

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FRANETTE McCULLOCH,)
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)
Plaintiff,)
)
)
v.) Civil Action No. 00-2195 (RWR)
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GEORGE W. BUSH,)
)
PRESIDENT OF THE)
)
UNITED STATES, et al.)
)
)
Defendants.)
_____)

MEMORANDUM OPINION

Plaintiff Franette McCulloch, an employee of the Executive Residence in the White House, alleges that her immediate supervisor, Roland Mesnier, continually harassed her in violation of her rights under the Presidential and Executive Office Accountability Act ("PEOAA"), 3 U.S.C. §§ 401-471 (West 2000) (Compl. Count II), and the Constitution (Compl. Count III). Furthermore, plaintiff claims that she is entitled to relief from the President's failure to issue required regulations under the PEOAA. (Compl. Count I.) Defendants have moved to dismiss plaintiff's claims for failing to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Because plaintiff's constitutional and regulatory claims fail to state claims upon which relief can be granted, they will be dismissed.

Furthermore, because plaintiff has failed to provide any equitable basis that would excuse her decision not to comply with the jurisdictional prerequisites of the PEOAA, this Court lacks subject matter jurisdiction over plaintiff's harassment claim under the PEOAA and it will be dismissed as well.

BACKGROUND

The plaintiff, Franette McCulloch, has been employed as an assistant pastry chef in the White House since 1983. (Compl. ¶ 10.) As an assistant pastry chef, plaintiff is an employee of the White House Executive Residence. (Pl.'s Mem. in Opp'n to Mot. to Dismiss ("Pl.'s Mem.") at 1.) Plaintiff alleges that since 1991, the head pastry chef, Roland Mesnier, has engaged in a pattern of sexually harassing her that has created a sexually-hostile work environment. (Compl. ¶ 12.) McCulloch alleges that she has been on a leave of absence since June of 1999 because of the effects of this sexually hostile work environment. (Id. ¶ 11.)

Prior to 1996, employees of the Executive Residence, like the plaintiff, did not have the rights afforded by Title VII of the Civil Rights Act of 1964. (Mem. in Supp. of Def. Pres. Clinton's Mot. to Dismiss ("Clinton's Mem.") at 5-6.)¹ The

¹Employees of the Executive Residence are not covered by Title VII. See Haddon v. Walters, 43 F.3d 1488 (D.C. Cir. 1995) (holding that while Title VII covers executive agencies

PEOAA extended the protections of Title VII and several other civil rights statutes to certain previously uncovered employees of the White House, like the plaintiff. (See id. at 6; 3 U.S.C. § 411(a),(c).)

The PEOAA, and the civil rights statutes which it embraces, require an aggrieved employee to take certain steps in a timely fashion before the employee can file suit in federal district court. The first step an aggrieved employee must take under the PEOAA is to seek counseling and mediation. See 3 U.S.C. § 451. The Act clearly states that an employee "who has not exhausted counseling and mediation . . . shall be ineligible" to proceed to the next step in the process. 3 U.S.C. § 452(b); see also, 3 U.S.C. § 435(e) (stating that only an employee covered by this Act "who has undertaken and completed the procedures described in section 452 may be granted a remedy under" § 411).

If an employee still has a grievance after exhausting the counseling and mediation process, she can either file a complaint with the appropriate agency or file a civil action in federal court. See 3 U.S.C. § 453(1),(2). The employee must file a suit no sooner than 30 days after she receives

by virtue of 42 U.S.C. § 2000e-16, Executive Residence employees are not covered by Title VII, because the Executive Residence is not an executive agency).

notice of the end of the period of mediation, but no later than 90 days after receiving notice. See id. § 453.

The President, or the designee of the President, is supposed to issue regulations that define the procedures for counseling and mediation. See id. § 452(a). These procedures are supposed to be "substantially similar" to the counseling and mediation process created under the Congressional Accountability Act of 1995. See id. If the President, or his designee, has not issued a regulation that is necessary to adjudicate the case, "the court shall apply, to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding." 28 U.S.C. § 3903 (West 2000).

As of the filing of this suit, the President had still not issued the required regulations for counseling and mediation. (Pl.'s Mem. at 1.) Nevertheless, the Office of Administration ("OA") within the Executive Office of the President ("EOP") has had an Equal Employment Opportunity ("EEO") office for many years. (Sharon Solomon Aff. ("Solomon Aff.") ¶¶ 1, 2.) In June of 1993, an EEO investigator interviewed the plaintiff as a potential witness to allegations of discrimination raised by one of plaintiff's

coworkers in the Executive Residence. (Id. ¶ 10.) During that interview, the EEO investigator explained the EEO process to McCulloch. (Id.) In February of 1994, plaintiff attended a briefing on the EEO process for Executive Residence employees. (Id. ¶¶ 12, 13.) Since at least October 1, 1997, the EEO office has had a counseling and mediation program in place. (Id. ¶ 19.)

In addition, an EEO office employee informed plaintiff's counsel before this action was filed that the "first and critical step to resolving Ms. McCulloch's complaint is to enter into the counseling process which we have offered to undertake." (Clinton's Mem. Ex. I.) Plaintiff elected to forego any attempt to seek counseling or mediation and filed this suit directly in federal district court.

DISCUSSION

The President has moved under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) to dismiss Count I for a lack of subject matter jurisdiction and for failing to state a claim upon which relief can be granted. The President has moved under Rule 12(b)(1) to dismiss Count II for lack of subject matter jurisdiction. Both the President and defendant Mesnier have

moved under Rule 12(b)(6) to dismiss Count III² for failing to state a claim upon which relief can be granted.

I. Counts I and III

To survive a Rule 12(b)(6) motion to dismiss, “the complaint must set forth sufficient information to suggest that there exists some recognized legal theory upon which relief can be granted.” Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988) (emphasis in original) (quoting Gregg v. Barrett, 771 F.2d 539, 547 (D.C. Cir. 1985)). When evaluating a motion to dismiss, the court must assume that plaintiffs’ factual allegations are true. If, however, the complaint fails to establish any right to relief, it must be dismissed. See Gregg, 771 F.2d at 547.

A. FAILURE OF THE PRESIDENT TO ISSUE REGULATIONS

Count I seeks injunctive and declaratory relief for the President’s failure to issue regulations pursuant to 3 U.S.C. § 452(a). Section 452(a) states, in relevant part, “[t]he President, or the designee of the President, shall by regulation establish procedures substantially similar to those under sections 402 and 403 of the Congressional Accountability

²Count III is the sole count in which Mesnier is named as a defendant.

Act of 1995³ for the counseling and mediation of alleged violations" of the PEOAA.

Plaintiff contends that the failure of the President to issue regulations violated § 452(a). (Compl. ¶¶ 63-72.) Plaintiff concludes this alleged violation requires this Court to "compel agency action unlawfully withheld or unreasonably delayed" pursuant to 5 U.S.C. § 706 (West 2000). Section 706 is a part of the Administrative Procedures Act ("APA") that provides for judicial review of agency action taken pursuant to the APA. See, e.g., Radio-Television News Dirs. Assoc. v. FCC, 184 F.3d 872 (D.C. Cir. 1999) (using § 706 to review agency action taken pursuant to the APA).

Plaintiff's argument fails to state a claim for two reasons. First, the Supreme Court has held "[t]he actions of the President . . . are not reviewable under the APA because . . . the President is not an 'agency.'" Dalton v. Specter, 511 U.S. 462, 470 (1994). Thus, the Supreme Court has squarely rejected the type of suit contemplated by the plaintiff.

³The Congressional Accountability Act of 1995 extended the protections of Title VII and other federal civil rights statutes to Congressional employees in the Legislative Branch. H.R. Rep. No. 103-650 pt. II (1994), 1994 WL 405910.

Second, even if the APA allowed for a suit against the President, review of a President's noncompliance with any part of the PEOAA is expressly forbidden by statute. "Except as expressly authorized by this chapter⁴ and chapter 5 of title 3⁵, the compliance or noncompliance with the provisions of chapter 5 of title 3, and any action taken pursuant to chapter 5 of title 3, shall not be subject to judicial review." 28 U.S.C. § 3907 (West 2000).

At minimum, then, plaintiff has failed to state a claim in Count I upon which relief can be granted. Thus, Count I will be dismissed pursuant to Rule 12(b)(6).⁶

B. PLAINTIFF'S CONSTITUTIONAL CLAIMS

In Count III, plaintiff brings a discrimination claim under the First and Fifth Amendments of the Constitution rather than the PEOAA. It is, in essence, the type of claim recognized in Bivens v. Six Unknown Fed'l Narcotics Agents, 403 U.S. 388 (1971). In Bivens, the Court held that the

⁴Chapter 179, Title 28, U.S.C., captioned "Judicial Review of Certain Actions by Presidential Offices." Plaintiff does not allege that this chapter authorizes judicial review of a President's non-compliance with the PEOAA.

⁵Chapter 5 of Title 3 codifies the provisions of the PEOAA.

⁶Because Count I will be dismissed under Rule 12(b)(6), I need not address whether Count I also could have been dismissed under Rule 12(b)(1).

plaintiff was entitled to bring a suit for money damages against federal agents who had allegedly violated his rights under the Fourth Amendment of the Constitution. See id. at 397. The Court based this holding on the notion that courts have the ability to provide a remedy for violations of certain federal rights. See id. at 396.

Congress can, however, limit the ability of courts to create damage remedies. “[C]ourts must withhold their power to fashion damages remedies when Congress has put in place a comprehensive system to administer public rights, has ‘not inadvertently’ omitted damages remedies for certain claimants, and has not plainly expressed an intention that the courts preserve Bivens remedies.” Spagnola v. Mathis, 859 F.2d 223 (D.C. Cir. 1988). Thus, the comprehensiveness of the statutory scheme determines whether courts should abstain from inferring some type of constitutional remedy. See id. at 227. Factors such as the adequacy of the specific remedy are irrelevant in this analysis. See id.

The Supreme Court has found that a specific, civil-rights remedial scheme created by statute preempts more general remedies that might exist. In Brown v. General Servs. Admin., 425 U.S. 820, 835 (1976), the Court held that Title VII “provides the exclusive judicial remedy for claims of

discrimination in federal employment." The Court explained "[i]n a variety of contexts the Court has held that a precisely drawn, detailed statute pre-empts more general remedies." Id. at 834. The reason for the holding in Brown is clear: "[a]llowing federal employees to recast their Title VII claims as constitutional claims would clearly threaten" Congress's intent that aggrieved federal employees exhaust the rigorous administrative requirements before they bring their suit in federal court. Ethnic Employees of Library of Cong. v. Boorstin, 751 F.2d 1405, 1415 (D.C. Cir. 1985).

Here, plaintiff's Bivens claim is defective in two ways. Bivens suits must be brought against individuals in their personal capacity. See Dacey v. Clapp, Civ. A. No. 92-1599, 1993 WL 547467, at *3 (D.D.C. Oct. 23, 1993) (holding that "a Bivens action cannot be brought against a defendant in his or her official capacity"); Robertson v. Merola, 895 F. Supp. 1, 3 (D.D.C. 1995) (noting that "Bivens suits are suits against government officials in their individual, rather than their official, capacities"). The Bivens claim against the President names him only in his official capacity, not in his individual capacity.

This Bivens claim, however, has an even more fundamental flaw that warrants dismissal against both defendants. The

PEOAA preempts any constitutional claim against the defendants for sex discrimination. Two bases exist for this conclusion.

First, the PEOAA provides a comprehensive scheme for addressing claims of sex discrimination. It defines the rights that are protected. See 3 U.S.C. § 411. It provides a non-adversarial, two-step process to help resolve claims of sex discrimination. See 3 U.S.C. § 452. If that process fails, it gives the aggrieved employee the option of filing a complaint with either the appropriate agency or a federal district court. See 3 U.S.C. § 453. Finally, it provides guidelines for how both a reviewing agency and a reviewing federal district court should apply the statute. See 3 U.S.C. § 455; 28 U.S.C. § 3903.

Both the plain language of the PEOAA and its legislative history make clear that the statute was meant to preempt any claims that might exist under the Constitution. The provisions of the PEOAA explain that, with one exception that does not apply here, "no person may commence an administrative or judicial proceeding to seek a remedy for the rights and protections afforded by this chapter except as provided for by [the PEOAA and the statutes it cross-references]." 3 U.S.C. § 435(d)(1). The House Report for the PEOAA also explains that the PEOAA is to provide the exclusive means of remedying

acts of discrimination that violate the Act. "The administrative and judicial procedures established by this Act are the exclusive procedures for remedying violations of the Act." H.R. Rep. No. 104-820, at 33 (1996). In both the plain language of the statute and the legislative history, Congress has made it clear that the PEOAA provides the exclusive means for employees who are covered by the Act to seek redress for any claims of sex discrimination. Because plaintiff is covered by the PEOAA, any Bivens-type claim she might have had before the PEOAA has been preempted by the Act. See Brown, 425 U.S. at 835 (reaching the same conclusion in the context of a Title VII suit).

Second, interpreting PEOAA as preempting any constitutional basis of recovery for claims of sexual discrimination by employees covered by the Act is consistent with how the Supreme Court and D.C. Circuit have interpreted Title VII, which is the statute after which the relevant sections of PEOAA have been patterned. See 3 U.S.C. § 411(a)(1). Brown's holding that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment" has served as the basis for a long line of cases in this Circuit interpreting Title VII as preempting constitutional claims for federal employment discrimination.

425 U.S. at 835. See, e.g., Ethnic Employees of the Library of Cong., 751 F.2d 1405 (affirming the district court's dismissal of constitutional claims of discrimination brought by federal employees, where the claims simply restated claims cognizable under Title VII); Kizas v. Webster, 707 F.2d 524 (D.C. Cir. 1983) (affirming the district court's dismissal of a Fifth Amendment discrimination claim brought by a federal employee, because Title VII provides the sole basis of recovery); Hofer v. Campbell, 581 F.2d 975 (D.C. Cir. 1978) (holding that a Fifth Amendment claim alleging discrimination brought by a federal employee must be dismissed because Title VII provides the exclusive remedy for such violations).

PEOAA provides, among other things, the protections afforded by Title VII to previously uncovered White House employees. See 3 U.S.C. § 411. If Title VII prevents other federal employees from bringing constitutional claims, PEOAA, out of parity and consistency, should be read as preventing the employees it covers from bringing constitutional claims. Thus, the plain language of the PEOAA, its legislative history, and the case law interpreting the parallel statute after which the PEOAA is partly patterned all support the position that the PEOAA preempts a White House employee

covered by the PEOAA from bringing a workplace claim of sex discrimination based upon the Constitution.

For all of the foregoing reasons, Count III will be dismissed.

II. Count II

In Count II, plaintiff brings a claim for harassment under the PEOAA against the President in his official capacity. (Compl. ¶¶ 8, 73-79.) Defendant has moved to dismiss Count II of the Complaint alleging this Court lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1).⁷

For purposes of Rule 12(b)(1), it is the plaintiff's burden to establish by a preponderance of the evidence that subject matter jurisdiction exists. See Fitts v. Federal Nat'l Mortgage Ass'n, 44 F. Supp. 2d 317, 320 (D.D.C. 1999) (citations omitted), aff'd, 236 F.3d 1 (D.C. Cir. 2001).

"Under settled law, the District Court may in appropriate

⁷In addition to the problems that are fatal to this claim, which I identify below, Count II of plaintiff's complaint is also defective because plaintiff has named the President as a defendant, despite the fact that 28 U.S.C. § 3901 provides that the aggrieved employee's employing office, which is the Executive Residence in the instant matter, is the only proper defendant in a suit brought under 28 U.S.C. § 1346(g). This defect in pleading is not fatal because under Rule 15(c), the filing of an amended complaint naming the Executive Residence as a defendant would relate back to the date the original complaint was filed. See Mondy v. Secretary of the Army, 845 F.2d 1051, 1053 (D.C. Cir. 1988).

cases dispose of a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) on the complaint standing alone. But where necessary, the court may consider the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the resolution of disputed facts." Herbert v. National Academy of Sciences, 974 F.2d 192, 197 (D.C. Cir. 1992).⁸

"When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the court's jurisdiction." United States v. Mottaz, 476 U.S. 834, 841 (1986) (quoting United States v. Sherwood, 312 U.S. 584, 586 (1941)). The statutory scheme of the PEOAA waives the government's sovereign immunity for sex-based discrimination against Executive Residence employees. This waiver is subject to several qualifications that limit the extent of the government's waiver of immunity, and under Mottaz, this Court has jurisdiction to hear claims of sex discrimination against

⁸Plaintiff has filed a motion to strike the affidavits the defendants have appended to their motions to dismiss. (Motion to Strike Decls. of Sharon Solomon and Mary Coutts Beck.) Because I have considered undisputed facts contained in the affidavits that address subject matter jurisdiction, plaintiff's motion to strike will be denied in accordance with Herbert.

Executive Residence employees only to the extent the government has waived its immunity. See 476 U.S. at 841.

In Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990), the Supreme Court articulated how the filing deadlines of Title VII limit the extent of the government's waiver. Because the section of the PEOAA relevant here is modeled after Title VII, see 3 U.S.C. § 411(a)(1), Irwin can be instructive in interpreting the extent to which the statutory requirements for filing a timely suit against the federal government limits the subject matter jurisdiction of courts.

In Irwin, the Court observed that the filing deadline in Title VII "is a condition to the waiver of sovereign immunity and thus must be strictly construed." Id. at 94. Despite this strict construction, courts may still extend equitable relief from the filing deadlines to parties who violate the deadlines. See id. at 95-96. Such relief, however, may be granted only sparingly. "We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." Id. at 96. Thus, Irwin makes it clear that in order to maintain a suit against the government, a

plaintiff must comply with conditions of the government's waiver and that equitable relief for failing to abide by the government's conditions of its waiver will be granted only sparingly.

Under the PEOAA, one of the requirements for maintaining a suit in federal district court against the federal government is seeking counseling and mediation. See 3 U.S.C. §§ 452(b), 453. Applying the logic of Irwin, the plaintiff must have complied with the PEOAA's requirements for maintaining a suit against the federal government, or some basis must exist for this court to extend equitable relief from the requirements of the PEOAA. It is undisputed that plaintiff has not complied with the PEOAA's requirement that a covered employee seek counseling and mediation. (Mary Coutts Beck Aff. ¶¶ 24-32.) So, the existence of subject matter jurisdiction is contingent upon there being some basis for extending equitable relief from the counseling and mediation requirements of the PEOAA.

Waiver, estoppel and equitable tolling can all provide equitable relief from a failure to bring a suit timely. See, e.g., Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (D.C. Cir. 1982) (holding that the filing of a timely charge with the EEOC is not jurisdictional and that filing deadlines

are subject to waiver, estoppel and equitable tolling). The equitable remedies of waiver, estoppel and tolling can extend the filing deadlines of the process, but they do not allow the plaintiff to circumvent the process. See, e.g., Kizas v. Webster, 707 F.2d 524, 546 (D.C. Cir. 1983) (noting that "nothing in Zipes suggests that parties complaining of federal employment discrimination in violation of Title VII should ever be waived into court without filing any initial charge with the agency whose practice is challenged").

In the context of a Title VII case, the D.C. Circuit has explained that even when a basis exists for granting equitable relief from a statute of limitations, the plaintiff "would, at most, be entitled to a waiver of the time limits for the initiation of a complaint with the administrative agency rather than to the right to institute a civil action." Siegel v. Krepes, 654 F.2d 773, 778 n.14 (D.C. Cir. 1981). Federal employees who raise claims of discrimination are not allowed to circumvent the administrative process "because such a process promotes dispute resolution through accommodation rather than through litigation." Id.

Four different provisions of the PEOAA cite the completion of counseling and mediation as prerequisites to filing a suit for damages in federal court. See 3 U.S.C. §§

435(e), 451, 452(b), and 455. In addition to the repetition of the exhaustion requirement in the plain language of the statute, the House Report for the PEOAA states that "[f]ollowing a *mandatory* period of counseling and mediation, the employee may choose" between an administrative remedy and a judicial remedy. H.R. Rep. 104-820(I), at 17-18 (1996) (emphasis added).

The statute and the legislative history make clear that the plaintiff was required to undergo counseling and mediation before bringing this suit in federal court. The plaintiff elected to forego counseling and mediation and to file a suit directly in federal district court. Plaintiff has had actual knowledge of an administrative process in place at the White House since August 25, 2000, when an OA employee informed her that the first step in resolving her claim is undergoing counseling. (Clinton's Mem. Ex. I.) Arguably, she has had constructive knowledge of this process since either June of 1993, when she was interviewed during the course of an EEO investigation, or in February of 1994, when she attended a training session on the EEO process. (Solomon Aff. ¶¶ 10, 12, 13.) Plaintiff does not dispute the occurrence of any of these incidents.

The process in place at the EEO office in the White House provides for counseling and mediation. (Id. ¶¶ 9, 19.) The counseling and mediation process used by the EEO office in the White House reportedly is governed by the Congressional Accountability Act. (Clinton's Mem. at 29.) While plaintiff is correct that the statute does not provide for the EEO office adopting the Congressional Accountability Act procedure in the absence of regulations, such actions by the EEO office are not contrary to the language of the PEOAA. The PEOAA, and the statutes it cross-references, direct a reviewing court or agency to apply, "to the extent necessary and appropriate, the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding." 28 U.S.C. § 3903; 3 U.S.C. § 455. The statute is silent as to what counseling and mediation procedures the agency of first instance is supposed to apply when the President, or the President's designee, fails to issue necessary regulations.

Differences might exist between the procedures the EEO office of the White House is currently using and "the most relevant substantive executive agency regulation promulgated to supplement the statutory provision at issue in the proceeding," 28 U.S.C. § 3903, that reviewing agencies and

courts are directed to apply in the absence of a PEOAA regulation. If differences do exist, a reviewing court or agency might find that an aggrieved employee's attempt to abide by a relevant substantive executive agency regulation on counseling and mediation could serve as a basis for granting equitable relief from the EEO's current filing deadlines.

By failing to undergo any type of counseling and mediation, however, plaintiff has removed any need to consider the validity of the procedures adopted by the EEO office at the White House. The President's failure to issue regulations may have provided a basis for equitable relief from the filing deadlines, but given the clear language of the statute, the lack of regulations can not justify the plaintiff's decision not to even attempt to pursue any form of counseling or mediation. See Siegel, 654 F.2d at 778 n.14 (explaining that equitable considerations that might serve as a basis for waiving filing deadlines under Title VII, cannot justify allowing the plaintiff to forego the administrative process entirely).

Plaintiff's failure to attempt to exhaust the mandatory administrative remedies means that Count II has been brought outside of the scope of the government's waiver of its immunity for sexual harassment suits. See Mottaz, 476 U.S. at

841. Because the plaintiff failed to exhaust her administrative remedies and no equitable reason excuses her failure to exhaust, I do not have subject matter jurisdiction over this count, and it will be dismissed.

CONCLUSION

Plaintiff's claim based on the President's failure to issue regulations is explicitly banned by statute. Plaintiff's constitutional claims against both defendants fail to state a claim upon which relief can be granted because any rights she might have had under the Constitution have been preempted by the PEOAA. The Court does not have subject matter jurisdiction over plaintiff's harassment claim under the PEOAA because the plaintiff, without excuse, elected not to abide by the jurisdictional prerequisites to bringing a PEOAA claim in federal district court. Accordingly, plaintiff's complaint will be dismissed. A Final Order consistent with this Memorandum Opinion is being issued.

SIGNED this _____ day of _____, 2001.

RICHARD W. ROBERTS
United States District Judge