No. _____

In the Supreme Court of the United States

CINTAS CORPORATION,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND VOLUME 1 OF APPENDIX [pp. 1-130]

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QUESTIONS PRESENTED

1. Title VII of the Civil Rights Act of 1964 obligates the Equal Opportunity Employment Commission ("EEOC") to receive a charge of discrimination, provide notice of the charge to a respondent, "make an investigation" into the charge, determine whether there is "reasonable cause" to believe that the charge is true, and attempt to eliminate any alleged unlawful practices with "informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5. The EEOC cannot file a civil lawsuit until it has discharged these administrative duties. The first question presented is:

   Does the EEOC satisfy these requirements when it brings broad, class action-style suits on behalf of an indeterminate and unidentified group of persons, without first identifying, investigating, finding reasonable cause, and attempting to conciliate the claims of the alleged individual victims of discrimination?

2. Can the EEOC litigate a claim alleging a "pattern or practice" of discrimination under Section 706 of Title VII, 42 U.S.C. § 2000e-5, seeking compensatory and punitive damages, or instead only under Section 707, 42 U.S.C. § 2000e-6, which expressly empowers the EEOC to bring "pattern or practice" suits and limits recovery to equitable relief?

PARTIES TO THE PROCEEDINGS

Pursuant to Rule 14.1(b), the following identifies all of the parties before the United States Court of Appeals for the Sixth Circuit:

The Petitioner (Defendant/Appellee below) is:

Cintas Corporation.

The Respondents (Plaintiffs/Appellants below) are:

Equal Employment Opportunity Commission

Mirna Serrano

Blanca Nelly Avalos

The Equal Employment Advisory Council filed a brief as Amicus Curiae below.

RULE 29.6 STATEMENT

Cintas Corporation is a publicly traded company that has no parent company. No publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Cintas Corporation respectfully petitions this Court to grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 699 F.3d 884, and reproduced at App. 1-46. The order denying a petition for rehearing and rehearing en banc is not reported but is reproduced at App. 104-5.

Two opinions of the district court are directly at issue in this petition: (1) an opinion and order dated February 9, 2010 that is reported at 711 F. Supp. 2d 782, and is reproduced at App. 70-99; and (2) an opinion and order dated September 20, 2010 that is unpublished but is reproduced at App. 47-69.

JURISDICTION

The Sixth Circuit entered its judgment and opinion on November 9, 2012, and denied rehearing and rehearing en banc on January 15, 2013. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

42 U.S.C. § 1981a, reproduced at App. 106-10.

42 U.S.C. § 2000e-5 ("§ 706" of Title VII), reproduced at App. 111-21.

42 U.S.C. § 2000e-6 ("§ 707" of Title VII), reproduced at App. 122-25.

42 U.S.C. § 2000e-8 ("§ 709" of Title VII), reproduced at App. 126-30.

INTRODUCTION

Title VII, as amended, contains an "integrated, multistep enforcement procedure" aimed at eliminating employment discrimination through a combination of informal EEOC action and litigation. *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977). The enforcement procedure reflects Congress's preference for resolving discrimination claims short of litigation. To that end, before the EEOC can file a lawsuit and seek relief for "a person claiming to be aggrieved," it "shall make an investigation" of the charge of discrimination; determine whether there is reasonable cause to believe that the charge is true; and "endeavor to eliminate any … alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion… ." § 706(b). "[T]he EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties." *Occidental Life*, 432 U.S. at 368. The scope of any subsequent suit by the EEOC is limited to charges investigated, found to be supported by reasonable cause, and subject to (unsuccessful) conciliation.

The question in this case is whether the EEOC may effectively evade these pre-suit administrative requirements by bringing broad, open-ended, class-action-style litigation without having investigated, found reasonable cause, or attempted to conciliate the

claims of the alleged individual victims—simply by referring to a vague "class" of "similarly situated" persons. The Sixth Circuit, in the decision below, said yes: that the EEOC had satisfied the statutory prerequisites by finding reasonable cause to believe that Cintas had discriminated against "females as a class" across an entire state, and by seeking to conciliate the claims of a single named individual as well as "other similarly situated qualified female applicants." App. 36-7. Even years after bringing suit, the EEOC still had not finalized and disclosed the number and names of the females allegedly discriminated against.

The Sixth Circuit's rule would substantially gut the investigation and conciliation requirements of Title VII. It would also greatly expand the EEOC's power and incentives to sue and, as a result, it would undermine Congress's objective of encouraging informal pre-suit resolution of employment disputes. Congress empowered the EEOC to gather the information needed to determine if a charge is true, so that it can disclose the full scope and nature of a potential claim to an employer and thereby hopefully resolve it without resorting to litigation. By finding that the EEOC could comply with its pre-suit obligations by simply informing an employer that it was investigating a charge on behalf of a "class" and demanding a settlement, the court below effectively eliminated two steps from the "integrated, multistep enforcement procedure" that Congress crafted.

The Sixth Circuit's holding squarely conflicts with a recent Eighth Circuit decision, which affirmed the dismissal of EEOC claims because the agency did not

"identify any of the 67 allegedly aggrieved persons as members of the [class] until after it filed" suit; it did not investigate their individual allegations, make reasonable-cause determinations specifically as to them, or attempt to conciliate their specific claims, instead referring only to a vague "class of employees." *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 673-76 (8th Cir. 2012).

This split stems from a broader disagreement among the Circuits over the degree to which courts may review the adequacy or reasonableness of the EEOC's conciliation efforts: The **Sixth Circuit**, along with the **Fourth** and **Tenth**, have adopted the most deferential position, allowing only minimal review for bad faith, *see* App. 36, while the **Second**, **Fifth**, **Eighth** and **Eleventh** Circuits have enforced more specific requirements on the agency to ensure that conciliation can be effective. *Compare, e.g.*, *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979) ("The law requires ... no more than a good faith attempt at conciliation."), *with EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003) (requiring EEOC to, *inter alia*, "outline … the reasonable cause for its belief that Title VII has been violated" and "respond in a reasonable and flexible manner to the reasonable attitudes of the employer").

The present dispute over whether the EEOC must investigate and identify the alleged individual victims of discrimination reflects the broader dispute over whether courts may "look behind" purported conciliation efforts—a question that has itself greatly confused the lower courts. As one court accurately observed, just after the Sixth Circuit's decision here,

"[t]he circuits appear to have split on the standard governing a court's inquiry into whether the EEOC has satisfied its conciliation obligation." *EEOC v. St. Alexius Med. Ctr.*, No. 12 C7646, 2012 U.S. Dist. LEXIS 178866, at *3 (N.D. Ill. Dec. 18, 2012).

Review of the Sixth Circuit's decision is warranted for a second reason: it ignored the language of Title VII and expanded the EEOC's power when it held that the EEOC can assert a "pattern or practice" discrimination claim under § 706 of Title VII, rather than § 707, even though—as the court acknowledged—"§ 706 does not contain the same explicit authorization as does § 707 for suits under a pattern-or-practice theory." App. 14. This has dramatic consequences because Title VII (as amended in 1991) entitles the EEOC to try its case to a jury and to seek compensatory and punitive damages when it asserts claims on behalf of individuals under § 706 (and presents direct evidence or proceeds under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*McDonnell Douglas*")), but limits the EEOC to a bench trial and to equitable relief when it asserts broad "pattern or practice" claims under § 707 (under the framework set forth in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) ("*Teamsters*")). The decision below renders § 707 meaningless and redundant by creating an extra-statutory "hybrid" cause of action under which the EEOC can assert a "pattern or practice" claim under § 706 and seek massive compensatory and punitive damage awards. This aspect of the decision also raises an important and unsettled question of federal law, as neither this Court nor any other circuit besides the court below has ever

held that the EEOC can assert such a claim under § 706.

Both of these important and recurring issues of federal law strike at the heart of Title VII and the EEOC's role. When Congress passed and amended Title VII, it endorsed a "federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court." *Occidental Life*, 432 U.S. at 368. The decision below treats the EEOC as if it were a private litigant, whose sole goal is to obtain the largest financial settlement possible, by granting it the power to pursue massive class action-type lawsuits and recover compensatory and punitive damages without any meaningful pre-suit requirement to investigate and conciliate. That is not at all what Congress intended.

For all of these reasons, and for the reasons stated below, the Court should grant certiorari.

STATEMENT OF THE CASE

1. Factual Background

Cintas was founded in 1929 in Cincinnati, Ohio, as a small business to reclaim and clean rags for factories. Today it has over 800,000 customers, is the largest supplier of uniforms in North America, and provides other products such as mats, restroom supplies, first aid products and fire protection services. App. 3-4. Cintas products are delivered by Service Sales Representatives ("SSRs"), who drive trucks and deliver products, but also provide customer service, sell

products, collect payments, and generally act as "the face of Cintas." *Id*. 3-4. The case below concerns SSR hiring in Michigan.

On April 7, 2000, Mirna Serrano filed an EEOC charge, alleging that a Cintas location in Michigan did not hire her as an SSR because of her gender. *Id*. 4. The EEOC purported to investigate, and eventually purported to broaden its investigation to include SSR hiring at other Michigan locations. *Id.* 4-5. The EEOC did not investigate the claims of any individual applicant besides Ms. Serrano. *Id.* 55-6, 67.

In 2002, the EEOC determined that there was "reasonable cause to believe that [Serrano's] allegations are true [and] reasonable cause to believe that [Cintas] discriminated against females as a class by failing to hire them as [SSRs]." *Id*. 5, 83-4. It then sent a conciliation agreement identifying a group of females who had applied to the locations it investigated, but did not allege that each (or any) of those females had been denied employment because of her gender. *Id*. The conciliation agreement also sought relief for an unspecified number of unidentified "similarly situated" persons. *Id*.

It is undisputed that the EEOC did not investigate or attempt to conciliate the claims of the individuals upon whose behalf it intended to seek relief through litigation, nor did the EEOC disclose to Cintas the identity or number of persons upon whose behalf it would ultimately seek relief in this litigation, before filing suit. *Id*. 35-7, 67.

2. Proceedings in the District Court

On April 14, 2005, the EEOC announced it was terminating conciliation efforts (*id*. 5), and on December 23, 2005 it filed a "Complaint-in-Intervention" against Cintas under § 706 of Title VII.[1] The EEOC filed an Amended Complaint on August 20, 2009. *Id*. 6. It is undisputed that the EEOC did not disclose the names of each individual upon whose behalf it sought relief until the court ordered it to do so in 2010. *Id*. 67.

Neither the Complaint nor the Amended Complaint alleged that Cintas engaged in a "pattern or practice" of discrimination or stated claims under § 707 of Title VII. *Id.* 23, n.3. Nevertheless, as the case progressed, it became clear that the EEOC believed it was pursuing a "pattern or practice" claim. Cintas moved for judgment on the pleadings, and asked the district court to "preclude the EEOC from prosecuting the instant § 706 action under the *Teamsters* 'pattern or practice' framework used in § 707 actions." *Id*. 71-2.

The district court granted Cintas's motion. *Id*. The court explained that, for purposes of the EEOC's enforcement authority, "[t]here is a significant distinction between §§ 706 and 707 claims." *Id*. quoting *EEOC v. Scolari Warehouse Markets, Inc.,* 488

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[1] The EEOC intervened in a private Title VII class action that was filed by Ms. Serrano on May 10, 2004. *Id*. 5. The private plaintiffs unsuccessfully moved for class certification. *Id.* 5-6. That decision was also appealed to the Sixth Circuit, and is still pending. *Id.* 6 n.2. The named private plaintiffs' individual claims were settled, dismissed, or otherwise resolved. *Id.* 6.

F. Supp. 2d 1117, 1143 (D. Nev. 2007). In particular, § 706 "unequivocally refers to claims by *individual plaintiffs* who allege they were discriminated against by their employer," and "nowhere within the text of § 706 can the EEOC find authority to bring a so-called 'pattern or practice' action." *Id*. 97. Rather, "[t]hat authority is ... couched within § 707, to which Congress chose not to extend compensatory or punitive damages … when amending [Title VII]." *Id*. 97. Because the EEOC had asserted claims under § 706, not § 707, it could not pursue a "pattern or practice" claim. *Id*. 97-8.

The court then ordered the EEOC to identify the individuals upon whose behalf it was seeking relief, and on March 23, 2010—nearly eight years after it ended its investigation—the EEOC finally identified 46 individual female applicants. *Id.* 67. Following discovery, the EEOC abandoned all but 13 of those claims (*id.*), and the district court subsequently granted summary judgment to Cintas on those 13 individual claims, under the *McDonnell Douglas* framework (*id.* 8, 188-542).

Cintas also moved for summary judgment because the EEOC failed to satisfy the administrative prerequisites for filing suit under Title VII. *Id*. 47-69. Applying the reasoning of the district court in *EEOC v. CRST Van Expedited, Inc.*, No. 07-cv-95, 2009 U.S. Dist. LEXIS 71396 (N.D. Iowa Aug. 13, 2009) *aff'd in relevant part and reasoning adopted*, 670 F.3d 897 (8th Cir. 2012), the court held that dismissal was appropriate because even "[y]ears after the EEOC filed its initial Complaint in this matter, Cintas still had no idea as to the identities of those allegedly aggrieved individuals upon whose behalf this § 706 action was

brought." App. 67. Because the EEOC never identified the claimants upon whose behalf it later purported to assert Title VII claims, it had not complied with its statutory duties to investigate the claims, determine reasonable cause, and attempt conciliation. *Id*. The court held "that the EEOC's failure to engage in the required 'integrated, multistep enforcement procedure' … [was] fatal to the EEOC's claims… ." *Id.* quoting *Occidental Life*, 432 U.S. at 359-60.

3. The Sixth Circuit's Decision

On appeal, the Sixth Circuit overturned the district court's holding that the EEOC had failed to satisfy its pre-suit obligations. App. 35-6. The panel acknowledged the district court's reliance on *CRST* (*see id*. 35), but chose not to apply the Eighth Circuit's rule. Rather, it reaffirmed its statement in *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984), that "it is inappropriate for a 'district court to inquire into the sufficiency of the [EEOC's] investigation.'" App. 36. It then ruled that the EEOC could comply with its Title VII obligations merely by "provid[ing] notice to Cintas that it was investigating class-wide instances of discrimination" and mentioning in a proposed conciliation agreement that it sought relief for an unspecified number of "similarly situated females." *Id.* 36-7.

The Sixth Circuit also held that the EEOC may employ the *Teamsters* "pattern or practice" framework referred to in § 707, even when it sues under § 706. *Id.* 14-19. The court acknowledged that "§ 706 does not contain the same explicit authorization as does § 707 for suits under a pattern-or-practice theory." *Id*. 14. It

(at least implicitly) acknowledged that neither this Court nor any other court of appeals had held that the EEOC could pursue "pattern or practice" claims under § 706. *See id*. 15-17. It further acknowledged the force of Cintas's argument that "Congress's 1991 amendments to § 706 adding compensatory and punitive damages—remedies not added to § 707—evidence a desire to prevent the availability of those remedies when the EEOC seeks to vindicate pattern-or-practice discrimination." *Id*. 18. Nevertheless, the Sixth Circuit held that "the district court erred in concluding that the EEOC may not pursue a claim under the *Teamsters* pattern-or-practice framework, pursuant to its authority vested in § 706… ." *Id*. 19.

REASONS FOR GRANTING THE PETITION

This Court should grant review to correct the Sixth Circuit's two legal errors, which together transform the EEOC from a restrained agency empowered to sue only as a last resort and, even then, to collect damages only on behalf of individual victims after proving individual discrimination, into an unbridled force capable of bringing all of the power of the federal government to bear in open-ended, class action-style litigation that surprises and intimidates employers with the threat of massive compensatory and punitive awards.

First, the Sixth Circuit erred by holding, consistent with its general view that courts must defer to the EEOC as to the sufficiency of the agency's pre-suit investigation and conciliation, that the EEOC may satisfy those requirements even without identifying the number or names of the alleged individual victims of

discrimination upon whose behalf it intends to seek relief. The court held instead that the agency may bring suit on behalf of an indeterminate "class" of individuals simply by issuing a reasonable-cause determination and offering to conciliate as to that aggregate, undefined group. That decision squarely conflicts with a holding of the Eighth Circuit, and district courts around the country are deeply divided on the same question. The deferential approach of the Sixth Circuit, from which this dispute stems, also broadly conflicts with holdings of at least four other Circuits, and those conflicting standards have led to massive confusion in the lower courts.

Second, the Sixth Circuit erred by holding that the EEOC can pursue "pattern or practice" claims under § 706 of Title VII, and therefore obtain compensatory and punitive damages for such claims, even though the statute expressly provides that the EEOC may assert such claims only under § 707 of Title VII, and is limited to equitable relief. That decision is not supported by any precedent of this Court, further expands the EEOC's power beyond Congress's intent, and contributes to ongoing confusion in the lower courts.

I. THE DECISION BELOW CONFLICTS WITH OTHER LOWER COURTS BY ALLOWING THE EEOC TO EVADE TITLE VII'S PREREQUISITES TO SUIT.

Title VII requires the EEOC to investigate a charge of discrimination, find reasonable cause to believe it is true, and attempt conciliation with the employer before it can file suit. The Sixth Circuit, following its general approach of restricting judicial review of the adequacy

of compliance with those prerequisites, held that the EEOC may satisfy them on a "class-wide" basis, without investigating individual allegations of discrimination—or even identifying the individuals' identities. That decision conflicts with the holdings of at least one other circuit, is inconsistent with several others, and ignores the language and purpose of Title VII.

A. Other Courts, Including the Eighth Circuit, Reject the Sixth Circuit's Holding That the EEOC's Pre-Suit Duties Can Be Satisfied Without Investigating or Identifying the Individual Alleged Victims of Discrimination.

Title VII contains "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life*, 432 U.S. at 359. The "procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice." *Id.* "A charge may be filed by an aggrieved individual or by a member of the Commission." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) citing § 706(b). The EEOC must then "serve a notice of the charge [on the employer] … and shall make an investigation thereof." § 706(b). During the investigation, the EEOC has authority to access and copy the employer's records, § 709(a), to compel the production of evidence, including witness testimony, by issuing administrative subpoenas, and to seek judicial enforcement of subpoenas. § 710 (citing 29 U.S.C. § 161); *see also Shell Oil*, 466 U.S. at 63-64. If the EEOC finds reasonable cause to believe that a charge is true, it must "endeavor

to eliminate any ... alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." § 706(b). After the EEOC completes its investigation and issues a reasonable cause determination, it may "bring a civil action" if it is "unable to secure … a conciliation agreement acceptable to the Commission." § 706(f)(1). Title VII prohibits the EEOC from filing a lawsuit unless and until it satisfies all of these administrative prerequisites. *Occidental Life*, 432 U.S. at 368.

The district court here found that, since the EEOC had never, before filing suit, even identified the 13 claimants upon whose behalf it sought relief, it could not possibly have complied with its statutory duty to investigate, determine reasonable cause, and attempt conciliation. App. 67. The Sixth Circuit reversed, reasoning that it sufficed for the EEOC to have found reasonable cause to believe that Cintas had discriminated against "females as a class" and to have apprised Cintas that it sought relief not just for Serrano but also on behalf of "other similarly situated qualified female applicants." *Id*. 36-7. In other words, the court ruled that the EEOC could satisfy its pre-suit obligations "on a class-wide basis" (*id.* 36), without investigating, assessing reasonable cause, or informing Cintas of the alleged individual acts of discrimination or even the number thereof.

The Eighth Circuit, on "substantially similar—in fact, identical—procedural facts" (*id.* 61), reached exactly the opposite result. That court held that the EEOC must at least identify the claimants upon whose behalf it seeks relief (or disclose the size of the class) to an employer before it can file suit. *CRST Van*

Expedited, 679 F.3d at 676. There, as here, the EEOC told the employer after its investigation that it had cause to believe that "a class" of women were victims of discrimination, but never provided notice about the size of the class or the identities of the victims. *Id.* As here, even after it filed suit, the EEOC did not disclose this information *for years*. *See id.* at 669 ("[I]t was unclear whether the … lawsuit involved two, twenty or two thousand 'allegedly aggrieved persons.'").

The Eighth Circuit acknowledged that "the EEOC enjoys wide latitude in investigating and filing lawsuits related to charges of discrimination," but, unlike the Sixth Circuit, found that "Title VII limits that latitude to some degree by 'placing a strong emphasis on administrative, rather than judicial, resolution of disputes.'" *Id.* at 674 (quotation omitted). The Eighth Circuit thus rejected the notion that the EEOC could assert claims on behalf of individuals it did not identify during its investigation, and affirmed summary judgment for the employer. *Id.* at 674-6.[2]

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[2] The EEOC previously suggested that it had not identified claimants to Cintas because some applications it received during discovery were redacted. App. 27-8. This does not explain why the EEOC failed to identify even *one* potential claimant until ordered to do so in 2010. *Id*. 67. What it does reveal is that the EEOC was using discovery in the litigation to identify potential claimants, which the Eighth Circuit (in conflict with the Sixth) has held the EEOC cannot do. *See CRST Van Expedited,* 679 F.3d at 675 ("the EEOC may not use discovery in the resulting lawsuit 'as a fishing expedition' to uncover more violations" (internal citations and quotations omitted)).

The conflict between the Sixth and Eighth Circuits is reflected in a deep division among district courts. Some have held, like the Sixth Circuit, that the EEOC can render reasonable-cause determinations as to, and seek to conciliate the claims of, broad, ill-defined "classes," with the authority to then bring suit on behalf of such a class and define its members only subsequently, after discovery. *See, e.g.*, ***EEOC v. Multilink, Inc.,*** No. 1:11-cv-2071, 2013 U.S. Dist. LEXIS 40097, at *3-5 (N.D. Ohio Mar. 12, 2013) (holding that EEOC's conciliation efforts were adequate where it gave notice that it "was investigating class-wide instances of discrimination … even though specific employees went unnamed"); ***EEOC v. U.S. Steel Corp.,*** No. 10-1284, 2013 U.S. Dist. LEXIS 22748, at *36-37 (W.D. Pa. Feb. 20, 2013) ("Given that the Sixth Circuit in *Serrano* found that the mere statement 'females as a class' … was sufficient to put the employer on notice that it had investigated and sought to conciliate class-wide claims, … similar language … indicates that [the employer] was likewise on notice about the scope and nature of any possible lawsuit arising from the EEOC's investigation."); ***EEOC v. Evans Fruit Co.,*** 872 F. Supp. 2d 1107, 1111 (E.D. Wash. 2012) (court "not persuaded the Ninth Circuit would adopt [the *CRST*] rule that the EEOC must specifically identify, investigate and conciliate each alleged victim of discrimination before filing suit").

Yet other district courts have held, like the Eighth Circuit in *CRST*, that the prerequisites to suit must be satisfied on an individual level to be at all meaningful. *See*, *e.g.*, ***EEOC v. Swissport Fueling, Inc.***, No. 10-02101, 2013 U.S. Dist. LEXIS 2054, at *74 (D. Ariz. Jan. 7, 2013) (rejecting EEOC effort to assert claims on

behalf of individuals not identified during its investigation); *EEOC v. First Midwest Bank, NA*, 14 F. Supp. 2d 1028, 1032-33 (N.D. Ill. 1998) (conciliation efforts inadequate where EEOC "refused to provide [employer] with any information regarding the class of female employees until [employer] made a conciliation offer"); *see also EEOC v. The Original Honeybaked Ham Co. of Georgia, Inc.*, No. 1:11-cv-02560 (D. Colo. Jan. 15, 2013) (where EEOC investigation focused on the conduct of one supervisor, suit on behalf of "class of female employees" could not be pursued).

On an important question of Title VII procedure like this one, even a split *only* among district courts would provide a powerful basis for certiorari. Most large employment discrimination suits—especially those pursued by the EEOC—settle before trial, and district courts are therefore often the last word on important procedural questions that shape the EEOC's power and thus the dynamics of settlement. Here, there is not only a deep division at the district court level, but also a square conflict between two Circuits that (because the district courts granted summary judgment) were able to address the issue. And these divisions stem from a broader disagreement, discussed below, among at least half a dozen Courts of Appeal. Clarity is needed, and this Court's intervention is warranted.

B. Four Circuits Also Disagree More Broadly with the Sixth Circuit's Highly Deferential Approach Toward Review of the EEOC's Pre-Suit Investigation and Conciliation.

Moreover, while the Sixth and Eighth Circuits may be the only Circuit Courts to have addressed this

precise issue, their disagreement reflects a broader disagreement among the Circuits as to the degree of deference that courts should apply in assessing the EEOC's compliance with its statutory pre-suit obligations. That broader dispute, which is far more protracted, is what gives rise to the current concrete dispute and would also be addressed by this Court's review here. This general "standard of review" issue has taken on greater importance in light of the position recently advanced by the EEOC—namely, that its compliance or noncompliance with Title VII's prerequisites to suit is *entirely non reviewable*. *See, e.g.*, *Swissport Fueling*, 2013 U.S. Dist. LEXIS 2054, at *67 ("The EEOC argues that summary judgment should be denied on this ground because its pre-litigation actions are not subject to judicial review.").

The Sixth Circuit, in the decision below, reaffirmed its prior holding that "it is inappropriate for a 'district court to inquire into the sufficiency of the [EEOC's] investigation.'" App. 36, quoting *Keco*, 748 F.2d at 1100. Instead, the court below held that the district court need only satisfy itself that the EEOC made a "good faith" effort at conciliation. *Id*. The Fourth and Tenth Circuits have adopted a similarly deferential posture. *See Radiator Specialty Co.*, 610 F.2d at 183 ("The law requires ... no more than a good faith attempt at conciliation."); *EEOC v. Zia Co.,* 582 F.2d 527, 532-34 (10th Cir. 1978) (same).

Other Circuits have applied different standards when faced with a challenge to the adequacy of the EEOC's compliance with its pre-suit obligations, all of which are inconsistent with the Sixth Circuit's deference to the EEOC in this case and in *Keco*, 748

F.2d at 1100. The Fifth and Eleventh Circuits apply a three-part test that requires the EEOC to outline why it believes its claims have merit and to respond to an employer reasonably and in a flexible manner prior to filing suit. *See Asplundh Tree Expert Co.*, 340 F.3d at 1259 ("To satisfy the statutory requirement of conciliation, the EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."); *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981) (same). In *EEOC v. Agro Distribution, LLC*, 555 F.3d 462, 468 (5th Cir. 2009), the Fifth Circuit applied the same three-part test, and rejected the notion that Title VII permitted the EEOC to use conciliation as a means to seek the largest settlement possible, criticized the EEOC for "abandon[ing] its role as a neutral investigator," and held that the EEOC could not use a proposed conciliation agreement "as a weapon to force settlement" by issuing a "take-it-or-leave-it demand."

The Second Circuit also has rejected the notion that Title VII permits the EEOC to determine for itself the adequacy of its own investigation and attempts at conciliation. That court requires the EEOC to "make a genuine effort to conciliate with respect to each and every employment practice complained of," and limits the EEOC to claims related to the geographic area of its investigations. *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981).

These conflicting standards have produced massive confusion. *See*, *e.g.*, *EEOC v. Alia Corp.,* 842 F. Supp.

2d 1243, 1255 (E.D. Cal. 2012) quoting *EEOC v. Timeless Investments, Inc.,* 734 F. Supp. 2d 1035, 1052 (E.D. Cal. 2010) (observing that "[t]here is a split among the circuit courts regarding the proper standard for reviewing whether the EEOC has attempted to conciliate in good faith" and that the Sixth and Tenth Circuits "have adopted a standard that is much more deferential to the EEOC" compared to the approach of the Second, Fifth, and Eleventh Circuits); *St. Alexius Med. Ctr.*, 2012 U.S. Dist. LEXIS 178866, at *3 ("The circuits appear to have split on the standard governing a court's inquiry into whether the EEOC has satisfied its conciliation obligation."); *EEOC v. Pbm Graphics*, 877 F. Supp. 2d 334, 360 (M.D.N.C. 2012) ("[F]ederal appellate courts have taken differing approaches in the level of scrutiny that should be used to review the conciliation process."); *EEOC v. Crye-Leike, Inc.*, 800 F. Supp. 2d 1009, 1017-18, n.5 (E.D. Ark. 2011) (same).

If this Court grants certiorari, its decision would likely resolve not only the important question of whether the EEOC may effectively evade its pre-suit duties by failing to identify or meaningfully describe the "class members" upon whose behalf it intends to seek relief, but also clarify more generally the proper role and approach of the federal courts in reviewing the EEOC's compliance with those obligations—including by confirming that, contrary to the EEOC, judicial review thereof is proper.

C. The Decision Below Is Inconsistent With the Language and Purpose of Title VII on an Issue of Growing Importance.

Those courts, including the Sixth Circuit, that have allowed the EEOC to bring suit without first having conducted any investigation, found any reasonable cause, or attempted any conciliation as to the individual aggrieved parties for whom it seeks relief, have distorted the language and purposes of Title VII's pre-suit administrative requirements. And this error is an extremely consequential one, as it allows the EEOC to rush toward litigation and coerce huge settlements by invoking the specter of indeterminate "class" members upon whose behalf the agency would seek potentially massive damage awards.

Congress's "intention to promote conciliation rather than litigation in the Title VII context" (*Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) citing *Shell Oil*, 466 U.S. at 77) is reflected by more than aspirational statements. Congress gave the EEOC broad pre-suit powers to investigate an employer charged with discrimination and to review and copy its records. § 709(a); § 710. *See Univ. of Pa. v. EEOC*, 493 U.S. 182, 191 (1990) (referring to the EEOC's "broad right of access to relevant evidence" when investigating Title VII charges and confirming its power to issue subpoenas); *Shell Oil*, 466 U.S. at 63 (same). Unlike a private litigant, the EEOC is not required to wait for discovery to access the information needed to prove its claims. In fact, Title VII requires the EEOC to "make an investigation." § 706(b). As a result, those courts that have rejected the Sixth Circuit's overly deferential approach have recognized the inequity of allowing the

EEOC to file suit, and then to use discovery to investigate and search for more potential claimants. *See*, *e.g.*, *CRST Van Expedited*, 679 F.3d at 675 ("The EEOC may not use discovery in the resulting lawsuit 'as a fishing expedition' to uncover more violations." (citations omitted)).

The Eighth Circuit's approach is more consistent with the text and purpose of Title VII, because the EEOC can use its pre-suit powers to complete its investigation and search for potential claimants prior to filing suit. That balance—pre-suit investigative powers coupled with a duty to investigate and conciliate before filing claims—reflects Congress's hope that charges will be settled *before* litigation. The decision below upsets that balance by allowing the EEOC to *retain* its pre-suit investigative powers but not requiring the agency to *use* them. As a result, employers are not able meaningfully to consider the substance or weight of the charges against them and therefore cannot make a reasoned determination as to whether to attempt conciliation or voluntary compliance.

Moreover, in light of the standard established by this Court for what the EEOC must include in a preliminary charge in order to access those broad investigative powers, the decision below would truly render the EEOC's pre-suit obligations a nullity. In *Shell Oil Co.*, 466 U.S. 54, this Court required that a charge filed by an EEOC Commissioner contain *virtually the same information* that the Sixth Circuit would require the EEOC to provide to an employer in the course of an attempted conciliation, *after an investigation has already taken place*:

> [T]he Commissioner should identify the groups of persons that he has reason to believe have been discriminated against, the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced.

Id. at 73. *Compare with* App. 36 (finding that EEOC complied with its pre-suit obligations simply by informing Cintas that "there is reasonable cause to believe that [it] has discriminated against females as a class by failing to hire them as [SSRs]"). The Sixth Circuit went so far as to hold that the EEOC complied with its pre-suit obligation to investigate and attempt conciliation merely by informing Cintas that it "*was investigating* class-wide instances of discrimination." *Id*. (emphasis added).

By holding that the same information that can support a charge can also support a showing that the EEOC investigated and attempted conciliation, the decision below for all practical purposes eliminates the investigation and conciliation requirement from Title VII, contrary to the congressional preference for resolving charges prior to suit. Those Circuits that engage in a more searching review of the EEOC's post-charge and pre-suit actions assure that the EEOC actually follows up a charge with investigation and conciliation efforts, which is more consistent with Title VII's requirement that the EEOC "shall make an investigation" (§ 706(b)) and Title VII's integrated, multistep enforcement procedure.

If the EEOC can preserve its power to define "class" members or add aggrieved parties *after* filing suit, simply by referring to "other similarly situated" persons its findings of reasonable cause or draft conciliation agreements, then the agency's power is dangerously expanded. By virtue of adding those phrases, the EEOC subjects the employer to "a moving target of liability throughout the conciliation process," *Swissport Fueling*, 2013 U.S. Dist. LEXIS 2054, at *79, and indeed throughout the discovery phase of subsequent litigation. This may add an *in terrorem* effect enabling the EEOC to extract larger settlements, but it hardly furthers Congress's intent of giving employers "adequate notice of the claims" against them, *id.*, such that they might meaningfully consider voluntary compliance or conciliation.

The sheer number of cases addressing this issue and their conflicting outcomes just over the last few years is testament to the current problem. This is, in other words, an issue of growing importance, especially as the EEOC begins to catch on to how the Sixth Circuit's decision allows it to pursue broad, class action-style litigation with minimum effort or investigation.

For these reasons, the Court should grant certiorari to correct the Sixth Circuit's judicial elimination of the investigation and conciliation requirements of Title VII.

II. THE SIXTH CIRCUIT'S DECISION IGNORED THE PLAIN LANGUAGE OF TITLE VII, WHICH ALLOWS THE EEOC TO ASSERT PATTERN OR PRACTICE CLAIMS UNDER § 707, NOT § 706, AND LIMITS THE EEOC TO EQUITABLE RELIEF.

The Sixth Circuit's decision ignores the plain language of Title VII, which authorizes the EEOC to pursue "pattern or practice" claims only under § 707, and not under § 706. For this separate reason, this Court should grant review.

A. The Sixth Circuit's Decision Ignores the Plain Language of Title VII, Resulting in a Vast Expansion of the EEOC's Powers.

Section 707 of Title VII expressly authorizes the EEOC to pursue a claim against an employer based on an alleged "pattern or practice" of discrimination. Its subsection (e) gives "the Commission … authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission." Section 706 contains no comparable authorization; it permits the EEOC to sue an employer only on behalf of a particular "person or persons aggrieved" by the employer's unlawful employment practice. The only reasonable interpretation of the two provisions is that the EEOC can assert a "pattern or practice" claim under § 707, but not in a § 706 suit like this one. *See*, *e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) (same).

This distinction is important because in 1991, Congress granted complaining parties under § 706—including the EEOC—the right to a jury trial and the ability to recover compensatory and punitive damages. 42 U.S.C. § 1981a(a)(1), (c) & d(1)(A). Congress did not amend § 707 similarly. The EEOC therefore cannot seek a jury trial, or compensatory or punitive damages, when it sues under § 707; it can only seek equitable relief, including back pay. § 707(a)(3) & (e). Congress could have, but did not, give the EEOC the same remedies in § 707 that it granted under § 706. As the court of appeals acknowledged, "Congress may have wanted to provide the EEOC with two different vehicles for initiating two different types of Title VII suits, each with its own advantages and disadvantages in terms of scope, burden of proof, and available remedies." App. 18.

That statement was correct. Where, as here, Congress amends one part of a statute without amending another, the law presumes that the amendment does not cover the part of the statute left untouched. *See*, *e.g.*, *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 174-75 (2009) citing *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 256 (1991) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Nevertheless, the Sixth Circuit erroneously treated Title VII as a kind of "smorgasbord of liability rules from which plaintiff can pick and choose." *Jones v. United States*, 703 F.2d 246,

250 (7th Cir. 1983). Nothing in the 1991 Act suggests that Congress intended any such thing.[3]

B. The Sixth Circuit's Decision Renders § 707 Superfluous.

A statute must be construed so that no part is "superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 32 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). The decision below renders § 707 superfluous and meaningless, because if the EEOC can import the "pattern or practice" theory into § 706 (seeking compensatory and punitive damages), it would never invoke § 707 (which prohibits such damages), and accordingly did not do so in this case.

The Sixth Circuit held that under its interpretation, § 707 retained independent significance because it "permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under § 706." App. 18. That statement overlooks the plain language of § 706, which permits the EEOC to file suit on its own initiative based on a Commissioner's charge, and does not require the EEOC to receive a charge from an

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[3] The EEOC previously relied heavily on *General Telephone Co. v. EEOC*, 446 U.S. 318, 323 (1980), but that case is inapposite. *General Telephone* held only that the EEOC does not have to comply with the requirements of Federal Rule of Civil Procedure 23 that govern private plaintiffs. *Id.* at 323. It does not follow from *General Telephone*—a case arising under the law that preceded the 1991 Civil Rights Act—that the EEOC may recover § 706 remedies in a suit invoking § 707 legal theories.

aggrieved individual. *See* § 706(b) (authorizing EEOC to begin pre-suit process "[w]henever a charge is filed by or on behalf of a person claiming to be aggrieved, *or by a member of the Commission*") (emphasis added).

As this Court observed in *Shell Oil*:

> A Commissioner may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge himself because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. [§706(b)]… . Second, when a Commissioner has reason to think that an employer has engaged in a 'pattern or practice' of discriminatory conduct, he may file a charge on his own initiative. [§707(e)].

466 U.S. at 62. When this Court in *Shell Oil* referred to the Commissioner filing a charge on behalf of *an individual*, it referred only to § 706, and related regulations. When it referred to the Commissioner filing a charge alleging a "*pattern or practice*," it referred only to § 707, and *not* to § 706. The Court's citations were consistent with the plain language of Title VII, which only authorizes the EEOC to assert a "pattern or practice" claim under § 707, and the Sixth Circuit was wrong when it held otherwise.

C. The Sixth Circuit's Decision Would Produce the Very Consequences Congress Sought to Avoid.

A § 707 "pattern or practice" claim proceeds under the *Teamsters* framework, which reverses the burden

of proof. If the EEOC establishes that "unlawful discrimination has been a regular procedure or policy followed by an employer" (431 U.S. at 360), discrimination against every member of the group *is presumed* and the burden shifts to the employer to prove that individual applicants were "denied an employment opportunity for lawful reasons" (*id.* at 362). When such a claim is asserted under § 707—as permitted by Title VII—the EEOC cannot recover punitive or compensatory damages. § 707(a)(3) & (e). Under the Sixth Circuit's holding, however, the EEOC can assert such a claim under § 706, and then use the *Teamsters* framework and shift to the employer the burden of disproving discrimination as to dozens, hundreds or thousands of persons, each presumptively entitled to emotional distress, economic and very likely punitive damages.

In fact, the EEOC takes the position that it can obtain punitive damages after the first phase of a "pattern or practice" trial—before the employer has even had a chance to shoulder the now-reversed proof burden. *See*, *e.g.*, *EEOC v. Dial Corp.*, 259 F. Supp. 2d 710, 712 (N.D. Ill. 2003). None of this can be reconciled with the Civil Rights Act of 1991. The specter of having to *disprove* discrimination to a jury—in a case brought in the name of the United States with compensatory and punitive damages to hundreds or thousands of persons on the line—gives the EEOC a powerful weapon with which to bludgeon vast settlements from innocent and yet risk-averse employers. Congress of course could have created that legal regime in the 1991 Civil Rights Act by amending § 707 along the same lines as § 706, but it did not do so.

In fact, the text and history of the 1991 Act demonstrates that this kind of result is exactly what Congress sought to avoid. The statute itself ties compensatory and punitive damage awards only to individual discrimination cases. *See* 42 U.S.C. § 1981a(b)(1) (awarding punitive damages when an employer is indifferent to the rights of "an aggrieved individual") *and* (b)(3) (setting a maximum amount of damages "for each complaining party"). And a primary concern about the 1991 amendments—which their supporters in Congress tried to allay—was that allowing compensatory and punitive damages "would … force employers to resort to quotas in their hiring… ." 137 Cong. Rec. H. 9505; *see also id.* (opponent arguing that the bill "would force employers to hire based on the numbers [and] guarantee a morass of costly litigation… ."). The supporters responded by pointing out that "the [compensatory and punitive] damages section [of the bill] applies to *individual* cases of intentional discrimination—where the statistical makeup of the workforce is irrelevant." *Id.* (emphasis added). In a pattern or practice case, however, the EEOC proves its case primarily through statistics. *See, e.g.*, *Teamster*s, 431 U.S. at 339 (1977) (statistics may be used to establish a prima facie case of discrimination); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-8 (1977) (gross statistical disparities alone may constitute prima facie proof in a pattern or practice case). If, as the Sixth Circuit now has held, punitive damages can flow from statistical disparities with little more, the danger Congress sought to avoid—quota hiring—becomes the employer's only safe harbor from potentially ruinous damages.

The Sixth Circuit—and the EEOC—suggested that the result below was justified because private plaintiffs may pursue class actions under a "pattern or practice" framework. App. 15-6 citing *Franks v. Bowman Transp. Co.,* 424 U.S. 747 (1976). But Title VII does not treat the EEOC as if it were a private plaintiff, and "the EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties." *Occidental Life*, 432 US at 368. In addition to enjoying broad authority to investigate employers before filing suit (*see supra* at 21-2), the EEOC is not required to comply with Federal Rule of Procedure 23 when it asserts claims on behalf of a group of individuals (*General Telephone*, 446 U.S. at 323). Congress chose to temper the EEOC's powers by placing substantive limitations on the EEOC when it chooses to litigate. Those limitations include the requirement that the EEOC only pursue claims that it has fully investigated and reasonably attempted to conciliate (§ 706(b)), and a limitation on the remedies the EEOC can pursue when it asserts "pattern or practice" claims under § 707. The Sixth Circuit's decision leaves in place the EEOC's powers, while ignoring and eliminating limitations that Congress chose to put in place.

Under proper statutory construction, none of this should have occurred. The proper rule is that, where the EEOC seeks to reverse the proof burden by employing the powerful weapon of § 707, that choice carries with it remedial consequences. When the EEOC sues under § 707, it is limited to the remedies provided under § 707. If the EEOC seeks additional remedies, § 706 is its vehicle to do so, but the EEOC cannot import into its § 706 suit the shifting proof-burden scheme reserved for § 707.

Finally, the Sixth Circuit's decision has contributed to ongoing confusion in the courts about the EEOC's pattern or practice authority. *See EEOC v. JBS USA, LLC*, No. 10-cv-318, 2012 U.S. Dist. LEXIS 167117, at *7 (D. Neb. Nov. 26, 2012) ("There is a split of authority among courts regarding whether the EEOC may employ the *Teamsters* method of proof, rather than the *McDonnell Douglas* framework, when the EEOC proceeds under Section 706"). Some courts have determined that the EEOC may bring pattern or practice cases only under § 707. *See, e.g., EEOC v. Bass Pro Outdoor World, LLC,* 884 F. Supp. 2d 499, 520 (S.D. Tex. 2012) (EEOC's pattern or practice authority is limited to § 707 because "§ 706 [does] not provide a vehicle for [EEOC] pattern or practice claims"); *EEOC v. JBS USA, LLC*, No. 10-cv-02103, 2011 U.S. Dist. LEXIS 87127, at *13-14 (D. Colo. Aug. 8, 2011) ("[T]he *Teamsters* framework generally applies to pattern or practice claims brought under § 707, whereas the *McDonnell Douglas* framework applies to individual claims brought under § 706."). Other courts have concluded that § 706 authorizes the EEOC to bring pattern or practice claims. *See, e.g.*, *EEOC v. Int'l Profit Assocs.,* No. 01 C 4427, 2010 U.S. Dist. LEXIS 32647, at *5-6 (N.D. Ill. Mar. 31, 2010) ("EEOC can maintain its 'pattern or practice' claim under section 706"); *Scolari Warehouse Mkts., Inc*., 488 F. Supp. 2d at 1144 (observing that "[a]llowing pattern-or-practice claims to proceed according to § 706 when Congress specifically created another avenue to bring such claims creates an apparent redundancy in the law that troubles the Court" and then deciding that "the EEOC's pattern-or-practice claim may proceed under §§ 706 and 707"). This Court should grant certiorari to

end this confusion and to clarify that the EEOC's pattern or practice authority is limited to § 707.

* * *

In two respects, the decision below undermines the balance struck by Congress, further empowering the EEOC at the expense of employers. Together, these errors allow the EEOC to wield the threat of huge *damages awards* on behalf of an *indeterminate and unidentified* "class" of individuals. That is not the role that Congress designed for this agency; this Court's intervention is badly needed to rein it in.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 10-2629/11-2057

[Filed November 9, 2012]

MIRNA E. SERRANO et al., *Plaintiffs*,	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff Intervenor-Appellant*,	)
v.	)
CINTAS CORPORATION, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
Nos. 2:04-cv-40132; 2:06-cv-12311—
Sean F. Cox, District Judge.

Argued: April 20, 2012

App. 2

Decided and Filed: November 9, 2012

Before: MOORE, GIBBONS, and ALARCÓN,* Circuit Judges.

COUNSEL

ARGUED: Jennifer S. Goldstein, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Gregory M. Utter, KEATING, MUETHING & KLEKAMP PPL, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Jennifer S. Goldstein, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Gregory M. Utter, Rachael A. Rowe, KEATING, MUETHING & KLEKAMP PPL, Cincinnati, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which ALARCÓN, J., joined and GIBBONS, J., joined in part. GIBBONS, J. (pp. 28–31), delivered a separate opinion concurring in part and dissenting in part.

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* The Honorable Arthur L. Alarcón, Senior Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION

KAREN NELSON MOORE, Circuit Judge. The Equal Employment Opportunity Commission ("EEOC") appeals two judgments entered by the district court in favor of Cintas Corporation ("Cintas") on sex-discrimination claims under Title VII. The EEOC alleged that Cintas discriminated against women in its hiring practices for the Service Sales Representative ("SSR") position. In the first judgment, entered on October 18, 2010, the district court granted Cintas's motion for judgment on the pleadings with respect to the EEOC's pattern-or-practice style claim and granted summary judgment for Cintas on the EEOC's thirteen individual-claimant claims. In the second judgment, entered on August 18, 2011, the district court granted Cintas's motion for attorney fees and costs in light of its status as the prevailing party. For the reasons that follow, we **VACATE** both judgments and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Background

Cintas is a corporation that supplies uniforms to businesses throughout North America. Sealed Appx. at A-1095. In fact, it is the largest such supplier with more than 800,000 clients and 400 operating facilities. *Id.* Cintas's SSRs are a key component of its workforce and provide the essential function of driving trucks to

pick up and deliver uniforms and other products requested by clients. *Id.* at A-911. While performing these functions, SSRs are also expected to act as sales representatives by providing any needed customer service, pitching up-sells to existing clients, and collecting payments due for services. *Id.* at A-911-12. Because SSRs are constantly out in the field servicing customers, SSRs are in many respects the public "face of Cintas." *Id.* at A-851.

Given the various demands of the job, SSRs are required to possess both communication and sales skills as well as the physical capacity to drive trucks and make deliveries. *Id.* at A-439-442. In addition, all SSRs are required to have a high school diploma or GED and a driver's license. *Id.* at A-37. The selection process for SSR candidates begins with a review of the candidate's application and resume. *Id.* at A-226, A-228. Desirable candidates are then selected for a brief screening interview, which may be conducted either in person or on the phone. *Id.* Candidates who perform well in screening are then invited to participate in more in-depth interviews and on-the-job simulations, after which an offer of employment may be made. *Id.* at A-234.

Mirna Serrano (Serrano), a female, unsuccessfully "applied numerous times" for a position as an SSR at Cintas's Michigan Westland location. R. 876-5 (Serrano EEOC Charge). Concluding that Cintas's failure to hire her may have been because of her sex, Serrano filed a discrimination charge with the EEOC on April 7, 2000. *Id.* On July 3, 2002, after investigating Serrano's claims and then expanding the investigation to include Cintas's female hiring practices throughout Michigan,

the EEOC issued a reasonable-cause determination stating that the EEOC had "reasonable cause to believe that [Serrano's] allegations are true" and "reasonable cause to believe that [Cintas] has discriminated against females as a class." R. 836-40 (EEOC Reasonable-Cause Determination). That same day, the EEOC sent a proposed conciliation agreement to Cintas suggesting that relief be provided to Serrano, one-hundred and eleven other specified women, and an unspecified number of "other similarly situated females." R. 836-41 (Proposed Conciliation Agreement at 3-4). Cintas did not respond or present a counteroffer for settlement. As a result, almost three years later on April 14, 2005, the EEOC notified Cintas that it was terminating conciliation efforts because they had been unsuccessful. R. 876-8 (EEOC Conciliation Termination Ltr.).

B. Procedural History

In May 2004, while the EEOC and Cintas were still involved in conciliation, Serrano filed a Title VII class-action complaint against Cintas in the U.S. District Court for the Eastern District of Michigan. R. 1 (Serrano Compl.). Shortly after conciliation terminated at the end of 2005, the EEOC intervened in the *Serrano* action. R. 97 (Dist. Ct. Order, 12/22/05); R. 98 (EEOC Compl.).[1] In June 2008, the private plaintiffs jointly moved for nationwide class certification, R. 411 (Plaintiffs' Mot. to Certify Class), which the district

[1] In July 2006, the *Serrano* case was consolidated for pretrial purposes with related case *Avalos et al. v. Cintas Corp.*, No. 06-12311. R. 143 (Dist. Ct. Order. 7/10/06). The EEOC was already an intervenor in the *Avalos* case prior to consolidation. *See* R. 144 (Dist. Ct. Order, 7/10/06).

court denied on March 31, 2009, R. 627 (Dist. Ct. Order, 3/31/09). The remaining named parties proceeded to litigate their individual claims and, by April 2010, all of the individual plaintiffs save Serrano "had their cases either dismissed, settled, or otherwise resolved." R. 937 (Dist. Ct. Op., 9/20/10, at 2).[2] Serrano and Cintas later concluded a settlement agreement in September 2010. *See* R. 937 (Dist. Ct. Op., 9/20/10).

After the class-certification issues were resolved, the EEOC and Cintas held a scheduling conference on August 10, 2009, and the district court set dates for discovery and the final pre-trial conference. R. 646 (Dist. Ct. Sched. Order, 8/11/09). In recognition of the denial of nationwide class certification for the private plaintiffs, the EEOC filed an amended complaint on August 20, 2009, which limited its allegations to "a class of women in the State of Michigan" as opposed to females nationwide. *See* R. 650 (EEOC First Amend. Compl. ¶¶ 8, 9, 11).

On October 21, 2009, Cintas moved for judgment on the pleadings, arguing that the EEOC could assert a claim of pattern-or-practice discrimination only pursuant to the EEOC's authority under § 707, and not under § 706, of Title VII. R. 662 (Cintas Mot. for Judgment). The district court granted Cintas's motion on February 9, 2010, R. 723 (Dist. Ct. Order, 2/9/10), and denied the EEOC's request to certify the issue for

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[2] Plaintiff Tanesha Davis timely appealed the district court's denial of class certification and grant of summary judgment on her individual claim. Case No. 06-12311, R. 669 (Notice of Appeal). This appeal is proceeding before another panel of this court. *See* Sixth Circuit Case No. 10-1662.

interlocutory appeal, R. 752 (Dist. Ct. Order, 3/12/10). Shortly thereafter, the EEOC made a series of motions in light of the district court's ruling. First, the EEOC moved for an extension of the discovery period to allow additional time to investigate individual-based claims. R. 731 (EEOC Mot. to Extend Discovery). Next, the EEOC moved to compel Cintas to produce, among other things, unredacted employment applications bearing the applicants' last names, addresses, and telephone numbers. R. 759 (EEOC Mot. to Compel). With both of these motions still outstanding, the EEOC moved to file a second amended complaint in order to add § 707 as a basis for its claims. R. 765 (EEOC Second Mot. to Amend).

The district court denied the discovery motions one by one. First, after a hearing, the district court denied the motion for an extension of discovery on April 5, 2010. R. 783 (Dist. Ct. Order, 4/5/10). Next, upon advice from the magistrate judge, the district court refused to compel Cintas to produce the unredacted employment applications. R. 807 (Magistrate Order, 4/22/10); R. 843 (Dist. Ct. Order, 7/7/10). After these rulings, on the final day of discovery, the EEOC sent notice of its intent to depose Scott Farmer, Cintas's President and CEO. On May 3, 2010, Cintas moved for a protective order barring the deposition. R. 816 (Cintas Mot. for Protective Order).

On June 2, 2010 after the close of the discovery period, the district court denied the EEOC's motion to file a second amended complaint. R. 829 (Dist. Ct. Order, 6/2/10); R. 940 (Amended Dist. Ct. Order). The next day the magistrate judge held a hearing on Cintas's motion for a protective order, and then issued

an order granting the motion. R. 831 (Magistrate Order, 6/10/10). Although the EEOC filed objections, R. 834 (EEOC Objections), it does not appear that the district court ever ruled on them.

On June 25, 2010, Cintas moved for summary judgment alleging that the EEOC failed to satisfy the administrative prerequisites to suit under § 706. R. 836 (Cintas *Omnibus* Mot. for Summary Judgment). On July 14, 2010, Cintas moved for summary judgment on the merits of each of the individual claimants' claims. *See* R. 848, R. 850, R. 852, R. 854, R. 856, R. 858, R. 859, R. 862, R. 864, R. 867, R. 869, R. 871, R. 873 (Cintas Mots. for Summary Judgment). Between September 3 and 10, 2010, the district court granted judgment in Cintas's favor on each of the individual summary-judgment motions. *See* R. 923-935 (Dist. Ct. Opinions). The district court thereafter also granted Cintas's omnibus motion alleging administrative default on September 20, 2010. R. 936 (Dist. Ct. Opinion, 9/20/10). The district court entered judgment on October 18, 2010, R. 941 (Judgment, Case No. 10-2629), and the EEOC filed a timely notice of appeal, R. 1070 (Notice of Appeal, Case No. 10-2629).

On October 18, 2010, Cintas moved, as the prevailing party, for attorney fees and costs, R. 943 (Cintas Mot. for Fees and Costs), and the district court granted the motion on August 4, 2011, R. 1079 (Dist. Ct. Op., 8/4/2011). The district court entered judgment on August 18, 2011, R. 1080 (Judgment, Case No. 11-2057), and the EEOC filed a timely notice of appeal, R. 1081 (Notice of Appeal, Case No. 11-2057).

II. ANALYSIS

The EEOC raises a number of challenges to the district court's resolution of its claims against Cintas. In particular, the EEOC argues that the district court erred in: (1) holding that the EEOC could not pursue a pattern-or-practice style claim pursuant to § 706 of Title VII; (2) denying the EEOC leave to amend its complaint; (3) refusing to extend the time for discovery; (4) declining to compel Cintas to produce unredacted employment applications; (5) granting a protective order barring the deposition of Scott Farmer ("Farmer"); (6) granting summary judgment in favor of Cintas on the thirteen individual claims; (7) holding that the EEOC failed to satisfy its administrative prerequisites to suit; and (8) awarding Cintas attorney fees and costs. We address each issue in turn.

A. Pattern or Practice of Discrimination

The first, and ultimately most salient, issue in this case concerns the disagreement among the parties as to whether the EEOC is limited to proving its allegations of discrimination pursuant to the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), burden-shifting framework, or whether it may employ the pattern-or-practice framework announced by the Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Before delving into the substance of this dispute, it is worth reviewing the legal landscape for Title VII discrimination claims and situating the *McDonnell Douglas* and *Teamsters* frameworks within that context.

1. Title VII Discrimination Claims

"The Supreme Court has recognized two distinct types of Title VII employment discrimination: 'disparate treatment' and 'disparate impact.'" *Huguley v. Gen. Motors Corp.*, 52 F.3d 1364, 1370 (6th Cir. 1995); *see also Bowdish v. Cont'l Accessories, Inc.*, No. 91-1548, 1992 WL 133022, at *3 (6th Cir. June 12, 1992) (unpublished opinion) ("Courts have recognized two different types of claims under [Title VII]: 'disparate impact' claims and 'disparate treatment' claims."). "Disparate impact claims involve facially neutral employment practices that have disproportionate impact on protected classes of individuals" while "[d]isparate treatment claims . . . involve intentionally discriminatory employment practices." *Bowdish*, 1992 WL 133022, at *3; *United States v. Brennan*, 650 F.3d 65, 89-90 (2d Cir. 2011). Plaintiffs asserting a disparate-treatment claim must prove discriminatory motive or intent, while plaintiffs asserting a disparate-impact claim need not. *Huguley*, 52 F.3d at 1371 ("Unlike disparate impact, a disparate treatment claim obligates the plaintiff to show discriminatory intent or motive for a *particular* adverse employment decision.") (citing *Teamsters*, 431 U.S. at 335-36 n.15). The Title VII jurisprudence has developed to allow plaintiffs to make their showing of discriminatory intent for disparate-treatment claims either through direct or circumstantial evidence. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511-12 (2002); *Foster v. Cuyahoga Cnty. Bd. of Comm'rs*, No. 97-3504, 1998 WL 57481, at *1 (6th Cir. Feb. 3, 1998) (unpublished opinion) ("To advance a disparate treatment claim, a plaintiff must show that the employer has a discriminatory motive, which may be

shown by direct evidence or through inference based on a prima facie showing of discrimination.") (citing *McDonnell Douglas*, 411 U.S. at 802), *cert. denied*, 525 U.S. 937 (1998).

Both *McDonnell Douglas* and *Teamsters* provide frameworks through which a plaintiff can prove intentional discrimination through circumstantial evidence. *See Birch v. Cuyahoga Cnty. Probate Ct.*, 392 F.3d 151, 165 (6th Cir. 2004) ("[T]he *McDonnell Douglas* . . . paradigm [is] utilized for intentional discrimination cases premised solely on circumstantial evidence."); *Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 183 (3rd Cir. 2009) ("The *Teamsters* framework was judicially promulgated as a *method of proof* for pattern-or-practice claims brought by the government under Title VII, as that statute authorizes—it provides a means by which courts can assess whether a particular form of statutorily prohibited discrimination exists, just as the *McDonnell Douglas* framework does for individual claims of disparate treatment." (emphasis added)); *Ekanem v. Heath & Hosp. Corp. of Marion Cnty., Ind.*, 724 F.2d 563, 575 (7th Cir. 1983) ("The 'pattern or practice' theory of proof set forth in *Teamsters* and its progeny affords plaintiffs wide latitude in attempting to establish circumstantial evidence of unlawful intent.").

The *McDonnell Douglas* burden-shifting framework consists of a three-step process. It requires a plaintiff first to establish a prima facie case by presenting evidence from which a jury could find that "(1) [plaintiff] is a member of a protected class; (2) [plaintiff] was qualified for [the] job; (3) [plaintiff] suffered an adverse employment decision; and

(4) [plaintiff] was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees." *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 391 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2380 (2009). "Once the plaintiff establishes this *prima facie* case, the burden shifts to the defendant to offer evidence of a legitimate, nondiscriminatory reason for the adverse employment action." *Id.* "[I]f the defendant succeeds in this task, the burden shifts back to the plaintiff to show that the defendant's proffered reason was not its true reason, but merely a pretext for discrimination." *Id.* at 391-92.

The *Teamsters* framework is distinct. It charges the plaintiff with the higher initial burden of establishing "that unlawful discrimination has been a regular procedure or policy followed by an employer or a group of employers." *Teamsters*, 431 U.S. at 360. Upon that showing, it is assumed "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy" and, therefore, "[t]he [plaintiff] need only show that an alleged individual discriminatee unsuccessfully applied for a job." *Id.* at 362. The burden then shifts to "the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons." *Id.* "When the Government seeks individual relief for the victims of the discriminatory practice," bifurcation of proceedings may be proper because "a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief." *Id.* at 361.

The two structures are similar insofar as they impose the initial burden on the plaintiff to present facts sufficient to create an inference of discrimination. *See id.* at 358. However, the substance of what the plaintiff must prove to prevail in establishing a prima facie case varies under each framework. In addition, the *Teamsters* framework contemplates a bifurcation of proceedings that the *McDonnell Douglas* framework does not. Accordingly, the district court's decision that the EEOC could not proceed under the *Teamsters* framework matters greatly to the structure of the proceedings as they move through discovery and eventually to trial. Before reviewing the merits of the district court's decision in this regard, it is useful to clarify its procedural posture for context.

After answering the EEOC's complaint and attending a scheduling conference, Cintas moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). R. 662 (Mot. for Judgment). In support of the motion, Cintas argued that the EEOC failed to state a claim for pattern-or-practice discrimination because the EEOC brought suit pursuant to § 706 of Title VII, and not § 707. The district court agreed with Cintas's arguments and granted judgment in its favor. R. 723 (Dist. Ct. Op., 2/09/10). However, in addition to concluding that the EEOC cannot pursue a claim under the *Teamsters* pattern-or-practice framework when it acts pursuant to § 706, the district court also made clear that the EEOC erred in never pleading its intent to rely on the *Teamsters* framework: The district court concluded that "[d]espite *more than ample opportunity* to express its intention to prosecute this action under the *Teamsters* framework, the EEOC only chose to formally raise the

issue and inform the Court - and Cintas - of its intentions at the eleventh hour in this litigation." *Id.* at 12. Thus, the district court emphasized the EEOC's failure to state in its complaint that it planned to proceed under the *Teamsters* pattern-or-practice framework and concluded that "[o]n these procedural facts alone" Cintas was entitled to judgment on the pleadings. *Id.* Consequently, although Cintas has focused primarily on the legal issue of the EEOC's enforcement authority under § 706, we must also consider whether the EEOC satisfied its pleading obligations. Because both decisions implicate a question of law, we review them de novo. *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 526 (6th Cir. 2006) ("We review de novo a judgment on the pleadings under Federal Rule of Civil Procedure 12(c).").

2. *Teamsters* Framework in an EEOC Suit Pursuant to § 706

The first issue that we must address, and the one given considerable attention by Cintas on appeal, is whether the EEOC may employ the *Teamsters* framework only when it acts pursuant to § 707. For the reasons that follow, we conclude that the EEOC's enforcement authority is not so limited.

Cintas is correct that § 706 does not contain the same explicit authorization as does § 707 for suits under a pattern-or-practice theory. *Compare* 42 U.S.C. § 2000e-5(b), (f)(1) (§ 706) ("Whenever a charge is filed by or on behalf of a person claiming to be aggrieved" and "the Commission determines after [its] investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor

to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." If "the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against" the respondent.), *with* 42 U.S.C. § 2000e-6(a), (e) (§ 707) (The Commission may "bring a civil action" against a private entity when it "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter."). However, relevant Supreme Court precedent suggests that the exclusion of pattern-or-practice language from § 706 does not mean that the EEOC may utilize a pattern-or-practice theory only when bringing suit under § 707. Instead, it suggests that the inclusion of the language in § 707 simply means that the scope of the EEOC's authority to bring suit is more limited when it acts pursuant to § 707.

The premise for the Supreme Court's decision in *Teamsters* was that *McDonnell Douglas* did not create "an inflexible formulation" for burden shifting, but rather embodied the "general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." *Teamsters*, 431 U.S. at 358. Thus, the Court explained, a plaintiff has flexibility in how she meets that initial burden, and variance based on the facts of the case is expected. *See id.* at 360. The Court in *Teamsters* then analogized the facts surrounding discrimination claims brought by the EEOC under § 707, which are limited to allegations of

a pattern or practice of discrimination, to the facts in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), a class-action lawsuit. *Teamsters*, 431 U.S. at 359-61. The Court in *Teamsters* concluded that "the nature of a pattern-or-practice suit brings it squarely within" the burden-shifting framework endorsed in *Franks*, *i.e.*, a framework in which class-action plaintiffs satisfy their initial burden of proof by making out a prima facie case of a policy of discrimination, which it is then left to the defendant to rebut. *Id.* at 360.

The *Teamsters* opinion, while ostensibly specific to suits that the EEOC brings pursuant to § 707, in no way indicated an intent to tie the pattern-or-practice framework exclusively to the EEOC's enforcement authority under § 707. To the contrary, the Court's reliance on *Franks,* a class-action case invoking § 706, suggests that the holding of *Teamsters* is not to be so narrowly circumscribed. Subsequent Supreme Court decisions affirming the viability of EEOC class claims under § 706 and Congress's "general intent to accord parallel or overlapping remedies against discrimination" further support this reading of *Teamsters*. *Gen. Tel. Co. of the Nw. v. EEOC*, 446 U.S. 318, 333 (1980) (internal quotation marks omitted); *see also id.* at 324 ("Given the clear purpose of Title VII, the EEOC's jurisdiction over enforcement, and the remedies available, the EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."); *id.* at 331 ("We are reluctant, absent clear congressional guidance, to subject § 706(f)(1) actions to requirements that might disable the enforcement agency from advancing the

public interest in the manner and to the extent contemplated by the statute.").

The EEOC asserts that the Sixth Circuit's decision in *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980), is binding precedent endorsing *Teamsters*'s application in the § 706 context. *Monarch* was a § 706 case in which this court cited *Teamsters* and *Franks* to conclude "that the trial should have been bifurcated, if class-wide discrimination was properly found." *Id.* at 1449. *Monarch* came closest to endorsing the EEOC's reading of *Teamsters* in a footnote stating: "Although we realize the Supreme Court in *Teamsters* was discussing the proper procedure for the district court to follow in a section 707 pattern-and-practice suit, it adopted this procedural framework from *Franks* which dealt with class actions under section 706." *Id.* at 1449 n.3. Given the procedural posture of the case, and that the application of *Teamsters* in the § 706 context is only implicitly endorsed, *Monarch*'s precedential value is ambiguous. *See id.* at 1449 (stating that court was reviewing trial-court decision issued prior to the Supreme Court holding that § 706 suits brought by the EEOC need not conform to Rule 23's class-action requirements). Nevertheless, *Monarch* stands as at least one example of a Sixth Circuit case applying the *Teamsters* framework to a suit brought by the EEOC pursuant to § 706, and there appear to be no Sixth Circuit decisions to date holding that *Teamsters* may not be applied in the § 706 context.

Cintas's strongest argument is that allowing the EEOC to pursue Title VII claims pursuant to the *Teamsters* framework under § 706 would render § 707 superfluous—a result that Congress could not have

intended. This argument is buttressed by Cintas's contention that Congress's 1991 amendments to § 706 adding compensatory and punitive damages—remedies not added to § 707—evidence a desire to prevent the availability of these remedies when the EEOC seeks to vindicate pattern-or-practice discrimination. Cintas has a point that reading § 706 to permit *Teamsters*-style claims creates some overlap with § 707. Moreover, Congress may have wanted to provide the EEOC with two different vehicles for initiating two different types of Title VII suits, each with its own advantages and disadvantages in terms of scope, burden of proof, and available remedies. However, an important distinction prevents § 707 from becoming superfluous even if *Teamsters* applies in the § 706 context: § 707 permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under § 706. *See EEOC v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 844555, at *9 (N.D. Ill. Mar. 16, 2007) (unpublished opinion). It is reasonable to conclude that the presence of a previously filed charge by an aggrieved person was the distinction upon which Congress wished the availability of particular remedies to rise and fall. In fact, this is arguably the most logical interpretation of congressional intent given that the need for compensatory and punitive damages diminishes when the EEOC is not seeking compensation for a specific victim of discrimination.

Cintas also suggests that allowing the EEOC to pursue the pattern-or-practice method for § 706 claims will allow the EEOC to "have its cake and eat it too" because the *Teamsters* framework provides a more generous standard of proof and § 706 affords greater

remedies. This argument is based on a mistaken premise. The *Teamsters* framework is not an inherently easier standard of proof; it is simply a different standard of proof. Indeed, under *Teamsters*, the plaintiff's initial burden to make out a prima facie case is heightened. Unlike under the *McDonnell Douglas* framework, where a plaintiff must show membership in a protected class, objective qualifications for the job, and an adverse employment decision from which others similarly situated but not part of the protected class were spared, *White*, 533 F.3d at 391, under *Teamsters* the plaintiff must demonstrate the existence of a discriminatory procedure or policy, 431 U.S. at 360. This is no simple task, as the plaintiff "must prove that discrimination 'was the company's standard operating procedure—the regular rather than the unusual practice.'" *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 716 (7th Cir. 2012) (quoting *Teamsters*, 431 U.S. at 336). It is only because this initial requirement is more arduous that after the showing is made it is assumed "that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy." *Teamsters*, 431 U.S. at 362. Even then, the defendant still may rebut the assumption by providing "lawful reasons" for the employment decision. *See id.* Thus, the EEOC must always weigh the risks—as well as the benefits—of proceeding under the *Teamsters* framework, for doing so involves a greater chance of losing at the prima facie stage.

Accordingly, we hold that the district court erred in concluding that the EEOC may not pursue a claim under the *Teamsters* pattern-or-practice framework, pursuant to its authority vested in § 706 of Title VII.

3. Failure to Assert *Teamsters* Framework in Complaint

Having concluded that the EEOC may pursue its claim under the *Teamsters* pattern-or-practice framework pursuant to its authority under § 706 of Title VII, we turn to the question whether the EEOC is barred from doing so in this instance because of deficiencies in its pleadings. As previously explained, the district court concluded that the EEOC's failure to plead its intent to prove its Title VII claim pursuant to the *Teamsters* pattern-or-practice framework in its complaint entitled Cintas to judgment on the pleadings. The district court's ruling of law was erroneous in light of controlling Supreme Court precedent.

The Supreme Court's decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), which neither the parties nor the district court discussed, has important implications for this issue. In *Swierkiewicz*, the Supreme Court resolved "the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the [*McDonnell Douglas*] framework." *Id.* at 508. The Court answered in the negative and explained that "[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement." *Id.* at 510. Thus, the Court reasoned, because "the precise requirements of a prima facie case can vary depending on the context," and the appropriate type of prima facie case may not be evident until discovery is conducted, it would be improper to impose "a rigid pleading standard for discrimination cases." *Id.* at 512. In so holding, the

Court recognized that in any given case a plaintiff may rely on direct or circumstantial evidence to prove the alleged intentional discrimination and, prior to knowing the universe of evidence available, it may be difficult to determine which theory is likely to be more successful. *Id.* at 511-12.

Consequently, *Swierkiewicz* establishes that so long as a complaint provides an adequate factual basis for a Title VII discrimination claim, it satisfies the pleading requirements of Federal Rule of Civil Procedure 8(a)(2). *See Lindsay v. Yates*, 498 F.3d 434, 439-40 (6th Cir. 2007). In this regard, the pleading requirements for Title VII claims are no different than those for other claims; they are subject to the same requirement of setting forth "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Moreover, *Swierkiewicz* remains good law after the Supreme Court's decision in *Twombly*. *Keys v. Humana, Inc.*, 684 F.3d 605, 609 (6th Cir. 2012) ("The Supreme Court's subsequent decisions in *Twombly* and *Iqbal* did not alter its holding in *Swierkiewicz*."). In *Twombly*, the Court noted that "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." *Twombly*, 550 U.S. at 570 (internal quotation marks and alterations omitted). The Court then emphasized that its decision in *Twombly* "do[es] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* This Circuit has continued to apply *Swierkiewicz*, and there

is no reason not to do so in this instance. *See Keys*, 684 F.3d at 609–10; *Lindsay*, 498 F.3d at 440 n.6.

Swierkiewicz compels the conclusion that a plaintiff is not required to plead whether she intends to employ the *McDonnell Douglas* or the *Teamsters* burden-shifting evidentiary framework. *Keys*, 684 F.3d at 606; *see also Pedreira v. Ky. Baptist Homes for Children, Inc.*, 579 F.3d 722, 728 (6th Cir. 2009) (recognizing that any disagreement over the evidentiary framework under which to proceed is "premature" at the pleadings stage), *cert. denied*, 131 S. Ct. 2091 (2011). Although a plaintiff must "offer[] evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act," *Teamsters*, 431 U.S. at 358, *Swierkiewicz* explained that plaintiffs are not required to commit to one methodology of evidentiary proof to substantiate that inference in their complaint, 534 U.S. at 511-12. Because *Swierkiewicz* provides that, at the pleading stage, a plaintiff need not indicate whether she seeks to prove intentional discrimination through direct or circumstantial evidence, it necessarily follows that a plaintiff need not indicate at the pleading stage which circumstantial evidentiary framework—*McDonnell Douglas* or *Teamsters*—she intends to employ. A contrary holding would impose an even more rigid pleading requirement than that which the Supreme Court rejected in *Swierkiewicz*. In fact, it would be akin to requiring a plaintiff to plead the theory of the case in the complaint, a requirement which has been rejected unequivocally even outside of the Title VII context. *See* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1219 (3d ed. 2012).

In sum, *Swierkiewicz* and *Teamsters* indicate that the district court erred in holding that Cintas was entitled to judgment on the pleadings in light of the EEOC's failure to plead its intent to rely on the *Teamsters* framework. *Teamsters* provides an evidentiary framework pursuant to which the EEOC may seek to prove its allegations of intentional discrimination, not an independent cause of action. *See Hohider*, 574 F.3d at 183. The EEOC, therefore was under no obligation to plead its intent to utilize the *Teamsters* framework; the EEOC was required only to set forth sufficient facts in its complaint upon which its claim for relief under Title VII was plausible. *See Twombly*, 550 U.S. at 570. Accordingly, it would be improper for this court to affirm the district court's ruling that the EEOC committed some sort of procedural default by failing to plead its intent to pursue the *Teamsters* pattern-or-practice framework in its complaint.

We do observe that the EEOC's complaint is not a model of good lawyering. The complaint is sparse—the substance of its allegations span only four brief paragraphs. Perhaps the EEOC relied on the private plaintiffs' complaint as establishing the context. Indeed, in light of that context, we are deeply suspicious of any argument by Cintas that it had no idea that the EEOC intended to proceed on a theory of discrimination that involved class-based allegations of pattern-or-practice discrimination.[3] Thus, were Cintas

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[3] It is undisputed that the EEOC did not include "pattern or practice" language in its complaints. While the EEOC's original complaint did cross reference the private plaintiffs' Second

Amended Complaint, which alleged that Cintas "engag[ed] in a nationwide policy, pattern or practice of denying 'Service Sales Representative' positions to female applicants," R. 70 (Plaintiffs Second Amend. Compl. ¶ 1), this cross reference was deleted from the EEOC's First Amended Complaint, *compare* R. 98 (EEOC Compl. ¶ 8), *with* R. 650 (EEOC First Amend. Compl. ¶ 8), which the EEOC filed after the private plaintiffs were denied nationwide class certification, *see* R. 627 (Dist. Ct. Order, 3/31/09). Of course, when amending its complaint, the EEOC could have included explicit pattern-or-practice allegations rather than just deleting the cross reference. The EEOC did not do so, however, and its rationale is unknown. Counsel at oral argument provided no explanation other than to say that the EEOC did not believe it necessary to include such language in its complaint.

Despite the absence of explicit pattern-or-practice language in the complaint, however, it strains credulity that Cintas was blind-sided at the scheduling conference by the EEOC's assertion that it would seek to prove that Cintas engaged in unlawful discrimination pursuant to the *Teamsters* pattern-or-practice framework. First, the private class-action suit in which the EEOC intervened concerned allegations that Cintas engaged in a pattern or practice of unlawful discrimination. *See* R. 70 (Plaintiffs Second Amend. Compl. ¶ 1). The denial of Rule 23 nationwide class certification for the private plaintiffs had no impact on the EEOC's class claims because Rule 23 does not apply to suits brought by the EEOC. *Gen. Tel. Co. of the Nw.*, 446 U.S. at 323; *see also Davoll v. Webb*, 194 F.3d 1116, 1146 n.20 (10th Cir. 1999) (denying class certification but upholding EEOC's Title VII claim pursued under a pattern-or-practice framework). Moreover, the EEOC's response to the denial of class certification was not to remove all class-based allegations from its complaint, but rather to limit the scope of its class to women in Michigan as opposed to women nationwide. If anything, this should have signaled to Cintas that the EEOC would be proceeding on the same theory, just on a more limited scope.

The EEOC's amended complaint also made clear that the EEOC's allegations extended beyond isolated incidents of discrimination. The EEOC alleged that Cintas "refused to recruit

on remand to challenge the EEOC's complaint on proper terms—that being on the adequacy of the factual basis for its allegations of discrimination—the appropriate remedy would be to grant the EEOC leave to amend the complaint to provide a more detailed factual basis. This result would be equitable in light of the fact that, to date, Cintas has not challenged the specificity of the EEOC's factual allegations of discrimination, and that the contours of the litigation have been clear to all parties involved since the outset.

B. Motion for Leave to File a Second Amended Complaint

After the district court held that the EEOC could not proceed under the *Teamsters* framework pursuant to § 706, the EEOC moved to amend its complaint to include § 707 as the statutory basis for its claims. The district court denied the motion upon concluding that the EEOC unduly delayed in seeking the amendment and that allowing amendment of the complaint would prejudice Cintas. R. 829 (Dist. Ct. Order, 6/2/10). Because we hold that the EEOC may proceed under the *Teamsters* framework pursuant to § 706, the EEOC's

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and hire women as Route Sales Drivers/Service Sales Representatives *throughout the State of Michigan* because of their sex" and purported to seek relief for "a *class of women* in the State of Michigan." R. 650 (EEOC First Amend. Compl. at 2, ¶¶ 8, 9) (emphasis added). The EEOC also requested relief tailored to remedying class-based harms: The EEOC requested an order that Cintas "institute and carry out polices, practices, and programs that provide equal employment opportunities for women and eradicate the effects of its past and present unlawful employment practices." *Id.* at 4.

appeal of the denial of its motion to amend is moot. However, because we are remanding to the district court to permit the EEOC to proceed under the pattern-or-practice-style framework pursuant to § 706, the district court may wish to reconsider the merits of permitting a second amended complaint in light of the changed circumstances.

C. Discovery Disputes

As previously mentioned, the EEOC challenges three discovery orders issued by the district court prior to its final judgment on the merits: (1) an order denying the EEOC's request for extension of discovery; (2) an order denying the EEOC's motion to compel Cintas to produce unredacted employment applications by Cintas; and (3) a protective order barring the deposition of Cintas executive Scott Farmer. We review these discovery decisions for abuse of discretion. *Dowling v. Cleveland Clinic Found.*, 593 F.3d 472, 478 (6th Cir. 2010) ("We review a district court's denial of additional time for discovery for an abuse of discretion."); *United States v. Blood*, 435 F.3d 612, 627 (6th Cir. 2006) ("We review the denial of a motion to compel production, as an evidentiary matter within the trial court's discretion, for an abuse of discretion."); *Doe v. Porter*, 370 F.3d 558, 560 (6th Cir. 2004) ("We review the district court's decision to grant a protective order for an abuse of discretion.").

1. Motion to Extend Discovery

The EEOC made clear that its motion for an extension of discovery was filed in light of the district court's ruling that the EEOC could not proceed under

the *Teamsters* pattern-or-practice framework. *See* EEOC Br. at 98 ("After the February order, EEOC faced the prospect of proving sex discrimination through scores of individual disparate treatment cases, rather than the *Teamsters* framework for which it had spent years preparing. EEOC realized that it would be unworkable to develop cases for all potentially-injured female applicants in the short discovery period remaining, and so it immediately moved (on February 17, 2010) for a discovery extension."). Because we have held that the EEOC may proceed under the *Teamsters* framework, the EEOC's appeal of the denial of this specific motion is moot. Moreover, although it is likely in light of our pattern-or-practice ruling that a new period of discovery will be necessary, we defer to the district court's judgment on this matter in the first instance.

2. Motion to Compel Production of Unredacted Applications

The EEOC also appeals the denial of its motion to compel Cintas to produce unredacted versions of the employment applications that the company produced during discovery. The magistrate judge initially denied the EEOC's motion because of the district court's pattern-or-practice ruling, concluding that the EEOC was not entitled to this discovery in light of proceeding solely on the thirteen individual claims. R. 807 (Magistrate Order, 4/22/10, at 2). The district court affirmed this ruling over the EEOC's objections. R. 843 (Dist. Ct. Order, 7/7/10). Due to our ruling that the EEOC may proceed under the pattern-or-practice framework, the district court's rationale for denying this discovery request no longer exists. Accordingly, we

vacate the district court's ruling and remand for further proceedings.

3. Deposition of Scott Farmer

In 2003, at Cintas's annual management meeting, Scott Farmer, Cintas's CEO, directed the attendees—as part of his discussion of diversity, a "key initiative" for the coming year—to "put the myth that females cannot be SSRs out of your mind and hire more women SSRs." Sealed Appendix at A-28, A-32. During the course of discovery, the EEOC entered notice of its intention to depose Farmer based on this statement. Cintas opposed the deposition and sought a protective order, which the magistrate judge granted. The magistrate judge, applying the "apex doctrine"—a doctrine that bars the deposition of high-level executives absent a showing of their "unique personal knowledge" of relevant facts—concluded that taking the deposition of Farmer was improper because the EEOC had failed to demonstrate that Farmer had personal knowledge about the individual claimants' rejected applications for employment.[4] R. 831 (Magistrate Order, 6/10/10, at 5-6); *see also* R. 816-2 (Farmer Aff. ¶¶ 5-9) (stating under oath that Farmer has no personal knowledge of these individual hiring decisions). The magistrate judge asserted that the "apex doctrine" is "well recognized" and cited in support *Bush v. Dictaphone Corp.*, 161 F.3d 363, 367 (6th Cir. 1998), and *Lewelling v. Farmer's Ins. of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989). R. 831 (Magistrate Order, 6/10/10, at 3, 6).

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[4] It does not appear that the district court ruled on the EEOC's objections to the order issued by the magistrate judge.

The EEOC argues that the magistrate judge misconstrued the relevant law because the "apex doctrine" has not been recognized and applied by this court.

Federal Rule of Civil Procedure 26(c)(1)(A) provides that a district "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, inter alia, barring the deposition of that individual. "To justify restricting discovery, the harassment or oppression should be unreasonable, but 'discovery has limits and . . . these limits grow more formidable as the showing of need decreases." 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL., FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed. 2012). "Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it." *Id.*

As articulated by the magistrate judge, the "apex doctrine" appears to assume that "harassment and abuse" are "inherent" in depositions of high-level corporate officers and therefore allow such depositions to be barred absent "a showing that the individual possesses relevant evidence which is not readily obtainable from other sources." R. 831 (Magistrate Order, 6/10/10, at 3-4). A few district courts in the Sixth Circuit have recently applied the apex doctrine claiming that while "the term 'apex deposition' has not been used by the Court of Appeals for the Sixth Circuit . . . this Circuit [has] used the same analysis without using the specific term." *HCP Laguna Creek CA, LP v. Sunrise Sr. Living Mgmt., Inc.*, No. 3-10-0220, 2010 WL 890874, at *3 n.4 (M.D. Tenn. Mar. 8, 2010)

(unpublished order); *see also Moore v. Weinstein Co.*, No. 3:09-cv-166, 2011 WL 2746247, at *3 (M.D. Tenn. July 12, 2011) (unpublished opinion); *Jones Co. Homes, LLC v. Laborers Int'l Union of N. Am.*, No. 10-mc-50989, 2010 WL 5439747, at *3 (E.D. Mich. Dec. 28, 2010) (unpublished order). We disagree.

This Circuit has endorsed the view that to justify a protective order, one of Rule 26(c)(1)'s enumerated harms "must be illustrated 'with a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 550 (6th Cir. 2004) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)). In keeping with this principle, while we sometimes have considered the need for the deposition—*i.e.*, its potential to result in relevant testimony—in reviewing the grant or denial of a protective order, we have not abandoned the requirement that one of the harms listed in Rule 26(c)(1)(A) must be specified in order to warrant a protective order. Even in cases where we have considered extensively a corporate officer's knowledge and, thus, capacity to provide information relevant to the case, we have declined "to credit a [corporate officer's] bald assertion that being deposed would present a substantial burden," and still required the corporate officer to meet Rule 26(c)(1)'s requirements. *Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 907 (6th Cir. 2009) (unpublished opinion).

For example, in *Elvis Presley Enterprises. v. Elvisly Yours, Inc.*, 936 F.2d 889, 894 (6th Cir. 1991), we upheld a protective order barring the deposition of Priscilla Presley ("Presley"), a corporate executive of

the plaintiff corporation, but independently verified the order's compliance with Rule 26(c)(1). Although we noted that Presley had filed an "affidavit stating that she had no knowledge" relevant to the particular trademark and state-law claims at issue, we also considered her sworn statement that the "primary purpose in deposing her would be to harass and annoy her." *Id.* In so doing, we declined to assume that Presley's role as a corporate officer warranted the assumption that the deposition would be unduly burdensome.

Neither *Bush* nor *Lewelling* dissuades us of this view. *Bush* involved an order by the district court barring the deposition of one corporate official and limiting the length and scope of another's to questions regarding the officer's involvement in the adverse employment decision at issue. 161 F.3d at 367. Although in *Bush* we discussed the relevant knowledge both corporate officers had regarding the case, we ultimately upheld the district court's limitations, concluding that they "seem[ed] a reasonable way to balance [plaintiff's] right to discovery with the need to prevent 'fishing expeditions.'" *Id.* In so concluding, we balanced the burdens on the deponent with the need for access to information relevant to the case, thus ensuring compliance with Rule 26(c)(1). Similarly, in *Lewelling*, we upheld a protective order barring the deposition of the "then-Chairman of the Board of Directors and Chief Executive Officer" of the defendant corporation. *Lewelling*, 879 F.2d at 218. The decision was brief, mentioning only the fact that plaintiffs had offered to cancel the deposition in exchange for settlement negotiations and that the corporation asserted that its officer had no knowledge relevant to

the case. *Id.* Though not explicitly discussed, plaintiffs' offer to cancel the deposition in exchange for settlement indicated that its deposition notice was being used as an oppressive bargaining chip, contrary to the purpose that deposition requests are meant to serve. Therefore, cognizant of Rule 26(c)(1), we upheld the protective order.

Accordingly, we conclude that the magistrate judge erred as a matter of law in relying on "apex doctrine" to grant the protective order. In doing so, the magistrate judge considered only Farmer's knowledge relevant to the EEOC's claims and failed to analyze, as required by Rule 26(c)(1), what harm Farmer would suffer by submitting to the deposition. This error of law constitutes an abuse of discretion that warrants vacating the magistrate judge's order. *See United States v. Clay*, 667 F.3d 689, 694 (6th Cir. 2012) ("[I]t is an abuse of discretion to make errors of law or clear errors of factual determination.") (internal quotation marks omitted).

Regardless, the magistrate judge's conclusion that Farmer is unlikely to have any information relevant to the issues in the case is undermined by our ruling that the EEOC may proceed under the *Teamsters* pattern-or-practice framework. Farmer's statements do suggest high-level-corporate awareness of Cintas's failure to hire females for the SSR positions, and this goes to the heart of what the EEOC will seek to prove in proceeding with its claims toward trial. In this sense, Farmer's testimony is likely to be highly probative, and he will need to demonstrate a substantial burden to justify a protective order barring discovery. *See* 8A CHARLES ALAN WRIGHT & ARTHUR R. MILLER ET AL.,

FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed. 2012). Accordingly, we vacate the district court's order and remand for further proceedings.

D. Summary Judgment: Individual Claims

The district court granted summary judgment to Cintas on the EEOC's claims on behalf of thirteen individuals; the court found that the EEOC had failed to make out a prima facie case of sex discrimination for eight claimants and that the EEOC had failed to rebut Cintas's neutral explanations for its hiring decisions for five claimants. Because these summary-judgment determinations were made under the *McDonnell Douglas* framework, we vacate the grant of summary judgment and remand to permit the parties to proceed under the *Teamsters* framework. Nevertheless, there is one point of law worth clarifying given its potential relevance to the future proceedings.

The district court concluded that the EEOC failed to state a prima facie case of sex discrimination for eight of the individual claimants because each claimant was not objectively eligible for employment due to allegedly dishonest representations in her employment application. The EEOC argues that this conclusion was erroneous because the district court evaluated the candidates' eligibility for employment based on after-acquired evidence of dishonesty in conflict with the Supreme Court's decision in *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995). At issue in *McKennon* was "whether an employee discharged in violation of the [ADEA] is barred from all relief when, after her discharge, the employer discovers evidence of wrongdoing that, in any event, would have led to the

employee's termination on lawful and legitimate grounds." 513 U.S. at 354. Given ADEA's purposes, the Court declined to adopt "[a]n absolute rule barring any recovery of back-pay." *Id.* at 362. However, the Court recognized that this after-acquired evidence could be considered in a court's weighing of the "extraordinary equitable circumstances that affect the legitimate interests of either party." *Id.* The Court also stated that reinstatement or front pay generally would be an inappropriate remedy in such a circumstance. *Id.*

Under *Teamsters* the EEOC must make a prima facie showing of a pattern-or-practice of discrimination, which is left to the employer to rebut by demonstrating a lawful reason for its employment decision. 431 U.S. at 360. Thus, the district court's ruling on after-acquired evidence of dishonesty pertains to the employer's burden rather than the EEOC's prima facie case. However, under *Teamsters*, as under *McDonnell Douglas*, the district court's conclusion that any dishonesty by an individual in an employment application operates as a per se bar to relief, regardless of whether Cintas was aware of the dishonesty at the time of the employment decision, conflicts with the careful framework established in *McKennon*. *See McKennon*, 513 U.S. at 358 ("It would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation."). Indeed, case law from this Circuit suggests that, if anything, after-the-fact evidence of dishonesty should be considered only in determining the amount of damages due to the individual and not in the initial liability stage. *See Brenneman v. Medcentral Health Sys.*, 366 F.3d 412, 416 n.2 (6th Cir. 2004) ("Thus,

while this post hoc, additional ground for plaintiff's termination may be relevant to the calculation of any damages, it is irrelevant to the determination of whether defendant improperly terminated plaintiff under the ADA or the FMLA in the first instance."), *cert. denied*, 543 U.S. 1146 (2005); *Cavin v. Honda of Am. Mfg., Inc.*, 346 F.3d 713, 718 n.3 (6th Cir. 2003) ("Regardless, this misrepresentation clearly was not a factor in Honda's decision to separate Cavin because Honda was not aware of the misrepresentation at the time of Cavin's termination. We do recognize, however, that the misrepresentation may be relevant to the calculation of Cavin's damages.").

It would be inappropriate for us to speculate as to what relief the EEOC may or may not be eligible to seek on behalf of allegedly dishonest individuals should it succeed in proving that Cintas was engaged in a pattern or practice of discrimination. However, in light of the district court's prior ruling, we do wish to emphasize that consideration of individual applicants' dishonesty should be reserved for the remedial portion of the proceedings.

E. Administrative Prerequisites: Conciliation of Claims

Shortly after granting summary judgment to Cintas on the merits of the thirteen individual discrimination claims, the district court also granted Cintas summary judgment on the ground that the EEOC failed to comply with the administrative prerequisites to suit under § 706. Relying heavily on an opinion from the U.S. District Court for the Northern District of Iowa, the district court reached two principal conclusions:

(1) that the EEOC never investigated or sought to conciliate claims on a class-wide basis; and (2) even if it had, class-wide conciliation was not an adequate substitute for conciliation on behalf of the thirteen claimants the EEOC ultimately named in its enforcement action. R. 936 (Dist. Ct. Op. at 11-16). In view of our holding that the EEOC may properly proceed with class-based claims under the *Teamsters* framework, we need only review the first of the district court's conclusions, and we do so de novo. *See Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 433 (6th Cir. 2009).

In *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1100 (6th Cir. 1984), we recognized that "the nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of th[e] agency" and, consequently, that it is inappropriate for a "district court to inquire into the sufficiency of the Commission's investigation." Instead, a district court should determine whether the EEOC made a good-faith effort to conciliate the claims it now asserts, thereby providing the employer with ample notice of the prospect of suit. *Id.* at 1102.

Despite the district court's conclusions otherwise, it is clear that the EEOC provided notice to Cintas that it was investigating class-wide instances of discrimination. In fact, the EEOC's reasonable-cause determination letter explicitly stated as much. *See* R. 836-40 (EEOC Ltr.) ("Furthermore, like and related and growing out of this investigation, there is reasonable cause to believe that [Cintas] has discriminated against females as a class by failing to hire them as Route Sales Drivers/Services Sales Representatives in violation of Title VII."). Although

the EEOC did not explicitly use the "females as a class" language in the proposed conciliation agreement, the agreement indicated that the EEOC sought class-based remedies by requesting relief for "other similarly situated qualified female applicants who sought employment with [Cintas]." R. 836-41 (Proposed Conciliation Agreement at 3, 4). Given that these documents were provided to Cintas on the same day, there is no basis for concluding that Cintas was unaware that the EEOC had investigated and was seeking to conciliate class-wide claims.

Moreover, Cintas does not appear to refute the EEOC's assertion that Cintas expressed no interest to the EEOC in reaching a settlement on these claims. As we recognized in *Keco*, "[t]he EEOC is under no duty to attempt further conciliation after an employer rejects its offer." 748 F.2d at 1101-02. Cintas's three-year silence in response to the EEOC's offer of conciliation can reasonably be interpreted as rejection and, accordingly, the EEOC acted appropriately in terminating conciliation and seeking to vindicate the claims through suit.

In light of this Circuit's decision in *Keco*, it is clear that the EEOC satisfied its administrative prerequisites to suit. Accordingly, we reverse the district court's contrary determination.

F. Attorney Fees and Costs

The district court awarded Cintas attorney fees and costs because it deemed the EEOC's failure to comply with Title VII's pre-litigation requirements to "constitute[] unreasonable conduct under

Christiansburg" *Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978). R. 1079 (Dist. Ct. Op., 8/4/11, at 6). We review for abuse of discretion fee awards granted by a district court in the context of Title VII. *Noyes v. Channel Prods., Inc.*, 935 F.2d 806, 810 (6th Cir. 1991). Because we reverse the district court's determination that the EEOC did not comply with Title VII's administrative prerequisites to suit—the primary basis for the district court's award of attorney fees—we vacate the order granting attorney fees as well. This result is also mandated in recognition that, in view of our rulings, Cintas is no longer a prevailing party.

However, even if our prior rulings did not command reversal of the award of attorney fees and costs, we would conclude that the district court abused its discretion in ordering the EEOC to pay Cintas attorney fees and costs. Awards of attorney fees and costs are preserved typically only for "unreasonable, frivolous, meritless, or vexatious" conduct. *Christiansburg*, 434 U.S. at 421. The district court identified the "egregious and unreasonable conduct" to include: (1) the EEOC filing over a dozen losing motions; (2) the EEOC's failure to respond properly to Cintas's discovery request; (3) the EEOC's "refus[al] to produce information regarding the identities of each individual" plaintiff after dismissal of the EEOC's pattern-or-practice claim; and (4) the EEOC's pursuit of claims on behalf of approximately forty individuals, despite its ultimate withdrawal of those claims because they lacked merit. R. 1079 (Dist. Ct. Op., 8/04/11, at 7-8). Standing alone, these actions do not seem so "unreasonable" so as to warrant the district court's ruling. *Christiansburg*, 434 U.S. at 422. Moreover, none of the legal issues raised by the EEOC appear to have

been "frivolous" or "groundless," nor has the EEOC engaged in "unreasonable" litigation strategies in pursuit of its claim. *Id.* at 421-22; *Lowery v. Jefferson Cnty. Bd. of Educ.*, 586 F.3d 427, 438-39 (6th Cir. 2009). The EEOC pursued its claim within the bounds of professional conduct and in the good-faith belief that it had done what was necessary to satisfy its administrative prerequisites to suit. Accordingly, we see no basis for awarding Cintas attorney fees and costs as the district court has done here. *See EEOC v. Bruno's Rest.*, 13 F.3d 285, 288 (9th Cir. 1993) (suggesting that the proper inquiry is not whether the EEOC failed to conciliate properly but "whether its belief that it had done so was reasonable"). We, therefore, reverse the district court's contrary determination.

III. CONCLUSION

In conclusion, we **VACATE** both judgments of the district court at issue in the present appeals and **REMAND** the case for further proceedings consistent with this opinion.

CONCURRING IN PART/ DISSENTING IN PART

JULIA SMITH GIBBONS, Circuit Judge, concurring in part and dissenting in part. In my view, both the panel majority and the district court, although reaching differing conclusions, have strayed into thorny issues of Title VII statutory construction that need not be considered to resolve this case. In so doing, they have overlooked rather basic and obvious principles that should be the basis for decision. Consequently, I join only limited portions of the majority opinion and respectfully dissent from the remainder.

The key to understanding the issues in this case is examining the precise language of the EEOC's pleadings. The EEOC's Complaint in Intervention, filed December 23, 2005, alleges that Cintas has intentionally discriminated against the three named plaintiffs and "a class of women" by refusing to recruit and hire them as SSRs because of their sex. No other elaboration is provided. Section 706 is only mentioned as one of the statutory provisions under which the EEOC believed it was authorized to bring suit. That first pleading was superseded by the EEOC's First Amended Complaint, filed August 20, 2009. The operative language of the First Amended Complaint with respect to Cintas's alleged discriminatory practices is identical to that of the Complaint in Intervention, except that the class of women is more specifically defined as "a class of women in the State of Michigan."

When Cintas sought judgment on the pleadings, it focused on the issue of whether a pattern-or-practice claim could be brought under § 706. But, as the majority recognizes, the motion necessarily implicated the sufficiency of the pleadings to raise a pattern-or-practice claim under any statutory provision. The district court focused on the statutory construction issue and concluded that such a claim could not be brought under § 706. The majority tackles both the question of whether § 706 is a proper vehicle for assertion of a pattern-or-practice claim, holding that it is, and the pleading sufficiency issue. With respect to the pleading sufficiency issue, the majority characterizes the pleading insufficiency as the plaintiffs' failure to state their intention to proceed under the *Teamsters* framework or to plead a *prima facie* case under that framework. The majority determines that neither is required and therefore finds the complaint sufficient.

The majority is correct, I believe, in its assessment that neither mention of *Teamsters* nor the pleading of a *prima facie* case is required to bring a pattern-or-practice claim. But the point on which I differ from the majority is its conclusion that, since neither is required, the EEOC has therefore pled a pattern-or-practice claim. The EEOC's operative First Amended Complaint does not include even a shred of an allegation suggesting a pattern-or-practice claim. Like the Complaint in Intervention that it followed, it is fairly read only as pleading disparate treatment claims on behalf of the named plaintiffs and the women comprising the alleged class. The EEOC's pleadings give no notice that it is pursuing some other theory of relief.

Implicit in the majority's opinion is the notion that, because the complaint need not state an intent to proceed under *Teamsters* or the facts that will constitute a *prima facie* case, it is sufficient for the complaint to list the statutory provision under which suit is brought. There are situations in which that premise is arguably correct. For example, had the complaint sought relief under § 707, which specifically authorizes the EEOC to bring pattern-or-practice claims and only relates to such claims, it might be a viable argument that the statutory reference operates as notice of the claim brought. But the premise is not sound where the statutory provision cited is § 706, which is not limited to a particular type of employment discrimination claim.

Nor does mention of a "class" claim give notice of the nature of the claim. While certainly most, perhaps virtually all, pattern-or-practice cases are "class" cases, not all EEOC "class" cases are pattern-or-practice cases. A "class" case, from the EEOC's perspective, is simply a "suit[ ] on behalf of multiple aggrieved individuals who were victims" of a discriminatory employment practice or policy. *See* U.S. Equal Employment Opportunity Comm'n, *A Study of the Litigation Program Fiscal Years 1997–2001*, at § B.2 (Aug. 13, 2002), *available at* http://web.archive.org/web/20021023165009/http://www.eeoc.gov/litigation/study/study.html. In a "class" case, the EEOC may proceed under the *McDonnell-Douglas* paradigm to prove the discrimination claims of one or more individual charging parties as a platform for obtaining relief for a broader, unidentified group of individuals. *See, e.g.*, *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1189, 1191–1200 (10th Cir. 2000) (analyzing a

pregnancy discrimination suit brought by the EEOC on behalf of four "[c]harging [p]arties and a group of similarly-situated pregnant employees" under *McDonnell-Douglas* and rejecting analogies to pattern-or-practice cases). Thus, the mere mention that relief is sought on behalf of a "class" and the prayer for "class" relief add nothing as far as notice that a pattern-or-practice claim is being pursued.

The complaint here simply does not set forth sufficient facts to make the EEOC's claim for relief plausible. As the majority notes, "[T]he pleading requirements for Title VII claims are no different than those for other claims; they are subject to the same requirement of setting forth 'enough facts to state a claim to relief that is plausible on its face.'" Maj. Op. at 15 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The *Twombly* standard is not met, in my view.

The majority seeks to excuse the EEOC's omission by saying that it may have relied on the complaint of the individual plaintiffs to allege a pattern or practice of discrimination. The operative complaint of the individual plaintiffs, the Second Amended Complaint, filed September 12, 2005, does contain allegations sufficient to state such a claim. But I know of no reason that the EEOC should be able to rely on this complaint rather than advising the court and other parties in straightforward fashion which claims brought by individual parties it intends to pursue. *See* 5A Charles Alan Wright et al., *Federal Practice & Procedure* § 1326 (3d ed. 2004) ("[R]eferences to prior allegations must be direct and explicit, in order to enable the responding

party to ascertain the nature and extent of the incorporation.")

Because the EEOC's complaint fails to state a pattern-or-practice claim, Cintas's motion was properly granted. The extensive analysis of the majority with respect to §§ 706 and 707 is simply unnecessary, and I would not reach that issue here.

The majority's treatment of the denial of the motion to amend, the discovery issues, the individual claims and, in part, the attorneys fees issue is premised on its ruling on the pattern-or-practice issue. Because I disagree with the majority's resolution of the pattern-or-practice issue, I might resolve some of the other issues differently. But it seems an unproductive use of judicial resources for me to analyze each of those issues in view of my preferred outcome in the case. My view on the pattern-or-practice issue, however, precludes my joining my fellow panelists' resolution of those issues. I do join the majority, however, in concluding that the EEOC satisfied its administrative prerequisites to suit and that, whatever the resolution of the pattern-or-practice issue, the district court abused its discretion in ordering the EEOC to pay Cintas's attorneys fees and costs.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 10-2629/11-2057

[Filed November 9, 2012]

MIRNA E. SERRANO et al.,	)
Plaintiffs,	)
	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff Intervenor-Appellant,	)
	)
v.	)
	)
CINTAS CORPORATION,	)
Defendant-Appellee.	)
	)

Before: MOORE, GIBBONS, and ALARCÓN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that both judgments of the district court at issue in the present appeals are VACATED, and the case is

REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Nos. 04-40132; 06-12311
HONORABLE SEAN F. COX
United States District Judge

[Filed September 20, 2010]

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff- Intervenor,	)
v.	)
CINTAS CORPORATION,	)
Defendant.	)

OPINION & ORDER GRANTING DEFENDANT'S OMNIBUS MOTION FOR SUMMARY JUDGMENT [Doc. No. 836]

On December 23, 2005, the Equal Employment Opportunity Commission ("EEOC") filed complaints as an intervening plaintiff in two cases that have been consolidated for pretrial purposes - *Mirna E. Serrano,*

et al. v. Cintas Corp. [Case No. 04-40132]; and *Blanca Nelly Avalos, et al. v. Cintas Corp.* [Case No. 06-12311] - alleging that Defendant Cintas Corporation ("Cintas") engaged in discriminatory hiring practices against female applicants in violation of 42 U.S.C. § 2000e-5, also known as a "Section 706" action.[1] The matter is before the Court on Cintas' "Omnibus Motion for Summary Judgment" [Doc. No. 836]. The parties have fully briefed the issues, and the Court declines to hear oral argument pursuant to E.D. MICH. L.R. 7.1(f)(2). For the reasons that follow, the Court **GRANTS** Cintas' motion [Doc. No. 836], and **DISMISSES** the EEOC's claims on behalf of all named plaintiffs **IN THEIR ENTIRETY**.

BACKGROUND

These causes of action have already suffered through a long, complex factual and procedural history - a history already discussed by the Court in previous orders. Therefore, only those facts of particular relevance to the instant motion are included below.

The individual plaintiffs in the *Serrano* action filed their original charge of discrimination with the EEOC on or about April 7, 2000 - over a decade ago. [*See Serrano* Complaint, Doc. No. 1, ¶7]. Two years later, in June of 2002 - the EEOC issued a determination that reasonable cause existed to believe Cintas had engaged in discriminatory hiring practices. [*See* Doc. No. 1, Ex.

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[1] For ease of reference, all further citations to document numbers in this motion will refer to the 04-40132 case unless otherwise noted.

A]. After two more years, in May of 2004, the EEOC formally declined to issue a right to sue letter - at which time the *Serrano* individual plaintiffs filed their lawsuit in this action. *Id*.

Roughly a year and a half after that - on December 23, 2005 - the EEOC filed suit as an intervening plaintiff in this action. [*See* Doc. No. 98]. The EEOC's first complaint brought actions under §§ 705 and 706. The EEOC also filed an amended complaint on August 20, 2009.

Since that time, the Court has denied both the *Serrano* and *Avalos* plaintiffs' motions for class-action certification [*see* Doc. No. 627] - and the Sixth Circuit has denied motions for interlocutory appeal. [*See* Doc. Nos. 632, 633]. All individual plaintiffs in the *Avalos* matter have had their cases either dismissed, settled, or otherwise resolved [*see* Case No. 06-12311, Doc. No. 647], as is also the case with all plaintiffs in the *Serrano* matter save for Mirna E. Serrano herself.[2] [*See* Doc. Nos. 712, 722, 732]. Practically speaking, therefore, all that remains of the *Serrano* and *Avalos* matters is the EEOC's § 706 claims against Cintas.

On October 21, 2009, Cintas filed its motion [Doc. No. 662] seeking to preclude the EEOC from proceeding under the "pattern or practice" framework announced by the U.S. Supreme Court in *Int'l*

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[2] Cintas' motion to dismiss the claims of Ms. Serrano [Doc. No. 881] is currently pending before this Court, which is unopposed by Ms. Serrano [Doc. No. 881, p.4] - though the EEOC opposes the Court granting the motion. [*See* Doc. No. 884].

Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). In opposition to that motion, the EEOC argued that it was entitled to pursue a "pattern or practice" action under the *Teamsters* framework - traditionally reserved for § 707 actions - in this action brought under § 706. [*See* Doc. No. 664].

On February 9, 2010, the Court granted Cintas' motion [Doc. No. 662], holding that the EEOC was precluded from advancing its § 706 claims against Cintas under the "pattern or practice" framework announced by the U.S. Supreme Court in *Teamsters*, but instead must proceed under the framework in *McDonnell-Douglas Corp. v. Green*, 422 U.S. 792 (1973). [*See* Doc. No. 723, p.21]. The Court denied the EEOC's motion to certify the issue for interlocutory appeal [*see* Doc. No. 752], and then subsequently denied the EEOC's second motion to amend the complaint to add a "pattern or practice" cause of action under § 707. [*See* Doc. No. 829].

The EEOC was required to disclose the names of all individuals upon whose behalf it was bringing this § 706 suit against Cintas no later than March 23, 2010. [*See* Doc. No. 735, p.16]. Though forty-six females were initially listed by the EEOC as having claims in this action, that number has since been pared to thirteen individual females - Susan Barber, Gayle Bradstrom, Christine Colfer, Gina Comiska, Kari (Denby) Kremhelmer, Tracy (Gerke) Williams, Leila (Houston) Vitale, Robin Leach, Susan (Majewski) Harrington, Diana Raby, Lori Schelske, Tanya Thompson, and Patricia Washington. As explained *infra*, the EEOC did not engage in any conciliation measures as required by

§ 706 before the EEOC filed suit on behalf of these named plaintiffs.

On June 25, 2010, Cintas filed its instant omnibus motion for summary judgment [Doc. No. 836], arguing that the EEOC's claims on behalf of all thirteen named plaintiffs in this action should be dismissed for failing to exhaust administrative remedies. The EEOC opposes the motion [*see* Doc. No. 876]. The matter is now ripe for decision by the Court.

Concurrent with the filing of this motion [Doc. No. 836], Cintas filed individualized motions attacking the merits of each of the thirteen named plaintiffs' claims. [*See* Doc. Nos. 848, 850, 852, 854, 856, 858, 859, 862, 864, 867, 869, 871, 873]. The Court addressed the merits of each of these individually-named plaintiffs' claims in separate opinions.

STANDARD OF REVIEW

Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c)(2). The party seeking summary judgment has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits which demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for

trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting FED. R. CIV. P. 56(e)).

ANALYSIS

In its instant motion [Doc. No. 836], Cintas argues that the EEOC's § 706 action against it should be dismissed for failure to exhaust administrative remedies. The Court agrees.

Section 706 of Title VII, 42 U.S.C. § 2000e-5, authorizes the EEOC to bring suit in its own name to ferret out unlawful sexual harassment. Specifically, § 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by the employer's unlawful employment practice. The EEOC is "master of its own case" when bringing suits on behalf of aggrieved persons in a § 706 lawsuit, and may bring such suits with or without the consent of the aggrieved persons. *EEOC v. Waffle House*, 534 U.S. 279, 291-92 (2002). "Nonetheless, it is axiomatic that the EEOC stands in the shoes of those aggrieved persons in the sense that it must prove all the elements of their [discrimination] claims to obtain individual relief for them." *EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918, 929 (N.D. Iowa 2009).

The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds "reasonable cause" to believe the employer has violated Title VII *and makes a good-faith attempt to settle the matter through conciliation*. The Supreme Court explained this process in depth in *Occidental Life Ins. Co. of Calif. v. EEOC*:

> Congress established an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court. That procedure begins when a charge is filed with the EEOC alleging that an employer has engaged in an unlawful employment practice. A charge must be filed within 180 days after the occurrence of the allegedly unlawful practice, and the EEOC is directed to serve notice of the charge on the employer within 10 days of filing. The EEOC is then required to investigate the charge and determine whether there is reasonable cause to believe that it is true. This determination is to be made "as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge." If the EEOC finds that there is reasonable cause it "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." When "the Commission is unable to secure. . . a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge."

Occidental Life, 432 U.S. 355, 359-60 (1977) (footnotes, citations and alterations omitted).

The EEOC's statutory obligation to investigate, determine reasonable cause, and conciliate has been called "crucial to the philosophy of Title VII" by other federal courts. *EEOC v. Pierce Packing Co.*, 669 F.2d

605, 608 (9th Cir. 1982) (internal quotations and citation omitted). These statutory requirements serve two important purposes: 1) ensuring that the employer is fully notified of the violations being alleged against it; and 2) allowing the EEOC the opportunity to consider the allegations and attempt to resolve any violations through conciliation and voluntary compliance. *EEOC v. American Nat'l Bank*, 652 F.2d 1176, 1185 (4th Cir. 1981).

Although a § 706 lawsuit must begin with a formal charge of discrimination, *Occidental Life*, 432 U.S. at 359, a § 706 lawsuit is not necessarily "confined to the specific allegations in the charge." *EEOC v. Delight Wholesale*, 973 F.2d 664, 668 (8th Cir. 1992). Rather, the judicially-created "reasonable investigation rule" allows the EEOC to pursue in litigation "[a]ny violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint." *General Telephone Co. v. EEOC*, 446 U.S. 318, 331 (1980). However, although broad in scope, the "reasonable investigation rule" is not without its limits. Rather, an original discrimination charge is only sufficient to support an EEOC action for:

> . . . any discrimination. . . developed during a reasonable investigation of the charge, *so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding*.

Delight Wholesale, 973 F.2d at 668-69 (emphasis added).

In this litigation, both Cintas and the EEOC concede that no individualized conciliation proceedings *of any kind* took place on behalf of the thirteen named plaintiffs in this § 706 suit. The EEOC did not investigate the specific allegations of any of the thirteen aggrieved persons until after the *Serrano* plaintiffs' initial complaint - and even its own complaint years later - was filed. Nor did the EEOC identify any of the thirteen allegedly aggrieved persons as members of the "class" until after the EEOC filed its initial complaint - indeed, as noted *supra*, the EEOC only identified the individuals upon whose behalf it was seeking relief on March 23, 2010. Nor still did the EEOC make an individualized reasonable cause determination as to the specific allegations of any of the thirteen named plaintiffs in this action. Finally, no attempt was made by the EEOC to conciliate the individual claims of the thirteen named plaintiffs prior to the filing of the EEOC's initial complaint.

Rather, the EEOC argues that its prior conciliation proceedings on the *Serrano* matter satisfy its responsibility to conciliate the claims of these thirteen individuals. Cintas, however, argues that the prior conciliation proceedings from the *Serrano* matter are insufficient to absolve the EEOC of its requirements under Title VII. Cintas explains its argument as follows:

> Therefore, as this case stands now, more than ten years after Ms. Serrano first filed her charge and almost five years since the EEOC intervened in this litigation, the EEOC is left with only [13] discrete, individual claims of disparate treatment. The EEOC has never

> asserted a claim for pattern or practice discrimination or any other claim for class-wide relief. None of the [13] individuals on whose behalf the EEOC is currently pursuing claims have ever filed a discrimination charge with the EEOC concerning their application or rejection from Cintas. Furthermore, despite its statutory obligation to do so, the EEOC did not investigate any of the [13] claims prior to intervening. The EEOC never issued a reasonable cause determination as to any of the [13] individual § 706 claimants, nor did it attempt to conciliate their claims. The EEOC literally sued first and began to ask questions only years later. Title VII simply does not permit the EEOC to callously disregard its clear pre-suit mandates, and summary judgment therefore should be granted.

[Def.'s Br., Doc. No. 836, pp.8-9].

The EEOC makes two arguments in opposition to Cintas' omnibus motion for summary judgment [Doc. No. 836]: 1) that judicial estoppel prevents Cintas from changing its position on this issue so late in the litigation; and 2) that the EEOC fulfilled its statutory obligation with regard to the thirteen named plaintiffs in this § 706 action. Ultimately, neither of these arguments has merit.

I. Judicial Estoppel.

The EEOC argues that Cintas should be judicially estopped from arguing that the EEOC failed to exhaust administrative remedies in these proceedings. [*See* EEOC's Br., Doc. No. 876, pp.5-7]. The Court disagrees.

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contrary argument to prevail in another phase." *Pegram v. Herdrich*, 530 U.S. 211, 227 n.8 (2000). Where a party:

> . . .assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formally taken by him.

Davis v. Wakelee, 156 U.S. 680, 689 (1895). The purpose of the judicial estoppel rule is to prevent the improper use of judicial machinery. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

In support of its argument, the EEOC relies upon what it purports to be Cintas' statements in their brief in support of denying an EEOC motion for interlocutory appeal:

> The circumstances here fit squarely within the doctrine of judicial estoppel. Contesting a motion for interlocutory appeal, Cintas argued that the EEOC did not meet the "controlling question of law" standard for such an appeal because the EEOC was not limited in its "ability to bring any individual claims. *Indeed, the EEOC is free to bring a discrimination claim on behalf of any woman who it alleges was not hired as an SSR at one of Cintas' Michigan locations* . . . ." Now, Cintas has changed its position by asserting that

> the EEOC is not free to bring a discrimination claim on behalf of females who were not hired as SSRs. In other words, Cintas has reversed its previous position - that interlocutory appeal was not appropriate because the EEOC could seek relief for female applicants under the *McDonnell Douglas* framework - and now takes the opposite position.

[EEOC's Br., Doc. No. 876, p.6 (internal citations omitted) (emphasis added)].

The Court, however, disagrees. In Cintas' reply brief [Doc. No. 883], Cintas rebuts the EEOC's contention that it somehow conceded that the EEOC was free to bring these claims without objection to any potential failure to exhaust administrative remedies:

> Cintas has ***never*** taken the position that the Commission satisfied the conditions precedent to filing suit for each of the 13 claims that it now purports to advance prior to its December 2005 intervention. In fact, in both its Answer to the EEOC's Complaint-in-Intervention (Dkt. 99) and its Answer to the EEOC's Amended Complaint (Dkt. 654), Cintas expressly denied that the Commission had fulfilled all of the conditions precedent to its intervention in the action.

[Def.'s Reply, Doc. No. 883, p.4]. The Court agrees. At no point in this litigation has Cintas conceded that the EEOC was free to do what it pleased with regard to its Title VII responsibility to investigate and conciliate potential claims. Further, at no time was the Court somehow misled by Cintas' prior filing - discussed

supra by the EEOC - regarding the EEOC's prerogative to pursue § 706 claims on behalf of allegedly aggrieved individuals. Rather, as Cintas argues in its reply brief:

> . . . there is nothing inconsistent with Cintas' positions. In the Omnibus Summary Judgment Motion, Cintas does not take the position that the Court's *February 9, 2010 Order* prevents the EEOC from pursuing these claims; rather, as Cintas explained in its brief, it is the *EEOC's own failure* to investigate, determine reasonable cause, and conciliate the 13 claims prior to intervening that is the reason that the claims must be dismissed.

Id. at 5 (emphasis in original).

The Court agrees. For these reasons, the Court holds that Cintas is not judicially estopped from raising the arguments in this motion, and the EEOC's arguments to the contrary are without merit.

II. Failure to Exhaust Administrative Remedies.

In opposition to Cintas' omnibus motion for summary judgment [Doc. No. 836], the EEOC argues that it has satisfied its Title VII responsibility to exhaust administrative remedies with respect to these thirteen named plaintiffs. Specifically, the EEOC argues:

> Cintas'[] argument that the Commission had to investigate, issue a cause finding, and conciliate on an individual basis for *each of the remaining class members* finds no support in the language

> of Title VII and, *with the exception of one district court decision in another circuit*, has not been accepted by any court.

[EEOC's Br., Doc. No. 876, p.9 (emphasis added)]. The EEOC then argues that its conduct with respect to these thirteen individually named plaintiffs is well-supported by federal case law. *Id*. at 9-11, citing ***EEOC v. Keco Indus., Inc.***, 748 F.2d 1097, 1101 (6th Cir. 1984); ***EEOC v. Paramount Staffing, Inc.***, 601 F.Supp.2d 986, 990 (W.D. Tenn. 2009); ***EEOC v. Cone Solvents, Inc.***, 2006 WL 1083406 (M.D. Tenn. Apr. 21, 2006); ***EEOC v. Applegate Holdings, LLC***, 2005 WL 1189601 (W.D. Mich. May 19, 2005); ***EEOC v. Mike Fink Corp.***, 1998 WL 34078445 (M.D. Tenn. July 17, 1998); ***EEOC v. Chrysler Corp.***, 546 F.Supp. 54 (E.D. Mich. 1982); ***EEOC v. Rhone-Poulenc***, 876 F.2d 16 (3d Cir. 1989); ***EEOC v. Calif. Psychiatric Transitions***, 644 F.Supp.2d 1249 (E.D. Cal. 2009); ***EEOC v. Dial Corp.***, 156 F.Supp.2d 926 (N.D. Ill. 2001); ***EEOC v. American Nat'l Bank***, 652 F.2d 1176 (4th Cir. 1981).

The above-cited legal precedent the EEOC relies upon, however, all pertains to lawsuits in *a class-action*, or at the very least, were *proper class-based actions* that were instituted *from the beginning* against an employer. Despite the EEOC's continuing insistence that this lawsuit is class-based [*see* EEOC's Br., Doc. No. 876, pp.7,8], and despite the EEOC's complaint citing to "a class" of allegedly aggrieved individuals, this case is not now, nor has it ever been, a class-based lawsuit.

Similar to the situation presented before the Northern District of Iowa in ***EEOC v. CRST Van***

Expedited, Inc., 2009 WL 2524402 (N.D. Iowa Aug. 13, 2009), here the EEOC originally filed suit on behalf of "Mirna E. Serrano. . . *and a class of women*[,]" [EEOC's Complaint, Doc. No. 98, ¶8 (emphasis added)], seeking to pursue claims on behalf of those women through a § 706 action. In *CRST*, the Northern District of Iowa was faced with the same situation, where that court dealt with another § 706 action brought on behalf of "Starke and a class of similarly situated female employees[.]" *CRST*, 2009 WL 2524402, *8. *CRST* commented as follows:

> The vague reference in the EEOC's Complaint to "Starke and a class of similarly situated female employees" added unnecessary confusion to this case. . . [T]he phrase "Starke and a class of similarly situated female employees" *does not comport with the language or structure of Section 706*. *See* 42 U.S.C. § 2000e-5(f)(1) (referring to "[t]he person or persons aggrieved" and "the person aggrieved"). Such phrase naturally evokes the thought of Starke as the named plaintiff in a Rule 23 class action against CRST; to the contrary, *it is settled that a Section 706 federal enforcement action bears little resemblance in practice to a Rule 23 class action*.

Id. (emphasis added). On substantially similar - in fact, identical - procedural facts, the *CRST* court rejected the EEOC's attempts to characterize its § 706 lawsuit - there, involving sixty-seven individually named plaintiffs seeking redress for sexual harassment allegedly suffered at the hands of their employer - as somehow class-based in nature. This Court likewise

declines to lend credence to the EEOC's substantially similar argument in this litigation.

The EEOC's brief [Doc. No. 876] largely downplays the relevance of the *CRST* opinion. Indeed, the EEOC's *only* mention of *CRST* by name in its entire brief occurs in a single footnote, where the EEOC states that "*CRST* cannot be squared with *General Telephone* or Title VII, is not a case decided by the Sixth Circuit, has no precedential value, and is contrary to *Keco* and its progeny." [EEOC's Br., p.9 n.2]. The Court disagrees - as Cintas argues in both its original [Doc. No. 836], and reply [Doc. No. 883] briefs to this motion, *CRST* is on point with the issues involved in this motion.

In *CRST*, a female employee of that company filed a charge of sexual harassment with the EEOC. *CRST*, 2009 WL 2523302, *1. A year and a half later, the EEOC issued a determination finding that reasonable cause existed to believe that CRST subjected the female employee and a "class of employees and prospective employees" to sexual harassment in violation of Title VII. *Id*. Conciliation with CRST was ultimately unsuccessful, and the EEOC filed a § 706 lawsuit alleging that CRST had failed to prevent or correct the sexual harassment that the female employee and a class of other similarly-situated women experienced in the workplace. *Id*. at *7.

At no point prior to the filing of the EEOC's § 706 lawsuit did the EEOC provide CRST with any notice as to the size of the class of employees involved. "In other words, it was unclear whether the instant Section 706 lawsuit involved two, twenty, or two thousand allegedly aggrieved persons." *Id*. at *8 (internal quotations

omitted). "In the initial stages of this case, it appeared the number of allegedly aggrieved persons was relatively small," *id*. at *9, but "[a]s discovery progressed. . . it became clear that the EEOC did not know how many allegedly aggrieved persons on whose behalf it was seeking relief. Instead, the EEOC was using discovery to find them." *Id*. Faced with this situation, the *CRST* court noted that:

> There was a clear and present danger that this case would drag on for years as the EEOC conducted wide-ranging discovery and continued to identify allegedly aggrieved persons. The EEOC's litigation strategy was untenable: CRST faced a continuously moving target of allegedly aggrieved persons, the risk of never-ending discovery and indefinite continuance of trial.

Id.

Just prior to the deadline the court set for the EEOC to name those plaintiffs upon whose behalf the EEOC was bringing its § 706 action, "CRST accused the EEOC of adopting a policy of 'naming everyone and asking questions later.'" *Id*. at *10. Indeed, in the ten days leading up to the deadline for naming plaintiffs, the EEOC added approximately two-hundred allegedly aggrieved plaintiffs to its list - many of whom the EEOC did not have addresses for, or even knowledge of the correct spelling of their names. *Id*. at *9. That number grew to 270 individuals by the deadline, only to shrink to approximately 150 after the EEOC did not make the remainder of the women available for deposition. *Id*. at *11. The Court then dismissed the majority of those remaining on the merits of their

claims, leaving a total of sixty-seven plaintiffs. *Id*. The EEOC contended that all sixty-seven of these women fell within the "class" described in the original discrimination charge - though the EEOC had not even been *aware* of the majority of the plaintiffs at that time. *Id*.

As is the case in this litigation, the *CRST* court noted as follows:

> . . . the case at bar is one of those exceptionally rare § 706 cases in which the record shows that the EEOC did not conduct *any* investigation of the specific allegations of the allegedly aggrieved persons for whom it seeks relief at trial before filing the Complaint - let alone a reasonable cause determination as to those allegations or conciliate them.

Id. at *16. Faced with this litigation posture - the *exact same scenario which faces this court in the instant motion* - the *CRST* court noted that:

> The EEOC cites no binding legal authority that allows it to do what it is attempting to do in this case, *i.e.*, boot-strap the investigation, determination and conciliation of the allegations of Starke and a handful of other allegedly aggrieved persons. *The mere fact that Starke and a handful of other women allege they were harassed while working for CRST provides no basis for the EEOC to litigate the allegations of 67 other women in this lawsuit*. To the contrary, when presented with analogous facts, the courts have largely resisted the EEOC's attempts to

> perfect an end-run around Title VII's statutory prerequisites to suit.

Id. (footnoted material omitted) (emphasis added).

As such, the *CRST* court dismissed the claims of all sixty-seven remaining named plaintiffs in that action:

> To rule to the contrary would severely undermine if not completely eviscerate Title VII's "integrated, multistep enforcement procedure, *Occidental Life*, 432 U.S. at 355, expand the power of the EEOC far beyond what Congress intended and greatly increase litigation costs.

Id. at *17. *CRST* also noted that accepting the EEOC's arguments "might avoid administrative proceedings for the vast majority of allegedly aggrieved persons," *id*. at *18, and that such power was clearly beyond Congressional intent in granting the EEOC powers under Title VII:

> Congress surely did not intend that employers, even ones whose workplaces might be rife with sexual harassment, face the moving target of allegedly aggrieved persons that CRST faced in both the administrative and legal phases of this dispute.

Id. That the EEOC had placed CRST on notice of a "class" of allegedly aggrieved individuals was beside the point:

> The EEOC's insistence that the 67 allegedly aggrieved persons for whom it now seeks relief are truly part of the "class" of persons it referenced in the Letter of Determination is not well taken. This argument does nothing more than trade on the inherent ambiguity in the term "class" to the EEOC's own advantage. . . . It is, after all, *the EEOC's duty* to put Defendants on notice of the scope of the charges against them in order to give every incentive and allowance for settlement of the claims prior to filing the suit in court.

Id. (internal citations and quotations omitted) (emphasis in original).

Though admitting that the ultimate remedy - outright dismissal - was "severe," *CRST* nonetheless found it appropriate on the facts of the case presented to it:

> Although dozens of potentially meritorious sexual harassment claims may now never see the inside of a courtroom, to rule to the contrary would work a greater evil insofar as it would permit the EEOC to perfect an end-run around Title VII's integrated, multistep enforcement procedure. It would ratify a "sue first, ask questions later" litigation strategy on the part of the EEOC, which would be anathema to Congressional intent. The Court cannot ignore the law as it is written by Congress. . . .

Id. at *19 (internal citations and quotations omitted).

The facts of the instant case are exactly on point with *CRST* - and this Court adopts the well-reasoned central holding of the *CRST* court. Here, the EEOC filed a charge of discrimination in the original *Serrano* matter, on behalf of Ms. Serrano and a "class" of women. The EEOC freely admits that it pursued no individual investigation on conciliation proceedings on the thirteen individuals involved in this § 706 action before it filed suit as an intervenor.

Years after the EEOC filed its initial Complaint in this matter, Cintas still had no idea as to the identities of those allegedly aggrieved individuals upon whose behalf this § 706 action was brought. Indeed, the EEOC was using discovery in the *Serrano* and *Avalos* class-action proceedings in large part to find these individuals. It was only on March 23, 2010 - by order of the Court, no less - that the EEOC finally disclosed the identities of its named plaintiffs to Cintas. At that time, forty-six individuals were originally named by the EEOC - though, as in *CRST*, that number quickly dwindled, first to fifteen claimants, and then to the thirteen before the court in this motion. *None of these thirteen allegedly aggrieved individuals were the subject of any pre-suit investigation or conciliation procedures*.

On these facts, the Court holds that the EEOC's failure to engage in the required "integrated, multistep enforcement procedure," *Occidental Life*, 432 U.S. at 355, mandated by Title VII before filing a Section 706 action, is fatal to the EEOC's claims on their behalf in this lawsuit. As was noted in *CRST*, dismissal, while a severe penalty, is nonetheless the appropriate remedy in this instance. As the *CRST* court noted:

> The government, like its citizens, must follow the law. The EEOC must respect Title VII's administrative scheme and follow the clearly delineated paths to justice that Congress has created. Seeking shortcuts to these paths does nothing more than undermine their valuable function and erode the meaning of the rights they are designed to protect. It is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.

CRST, 2009 WL 2524402, *19 (internal quotations and citations omitted). The Court agrees, and the EEOC's arguments to the contrary are without merit.

CONCLUSION

For the reasons explained above, the Court **GRANTS** Cintas' omnibus motion for summary judgment [Doc. No. 836], and **DISMISSES WITH PREJUDICE** the EEOC's claims on behalf of Susan Barber, Gayle Bradstrom, Christine Colfer, Gina Comiska, Kari (Denby) Kremhelmer, Tracy (Gerke) Williams, Leila (Houston) Vitale, Robin Leach, Susan (Majewski) Harrington, Diana Raby, Lori Schelske, Tanya Thompson, and Patricia Washington.

IT IS SO ORDERED.

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: September 20, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 20, 2010, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed February 9, 2010]

Case No. 04-40132
HONORABLE SEAN F. COX
United States District Judge

MIRNA E. SERRANO, *et al.*,	)
	)
Plaintiffs,	)
	)
and	)
	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
	)
Plaintiff-Intervenor,	)
	)
v.	)
	)
CINTAS CORPORATION,	)
	)
Defendant.	)

Consolidated for Pre-Trial Proceedings With

Case No. 06-12311
HONORABLE SEAN F. COX
United States District Judge

BLANCA NELLY AVALOS, *et al.*,

Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Intervenor

v.

CINTAS CORPORATION,

Defendant.

OPINION & ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS
[Doc. No. 662]

On December 23, 2005, the Equal Opportunity Employment Commission ("EEOC") filed complaints as an intervening plaintiff in two cases that have been consolidated for pretrial purposes - *Mirna E. Serrano, et al. v. Cintas Corp*. [Case No. 04-40132]; and *Blanca Nelly Avalos, et al. v. Cintas Corp.* [Case No. 06-12311] - alleging that Defendant Cintas Corporation ("Cintas") engaged in discriminatory hiring practices against

female applicants.[1] The matter is before the Court on Defendant Cintas's "Motion for Judgment on the Pleadings With Respect to Plaintiff-Intervenor's Pattern or Practice Discrimination Claim" [Doc. No. 662]. Both parties have fully briefed the issues, and a hearing was held on January 21, 2009. For the reasons that follow, the Court **HOLDS** that the EEOC is precluded from advancing its claims against Cintas under the *Teamsters* "pattern or practice" framework. The Court therefore **GRANTS** the Defendant's Motion [Doc. No. 662].

BACKGROUND

These causes of action have already suffered through a long, complex factual and procedural history - a history already discussed by the Court in previous orders. Therefore, only those facts of particular relevance to the instant motion are included below.

On December 23, 2005, the EEOC filed complaints as an intervening plaintiff in both the *Seranno* and *Avalos* cases. The EEOC then amended both complaints on August 20, 2009. [*See* Doc. No. 650, Case No. 04-40132; Doc. No. 503, Case No. 06-12311]. The first numbered paragraph of each complaint reads as follows, in pertinent part:

> This action is authorized and instituted pursuant to Sections 705(g)(6) and 706(f)(1) and

---

[1] As the EEOC's two complaints are mirror images of one another, for ease of reference all further citations to document numbers in this motion will refer to the 04-40132 case, unless otherwise noted.

> (3) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-4 and -f(f)(1) and (3) ("Title VII") and Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

[Doc. No. 650, ¶1, Case No. 04-40132; Doc. No. 503, ¶1, Case No. 06-12311]. Again, the EEOC brought this action, in part, as a "Section 706" action under 42 U.S.C. § 2000e-5, and not as a "Section 707" action under 42 U.S.C. § 2000e-6.[2] It is the distinction between Section 706 actions and Section 707 actions that is the subject of this motion.

Lawsuits under § 706

Section 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by an employer's unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). The EEOC may file a § 706 lawsuit against a private employer, after the filing of a charge of unlawful employment discrimination with the EEOC, if the EEOC finds "reasonable cause" to believe that the employer violated Title VII. *See, e.g., Occidental Life Ins. Co. of Calif. v. EEOC*, 432 U.S. 355, 359-60 (1977). In *General Tel. Co. of the Northwest, Inc. v. EEOC* - regarded as "the seminal § 706 case," *EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918, 929 (N.D. Iowa 2009) - the Supreme Court explained as follows:

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[2] Actions pursuant to either 42 U.S.C. § 2000e-5 or 42 U.S.C. § 2000e-6 are commonly referred to as "706 Actions" or "707 Actions" - a reference to those statutory sections' placement in the Civil Rights Act of 1964.

> Title VII. . . authorizes the procedure that the EEOC followed in this case. Upon finding reasonable cause to believe that [a private employer] had discriminated. . . the EEOC filed suit. . . . [T]he EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, *of securing relief for a group of aggrieved individuals*.

General Telephone, 446 U.S. at 324 (emphasis added).

The EEOC is "master of its own case" when bringing suits on behalf of aggrieved persons in a § 706 lawsuit, and may bring such suits with or without the consent of the aggrieved persons. *EEOC v. Waffle House*, 534 U.S. 279, 291-92 (2002). "Nonetheless, it is axiomatic that *the EEOC stands in the shoes of those aggrieved persons in the sense that it must prove all the elements of their [discrimination] claims to obtain individual relief for them*." *CRST*, 611 F.Supp.2d at 629 (emphasis added).

Plaintiffs in a § 706 action pursue their claims under the familiar burden-shifting scheme outlined in *McDonnell-Douglas Corp. v. Green*, 422 U.S. 792 (1973). *See Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 760 (4th Cir. 1998). Under the *McDonnell-Douglas* framework, plaintiffs must first establish a *prima facie* case of discrimination. *McDonnell-Douglas*, 422 U.S. at 802. Once the plaintiff has established a *prima facie* case of discrimination, the burden of production shifts to the employer to rebut the plaintiff's *prima facie* case by articulating a legitimate, nondiscriminatory reason for the adverse employment action. *Id*. If the employer articulates

such a legitimate, nondiscriminatory reason, the plaintiff bears the burden of proving that the employer's articulated reason is a pretext for discrimination. *Id*.

If the EEOC prevails in a § 706 action, the EEOC is entitled to equitable relief for the individuals upon whose behalf the EEOC brought suit, 42 U.S.C. § 2000e-5(g), and may also pursue compensatory and punitive damages, 42 U.S.C. § 1981a(a)(1).

Lawsuits Under § 707

Section 707 permits the EEOC to bring suit against employers whom it has reasonable cause to believe are engaged in a "pattern or practice" of unlawful employment discrimination. 42 U.S.C. § 2000e-6; *see also General Telephone*, 446 U.S. at 327 n.9 ("If, for any reason, [the] EEOC. . . believes a pattern or practice of discrimination exists in [a private employer], its recourse is to file a suit under § 707." (citations and emphasis omitted)). "A pattern or practice case seeks to eradicate systemic, company-wide discrimination and focuses on an objectively verifiable policy or practice of discrimination by a private employer against its employees." *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1070 (C.D. Ill. 1998).

Like § 706, § 707 grants the EEOC the right to seek equitable relief - such as an injunction - against employers found to have engaged in a pattern or practice of unlawful employment discrimination. 42 U.S.C. § 2000e-6(a). Unlike § 706, however, the EEOC is not authorized to seek compensatory or punitive

damages under § 707 - 42 U.S.C. § 1981a only authorizes the recovery of compensatory and punitive damages "in an action brought by a complaining party under [§ 706]." 42 U.S.C. § 1981a(a)(1).

As *General Telephone* is regarded as the seminal § 706 case, the U.S. Supreme Court's holding in *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) is regarded as the seminal § 707 case. To prove a pattern or practice claim under § 707, the EEOC must "establish by a preponderance of the evidence that racial discrimination was the company's standard operating procedure - the regular rather than the unusual practice." *Id*. at 336. That is, the EEOC is required "to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id*. A pattern or practice is:

> . . . present only where the denial or rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature. There would be a pattern or practice if, for example, a number of companies of persons in the same industry or line of business discriminated, if a chain of motels or restaurants practiced racial discrimination through all or a significant part of its system, or if a company repeatedly and regularly engaged in acts prohibited by the statute. The point is that single, insignificant, isolated acts of discrimination by a single business would not justify a finding of a pattern or practice. . . .

Id. (internal citations and quotations omitted).

Teamsters also adopted a burden-shifting framework for § 707 actions, separate and distinct from the *McDonnell-Douglas* burden-shifting framework utilized in § 706 actions, as explained below:

> The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers. *At the initial, "liability" stage of a pattern or practice suit[,]* the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its *burden is to establish a prima facie case that such a policy existed*. The burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant. An employer might show, for example, that. . . during the period it is alleged to have pursued a discriminatory policy it made too few employment decisions to justify the inference that it had engaged in a regular practice of discrimination.
>
> *If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy*. Without any further evidence from the Government, a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive

order. . . or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.

When the Government seeks individual relief for the victims of the discriminatory practice, a district court must usually conduct additional proceedings after the liability phase of the trial to determine the scope of individual relief. [A]s is typical of Title VII pattern-or-practice suits, the question of individual relief does not arise until it has been proved that the employer has followed an employment policy of unlawful discrimination. The force of that proof does not dissipate at the remedial state of the trial. The employer cannot, therefore, claim that there is no reason to believe that its individual employment decisions were discriminatorily based; it has already been shown to have maintained a policy of discriminatory decision-making.

The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuant of that policy. *The Government need only show that an alleged individual discriminatee unsuccessfully applied for a job and therefore was a potential victim of the proved discrimination. The burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons*.

Teamsters, 431 U.S. at 360-62 (footnotes and citations omitted) (emphasis added).

Differences Between § 706 Actions and § 707 Actions

"There is a significant distinction between §§ 706 and 707 claims." *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F.Supp.2d 1117, 1143 (D. Nev. 2007). As the Supreme Court has recognized:

> A Commissioner [of the EEOC] may file a charge in either of two situations. First, when a victim of discrimination is reluctant to file a charge. . . because of fear of retaliation, a Commissioner may file a charge on behalf of the victim. [42 U.S.C. § 2000e-5]. Second, when a Commissioner has reason to think that an employer has engaged in a "pattern or practice" of discriminatory conduct, he may file a charge on his own initiative. [42 U.S.C.] § 2000e-6.

EEOC v. Shell Oil Co., 466 U.S. 54, 62 (1984). Similarly, the Central District of Illinois noted as follows:

> [A] § 706 case is based on one or more individual charges or complaints of unlawful discrimination by an employer, and a § 707 case is based on a pattern or practice of systemic discrimination by an employer. Although both a § 706 case and a § 707 case can be filed by the EEOC in its own name and initiated by a "Commissioner's charge," rather than an individual charge, the converse is not true. A § 707 case cannot be

> initiated by an individual charge, and it cannot be filed as a civil suit by an individual. A § 707 case is a "pattern or practice" case that challenges systemic, wide-spread discrimination by an employer. Conversely, a § 706 case seeks to vindicate. . . the rights of aggrieved individuals who are challenging an unlawful employment practice by an employer. The distinction is subtle and not immediately apparent from the language of Title VII, but it is, nonetheless, an important distinction.

Mitsubishi Motor, 990 F.Supp. at 1084 (citation and footnote omitted). Finally, as explained *supra*, § 706 actions and § 707 actions have the following distinctions directly pertinent to this motion: Section 706 actions proceed under the *McDonnell-Douglas* burden-shifting framework, and if the EEOC prevails, it may secure equitable and/or legal damages (including punitive damages); Section 707 actions, however, proceed under the *Teamsters* burden-shifting framework, and may only seek equitable, as opposed to legal, damages.

The Instant Motion

Cintas's motion for judgment on the pleadings [Doc. No. 662] argues as follows, in pertinent part:

> The EEOC purports under § 706 of Title VII to assert a claim that the statute does not permit: a pattern or practice claim seeking compensatory and punitive damages from Cintas. The EEOC further claims that it can prove a pattern or practice by applying the

> minimal Teamsters' prima facie proof model that would shift the burden to Cintas to disprove discrimination. The EEOC can do none of these things under the § 706 claim that it has asserted. First, a pattern or practice claim can be asserted by the EEOC only under § 707 of Title VII - not here pled. Second, compensatory and punitive damages are not available in pattern or practice cases; the only remedy is injunctive relief. Third, the Teamsters' burden-shifting proof model applies only in § 707 cases.
>
> By alleging a pattern or practice claim under § 706, the EEOC is attempting to manipulate the clearly-defined contours of Title VII so that it may take advantage of the lower burden of proof that is available for a § 707 pattern or practice claim [under *Teamsters*, as opposed to under *McDonnell-Douglas*], while still seeking to recover compensatory and punitive damages, which are only available under § 706.

[Def.'s Br., Doc. No. 662, p.2].

While the EEOC's complaint does not specifically allege that it is pursuing a "pattern or practice" claim against Cintas, the EEOC readily admits as much in its response brief [Doc. No. 664]. The EEOC argues, however, that it may bring a pattern or practice claim under § 706. [*See, e.g.*, EEOC's Br., Doc. No. 664, p.2 ("Since the 1972 amendments to Title VII, the [EEOC] may sue under § 706 and obtain damages for a class of aggrieved individuals pursuant to the proof scheme outlined in [*Teamsters*].")].

STANDARD OF REVIEW

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Tucker v. Middleburg Legacy Place*, 539 F.3d 545, 549 (6th Cir. 2008)(internal citations and quotations omitted). The Sixth Circuit, in *Streater v. Cox*, 2009 WL 1872471, *3 (6th Cir. June 30, 2009), recently elaborated upon the pleading requirements necessary to survive a Rule 12(c) motion for judgment on the pleadings:

> In *Bell Atlantic Corp. v. Twombley*, 550 U.S. 544 (2007), the Supreme Court explained that "a plaintiff's obligation to provide the 'grounds' of 'his entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. . . . Factual allegations must be enough to raise a right to relief above the speculative level. . . ." In *Erickson v. Pardus*, 550 U.S. - - - (2007), decided two weeks after *Twombley*, however, the Supreme Court affirmed that "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short a plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice of what the. . . claim is and the grounds upon which it rests.' The opinion in *Erickson* reiterated that "when ruling on a defendant's motion to dismiss, a judge must accept as true

> all of the factual allegations contained in the complaint." We read the *Twombley* and *Erickson* decisions in conjunction with one another when reviewing a district court's decision to grant a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12.

Streater, 2009 WL 1872471, *3, quoting *Sensations, Inc. v. City of Grand Rapids*, 526 F.3d 291, 295-96 (6th Cir. 2008) (internal citations omitted).

ANALYSIS

Cintas asks this Court to preclude the EEOC from prosecuting the instant § 706 action under the *Teamsters* "pattern or practice" framework used in § 707 actions. The Court agrees for the reasons that follow, and therefore **GRANTS** Cintas's motion [Doc. No. 662].

I. The Procedural History of the EEOC's Involvement in These Actions.

The individual plaintiffs in the *Seranno* action filed their original charge of discrimination with the EEOC on or about April 7, 2000 - *almost a decade ago at this point*. [*See Seranno* Complaint, Doc. No. 1, ¶7]. It took the EEOC *over two years* - until roughly June of 2002 [*See* Doc. No. 1, Ex. A] to issue a determination that reasonable cause existed to believe Cintas had engaged in discriminatory hiring practices.

Despite this finding in June of 2002, the *Seranno* individual plaintiffs were *still* seeking a right to sue letter from the EEOC *another two years later*, and it was only in May of 2004 - *over four years from when the original charge was filed* - that the EEOC formally declined to issue a right to sue letter. The *Seranno* individual plaintiffs then filed their lawsuit in this action on May 10, 2004 [*See* Doc. No. 1].

It took *another year and a half* for the EEOC to *again* change its posture regarding this action: on December 23, 2005, the EEOC - who over a year and a half beforehand had not even been willing to grant the *Seranno* individual plaintiffs a right to sue letter - apparently became convinced that Cintas's alleged discrimination warranted the EEOC's intervention as a third-party plaintiff. [*See* EEOC's Complaint, Doc. No. 98].

The EEOC's original Complaint brought actions under §§ 705 and 706 - not § 707 [*See* Doc. No. 98, ¶4] - and *nowhere* within the EEOC's original Complaint does the EEOC allege that Cintas engaged in a "pattern or practice" of discrimination, *nor* does the EEOC give *any* indication that it sought to prove its claims pursuant to the *Teamsters* framework.

Almost four years after that - and *over nine years* since the *Seranno* individual plaintiffs filed their original charge of discrimination - the EEOC amended its original Complaint on August 20, 2009. [*See* EEOC's First Amended Complaint, Doc. No. 650]. As was the case with its first Complaint, the EEOC alleged actions under §§ 705 and 706 - not § 707 [*See* Doc. No. 650, ¶4] - and *nowhere* within the EEOC's

amended Complaint does the EEOC allege that Cintas engaged in a "pattern or practice" of discrimination, *nor* does the EEOC give *any* indication that it sought to prove its claims pursuant to the *Teamsters* framework.

Against this procedural backdrop, Cintas filed the instant motion on October 21, 2009 [*See* Doc. No. 662], seeking to preclude the EEOC from proceeding under a *Teamsters* framework in this action brought under § 706. It was only upon filing its *response brief* to the instant motion on November 4, 2009 - *almost four years* after intervening in this action - that the EEOC formally announced to the Court its intention to proceed under the *Teamsters* framework.

At oral argument before the Court on January 27, 2010, counsel for the EEOC admitted that its Complaint is devoid of any mention of the *Teamsters* framework - again, traditionally utilized in § 707 actions, as opposed to the *McDonnell-Douglas* framework typically utilized in § 706 actions. Further, when asked at oral argument to direct the Court to paragraphs in the Complaint supporting the EEOC's contention that Cintas engaged in a "pattern or practice" of discrimination, counsel for the EEOC first remarked that "pattern or practice" is not generally regarded by the EEOC as being a term of art.[3] When pressed on the subject, counsel for the EEOC admitted that a "pattern or practice" allegation could only be

[3] This, despite federal courts around the country repeatedly referring colloquially to § 707 actions as "pattern or practice" actions in their written opinions.

generally inferred from the other allegations in the EEOC's Complaint.

On these procedural facts alone, sufficient justification exists for the Court to grant Cintas's instant motion - Despite *more than ample opportunity* to express its intention to prosecute this action under the *Teamsters* framework, the EEOC only chose to formally raise the issue and inform the Court - and Cintas - of its intentions at the eleventh hour in this litigation. Even if these procedural facts did not justify granting the motion, however, the EEOC's claims still fail on their merit.

II. *Monarch Machine Tool* is Not Controlling of the Issues in This Motion.

The narrow issue involved in this motion, whether the EEOC may bring a § 706 action for compensatory and punitive damages under the *Teamsters* pattern or practice framework, has not yet been decided by *any* circuit courts of appeal, and only a handful of district courts - arriving at differing outcomes - have addressed the issue.[4] As such, this is an issue of first impression for this Court.

A preliminary matter bears comment, however. The EEOC cites to the Sixth Circuit's opinion in *EEOC v.*

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[4] Other federal courts have, however, allowed the EEOC to proceed in a "hybrid" fashion - bringing actions under §§ 706 and 707 *concurrently*, and allowing the entire "hybrid" action to proceed under the *Teamsters* framework. This, however, is not the case in the instant litigation, where the EEOC has not pled an action under § 707.

Monarch Machine Tool Co., 737 F.2d 1444 (6th Cir. 1984), for the proposition that the Sixth Circuit has already sanctioned the use of the *Teamsters* framework for § 706 actions. The EEOC's reliance upon *Monarch* is limited to the following footnote:

> Although we realize the Supreme Court in *Teamsters* was discussing the proper procedure for the district court to follow in a section 707 pattern-and-practice suit, it adopted this procedural framework from *Franks* [*v. Bowman Transp. Co.*, 424 U.S. 747 (1967)] which dealt with class actions under section 706.

Monarch, 737 F.2d at 1449, n.3. Thus, the EEOC argues that "[i]n other words, while noting that Rule 23 does not apply to an EEOC suit, *Monarch* advised courts to use the *Teamsters* framework in a Commission pattern-or-practice case under § 706." [EEOC's Br., Doc. No. 664, pp.6-7].

As *dicta*, however, an extraneous footnote in a sixteen year old case does not constitute binding precedent for the issues involved in this motion. The Sixth Circuit in *Monarch* reversed and remanded for a new trial due to the fact that, just prior to the Supreme Court's holding in *General Telephone*, the trial court limited relief to the charging plaintiffs due to the fact that the EEOC did not pursue class certification under FED. R. CIV. P. 23. *Monarch*, 737 F.2d at 1447 ("Because it is most apparent that had the trial judge possessed the advantage of the Supreme Court's ruling in [*General Telephone*] at the time of trial, he would have proceeded with the class action aspects of the suit in the manner sought by the Commission, we note at

the outset that a general remand is necessary for that purpose"). Furthermore, the above-quoted material from the *Monarch* opinion, included within a footnote, is merely dicta. *See, e.g., Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 417 (6th Cir. 2008) (holding footnoted material to be mere dicta); *Scotty's Contracting and Stone, Inc. v. United States*, 326 F.3d 785, 790 (6th Cir. 2003) (same).

Since the *Monarch* holding was published in 1984, not once has the Sixth Circuit - or any other federal court, for that matter - cited to *Monarch* for the proposition in question. More importantly, since *Monarch*, the Sixth Circuit has never explicitly stated that the EEOC may prosecute a § 706 action under the *Teamsters* pattern or practice framework. Rather, the Sixth Circuit has since *reaffirmed* the distinction between § 706 and § 707 actions: ". . .the [Supreme] Court has noted that there is a 'manifest' and 'crucial' difference between an individual's claim of discrimination and a class action alleging a general pattern or practice of discrimination." *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 575 (6th Cir. 2004). Therefore, this Court regards the above-quoted *Monarch* footnote as merely unpersuasive *dicta*.

III. Precedent From Other District Courts On Point With the Issue in the Instant Motion

The briefing provided by both parties to this motion makes the issues involved appear far more complex than they are in reality - a sentiment shared by several

other district courts considering similar issues.[5] Both parties' briefs cite almost every major federal court opinion discussing § 706 actions, § 707 actions, and even hybrid actions under both § 706 and § 707 - the vast majority of which are not controlling of the issues involved in this motion. Further, many of these holdings by other federal courts "have blurred the line" between § 706 and § 707 claims, the consequence of which, in the opinion of another district court, has led to "widely divergent analyses that are impossible to reconcile or even tidily summarize." *EEOC v. CRST Van Expedited, Inc.*, 615 F.Supp.2d 867, 877 (N.D. Iowa 2009).

Only three district courts have considered the exact, narrow issue encompassed in this motion - whether the EEOC may utilize the *Teamsters* framework in prosecuting its case *solely under a* § 706 action. One of these three opinions - albeit in *dicta* - ruled against the EEOC, while the other two opinions allowed the EEOC to pursue a § 706 action under the *Teamsters* framework. Each of these opinions will be discussed in turn.

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[5]*See, e.g., EEOC v. CRST Van Expedited, Inc.*, 611 F.Supp.2d 918, 933 (N.D. Iowa 2009) (". . .courts have blurred the line between class-wide claims. . . and pattern or practice claims. . . Not surprisingly, it appears much confusion has already crept into this case. The EEOC is pursuing matters in this case that it did not plead or allege in the EEOC's Complaint"); *EEOC v. Int'l Profit Assocs., Inc.*, 2007 WL 844555 (N.D. Ill. March 16, 2007) ("The parties' briefs are hopelessly confused, and demonstrate that a controlling issue with regard to IPA's motions is not factual, but rather centers on the parties' differing conceptions of what type of case this is, what methods of proof apply, and how it should be tried").

A. *International Profit Associates*

In *EEOC v. Int'l Profit Associates, Inc.*, 2007 WL 844555 (N.D. Ill. March 16, 2007), the EEOC alleged that the employer had "engaged in an ongoing pattern or practice of unlawful employment activities at its business facilities in Illinois," and brought a § 706 action seeking "injunctive relief as well as compensatory and punitive damages." *IPA*, 2007 WL 844555 at *1. When the employer objected to the EEOC's attempt at prosecuting its § 706 action under the *Teamsters* framework, the employer filed a motion for summary judgment.

Despite noting the "distinction between a suit brought under section 706 and a suit brought under section 707," the Northern District of Illinois nonetheless allowed the EEOC to proceed with its § 706 action under the *Teamsters* framework. *Id*. at *9. The district court based its holding on the following reasoning:

> However, the EEOC may still rely on the pattern or practice theory when it sues under section 706. In fact, the current version of section 707 provides that the EEOC "shall have authority to investigate and act on a *charge or a pattern or practice* of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the [EEOC]. *All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title*." 42 U.S.C. § 2000e-6(e) (emphasis added). Thus, section 707 itself contemplates that when a charge is filed with the EEOC, and

> the charge (or the EEOC's subsequent investigation of it) gives the EEOC reasonable cause to believe that the employer is engaging in an unlawful pattern or practice of discrimination, the EEOC will bring the pattern or practice suit on behalf of the group of persons affected pursuant to section 706.

Id. (emphasis in original). No other reasoning was provided by the *International Profit Associates* court in support of its holding.

A reference to "the procedures set forth in section 2000e-5" in § 707 simply does not justify importing the *Teamsters* framework into a § 706 action. The only "procedures" outlined in § 706 deal with matters relevant to the *filing* and *institution* of a civil action in district court, not the manner of proof required to be followed in such an action. *See, e.g.,* 42 U.S.C. § 2000e-5(f) (outlining the procedures by which the EEOC or a private actor may file suit in district court, the jurisdiction of the district courts over such matters, and the assignment of the case for hearing).

The language of § 706 does not contain a congressional mandate to apply the *McDonnell-Douglas* framework to such actions - nor does § 707 itself require proofs to be submitted under the *Teamsters* framework. If anything, the reference to "the procedures set forth in section 2000e-5" within § 707 supports an argument that § 707 actions should be tried under the framework for a § 706 action - the *McDonnell-Douglas* framework - not the other way

around. For these reasons, the Court respectfully declines to follow the reasoning set out by the Northern District of Illinois in *International Profit Associates*.

B. *Scolari Warehouse Markets*

The second district court to consider this issue - *EEOC v. Scolari Warehouse Markets, Inc.*, 488 F.Supp.2d 1117 (D. Nev. 2007) - also held that the EEOC could utilize the *Teamsters* framework in an action solely brought under § 706. In *Scolari*, however, the EEOC sought to bring a pattern or practice case through *concurrent* charges under *both* § 706 *and* § 707. Despite this "hybrid" procedural posture, the *Scolari* court nonetheless analyzed the more narrow issue of whether the EEOC could bring a pattern or practice claim *solely* under § 706 - an issue not directly before that court. *Scolari*, 488 F.Supp.2d at 1144.

Noting that "[t]he Court is not aware of any circuits that have decided the narrow issue of whether pattern-or-practice claims may be brought pursuant to § 706 for the purpose of seeking punitive or compensatory damages. . . ," *Id*., the *Scolari* court then immediately expressed doubt about the propriety of the EEOC's arguments:

> Allowing pattern-or-practice claims to proceed according to § 706 when Congress specifically created another avenue to bring such claims creates an apparent redundancy in the law that troubles the Court.

Id. Despite what that court deemed a "troubling redundancy," however, *Scolari* allowed the EEOC to

nonetheless pursue a pattern or practice claim under § 706:

> Title VII, as remedial legislation, has long been construed liberally, and any ambiguities in the statutes generally have been resolved in favor of the complainants. As a "prophylactic" piece of legislation, the Court is hesitant to limit remedies that would serve Title VII's purpose. Indeed, allowing punitive and compensatory damages for class-wide claims and not for pattern-or-practice claims, when both are equally severe in magnitude, would disrupt Title VII's purpose to eradicate wide-spread discrimination and to make persons whole again. Precluding district courts from awarding punitive and compensatory damages in pattern-or-practice cases also would interfere with a court's broad discretion to determine appropriate relief.

Scolari, 488 F.Supp.2d at 1144-45 (internal citations omitted).

That Title VII is generally seen as being "remedial" or "prophylactic" in nature - as the *Scolari* court so found - does not justify a holding contrary to the plain language of §§ 706 and 707. Similarly, that allowing punitive and compensatory damages in § 706, but not § 707, actions may "disrupt Title VII's purpose" is also irrelevant - Congress apparently did not think so, as the 1992 amendments to 42 U.S.C. § 1981a *only extended punitive and compsensatory damages to § 706 actions, not § 707 actions*. The *Scolari* court's personal opinion that § 706 actions and § 707 actions "both are

equally severe in magnitude" is also beside the point - again, Congress apparently did not think so in drafting Title VII, or in amending Title VII in 1992.

So to is *Scolari*'s reliance on the "court's broad discretion to determine appropriate relief" similarly unjustified. While district courts *do* have broad *equitable* powers to remedy Title VII violations, *see, e.g., Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 422 (1986), a district court may not afford *legal remedies* in direct contravention to the statute's plain language. For these reasons, the Court respectfully declines to follow the reasoning set out by the District of Nevada in *Scolari*.

C. *CRST Van Expedited*

The third and final district court to consider whether the EEOC may bring a § 706 claim pursuant to the *Teamsters* framework was the Northern District of Iowa in *EEOC v. CRST Van Expedited, Inc.* - though in that case the court only discussed the issue in *dicta*, as the employer had not directly raised the issue:

> Fortunately, the court need not cut through this cloud of confusion to rule on the Motion. CRST does not argue that the EEOC's Complaint fails to state a "pattern or practice claim." Indeed, CRST filed the instant Motion to seek its dismissal; presumably, CRST does not seek to dismiss what it does not believe to exist.

CRST, 611 F.Supp.2d 918, 934 (N.D. Iowa 2009). Despite not directly ruling on the propriety of the EEOC's attempt to bring a pattern or practice suit

under § 706, the *CRST* Court was not receptive to the EEOC's arguments on the subject - arguments similar to those made by the EEOC before this Court in the instant motion:

> In sum, it would appear that the EEOC is attempting to have its cake and eat it too. That is, the EEOC is attempting to avail itself of the *Teamsters* burden-shifting framework yet still seek compensatory and punitive damages under § 706. Complicating matters further, it is important to remember that the Supreme Court designed the *Teamsters* burden-shifting framework with only equitable relief in mind.

Id. In another opinion from later that same year, the *CRST* Court again expressed hostility to the EEOC's attempts to broaden its remedial powers beyond the text of Title VII:

> The EEOC's proposed construction of its powers is inconsistent with its statutory mandate. The district court in [*EEOC v.*] *Burlington* [*Med. Supplies, Inc.*, 536 F.Supp.2d 647, 659 (E.D. Va. 2008)] aptly observed:
>
> The EEOC's special statutory mandate does not entitle it to "expand substantive rights, such as reviving state claims" that would not otherwise be actionable under Title VII. *On the contrary, the EEOC's ability to secure enforcement of Title VII on behalf of the public is primarily served through its ability to secure injunctive relief, not*

> *bootstrapping individual damage claims into the EEOC's enforcement action.*

CRST, 615 F.Supp.2d 867, 878 (emphasis added).

IV. The EEOC May Not Pursue a § 706 Action Under the *Teamsters* Pattern or Practice Framework.

As noted by the District of Nevada in *Scolari*, "[t]he Court is not aware of any circuits that have decided the narrow issue of whether pattern-or-practice claims may be brought pursuant to § 706 for the purpose of seeking punitive or compensatory damages." *Scolari*, 488 F.Supp.2d at 1144. In the instant case, the EEOC has alleged that Cintas engaged in discriminatory conduct in violation of § 706, but not under § 707, of Title VII. The EEOC further argues that it may pursue this § 706 action under the *Teamsters* pattern or practice framework - a framework designed for § 707 claims. The Court disagrees.

Much of the case law cited by the EEOC in support of its instant arguments - and by the *Scolari* court as well - deals with cases brought by the EEOC under *both* § 706 and § 707 *simultaneously*. As the EEOC has not brought an action under both of these sections in the instant case, the Court reserves judgment on the propriety of allowing the EEOC to "blur the lines" - in the words of the *Scolari* Court - between the two statutory sections in this manner. Even *if* the EEOC may bring such an action under *both* sections, however, this does not support the EEOC's claim here that this action can proceed under *Teamsters* solely under § 706. Aside from the opinions in *International Profit*

Associates and *Scolari* - both of which this Court declines to follow - no federal court has held that the EEOC may forgo filing a § 707 action and proceed under the *Teamsters* framework solely on a § 706 claim.

For all of the "line blurring" between § 706 and § 707 claims - engaged in not only by the EEOC in response to this motion, but by other federal courts as well - which have led to "widely divergent analyses that are impossible to reconcile or even tidily summarize," *CRST*, 615 F.Supp.2d at 877, this motion amounts to little more than a simple exercise in statutory interpretation. Section 706 actions are - and have always been - adjudicated under the burden-shifting framework announced in *McDonnell-Douglas*, while "pattern or practice" actions - outlined in section 707 - are unequivocally subject to the *Teamsters* burden shifting framework.

In the instant case, the EEOC made the decision - perhaps strategic, perhaps simply in error; it matters not for purposes of this motion - to forgo filing a § 707 claim and simply file a § 706 claim. Section 706, as outlined *supra*, unequivocally refers to claims by *individual plaintiffs* who allege they were discriminated against by their employer; nowhere within the text of §706 can the EEOC find authority to bring a so-called "pattern or practice" action. That authority is instead couched within § 707, to which Congress chose not to extend compensatory or punitive damages to when amending 42 U.S.C. § 1981a in 1992.

As a result of its failure to plead a § 707 claim, the EEOC is limited to pursuing § 706 claims on behalf of those individuals it identifies, and cannot rely on the

Teamsters paradigm to establish Cintas' alleged liability. Therefore, the Court **HOLDS** that the EEOC is precluded from advancing its claims against Cintas in the instant action under the *Teamsters* framework, but instead must proceed under the framework announced in *McDonnell-Douglas*.

To hold otherwise would, as noted by Cintas in their brief, render § 707 superfluous:

> If the EEOC can state a claim for pattern or practice discrimination under § 706, and potentially recover both equitable and monetary relief under that provision, there would be no reason to ever bring a claim under § 707. The EEOC would invariably choose to pursue pattern or practice claims under § 706 in order to take advantage of its more comprehensive range of remedies. This interpretation of Title VII would clearly render § 707 superfluous, and, in most cases, entirely insignificant.

[Def.'s Br., Doc. No. 662, p.16]. The Court agrees. Federal courts are admonished to "construe statutes, where possible, so as to avoid rendering superfluous any parts thereof." *Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991).

CONCLUSION

For the reasons explained above, the Court **GRANTS** Defendant's Motion [Doc. No. 662], and **HOLDS** that the EEOC is precluded from advancing its claims against Cintas in the instant action under the *Teamsters* framework, but instead must proceed

under the framework in *McDonnell-Douglas Corp. v. Green*, 422 U.S. 792 (1973).

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: February 9, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on February 9, 2010, by electronic and/or ordinary mail.

s/Jennifer Hernandez
Case Manager

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Case No. 04-40132
Judge Sean F. Cox
Magistrate Judge R. Steven Whalen

[Filed August 18, 2011]

MIRNA E. SERRANO, *et al.*, individually and on behalf of others similarly situated	)
Plaintiffs,	)
and	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
Plaintiff-Intervenor,	)
v.	)
CINTAS CORPORATION,	)
Defendant.	)

JUDGMENT

This matter was resolved upon the entry of the Court's August 4, 2011 Opinion and Order (Dkt. 1079). In accordance with that Opinion and Order, it is hereby ORDERED, DECREED AND ADJUDGED as follows:

1. Judgment is entered against Plaintiff-Intervenor Equal Employment Opportunity Commission ("EEOC") and in favor of Defendant Cintas Corporation ("Cintas") in the amount of $2,638,443.93, plus post-judgment interest at the statutory rate from and after the date of judgment until payment in full.

2. The Taxed Bill of Cost, entered by the Clerk of the Court on October 21, 2010, shall not be taxed to former Plaintiffs Mirna Serrano, Stefanie McVay or Linda Allen, and shall only be taxed to the EEOC.

This is a final, appealable Order and there is no just cause for delay.

IT IS SO ORDERED.

Dated: August 18, 2011

s/ Sean F. Cox
Sean F. Cox
U. S. District Judge

I hereby certify that the above document was served on counsel and/or the parties of record by electronic means.

Dated: August 18, 2011

s/ Jennifer Hernandez
Case Manager

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 04-40132
Honorable Sean F. Cox

[Filed October 18, 2010]

MIRNA E. SERRANO, *et al.*, individually and on behalf of others similarly situated,

Plaintiffs,

and

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff Intervenor,

v.

CINTAS CORPORATION.

Defendants.

JUDGMENT

This action came to decision by the Court. For the reasons set forth in several Opinion & Orders issued in this action, **IT IS ORDERED, ADJUDGED, AND DECREED** that Plaintiffs' Complaint is **DISMISSED WITH PREJUDICE.**

S/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: October 18, 2010

I hereby certify that a copy of the foregoing document was served upon counsel of record on October 18, 2010, by electronic and/or ordinary mail.

S/Jennifer Hernandez
Case Manager

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 10-2629/11-2057

[Filed January 15, 2013]

MIRNA E. SERRANO, ET AL.,	)
	)
Plaintiffs,	)
	)
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)
	)
Plaintiff-Intervenor-Appellant,	)
	)
v.	)
	)
CINTAS CORPORATION,	)
	)
Defendant-Appellee.	)
	)

ORDER

BEFORE: MOORE, GIBBONS, and ALARCON,[*] Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

[*] Hon. Arthur L. Alarcon, Senior Circuit Judge of the United States Court of Appeals for the Ninth Circuit, sitting by designation.

APPENDIX G

RELEVANT STATUTES

42 USC § 1981a - Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e–2, 2000e–3, 2000e–16], and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5, 2000e–16] (as provided in section

107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e–5(g)].

(3) Limitations

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

(4) Construction

Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1981 of this title.

(c) Jury trial

If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury; and

(2) the court shall not inform the jury of the limitations described in subsection (b)(3) of this section.

(d) Definitions

As used in this section:

(1) Complaining party

The term "complaining party" means—

(A) in the case of a person seeking to bring an action under subsection (a)(1) of this section, the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

(B) in the case of a person seeking to bring an action under subsection (a)(2) of this section, the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 794a(a)(1) of title 29, or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 [42 U.S.C. 12111 et seq.].

(2) Discriminatory practice

The term "discriminatory practice" means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a) of this section.

42 USC § 2000e–5 - Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and

shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

(c) State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [1] of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

In the case of any charge filed by a member of the Commission alleging an unlawful employment practice

occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved

within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

(3)

(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this subchapter, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

(B) In addition to any relief authorized by section 1981a of this title, liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation

agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge

(A) by the person claiming to be aggrieved or

(B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the

court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for

hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)

(A) No order of the court shall require the admission or reinstatement of an individual as

a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e–3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e–2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e–2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

(h) Provisions of chapter 6 of title 29 not applicable to civil actions for prevention of unlawful practices

The provisions of chapter 6 of title 29 shall not apply with respect to civil actions brought under this section.

(i) Proceedings by Commission to compel compliance with judicial orders

In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals

Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, title 28.

(k) Attorney's fee; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 USC § 2000e–6 - Civil actions by the Attorney General

(a) Complaint

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full

enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint

> (1) signed by him (or in his absence the Acting Attorney General),
>
> (2) setting forth facts pertaining to such pattern or practice, and
>
> (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) Jurisdiction; three-judge district court for cases of general public importance: hearing, determination, expedition of action, review by Supreme Court; single judge district court: hearing, determination, expedition of action

The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a

three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

(c) Transfer of functions, etc., to Commission; effective date; prerequisite to transfer; execution of functions by Commission

Effective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.

(d) Transfer of functions, etc., not to affect suits commenced pursuant to this section prior to date of transfer

Upon the transfer of functions provided for in subsection (c) of this section, in all suits commenced pursuant to this section prior to the date of such transfer, proceedings shall continue without abatement, all court orders and decrees shall remain in effect, and the Commission shall be substituted as a party for the United States of America, the Attorney General, or the Acting Attorney General, as appropriate.

(e) Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e–5 of this title.

42 U.S.C. § 2000e-8 - Investigations

(a) Examination and copying of evidence related to unlawful employment practices

In connection with any investigation of a charge filed under section 2000e–5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation.

(b) Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

(c) Execution, retention, and preservation of records; reports to Commission; training program records; appropriate relief from regulation or order for undue hardship; procedure for exemption; judicial action to compel compliance

Every employer, employment agency, and labor organization subject to this subchapter shall

(1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed,

(2) preserve such records for such periods, and

(3) make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this subchapter or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purposes of this subchapter, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which applications were received, and to furnish to the Commission upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may apply to the Commission for an exemption from the application of such regulation or order, and, if such application for an exemption is denied, bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application

of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief. If any person required to comply with the provisions of this subsection fails or refuses to do so, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, or the Attorney General in a case involving a government, governmental agency or political subdivision, have jurisdiction to issue to such person an order requiring him to comply.

(d) Consultation and coordination between Commission and interested State and Federal agencies in prescribing recordkeeping and reporting requirements; availability of information furnished pursuant to recordkeeping and reporting requirements; conditions on availability

In prescribing requirements pursuant to subsection (c) of this section, the Commission shall consult with other interested State and Federal agencies and shall endeavor to coordinate its requirements with those adopted by such agencies. The Commission shall furnish upon request and without cost to any State or local agency charged with the administration of a fair employment practice law information obtained pursuant to subsection (c) of this section from any employer, employment agency, labor organization, or joint labor-management committee subject to the jurisdiction of such agency. Such information shall be furnished on condition that it not be made public by the recipient agency prior to the institution of a proceeding

under State or local law involving such information. If this condition is violated by a recipient agency, the Commission may decline to honor subsequent requests pursuant to this subsection.

(e) Prohibited disclosures; penalties

It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this subchapter involving such information. Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty, of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.