example, the Commission attempted to conciliate a charge of discrimination by:

1. Submitting a proposed conciliation agreement and consent order;
2. Scheduling a conciliation meeting; and
3. Offering respondent the opportunity to make another conciliation proposal.

The respondent contended that the Commission’s conciliation efforts fell short of the necessary “attempt at conciliation” for acquiring jurisdiction since the charging party did not attend the conciliation meeting. The *Voiers* court disagreed:

[W]e find that the Commission attempted to conciliate this matter in accordance with R.C. 4112.05, but its conciliation efforts failed. Accordingly, we find that the Commission satisfied the jurisdictional prerequisite of R.C. 4112.05(B)(4), and therefore had jurisdiction to file its complaint and proceed with the formal hearing.

*Id.* at 205. See also *Harbor Park Marinas, Inc. v. Ohio Civil Rights Com.*, 64 Ohio App. 2d 120, 124 (Ohio Ct. App. 1978) (jurisdiction attacked where the record did not include the Commission’s initial conciliation proposal. “The exclusion of the initial commission conciliation proposal . . . did not in any way affect the decisive issue” of whether discrimination occurred).

In this case the Commission did much more than send a notice. It:

1. Repeatedly communicated about conciliation with Relator;
2. Learned from Relator that it considered conciliation “meaningless” and
3. Concluded that conciliation would be futile.

Since the Commission in this case completed an attempt at conciliation and issued a complaint within one year of the complainant filing her charge of discrimination, it had sufficient jurisdiction for Relator to avail itself of the remedy through the appeal available under R.C. 4112.06.

### **Conclusion**

The Twelfth Appellate District erred by issuing a writ of mandamus where Relator-Appellant has an adequate remedy under R.C. § 4112 to challenge the Commission’s conduct of its investigation and the adequacy of its conciliation attempt. Denying the writ will thus cause Relator-Appellant no harm, since it can pursue its application for a subpoena on appeal and reopen conciliation upon obtaining that subpoena. Indeed, Relator-Appellant can conciliate this case even now, presumably with the benefit of a subpoena issued after the Commission filed its complaint.

If the Court allows a writ to issue in this case, it will invite endless attacks on the Commission’s jurisdiction. This Court consistently rebuffed such attacks following its decision in *Republic Steel*. It must therefore adhere to the standards it has set forth and keep closed the door

to collateral attacks on the Commission's jurisdiction through challenges to the adequacy of the Commission's subpoena procedures and conciliation attempts.

Respectfully Submitted:

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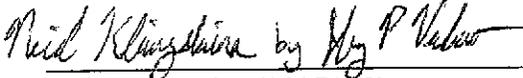
## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Brief of *Amici Curiae*, Ohio Employment Lawyers Association in Support of Respondents-Appellants Ohio Civil Rights Commission and Ohio Attorney General Marc Dann was served upon the following, via regular, U.S. Mail, postage prepaid this 15<sup>th</sup> day of May, 2007:

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LEXSEE 2006 U.S. DIST. LEXIS 36099

**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., Plaintiffs v.  
WORLD KITCHEN, INC. and ALLAN COVIELLO, Defendants**

**CIVIL ACTION NO. 1:05-CV-1970**

**UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF  
PENNSYLVANIA**

*2006 U.S. Dist. LEXIS 36099*

**June 2, 2006, Decided**

**PRIOR HISTORY:** *EEOC v. World Kitchen, Inc.*, 2006 U.S. Dist. LEXIS 27546 (M.D. Pa., Apr. 19, 2006)

**COUNSEL:** [\*1] For Equal Employment Opportunity Commission, Plaintiff: Cynthia A. Locke, Jacqueline H. McNair, Judith A. O'Boyle, Equal Employment Opportunity Commission, Philadelphia, PA.

For Brenda Adkins, Ruthann Geer-Lloyd, Intervenor Plaintiffs: Jeffrey I. Pasek, Cozen & O'Connor, Philadelphia, PA.

For World Kitchen, Inc., a subsidiary of WKI Holding Company, Defendant: Adrienne C. Mazura, DLA Piper, Rudnick, Gray, Cary, Chicago, IL US; Michael J. O'Neill, Philadelphia, PA; Tracy L. Bradford, DLA Piper, Rudick, Gray, Cary US LLP, Chicago, IL US.

**JUDGES:** CHRISTOPHER C. CONNER, United States District Judge.

**OPINION BY:** CHRISTOPHER C. CONNER

**OPINION:**

**ORDER**

AND NOW, this 2nd day of June, 2006, upon consideration of the motion to dismiss or, alternatively, for summary judgment (Doc. 3), filed by defendant World Kitchen, Inc. ("World Kitchen"), arguing that the court lacks jurisdiction or that summary judgment is appropriate because plaintiff Equal Employment Opportunity Commission ("EEOC") failed to conciliate in good faith before commencing the instant action, see 42 U.S.C. § 2000e-5(b) (providing that the EEOC "shall endeavor to eliminate any such alleged unlawful [\*2] employment practice by informal methods of conference, conciliation, and persuasion"), and the court finding that the EEOC's initial attempt to conciliate was sufficient to meet juris-

dictional requirements, n1 see *EEOC v. Hugin Sweda, Inc.*, 750 F. Supp. 165, 167-68 (D.N.J. 1990) (finding the EEOC's initial conciliation efforts sufficient for jurisdictional purposes when the EEOC sent letters of violation, spoke to the defendant's counsel only twice, and failed to reschedule a conciliation conference); see also *EEOC v. Sears, Roebuck & Co.*, 391 F. Supp. 2d 317, 320 (D.N.J. 2005) (setting forth the standard for determining the adequacy of an attempted conciliation), but that the EEOC prematurely ended the conciliation process due to an inadvertent error, n2 see *Hugin Sweda, Inc.*, 750 F. Supp. at 168 ("Rather than dismiss the case, if a court finds that further conciliation efforts are required, the proper course is to stay proceedings until such informal proceedings can be concluded."), it is hereby ORDERED that:

1. The motion to dismiss or, alternatively, for summary judgment (Doc. 3) is DENIED.
2. The proceedings in the [\*3] above-captioned case are STAYED to provide the opportunity for a renewed conciliation attempt.
3. The parties shall file a joint status report concerning the progress of the attempted conciliation on August 4, 2006 or upon the conclusion of the attempted conciliation, whichever first occurs.

n1 By September 13, 2005, World Kitchen had received the EEOC's determination letters and proposed conciliation agreement, which requested a response within three days. (Doc. 4, Ex.

A PP2, 6.) In response to the proposed conciliation agreement, World Kitchen sent the EEOC questions regarding its terms. (Doc. 4, Ex. B P2.) On September 21, 2005, the EEOC investigator transmitted, via facsimile, a supplement to the original conciliation agreement with answers to World Kitchen's questions. The EEOC investigator requested a response within two days. (Doc. 14, Danese Aff. P9, Doc. 14, Ex. 5.) World Kitchen never received the fax because the EEOC investigator erred on the last digit of the fax number. (Doc. 14, Danese Aff. P13.) Unaware of his mistake, when the EEOC investigator did not receive a response after six days, he forwarded the file to management and the EEOC subsequently issued the notice of conciliation failure. (Doc. 14, Danese Aff. P11-12; Doc. 14, Ex. 6.)

World Kitchen argues that the EEOC did not conciliate in good faith because of the limited time given for its response to the conciliation agreements and the EEOC's failure to inquire about the lack of response to the supplemental conciliation agreement. The court is unpersuaded. Although the EEOC's requested response times were minimal, the EEOC demonstrated a willingness to extend the deadlines and there is no indication that it would not have done so if World Kitchen had so requested with the supplemental

conciliation agreement. The EEOC's mistaken belief that conciliation failed does not demonstrate a lack of good faith; however, it resulted in the premature end to EEOC's conciliation efforts. See *infra* note 2.

[\*4]

n2 Although the EEOC's initial effort at conciliation was sufficient for jurisdictional purposes, the court finds that further conciliation is required for the EEOC to fulfill its statutory duty. See *Hugin Sweda, Inc.*, 750 F. Supp. at 168 (finding that further conciliation was required with respect to the charges and the class action); *id.* ("[S]ummary judgment is far too harsh a sanction to impose on the EEOC even if the court should ultimately find that conciliation efforts were prematurely aborted."); see also *id.* (advising that "a conciliation conference is likely to provide the defendant with an adequate opportunity to respond to the charges and negotiate a settlement").

CHRISTOPHER C. CONNER

United States District Judge