No. 14-3653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

v.

CVS Pharmacy, Inc.,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Illinois
Case No. 1:14-cv-00863
The Honorable Judge John W. Darrah

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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Appellate Court No: 14-3653

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No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* with the consent of the parties. The brief urges this Court to affirm the decision below and thus supports the position of Defendant-Appellee.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes over 250 of the nation's largest private sector companies, collectively providing employment to millions of people throughout the United States. They all are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., as amended, and other antidiscrimination laws.

As employers, and as potential defendants to Title VII discrimination claims, EEAC's members have a direct and ongoing interest in the issues presented in this appeal, which concern the authority of the Equal Employment Opportunity Commission (EEOC) to bring a Title VII pattern-or-practice claim where (1) no protected-basis discrimination, intentional or otherwise, is alleged, and (2) the agency did not attempt to conciliate prior to filing suit. As a national representative of large employers, EEAC has perspective and experience that can help the Court assess issues of law and public policy that have been raised in this case, beyond the help that the

lawyers for the parties can provide. *Cf. Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Accordingly, EEAC seeks to bring these countervailing policy considerations to the Court's attention and assist the Court in putting the arguments of Defendant-Appellee into proper perspective. Mindful of this Court's admonitions in *Ryan*, EEAC's *amicus* brief does not rehash legal arguments addressed in the parties' briefs. Rather, it offers observations and perspectives on the issues, based on the collective experience of EEAC's member companies.

Since 1976, EEAC has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court, this Court[1], and other federal courts of appeals, many of which have involved Title VII questions. Because of its experience in these matters, EEAC is well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

In July 2011, CVS Pharmacy terminated the employment of manager Tonia Ramos. *EEOC v. CVS Pharmacy, Inc.*, __ F. Supp. 3d __, 2014 WL 5034657, at *1 (N. D. Ill. Oct. 7, 2014). In connection with her termination,

[1] *See, e.g., Ameritech Benefit Plan Comm. v. Commun. Workers of Am.*, 220 F.3d 814 (7th Cir. 2000); *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289 (7th Cir. 2000); *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005); *McReynolds v. Merrill Lynch & Co., Inc.,* 694 F.3d 873 (7th Cir. 2012); *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *vacated*, 135 S. Ct. 1645 (2015).

Ramos signed a standard severance agreement, which barred her from initiating or filing "a complaint or proceeding asserting any of the Released Claims," *id.* at *2 n.3, but also expressly provided that its terms would not affect "any rights that the Employee cannot lawfully waive." *Id.* In addition, the agreement contained an explicit carve-out for discrimination charges, providing that the agreement did not operate and was not intended to interfere with an individual's right to file a charge or cooperate with an administrative charge investigation. *Id.*

After signing the agreement, Ramos filed a charge with the EEOC asserting that CVS discriminated against her on the basis of race and sex. *Id.* at *1. The EEOC dismissed those claims, but nevertheless found reasonable cause to believe that CVS's use of the severance agreement amounted to a pattern or practice of "resistance" to the full enjoyment of rights under Title VII. *Id.* Ramos's charge did not include such a claim, and it is undisputed that the agency never initiated statutory conciliation efforts prior to filing suit. *Id.* at 2.

The EEOC filed suit on February 7, 2014, alleging that CVS was engaged in a pattern or practice of unlawful discrimination by, among other things, "conditioning the receipt of severance benefits on FLSA exempt non-store employees' agreement to a Separation Agreement that deters the filing of charges and interferes with employees' ability to communicate voluntarily with the EEOC and FEPAs." *Id.* It downplayed what it referred to as a

"single qualifying sentence" providing that the agreement does not prevent the filing of administrative charges with the EEOC or a state agency or participation in a discrimination charge investigation. *Id.*

CVS challenged the EEOC's contention that its severance agreement was facially unlawful, and also argued that dismissal was warranted on the ground that the EEOC failed to engage in any conciliation as required by Title VII. *Id.* at *3. Without addressing the substantive basis for the EEOC's lawsuit, the trial court concluded that the plain text of the statute requires the EEOC to conciliate as a precondition to filing suit and because it failed to do so here, dismissal was warranted. *Id.* at *4. This appeal ensued.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) enforces, *inter alia,* Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, which bars (1) intentional workplace discrimination on the basis of race, color, religion, sex or national origin; (2) the unjustified use of a facially neutral employment policy or practice having adverse impact on a protected group; and (3) adverse employment actions taken in retaliation for an individual's exercise of statutorily-protected rights. In this case, the EEOC contends that Defendant-Appellee CVS's severance agreement purportedly "deters or forbids" the filing of discrimination charges and thus facially and categorically violates Title VII. Br. of Appellant 38. Because the

EEOC's legal theory conflicts with the plain text, legislative history, and public policy objectives of Title VII itself, the EEOC's suit cannot stand.

Section 707 of Title VII authorizes the EEOC to bring pattern-or-practice discrimination lawsuits whenever 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 right under Title VII, and that the alleged pattern or practice "is of such a nature and is intended to deny the full exercise" of such rights. 42 U.S.C. § 2000e-6(a). Here, the EEOC is asserting that by utilizing a severance agreement that contains a standard, unremarkable waiver, CVS has engaged in a pattern or practice of discrimination in violation of Title VII.

Such a view – which amounts to an across-the-board indictment of all severance agreements containing waivers of claims – is contrary to the plain text of Title VII and, if accepted by this Court, would force employers into an untenable position of choosing between giving up general severance programs altogether and continuing to use them under constant risk of pursuit by the EEOC. Notably, the EEOC has attempted, thus far unsuccessfully, to challenge other broadly-applied employment policies under a pattern-or-practice theory. This Court should not entertain its efforts to do so in this context.

Section 707 authorizes the EEOC to "investigate and act on" suspected pattern-or-practice discrimination, but specifies that its actions must comply

with the procedures set out in Section 706. 42 U.S.C. § 2000e-6(e). Among other things, Section 706 imposes an affirmative obligation on the EEOC to attempt to resolve suspected discrimination via informal means of "conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Supreme Court this Term in *EEOC v. Mach Mining, LLC,* 135 S. Ct. 1645 (2015), confirmed the importance of presuit conciliation to Title VII's enforcement scheme. Indeed, Title VII's plain text, reinforced by the rationale of *Mach Mining*, confirms that the EEOC's duty to conciliate exists regardless of the particular statutory provision under which it brings a subsequent Title VII lawsuit.

ARGUMENT

I. THE MERE OFFER OF SEVERANCE PAY IN EXCHANGE FOR A WAIVER OF CLAIMS DOES NOT VIOLATE TITLE VII

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., as amended, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In this case, the EEOC has alleged that CVS's use of a severance agreement containing (among other things) a waiver and release of claims amounts to an unlawful "pattern or practice" of discrimination and therefore

is facially unlawful under Title VII. Because the EEOC does not assert, and cannot demonstrate, that CVS utilized the release (1) with the intent to discriminate on the basis of a protected trait, (2) in a manner that imposed an adverse impact on a particular protected group, or (3) to retaliate against individuals who exercised their statutorily-protected rights, dismissal is warranted.

A. Title VII Prohibits Workplace Discrimination On The Basis Of A Protected Characteristic Or Protected Conduct

Title VII prohibits discrimination in the terms, conditions and privileges of employment *because of* race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2(a)(1), or *because* an individual has opposed a discriminatory employment practice or participated in a Title VII proceeding, 42 U.S.C. § 2000e-3(a). It also bars, "in some cases, practices *that are not intended to discriminate* but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added).[2] While the disparate treatment and disparate impact theories are both used to root out discriminatory employment practices, they are mutually exclusive concepts, subject to different standards of proof, defenses, and liability. *See, e.g.,* 42 U.S.C. § 2000e-2(k)(2) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of

[2] Although the severance at issue here is facially nondiscriminatory, the EEOC does not assert that its application resulted in unlawful disparate impact against any one Title VII protected group.

intentional discrimination under this subchapter"). Thus, "although it is clear that the same set of facts can support both theories of liability, it is important to treat each model separately because each has its own theoretical underpinnings." *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir. 1991) (citation omitted).

In addition to prohibiting status-based discrimination, Title VII also declares it unlawful for an employer to take adverse action against an individual because he or she has engaged in statutorily-protected *conduct*. It provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because* he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). In order to make out a threshold case of retaliation, a plaintiff must prove that: (1) he or she engaged in protected activity; (2) the employer took a materially adverse action; and (3) the adverse action was the but-for cause of the plaintiff's protected conduct. *See Univ. of Tex. SW Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

B. As Are Those Routinely Utilized By Employers, CVS's Severance Agreement Is Facially Nondiscriminatory

Like many employers, CVS from time to time utilizes a standard severance agreement that conditions the receipt of enhanced benefits upon the execution of a release of claims. Releases are used routinely when any

kind of litigation is settled between the parties. As was the case here, employers often will require a departing employee to sign a release in exchange for separation benefits to which the employee would not otherwise be entitled, whether or not the employee has indicated any intent to pursue claims against the company. A release can be offered individually, as when a single employee is being terminated, or may be part of a group termination such as a reduction in force. By their very nature, severance agreements are nondiscriminatory on their face, and typically are not utilized as a means to discriminate on the basis of a protected trait or to retaliate on the basis of protected conduct.

The EEOC is skeptical of releases in general, and particularly averse to those that allegedly prevent or deter people from filing charges with the agency itself, however. It long has taken the position that the right to file a charge with the EEOC, or to participate in an EEOC investigation, is a right that can *never* be waived under *any* circumstances. In policy guidance published in 1997, the agency declared those rights to be non-waivable.[3] In 2002, the Supreme Court lent support to that view, holding in *EEOC v. Waffle House, Inc.*, that the EEOC's right to take employers to court and decide what remedies to seek to enforce federal antidiscrimination law cannot be limited by private agreements to which it is not a party. 534 U.S. 279 (2002). While unenforceable as to the EEOC, no court – including the

[3] EEOC, Enforcement Guidance on Non-Waivable Employee Rights under Equal Employment Opportunity Commission (EEOC) Enforced Statutes (Apr. 10, 1997), *available at* http://www.eeoc.gov/policy/docs/waiver.html.

Supreme Court – ever has held that such an agreement, by its existence alone, is unlawfully discriminatory.

Nevertheless, the EEOC has attempted to persuade the courts over the years to rule it illegal for an employer to even *request* a release that might prevent someone from filing a charge. Until recently, the agency characterized such releases as a form of so-called "anticipatory" or "facial" retaliation constituting a *per se* violation of federal nondiscrimination law because they suppress, in advance, an individual's exercise of his or her right to file a discrimination charge. In the EEOC's view, a violation would exist without any proof whatsoever of any kind of actual discrimination, regardless of whether the employee actually *signed* it or, as here, filed a charge despite having done so.

Not surprisingly, no court thus far has agreed with the EEOC that the mere offer of a release amounts to a *per se* violation of federal nondiscrimination or anti-retaliation laws.[4] In *Isbell v. Allstate*, in which the EEOC participated as an *amicus curiae*, this Court rejected a claim that the employer committed unlawful retaliation when it terminated all of its employee insurance agents and required those who wanted to stay with the company in an independent contractor relationship to sign a release of

[4] The Eleventh Circuit addressed a related issue in 2002 when it ruled in *Weeks v. Harden Manufacturing Corp.* that requiring employees, as a condition of employment, to sign an agreement to arbitrate employment disputes does not constitute unlawful retaliation. 291 F.3d 1307 (11th Cir. 2002). Similarly, the Ninth Circuit has suggested, without deciding, that such a claim seems to be untenable "on the surface." *See EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 754 (9th Cir. 2003) (*en banc).*

claims. 418 F.3d 788 (7th Cir. 2013). The Sixth Circuit also held in *EEOC v. SunDance Rehabilitation Corp*. that there was no merit to the EEOC's novel legal theory that conditioning severance pay on signing a release was a form of unlawful retaliation. 466 F.3d 490 (6th Cir. 2006).

The Third Circuit recently rejected a similar argument that the mere offer of a release amounted to facial retaliation under Title VII, as well as the Age Discrimination in Employment Act (ADEA) and the Americans with Disabilities Act (ADA), noting that under longstanding legal principles, conditioning the receipt of benefits an individual is not otherwise entitled to receive upon execution of a written release is perfectly lawful and does not implicate federal anti-retaliation law. *EEOC v. Allstate Ins. Co.*, 778 F.3d 444 (3rd Cir. 2015). Indeed, it is well settled that employers lawfully "can require terminated employees to waive existing legal claims in order to receive unearned post-termination benefits." *Id.* at 453.

Undeterred, the EEOC here is attempting to devise a new cause of action against employers that condition severance pay on the signing of a release, now characterizing such actions as "a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII." Br. of Appellant 2 (citations omitted). Specifically, it claims that the release here impermissibly restricts the non-waivable right of employees to file discrimination charges. That argument is disingenuous, however, as it is flatly contradicted by the plain language of the release itself. The EEOC

readily concedes that the release contains an unqualified carve-out permitting the filing of administrative discrimination charges, as well as participation in charge investigations. *See* Br. of Appellant 4 (reciting language in agreement providing that "nothing in this paragraph is intended to or shall interfere with Employee's right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws, nor shall this Agreement prohibit Employee from cooperating with such agency in its investigation").

At bottom, the EEOC's position can best be summed up as a new tactic in a long-running campaign to prosecute employers that seek to use releases – which by their very existence, the agency believes, prevent departing employees from filing discrimination charges with it. As noted, however, every court to rule on the question has concluded that offering a release that does not meet legal standards is not itself illegal, even if the argument itself ultimately is found to be unenforceable.

Moreover, very similar language – now under attack by the EEOC – was included as a mandatory component of at least one highly-publicized, agency-negotiated consent decree involving a release that allegedly restricted the right to file a discrimination charge or participate in a government investigation. In *EEOC v. Eastman Kodak Co.*, No. 06-cv-6489 (W.D.N.Y. Oct. 11, 2006), the EEOC resolved its suit by requiring the company reform its release to read as follows:

> Nothing in this Agreement shall be construed to prohibit you from filing a charge with or participating in any investigation or proceeding conducted by the EEOC or a comparable state or local agency. Notwithstanding the foregoing, you agree to waive your right to recover monetary damages in any charge, complaint, or lawsuit filed by you or by anyone else on your behalf.

Consent Decree at 4, *EEOC v. Eastman Kodak Co.*, No. 06-cv-6489 (W.D.N.Y. Oct. 11, 2006). As one commentator noted, "Many employers then incorporated this disclaimer in their own separation agreements, taking comfort that the EEOC's express approval of this language would prevent its later challenging the agreements as misleading on the continued right to file charges or participate in their investigation." Nancy Morrison O'Connor, *Preventing Release from Releases as Federal Agencies Attempt to Put Separation Agreements Asunder*, 69 The Advoc. (Tex.) 90, 91 (2014).

Despite having signaled that the reformed release language indeed was considered to be lawful, the EEOC has since sued CVS and other employers for maintaining agreements containing materially indistinguishable release language. *See, e.g., EEOC v. Baker & Taylor,* No. 1:13-cv-1329 (N.D. Ill. July 10, 2013). Taken to its logical end, the EEOC's reasoning effectively would outlaw the use of all releases in the employment context – a result clearly at odds with the long line of case law recognizing the general validity of releases of employment claims.

C. Unlawful "Pattern-or-Practice" Discrimination Cannot Occur In The Absence Of Intentional, Status- Or Conduct-Based Discrimination

Section 707 of Title VII provides:

> Whenever the [EEOC] 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 [EEOC] may bring a civil action in the appropriate district court of the United States by filing with it a complaint … setting forth facts pertaining to such pattern or practice….

42 U.S.C. § 2000e-6(a) (emphasis added). This Court has observed that "[p]attern-or-practice claims, like differential treatment claims, represent a theory of intentional discrimination, [which] require a 'showing that an employer regularly and purposefully discriminates against a protected group.' Plaintiffs 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) (citations omitted).

Indeed, Section 707 on its face applies only to practices "*intended* to deny the full exercise" of Title VII rights, not to practices that are facially nondiscriminatory. Thus, in order to establish a threshold claim, the government must "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Int'l Bhd. of Teamsters v. U.S.,* 431 U.S. 324, 360 (1977); *see also EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998).

Inasmuch as the EEOC's entire legal theory rests on an incorrect notion that facially nondiscriminatory practices – like the use of a standard severance agreement containing a waiver and release of claims – are subject to challenge under Section 707, its case falls of its own weight.

II. PERMITTING THE EEOC TO MOUNT FACIAL CHALLENGES TO WORKPLACE AGREEMENTS SOLELY BECAUSE THEY CONTAIN STANDARD WAIVER PROVISIONS WOULD BE CONTRARY TO THE POLICIES UNDERLYING TITLE VII AND WOULD SIGNIFICANTLY DISADVANTAGE EMPLOYERS AND EMPLOYEES ALIKE

A. Outlawing Use Of Workplace Agreements Containing Waivers Would Frustrate Voluntary Resolution Of Disputes

Congress intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters* v. *City of Cleveland,* 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-18 (1975)). The EEOC's regulations provide that in enacting Title VII, Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b).

With this delegated responsibility comes a corresponding obligation on the part of the enforcement agencies and the courts to afford employers a degree of latitude in adapting their employment practices to Title VII requirements. The EEOC's regulations explicitly recognize this need in

stating that "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. § 1608.1(c) (cited in *Local No. 93,* 478 U.S. at 516).

A rule barring general releases of unasserted claims would seriously jeopardize voluntary settlements of pending claims involving employment-related issues, contrary to Title VII's principle aims and purposes. Whenever an employer settles an employment dispute under any of the myriad federal or state statutes governing the employment relationship, as well as common law claims, the employer typically will ask for a general release from the employee, covering any and all claims the employee may have, including claims not yet raised. If the employer is precluded from even offering a full release as part of a global settlement of the employee's claims – common law, state, and federal alike – it will be disinclined to pay as much, if anything, for a partial one.

If the EEOC's legal theory regarding the susceptibility of severance agreements to pattern-or-practice discrimination liability were to take hold, employers also would no longer have any incentive to offer meaningful severance benefits to departing employees. In particular, such a rule would undermine the preclusionary effect of any general release of employment claims in any context, reducing its value to employers and in turn reducing what they are willing to pay for it, to the ultimate detriment of the employees who are the recipients of the consideration given for the release.

Typically, from the employer's perspective, the principal value of a general release is that it eliminates any possibility of post-termination litigation with the outgoing employee, therefore facilitating a full and peaceful closure of the employment relationship. To have such value, however, the release must cover any and all existing or potential claims growing out of the employment relationship. For if the employee remains free to assert even one potential employment-related claim, meritorious or otherwise, the employer will remain subject to the potentially costly and disruptive prospect of having to defend against post-termination litigation by the employee.

Making the mere offer of a release facially unlawful thus creates a substantial disincentive for employers to offer separation benefits. The inability to obtain a full release, including a release of federal EEO claims, will substantially reduce the amount employers are willing to pay. As a result, layoffs and terminations will still occur, but with lesser, if any, additional benefits than offered in the past. As a consequence, the many employees who face layoffs will be deprived of substantial payments that might mean the difference between financial security and financial peril.

B. Condoning The EEOC's Tactics In This Case Will Only Encourage More Widespread Investigative And Litigation Abuses, Particularly Against Large Employers That Commonly Offer Enhanced Benefits In Exchange For A Waiver of Claims

In place since December 2012, the EEOC's Strategic Enforcement Plan (SEP) for Fiscal Years (FY) 2013-2016 identifies six national enforcement priorities. Fifth on the list is "Preserving Access to the Legal System," which it says includes "overly broad waivers (and) settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination ...." EEOC, SEP (FY 2013-2016).[5]

While its suit against CVS clearly is in furtherance of that stated enforcement priority, the agreement in question is hardly a good vehicle, since it explicitly provides that it does *not* interfere with the right to file an EEOC charge or participate in an investigation. In fact, it is difficult to identify anything that CVS could have done to avoid this particular accusation, short of not requiring people to sign a release at all – and as a result not offering any severance pay in return.

As noted, permitting the EEOC to challenge facially nondiscriminatory severance agreements containing standard releases under a broad "pattern-or-practice" theory would prompt employers to seriously reconsider offering *any* enhanced separation benefits, to the detriment of both employers and

[5] *Available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 22, 2015).

employees alike. Perhaps more significantly, it also would create a ready subject for questionable EEOC systemic investigations and litigation, which can be disruptive to business operations and extremely costly to defend.

III. TITLE VII DOES NOT AUTHORIZE PATTERN OR PRACTICE SUITS BASED ON CLAIMS THAT WERE NOT ASSERTED IN AN UNDERLYING CHARGE AND NOT SUBJECT TO PRESUIT INVESTIGATION AND CONCILIATION

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through an administrative framework of charge investigations and informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b); *see also EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984). "Prior to 1972, the EEOC had no power to remedy employment discrimination by legal action, but the Attorney General was empowered to bring an action against an employer or group of employers whom he had reasonable cause to believe was engaged in a 'pattern or practice' of employment discrimination." Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol'y Rev. 219, 249 (1995) (footnote omitted).

In 1972, Congress amended Title VII to authorize the EEOC to sue private employers in its own name, both on behalf of alleged victims and in the public interest. It also transferred to the EEOC the authority to prosecute pattern or practice discrimination claims. "Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative

functions in § 706 of the amended Act." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

While the Attorney General "was not required to follow any administrative procedures prior to suit because Congress originally devised pattern or practice suits to allow swift federal prosecution of particularly harmful practices," when the Title VII was amended, Congress "made exhaustion of the EEOC's charge processing system (i.e. charge filing, investigation, reasonable cause determination, and attempted conciliation) a precondition to a pattern or practice suit brought by the EEOC." Munroe, 13 Yale L. & Pol'y Rev. at 249 (footnote omitted). Indeed:

> Congress continued to regard the investigation and resolution of "aggrieved person" charges by the EEOC as a priority. Congress envisioned that the EEOC would attack practices while investigating these charges. Individual acts of discrimination are frequently symptomatic of a pattern or practice of discrimination .... The EEOC's new enforcement power should be used for the elimination of patterns and practices of discrimination wherever an investigation of a charge discloses the existence of such employment situations.

Munroe, 13 Yale L. & Pol'y Rev. at 253 (footnotes and quotations omitted).

Section 707 of Title VII thus provides that the EEOC:

> [S]hall 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[, but that a]ll 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). Section 706 provides, in turn:

> [T]he Commission *shall* serve a notice of the charge ... within ten days, and shall make an investigation thereof. ... 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 .... 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 such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b) (emphasis added).

Accordingly, the plain text of the statute requires that the EEOC satisfy all administrative requirements prior to initiating a pattern-or-practice lawsuit in federal court. That administrative process begins with receipt of a legally sufficient discrimination "charge." 42 U.S.C. § 2000e-5; *see also EEOC v. Univ. of Pa.*, 493 U.S. 182, 190 (1990) ("[t]he Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination"). A valid charge under the Act is one that is submitted in writing, under oath or affirmation, 42 U.S.C. § 2000e-5(b), and signed by the charging party. 29 C.F.R. § 1601.9.

The importance of the statutory and regulatory provisions governing the contents of a valid Title VII charge is not merely academic. The allegations in the charge govern the scope of any subsequent investigation by the EEOC and, where the charge is deemed to have merit, statutory pre-suit conciliation efforts. If the EEOC suspects another form of discrimination other than that which was alleged in the charge being investigated, it must obtain a valid charge in order to investigate, such as via the issuance of a

"Commissioner charge." *See EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 655 n.7 (7th Cir. 2002) (if EEOC discovers a pattern or practice of discrimination during the investigation of a narrower charge, it would be "free to file a commissioner's charge incorporating those allegations and broaden its investigation accordingly"). Even the EEOC's own *Compliance Manual* recognizes that agency investigators are not at liberty to expand individual charge investigations to include issues beyond the scope of the charging party's allegations and specifically counsels investigators to consider the appropriate statutory authority before investigating other forms of suspected discrimination. EEOC Compl. Man., On-Site Investigation, § 25.7 Reporting Potential Violations Not Currently Being Investigated (2006 & Supp. 2009) (investigators should consider "seeking a commissioner charge to address . . . new bases/issues" that go beyond those already being investigated).

In this case, the EEOC initiated a pattern-or-practice lawsuit based on the language of CVS's severance agreement, even though the underlying charge did not raise that issue. Worse still, the agency filed suit without first having attempted to conciliate, as required by Section 706 of the statute. Because Title VII's text is unambiguous regarding the EEOC's obligation to investigate and conciliate pattern or practice claims prior to bringing suit in federal court, its claim that no such duty exists is plainly false, and should be forcefully rejected by this Court.

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council respectfully urges the Court to affirm the district court's decision below.

Respectfully submitted,

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