No. 14-3653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff/Appellant,

v.

CVS PHARMACY, INCORPORATED,
Defendant/Appellee.

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

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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STATEMENT OF JURISDICTION

The Equal Employment Opportunity Commission ("EEOC" or "Commission") brought this enforcement action against defendant CVS Pharmacy, Inc. ("CVS") pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. §§ 2000e *et seq*. Complaint, R.1 at 1; A-10.[1] The district court had jurisdiction under 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. *Id*. Final judgment was entered on October 7, 2014. Order, R.32. The EEOC timely appealed on December 5, 2014. Notice of Appeal, R.38. *See* Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in granting summary judgment to the defendant and dismissing this case because the EEOC had failed to engage in conciliation prior to bringing suit.

2. Whether a reasonable fact-finder could find that CVS's use of a separation agreement that deters or forbids the filing of charges and/or cooperation with the EEOC constitutes a "pattern or practice of resistance to the full enjoyment of … rights secured by" Title VII in violation of Section 707(a), 42 U.S.C. § 2000e-6(a).

[1] "R.#" refers to the district court docket entry. Where a cited document is included in the Appendix attached to this brief, "A-#" refers to its location in the Appendix.

STATEMENT OF THE CASE

A. Course of Proceedings

This is an appeal from a final judgment of the district court dismissing this Title VII enforcement action. On February 7, 2014, the EEOC filed a complaint alleging that, since "at least" August 2011, CVS had "been engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII, in violation of Section 707." Complaint, R.1 at 2; A-11. The complaint described this pattern or practice of resistance as including "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 state fair employment practices agencies, or FEPAs. *Id.* The EEOC sought only non-monetary injunctive relief enjoining CVS from using the Separation Agreement in question and ordering CVS to "reform its Separation Agreement consistent with the provisions of Section 707 of Title VII" and to "institute and carry out policies, practices, and programs that provide for the full exercise of the right to file a charge and participate and cooperate with the EEOC and FEPAs," as well as other appropriate injunctive relief and costs. *Id.* at 5-6; A-14-15.

On April 18, 2014, CVS filed a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment. R.15. The Commission responded in opposition to CVS's motion on June 6, 2014. R.27. CVS filed a reply to the EEOC's

response on July 7, 2014. R.29. On October 7, 2014, the district court issued its Memorandum Opinion and Order granting summary judgment to CVS and entered final judgment against the EEOC. Memorandum Opinion & Order ("Op."), R.33; A-1-9.

B. Statement of the Facts

The facts of this case are fairly straightforward and mostly undisputed. The EEOC learned of the Separation Agreement ("SA") at issue here when a charging party gave it to the agency in connection with its investigation of her individual charge of discrimination.[2] Op., R.33 at 2; A-2. The SA is five single-spaced pages long and consists of twenty-three numbered provisions. R.1-1; A-17-21. The key provisions for purposes of this case, in relevant part, are:

- Paragraph 7, which provides that the employee releases CVS "from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees . . . due to any matter whatsoever relating to Employee's employment, compensation, benefits, and/or termination of Employee's employment with CVS." It further specifies that the released claims include any claim arising under Title VII, the ADA, and/or the ADEA, as well as "any claim of unlawful discrimination of any kind." The last sentence of the paragraph states, in relevant part, that "[n]otwithstanding the

[2] The charge in question alleged sex and race discrimination in violation of Title VII; it did not allege a pattern or practice of discrimination and was unrelated to the severance agreement. McConnell Affidavit, R.17-1, Exh. I. The EEOC issued a dismissal and notice of suit rights on the charge in June 2013. *Id.*

foregoing, this release does not include any rights that Employee cannot lawfully waive," and lists three specific types of claims that are not included in the release. R.1-1 at 2, A-18. The right to file a charge with the EEOC is not mentioned.

- Paragraph 8, which requires the employee to agree that s/he will not "initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against" CVS "in any federal, state, or local court *or agency*." (Emphasis added.) It further provides that the employee "agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee." Two sentences later, it states 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 any such agency in its investigation." *Id.*
- Paragraph 13(a), which provides that the employee agrees not to "disclose to any third party or use for himself/herself or anyone else any Confidential Information without the prior written authorization of CVS Caremark's Chief Human Resources Officer." It specifies that "confidential information" includes information about CVS's personnel, "including the skills, abilities and duties of

the Corporation's employees, wages and benefit structures, succession plans,[and] information concerning affirmative action plans or planning." R.1-1 at 3; A-19.

- Paragraph 13(d), which provides that the employee will not make any statements that disparage the business or reputation of CVS or its officers, directors, or employees. "Notwithstanding the foregoing, nothing in this Agreement shall prohibit Employee from (i) making truthful statements or disclosures that are required by applicable law, regulation or legal process; or (ii) requesting or receiving confidential legal advice." R.1-1 at 4; A-20.
- Paragraph 13(e), which provides that the employee must notify CVS's General Counsel "by telephone and in writing" if s/he "receives a subpoena, deposition notice, interview request, or any other inquiry, process or order which requires or may reasonably be construed to require Employee to produce Confidential Information." It further states that the employee must give CVS's General Counsel a copy of any such document it receives and "provide reasonable cooperation with respect to any procedure that the Company may initiate to protect Confidential Information or other interests." If CVS objects to the request, the SA requires the employee to "cooperate to ensure that there shall be no disclosure until the court or other applicable entity has ruled upon the objection, and then only in accordance with the ruling so made." The last

sentence of the paragraph provides that "[n]othing in this Agreement shall be construed to prohibit Employee from testifying truthfully in any legal proceeding." *Id.*

- Paragraph 14, which states that an employee's breach of any of the covenants in paragraph 13 "will result in irreparable injury to [CVS] for which there is no adequate remedy at law, that monetary relief will be inadequate," and that CVS will be entitled to obtain a TRO and/or a preliminary or permanent injunction, along with any other relief pertaining to enforcing the SA, against the breaching employee. It further provides that, in the event that a court sides with CVS and issues an injunction or any other order, or awards CVS damages due to the breach, the employee "agrees promptly to reimburse [CVS] for all reasonable attorneys fees incurred . . . in connection with obtaining such equitable relief or damages." *Id.*

On June 10, 2013, the EEOC sent CVS a letter stating that the agency had reasonable cause to believe that CVS "was engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII of the Civil Rights Act of 1964 and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights described in Title VII in violation of Section 707(a) of Title VII." McConnell Affidavit, R.17-1, Exh. H, at 1. The letter further explained that, "[s]ince at least July 2011, CVS/Caremark has conditioned employees' receipt of severance pay on

an overly broad, misleading and unenforceable Separation Agreement that interferes with employees' right to file charges with the EEOC and state Fair Employment Practices Agencies, communicate with the EEOC and state FEPAs, and participate in EEOC and FEPA investigations and enforcement actions." *Id.* The EEOC gave CVS fourteen days to agree to various terms of injunctive relief in the form of a consent decree; in the absence of such an agreement, the letter explained, "it may be necessary for the agency to seek other court intervention." *Id.* at 1-2.

After several telephone conversations between EEOC and CVS attorneys, CVS sent the EEOC a letter on July 29, 2013, "request[ing] that EEOC comply with the pre-suit procedures contained in Title VII Section 706, 42 U.S.C. § 2000e-5, and that EEOC reconsider its position about an alleged 'pattern or practice' violation of Title VII . . . ." McConnell Affidavit, R.17-1, Exh. J, at 1. According to CVS, "[n]o [] charge is pending that would give rise to the pattern or practice allegations and possible lawsuit described by the June 10 letter . . . . and EEOC has not issued any reasonable cause determination based on any charge. The Commission likewise has not endeavored to eliminate any alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* CVS also took the position that nothing about the SA constituted a violation of Title VII, as the agreement did not "violate[] the anti-discrimination protections contained in Title VII Section 703, 42 U.S.C. § 2000e-2," and there was no allegation that it constituted retaliation in violation of Section 704(a), 42 U.S.C. § 2000e-

3(a). *Id.* at 2. Nonetheless, CVS stated, it remained open to exploring "whether [the parties] can agree upon an appropriate conciliation agreement." *Id.*

After two more telephone conversations on July 29 and 30, 2013, CVS sent the EEOC another letter on August 1, 2013. McConnell Affidavit, R.17-1, Exh. K, at 1. As that letter—and the July 29 letter—reflect, the EEOC explained to CVS that it would not be conciliating this matter because the EEOC was proceeding under Section 707(a) of Title VII, and the charge-processing and conciliation procedures of Section 706 do not apply to this Section 707 action. *Id.*; McConnell Affidavit, R.17-1, Exh. J, at 1-2. In the August 1 letter, CVS stated its disagreement with the EEOC's legal position, maintaining that all Section 707 actions are fully subject to the procedural requirements of Section 706, including that the EEOC act only after it receives a charge in writing, that it serve the charge on the respondent within ten days, that it conduct an investigation, and that it engage in confidential conciliation if reasonable cause is found. McConnell Affidavit, R.17-1, Exh. K, at 1. CVS further stated that, while it "does not consent to any public proceeding by EEOC without any pre-suit attempt at conciliation," it "remains willing to participate in conciliation proceedings and is amenable to an appropriate conciliation agreement with the Commission." *Id.* at 2.[3]

[3] In the same letter, CVS stated that it "is implementing changes to its release agreements to enhance the existing language to ensure that employees understand their rights to file a charge with the EEOC and to cooperate fully with EEOC." McConnell Affidavit, R.17-1, Exh. K, at 2. However, at no time prior to or during this litigation has CVS consented to disclose, or actually disclosed, any revised language to the EEOC.

The present suit was filed in the Northern District of Illinois on February 7, 2014. As described above, the complaint stated that the suit "is authorized and instituted pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6 ('Section 707')," and alleged that CVS's use of the SA constituted "a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII, in violation of Section 707." Complaint, R.1 at 1-2; A-10-11. CVS filed a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment, on April 18, 2014. R.15.

C. District Court's Decision

On October 7, 2014, the district court granted CVS's motion for summary judgment. Op., R.33 at 1; A-1. After reviewing the factual background of the case and the governing legal standard on summary judgment, the court began its analysis by rejecting the EEOC's argument that Section 707(a)'s reference to "resistance" has any substantive meaning beyond acts of discrimination or retaliation. *Id.* at 4 & n.2; A-4. According to the court, because the Supreme Court in *Burlington Northern* "stated that the antiretaliation provision is designed to keep employers from interfering with the enforcement of the Act 'through retaliation,'" and because "the antiretaliation provision is interpreted broadly," "the term 'resistance' is encompassed by the antiretaliation and discrimination provisions and requires some retaliatory or discriminatory act." *Id.* at 4 n.2; A-4 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63, 67 (2006)).

The court also rejected the EEOC's interpretation of paragraphs 7 and 8 of the SA, observing that "there is a specific carve out for an employee's 'right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws'; and [sic] further provides, 'nor shall this Agreement prohibit [the employee] from cooperating with any such agency in its investigation.'" Op., R.33 at 4-5 n.3; A-4-5. The court held that, because "'participate' is a broad term," "[i]t is not reasonable to construe 'the right to participate in a proceeding with any appropriate federal … agency,' (SA at ¶ 8), to exclude the right of the employee from filing an EEOC charge." *Id.* at 5 n.3; A-5. The court then elaborated, "even if the Separation Agreement explicitly banned filing charges, those provisions would be unenforceable and could not constitute resistance to the Act." *Id.* (citing *EEOC v. Astra U.S.A., Inc.*, 94 F.3d 738, 746 (1st Cir. 1996), and *EEOC v. Morgan Stanley & Co.*, No. 01-CV-8421, 2002 WL 31108179, at *1-2 (S.D.N.Y. Sept. 20, 2002)).

Next, the court turned to the relationship between sections 707(a) and 707(e) of Title VII. The court first pointed to section 707(e)'s language stating that the EEOC "'shall have authority to investigate and act on a charge of a pattern or practice of discrimination …'" and that "[a]ny 'such actions shall be conducted in accordance with the procedures set forth in [Section 706].'" Op., R.33 at 5-6; A-5-6 (quoting 42 U.S.C. § 2000e-6(e)). The court then noted section 706's mandate that "[w]hen there is a reasonable belief that a person or persons has engaged in an unlawful employment

practice, the EEOC 'shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, *conciliation*, and persuasion.'" *Id.* at 6; A-6 (quoting 42 U.S.C. § 2000e-5(b)) (emphasis in district court opinion).

The court then rejected the EEOC's argument that "since the Attorney General was not required to bring a charge or engage in conciliation, the transfer of that office's authority to the EEOC under Section 707(a) is not constrained by the procedures required under Section 706." Op., R.33 at 6; A-6. According to the court, "courts have interpreted Section 707(a) as granting authority to the EEOC to bring charges of a pattern or practice of discrimination and not as creating a separate cause of action." *Id.* at 7; A-7 (citing *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 964-65 (11th Cir. 2008), and *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 336 (1977)). Thus, the court reasoned, when this Court said in *Harvey Walner* that the EEOC had the authority to proceed under section 707(a) without "certain prerequisites," the Court was referring to the "ability of the EEOC to proceed without a charge filed with the Commission," not an exception to the conciliation requirement. *Id.* (citing *EEOC v. Harvey L. Walner & Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996)).

Accordingly, the court reasoned, "it is clear that the transfer of prosecutorial authority in 707(a) from the Attorney General was not intended to create a cause of action for the EEOC other than those specifically conferred on the commission pursuant to 707(e) and subject to the procedures provided in 706, including the obligation of

conciliation." Op., R.33 at 7; A-7. The court noted that the EEOC "cites to no case law distinguishing actions brought under Section 707(a) and actions brought under 707(e), nor has any case been found that supports the distinction between the two sections as argued by the EEOC." *Id.* The court did not find the difference in wording between sections 707(a) and 707(e) to be controlling, stating that "[t]he Seventh Circuit has commented that 'Congress' special care in drawing so precise a statutory scheme' as Title VII 'makes it incorrect to infer that Congress meant anything other than what the text does say.'" *Id.* at 7-8; A-7-8 (quoting *EEOC v. Mach Min., LLC*, 738 F.3d 171, 174 (7th Cir. 2013), *vacated & remanded on other grounds*, 575 U.S. ___ (2015) (No. 13-1019) (internal citation and quotation marks omitted)).

Lastly, the court ruled that because the EEOC did not conciliate with CVS prior to filing suit, the agency lacked authority to file it. According to the court, "[w]hile the 1972 Amendment did authorize the EEOC to proceed without a charge on 'pattern or practice' claims, the Amendment did not authorize the EEOC to forego the procedures in Section 706." Op., R.33 at 8; A-8 (citing 42 U.S.C. § 2000e-6(e) and *EEOC v. United Air Lines, Inc.*, 73 C 972, 1975 WL 194, *2 (N.D. Ill. June 26, 1975)). The court observed, "[m]oreover, the EEOC's own regulations require the agency to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred or is occurring." *Id.* (citing 29 C.F.R. § 1601.24(a)). Thus, the court concluded, because "EEOC was required to follow the

procedures in 706, including conciliation," but "failed to do so, … the EEOC was not authorized to file this suit against CVS; and CVS is entitled to judgment as a matter of law." *Id.* at 8-9; A-8-9.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment de novo, construing all facts and drawing all reasonable inferences in the nonmoving party's favor. *Burnell v. Gates Rubber Co.*, 647 F.3d 704, 707 (7th Cir. 2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Spurling v. C & M Fine Pack, Inc.*, 739 F.3d 1055, 1060 (7th Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). "The party seeking summary judgment has the burden of establishing that no genuine dispute exists as to any material fact." *Cung Hnin v. TOA (USA), LLC*, 751 F.3d 499, 504 (7th Cir. 2014) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

SUMMARY OF ARGUMENT

The district court erred in granting summary judgment to CVS and/or dismissing this case because the EEOC failed to engage in conciliation with CVS prior to bringing suit. Unlike Section 706, Section 707 of Title VII authorizes the EEOC to bring actions challenging patterns or practices of resistance to the full enjoyment of rights secured by the statute regardless of whether the acts of resistance independently constitute violations of Sections 703 or 704. The EEOC may bring such suits on its own initiative

without the filing of a charge of discrimination, and when it does so the charge-filing and conciliation procedures of Section 706 do not apply. Thus, although the EEOC did attempt to resolve this matter with CVS prior to filing suit, neither Title VII nor any other authority required the EEOC to engage in conciliation.

Moreover, summary judgment is further unwarranted because a reasonable trier of fact could find that CVS's use of the SA constitutes an actionable pattern or practice of resistance to the full enjoyment of rights secured by Title VII. Taken together, sections 704 and 706(b) and (e) of Title VII expressly protect the rights of individuals to file charges and cooperate with the EEOC, and the EEOC depends vitally on the participation of such individuals in furtherance of its enforcement efforts. The SA, which is drafted in legalistic and confusing terms, includes both anti-cooperation and anti-charge filing language of a kind that courts across the country have repeatedly recognized to be void as against public policy. Regardless of what a lawyer or expert might know about the unenforceability of such terms, a reasonable layperson reading the SA could well conclude that dire consequences, including legal liability, might attach to any communication or interaction s/he might have with the EEOC. This Court has recognized that overly broad or ambiguous threats of this sort may carry a significant chilling effect on the exercise of individual rights, regardless of whether they are ultimately acted upon. Accordingly, this Court should not affirm the district court's

grant of summary judgment on the alternative ground that the language in the SA is unenforceable or otherwise does not constitute a violation of Section 707.

ARGUMENT

I. Section 707 of Title VII Authorizes the EEOC to Bring Some Actions Challenging a Pattern or Practice of Resistance to the Full Enjoyment of Rights Secured by Title VII Without a Charge and Without Following the Procedures of Section 706.

A. Title VII's Statutory Scheme Creates Important Differences Between Enforcement Actions Under Sections 706 and 707.

As this Court has observed, "[s]tatutory interpretation begins with the plain language of the statute." *United States v. Berkos*, 543 F.3d 392, 396 (7th Cir. 2008). "This court assumes that the purpose of the statute is communicated by the ordinary meaning of the words Congress used; therefore, absent any clear indication of a contrary purpose, the plain language is conclusive." *United States v. Ye*, 588 F.3d 411, 414-15 (7th Cir. 2009).

The two principal sections of Title VII that govern enforcement actions in court are Section 706, 42 U.S.C. § 2000e-5, and Section 707, 42 U.S.C. § 2000e-6.[4] Sections 706 and 707 use materially different language, serve different purposes, and function differently within the statutory enforcement scheme of Title VII. A brief review of Title

[4] There is a third section of the statute, Section 717 (42 U.S.C. § 2000e-16), that governs enforcement actions brought by federal and state employees. This provision is not at issue in this case.

VII's relevant structure and language demonstrates how Section 706 and Section 707 enforcement actions differ.

In its current form, Title VII consists of eighteen numbered sections; only those pertinent to this case will be addressed here. The first section, Section 701 (42 U.S.C. § 2000e), contains definitions of various terms used in the statute, including separate definitions for the term "person" (§ 701(a)), "employer" (§ 701(b)), and "employee" (§ 701(f)). Section 703 (42 U.S.C. § 2000e-2) is titled "Unlawful Employment Practices," and it sets out separate lists of prohibited conduct by "employer[s]," "employment agenc[ies]," "labor organization[s]," and "joint labor-management committee[s]," as those entities are defined in Section 701. With respect to employers, the statutorily defined unlawful employment practices include:

- "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" (§ 703(a)(1));
- "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin" (§ 703(a)(2)); or

- "to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training" (§ 703(d)).

The next section, Section 704 (42 U.S.C. § 2000e-3), titled "Other Unlawful Employment Practices," adds two more such practices to the list in Section 703. It forbids employers:

- "to discriminate against any of [their] 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" (§ 704(a)); or
- "to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer … indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except … when religion, sex, or national origin is a bona fide occupational qualification for employment" (§ 704(b)).

With the statutory scope of "unlawful employment practices" thus defined, the statute then turns to the handling and enforcement of the law against such practices. Section 706 of Title VII, 42 U.S.C. § 2000e-5, is titled "Enforcement Provisions," and it

sets forth a detailed procedure by which the EEOC and private parties are required to work together to enforce Title VII's prohibitions against unlawful employment practices. It begins by observing broadly that the EEOC "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." Section 706(a) (42 U.S.C. § 2000e-5(a)).

Section 706(b), 42 U.S.C. § 2000e-5(b), then sets forth the EEOC's basic procedures for filing and processing charges of unlawful employment practices. The key aspects of those procedures for the present purposes are as follows:

- A charge may be filed "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission." "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."
- "The Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer … 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 and promptly notify the person claiming to be aggrieved and the respondent of its action."

- "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."

Section 706(f) then sets forth the terms on which the EEOC, the Attorney General, and aggrieved private individuals may bring enforcement suits with respect to charges of unlawful employment practices. According to Section 706(f)(1), if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission" within thirty days of a charge being filed, the EEOC may bring a civil action against any respondent not a government, governmental agency, or political subdivision.[5] 42 U.S.C. § 2000e-5(f)(1). If the EEOC should dismiss a charge or decide not to file an enforcement action of its own within 180 days of the date the charge was filed, the statute provides, the EEOC "shall so notify the person aggrieved and within

[5] If the respondent is a governmental entity, the Commission is authorized to refer the case to the Attorney General for potential litigation. 42 U.S.C. § 2000e-5(f)(1).

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." *Id.*

Finally, Section 706(g) (42 U.S.C. § 2000e-5(g)) addresses the remedies available in enforcement suits brought under Section 706. According to Section 706(g)(1), if the court finds that the respondent intentionally engaged 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 … , or any other equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g)(1).

The next section, and the one under which this case arises, is Section 707 (42 U.S.C. § 2000e-6): "Civil Actions by the Attorney General." After Title VII was amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972), the powers of the Attorney General to bring enforcement actions against non-governmental entities under Section 707 were transferred to the EEOC, and the EEOC was additionally empowered to investigate and act on charges alleging a pattern or practice of discrimination pursuant to Section 707(e). 42 U.S.C.

§§ 2000e-6(c), (e). Accordingly, the references to "the Attorney General" in Sections 707(a) and (b) now apply to the EEOC.[6]

Section 707(a) (42 U.S.C. § 2000e-6(a)) provides:

> 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 … , (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.

Section 707(c) (42 U.S.C. § 2000e-6(c)), as previously mentioned, was added as part of the 1972 amendments to Title VII and transferred the functions of the Attorney General to the EEOC. It further provided that "[t]he Commission shall carry out such functions in accordance with subsections (d) and (e) of this section." *Id.* Section 707(e) (42 U.S.C. § 2000e-6(e)) states as follows:

> 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 [i.e., Section 706] of this title.

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[6] Section 707(b) addresses the jurisdiction of the district courts over these actions and various procedural matters. Section 707(d) provided that, after the 1972 amendments, the EEOC would be substituted for the Attorney General in all Section 707 suits then pending in court. Neither subsection (b) nor (d) is otherwise at issue in this case.

There are some readily apparent differences between Sections 706 and 707, particularly in the language of the enforcement provisions:

- Authority Conferred: Section 706(a) empowers the EEOC "to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title." Section 707(c) transfers to the EEOC what was previously the Attorney General's power to bring suit against "any person or group of persons [] engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter"; and Section 707(e) authorizes the EEOC to "investigate and act on a charge of a pattern or practice of discrimination … in accordance with the procedures set forth in section 2000e-5 of this title." While a "pattern or practice of resistance" may include a pattern of employment actions that are themselves unlawful employment practices, the text of Section 707(a) does not limit "a pattern or practice of resistance" to that situation.
- Scope of Violation (Individual, Pattern-or-Practice): Actions brought under Section 707(a) *must* challenge a pattern or practice of "resistance" to Title VII rights; they cannot challenge isolated conduct. Section 706 actions may challenge any kind of unlawful employment action, whether individual or class-based.

- Permissible Defendants: Because Section 706(a) provides that Section 706 actions may only be brought against persons engaging in "unlawful employment practice[s]" pursuant to Sections 703 or 704, and Sections 703 and 704 define "unlawful employment practices" as certain actions taken by employers, employment agencies, labor organizations, or joint labor-management committees, only these entities may be sued under Section 706. Section 707, on the other hand, contains no such limitation; Section 707(a) states that suit may be brought against "any person or group of persons [] engaged in a pattern or practice of resistance …" but does not limit actionable conduct to "unlawful employment practices."[7]
- Permissible Plaintiffs: Section 706(f) provides that the EEOC, the Attorney General, or a "person aggrieved" may file suit in federal court, but, pursuant to Sections 707(a) and (c), only the EEOC or the Attorney General may bring a Section 707 suit.
- Charge-Filing Requirement: Section 706(f)(1) states that the filing of a charge is a prerequisite to a lawsuit against the respondent, regardless of who might be bringing the suit; Section 707(a) says that the government may bring suit "*whenever*" it "has reasonable cause to believe that any

[7] Thus, for example, as discussed further below, Section 707 "interference" actions have been brought against non-employer entities such as the Ku Klux Klan. *See, e.g.*, *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330, 335-36 (E.D. La. 1965).

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 ….” (emphasis added).

- Conciliation as Prerequisite to Suit: Prior to bringing suit under Section 706(f), the EEOC is required to “endeavor to eliminate any [] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion” as set forth in Section 706(b). Section 707(e) states that the EEOC is to “investigate and act on” pattern-or-practice *charges* of discrimination in accordance with Section 706 procedures, which includes conciliation, but it does not state that conciliation is a prerequisite for all Section 707 suits. It delineates only a specific group of potential Section 707 violations that must follow Section 706 procedures.
- Available Remedies: Section 706(g)(1) provides for the full panoply of remedies available in Title VII enforcement suits, including injunctive relief, back pay, “or any other equitable relief as the court deems appropriate.” Further, 42 U.S.C. § 1981a provides for recovery of compensatory and punitive damages for claims of intentional discrimination brought under Section 706. Section 707(a), on the other hand, allows the government to seek such relief “as [it] deems necessary to insure the full enjoyment of the rights herein described.”

B. The Administrative Prerequisites of a Section 706 Enforcement Action Do Not Apply to Section 707 Enforcement Actions Alleging a "Pattern or Practice of Resistance" to Rights Secured by Title VII.

This tandem review of Title VII's respective enforcement provisions reveals important implications for this and other Section 707 actions. First, while all Section 706 enforcement actions *must* originate with a charge of discrimination that must be handled in accordance with Section 706's charge-processing requirements, Section 707 actions *may* so originate, but need not. Not only is this distinction present in the plain language of the statute, but its significance has been recognized by this Court and other federal courts of appeal around the country. *See, e.g.*, *Harvey Walner*, 91 F.3d at 968 ("In the course of amending the enforcement provisions of Title VII, Congress also transferred to EEOC authority previously vested in the Attorney General under § 707 of Title VII to institute 'pattern or practice' lawsuits on its own initiative—i.e., without certain of the prerequisites to a civil action under § 2000e-5(f)."); *Serrano & EEOC v. Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012) (observing that "§ 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"); *United States v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 n.5 (9th Cir. 1979) ("Section 707 [] contains no requirement that anyone file a charge."); *EEOC v. Cont'l Oil Co.*, 548 F.2d 884, 890 (10th Cir. 1977) (noting that Section 707 "affords a broad based remedy without regard to individual charges or complaints"). As the Fifth Circuit put it:

> Under § 707, the EEOC (formerly the Attorney General) may institute a "pattern or practice" suit anytime that it has "reasonable cause" to believe such a suit necessary.… Section 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought. It was unquestionably the design of Congress in the enactment of § 707 to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals.… Rather, it is to those individual grievances that Congress addressed § 706, with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent when "reasonable cause" has been found.

United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 843 (5th Cir. 1975) (internal citations omitted).

Second, just as Section 707 claims may or may not originate with a charge, the patterns or practices of resistance to Title VII rights they allege may or may not be comprised of "unlawful employment practices" within the meaning of Sections 703 or 704. Whereas, in Section 706, Congress opted for fairly specific definitions of both actionable conduct and who may be sued, in Section 707(a) Congress chose much broader and more open-ended language, authorizing suit against "any person or group of persons" "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter." As the Supreme Court observed in *Teamsters*, "[t]he 'pattern or practice' language in § 707(a) of Title VII . . . was not intended as a term of art, and the words reflect only their usual meaning." *Teamsters*, 431 U.S. at 336 n.16. *See, e.g.*, Webster's Third New Int'l Dictionary 1932 (1993 ed.) (defining

"resistance" as, in relevant part: "the act or an instance of resisting: passive or active opposition"); *id.* (defining "resist" as, in relevant part, "to exert oneself to counteract or defeat: to strive against: OPPOSE").

As the Supreme Court and this Court have repeatedly observed, where Congress creates such a linguistic distinction, courts are to presume it was intentional. *See, e.g.*, *Burlington N.*, 548 U.S. at 62-63 (in construing sections 703 and 704 of Title VII, "the question is whether Congress intended its different words to make a legal difference. We normally presume that, where words differ as they differ here, '"Congress acts intentionally and purposely in the disparate inclusion or exclusion."'") (citing and quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Mach Min.*, 738 F.3d at 174 (noting "the Supreme Court's recent admonition that 'Congress' special care in drawing so precise a statutory scheme' as Title VII 'makes it incorrect to infer that Congress meant anything other than what the text does say'") (quoting *Univ. of Tex. SW Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517, 2530 (2013)).

Moreover, Section 707(a) of Title VII is no statutory anomaly. At least three other federal civil rights laws contain analogous provisions where Congress created a more specific cause of action for aggrieved persons and/or the government, sometimes with prerequisite exhaustion of administrative remedies, accompanied by a broader "pattern or practice of resistance to the full enjoyment of rights" action by the Attorney General. For example, the same language appears in Title II of the Civil Rights Act of 1964, 42

U.S.C. §§ 2000a *et seq.*, which prohibits discrimination or segregation in places of public accommodation. Like Title VII, Title II has one subsection authorizing civil actions by persons aggrieved, § 2000a-3, and a separate one, § 2000a-5, authorizing civil actions by the Attorney General. While Section 2000a-3 authorizes persons aggrieved to bring civil actions for injunctive relief only "whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title," Section 2000a-5 authorizes the Attorney General to file suit "whenever [s/he] has reasonable cause to believe that any person or group of person is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter …."

Several years later, Congress again incorporated the concept of the "pattern or practice of resistance" into the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.*[8] In the provision regarding enforcement actions by the Attorney General, 42 U.S.C. § 3614, there are again separate subsections for "pattern or practice of resistance" cases, on the one hand (§ 3614(a)), and cases brought "on referral of discriminatory housing practice or conciliation agreement for enforcement" (§ 3614(b)), on the other. Again, just as in the respective provisions of the 1964 Civil Rights Act, the more specific enforcement provision (here, (§ 3614(b)) ties litigation

[8] *See Kyles v. J.K. Guardian Security Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) ("Courts have recognized that Title VIII is the functional equivalent of Title VII, … and so the provisions of these two statutes are given like construction and application.") (internal citations omitted).

authority to particular discriminatory practices mentioned in other parts of the statute, whereas the "pattern or practice of resistance" provision (§ 3614(a)) is worded more broadly. And Congress incorporated the same concept again when it passed the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), 42 U.S.C. §§ 1997 *et seq.*, which authorizes the Attorney General to bring suit for equitable relief "whenever [s/he] has reasonable cause to believe that [a state or its agent] is subjecting persons residing in or confined to an institution … to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities." 42 U.S.C. § 1997a. CRIPA also has a separate provision governing prisoner suits, which, like Section 706 of Title VII, provides that prisoners may not file suit challenging their conditions of confinement until they first exhaust their available administrative remedies. 42 U.S.C. § 1997e(a).

The distinct pattern that emerges among these federal civil rights statutes is one of dual causes of action: one provision applying to both the government and aggrieved persons, and another solely to the government. The former restricts the plaintiffs to more specific and narrowly drawn claims, but provides for greater and more personalized remedies (such as compensatory damages) tailored to the injuries of individual victims. The latter allows the government, and only the government, greater

freedom to protect the statutory rights at issue by targeting broader "patterns or practices of resistance," but provides only for such relief as may be necessary to safeguard those rights. Section 707(a) fits logically and neatly into this framework, and, as the Sixth Circuit observed, "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*, 699 F.3d at 896.

This understanding of the Section 707 "pattern or practice of resistance" action as distinct from and broader than Section 706 suits is also consonant with the existing legislative history of Section 707, specifically that of the 1972 amendments to Title VII. The Supreme Court discussed the 1972 amendments in detail in *General Telephone Company of the Northwest, Inc., v. EEOC*, 446 U.S. 318 (1980). Although *General Telephone* itself was a Section 706 suit, the Court engaged in a fairly detailed analysis of the legislative history of the 1972 amendments as they affected both Sections 706 and 707. It explained, in relevant part:

> The purpose of the amendments, plainly enough, was to secure more effective enforcement of Title VII. As Title VII was originally enacted as part of the Civil Rights Act of 1964, the EEOC's role in eliminating unlawful employment practices was limited to "informal methods of conference, conciliation, and persuasion." … Congress became convinced, however, that the "failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII." S. Rep. No. 92-415, p. 4 (1971).

* * *

> Prior to 1972, the only civil actions authorized other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect "a pattern or practice" of discrimination. These actions did not depend upon the filing of a charge with the EEOC; nor were they designed merely to advance the personal interest of any particular aggrieved person. Prior to 1972, the Department of Justice filed numerous § 707 pattern-or-practice suits. 118 Cong. Rec. 4080 (1972) (remarks of Sen. Williams).
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> The 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion. In discussing the transfer, Senator Hruska described § 707 actions as "in the nature of class actions." 118 Cong. Rec. 4080 (1972). Senator Williams then noted that, upon the transfer, "[t]here will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring." *Id.*, at 4081. Senator Javits agreed with both Senators: "The EEOC … has the authority to institute exactly the same actions that the Department of Justice does under pattern or practice." Senator Javits further noted that "if [the EEOC] proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits…. [T]he power to sue … fully qualifies the [EEOC] to take precisely the action now taken by the Department of Justice." *Id.*, at 4081-4082.

Gen. Tel., 446 U.S. at 325, 327, 328-29. This Court has also recognized that, prior to 1972, the Attorney General's finding of reasonable cause to sustain a Section 707 suit was "not a litigable issue." *United States v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers, Local No. 1*, 438 F.2d 679, 681 & n.3 (7th Cir. 1971).

Early litigation under both Section 707 and Title II's analogous provision, 42 U.S.C. § 2000a-5, also reflects the courts' understanding that the Attorney General was

not limited to bringing cases where the alleged violations were also independently actionable under Section 706 or § 2000a-3. Thus, for example, as mentioned *supra* at 23 n.7, in *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), the Attorney General sought and received an injunction against the Klan under several statutory civil rights provisions, including Title VII's Section 707 and Title II's § 2000a-5. 250 F. Supp. at 335. With respect to all provisions of the 1964 Act, the court observed, "[a]s clearly as words can say, these provisions reach any person and any action that interferes with the enjoyment of civil rights secured by the Act." *Id.* at 349. Accordingly, the court granted the government's request for an injunction based, inter alia, on the defendants' admission that they "beat and threatened Negro pickets to prevent them from enjoying the right of equal employment opportunity…. Such acts not only deter Negroes but intimidate employers who might otherwise wish to comply with the law but fear retaliation and economic loss." *Id.* at 356.

Approximately twenty-five years later, the Third Circuit recognized the availability of a Section 707 cause of action against the Commonwealth of Pennsylvania for "prophylactic relief" from a policy that "endangered" a public school teacher's Title VII rights, even where "the Commonwealth was not [the teacher's] 'employer'" and it "cannot be liable to [her] for religious discrimination under 42 U.S.C. § 2000e-2(a)." *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 891-92 (3d Cir. 1990). *See also United States v. Gulf-State Theaters*, 256 F. Supp. 549, 557-58 (N.D. Miss. 1966)

(enjoining a private individual under the Title II resistance provision from "urging, advocating, recommending, establishing, or continuing a policy of noncompliance with the Act" in movie theaters, many of which he did not own or control); *United States v. Sampson*, 256 F. Supp. 470, 474 & n.6 (N.D. Miss. 1966) (finding that, although plaintiff's request for an injunction against public officials under Title II was unwarranted at the time, such relief "of course" could be sought under § 2000a-5 in the future, "should the need arise").

While the district court in this case stated that it disagreed with this view of the statute and that, in its view, "the term 'resistance' is encompassed by the antiretaliation and discrimination provisions" of Title VII, its legal basis for that disagreement is unclear. Op., R.33 at 4 n.2; A-4. The Supreme Court's decision in *Burlington Northern*, cited by the district court in support of this point, construed the scope of Section 704 of Title VII and its prohibition on retaliation; it nowhere mentioned or purported to address Section 707 or "resistance" claims at all. *Id.* (citing *Burlington N.*, 548 U.S. at 63, 67).

Later in its opinion, the district court stated that "courts have interpreted Section 707(a) as granting authority to the EEOC to bring charges of a pattern or practice of discrimination and not as creating a separate cause of action," citing the Eleventh Circuit's *Davis* opinion and the Supreme Court's decision in *Teamsters*. Op., R.33 at 7; A-7. But, again, while both *Davis* and *Teamsters* address Section 707 to differing

degrees, neither case stands for the proposition that Section 707 actions may only challenge unlawful employment practices within the meaning of Sections 703 and 704. *Davis* was a purely private Section 706 action against a private defendant, so anything the Eleventh Circuit may have said incidentally about Section 707 in *Davis* was, at best, dicta. *Davis*, 516 F.3d at 961 ("The plaintiffs in this employment discrimination case brought under Title VII … are seven employees and two former employees of Coca-Cola Bottling Co. Consolidated …."). That said, the district court's discussion of *Davis*'s reference to Section 707(a) omitted telling language from a footnote attached to the passage the district court cited:

> The Supreme Court noted long ago that "[t]he 'pattern or practice' language in § 707(a) of Title VII was not intended as a term of art." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.16 (1977) (internal citation omitted). Regardless of what Congress may or may not have intended, the phrase has come through common usage to represent the sum total of the evils Congress intended to attack in § 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). *See, e.g.*, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876–77 (1984). We use it thus.

516 F.3d at 965 n.17.

Teamsters, on the other hand, was a Section 707 suit alleging a pattern or practice of discrimination on the basis of race and national origin. 431 U.S. at 328-29. Again, though, the *Teamsters* Court was not considering the question before this Court; the "pattern or practice of resistance" alleged in that case was "that the company, in violation of § 703(a) of Title VII, regularly and purposefully treated Negroes and Spanish-surnamed Americans less favorably than white persons." *Id.* at 335. Thus,

when the *Teamsters* Court spoke of the government's burden in that case to demonstrate the existence of a pattern or practice of *discriminatory* acts, it did so because a pattern or practice of discrimination was what was at issue in that case, not because it was enunciating a broader governing standard for, or announcing a limitation on, all Section 707 claims. *E.g.*, *id.* at 336 (observing that the government "had to 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 342 ("The District Court and the Court of Appeals, on the basis of substantial evidence, held that the Government had proved a prima facie case of systematic and purposeful employment discrimination ….").

In fact, the district court agreed with the EEOC that this Court recognized in *Harvey Walner* that the EEOC could "institute 'pattern or practice' lawsuits on its own initiative"—i.e., without a charge—under Section 707. Op., R.33 at 7; A-7 (citing *Harvey Walner*, 91 F.3d at 968). What the district court failed to understand, though, is that Title VII's conciliation requirement flows from the presence of a charge, and neither the statute nor the implementing regulations contain any "free-standing" conciliation requirement in the absence of a charge. Accordingly, because this case did not originate with a charge as its jurisdictional basis, the EEOC was not obliged to conciliate with CVS before filing suit.

As discussed *supra* at 18-19, Title VII's charge-filing and conciliation requirements are set forth in Section 706(b), 42 U.S.C. § 2000e-5(b). According to the statute, if a charge is filed, and "[i]f 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." *Id.* *See also Mach Min.*, 575 U.S. ___, slip op. at 5 ("Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation *of a discrimination charge* prior to filing a lawsuit.") (emphasis added.) Section 707(e) then incorporates Section 706(b)'s procedures into Section 707 actions where charges have been filed. 42 U.S.C. § 2000e-6(e). By the plain language of the statute, these are the only circumstances under which Title VII obliges the EEOC to engage in the statutory conciliation procedure: where there has been a charge and reasonable cause has been found. There are no others.

The district court pointed to 29 C.F.R. § 1601.24(a) in support of its holding that conciliation was required in this case, but the court fundamentally misunderstood the significance of the regulation it cited. The EEOC's procedural regulations implementing Title VII are found in 29 C.F.R, Part 1601. Section 1601.24(a) is found under Subpart B: Procedure for the Prevention of Unlawful Employment Practices, and falls under another heading titled "Procedure to Rectify Unlawful Employment Practices." By its plain language, § 1601.24(a) states that "[w]hen the Commission

determines that there is reasonable cause to believe that an *unlawful employment practice* has occurred or is occurring, the Commission shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion…. " (emphasis added).[9] *See also Mach Min.*, 575 U.S. ___, slip op. at 7 (observing that statutory conciliation "concerns a particular thing: the 'alleged unlawful employment practice'"). In other words, this is a regulation interpreting Section 706(b) and the normal conciliation procedures that occur when a charge is filed alleging an unlawful employment practice. It has no bearing on "pattern or practice of resistance" actions brought under Section 707(a) that do not originate with a charge.[10]

Accordingly, the district court erred when it dismissed this case on the grounds that the EEOC lacked authority to file it because it had not first conciliated with CVS. As discussed further below, this case challenges a pattern or practice of resistance to the

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[9] Again, Title VII contains an express definition of "unlawful employment practices," and that definition limits unlawful employment practices to those defined in Sections 703 and 704. *See supra* at 16-17; 42 U.S.C. §§ 2000e-2, 2000e-3.

[10] The language the district court quoted from *EEOC v. United Air Lines, Inc.*, an unpublished 1975 decision of the Northern District of Illinois, also has no bearing on this issue. Op., R.33 at 8; A-8. In the cited passage, the court was merely observing generally that, under what was then "the Commission's new authority under [Section] 707(c)," the EEOC was required to follow Section 706(b)'s procedures where applicable, "includ[ing] efforts to conciliate with the respondent prior to the institution of suit." *United Air Lines*, 1975 WL 194, at *2. *United Air Lines* was a Section 707 suit originally brought by the Attorney General but transferred to the EEOC after the 1972 amendments to Title VII, and the court held that the EEOC was *not* required to engage in section 706(b)'s procedural prerequisites after being substituted for the Attorney General as plaintiff. *Id.* The issue of the permissible scope of Section 707 actions was not before that court, and the court did not consider it.

full enjoyment of Title VII rights pursuant to Section 707(a). It is not based on a charge alleging a pattern or practice of unlawful employment discrimination and, therefore, the agency was not required to conciliate it as a prerequisite to suit.

II. An Employer's Use of a Severance Agreement that Deters or Forbids the Filing of Charges and/or Cooperation with the EEOC Constitutes a Pattern or Practice of Resistance to the Full Enjoyment of Rights Secured by Title VII.

The EEOC brought this Section 707 enforcement action as part of its efforts to protect the rights of working Americans to cooperate with the EEOC without fear of retribution. The separation agreement ("SA") CVS has used since at least August 2011 has infringed on those rights by threatening those who sign it that they may themselves be sued and held liable for damages, including CVS's attorneys' fees, if they make "disparaging" statements about CVS to the EEOC, or if they cooperate with an EEOC investigation without first obtaining all requisite authorization from CVS management. *See supra* at 4-6. The SA also includes profoundly confusing language about signatories' charge-filing rights, again suggesting that an employee who files a charge with the EEOC, as s/he is entitled to do as a matter of law, could be punished with liability for CVS's legal fees. *See supra* at 3-4. Because these provisions of the SA could reasonably be found to constitute a pattern or practice of resistance to the full enjoyment of signatories' Title VII rights, which was of such a nature and intended to deny the full exercise of those rights, summary judgment in favor of CVS was inappropriate on any grounds.

A. The Rights of Individuals to File Charges and Cooperate with the EEOC Are Rights Secured by Title VII.

Title VII expressly protects individuals' rights to "[make] a charge, testif[y], assist[], or participate[] in any manner in an investigation, proceeding, or hearing" brought under Title VII. 42 U.S.C. § 2000e-3(a); *see also* § 2000e-5(b), (e) (laying out the charge-filing process and the EEOC's handling of charges). Both before and after the 1972 amendments to Title VII, the scheme Congress adopted to protect and vindicate the right to be free from unfair employment practices has always entailed a close partnership between the EEOC and the public. As the Supreme Court has observed, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington N.*, 548 U.S. at 67.

Accordingly, federal courts of appeals have repeatedly recognized the rule that individual waivers of the right to file charges or otherwise to cooperate with the EEOC are void as against public policy. The lead case on this issue is widely recognized to be *EEOC v. Cosmair, Inc.*, 821 F.2d 1085 (5th Cir. 1987). In *Cosmair*, an ADEA suit, the Fifth Circuit held that "an employer and an employee cannot agree to deny to the EEOC the information it needs to advance [the] public interest. A waiver of the right to file a charge is void as against public policy." *Id.* at 1090. The court explained:

> Allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could impede EEOC enforcement of the civil rights laws. The EEOC depends on the filing of charges to notify it of possible discrimination. *EEOC v. Shell Oil Co.*, 466 U.S. at 69; *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969). A charge not

> only informs the EEOC of discrimination against the employee who files the charge or on whose behalf it is filed, but also may identify other unlawful company actions.… When the EEOC acts on this information, "albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." *General Telephone Co. v. EEOC*, 446 U.S. 318, 326 (1980); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-43 (9th Cir. 1987).

Id.

Taking up the subject in the Title VII context, the First Circuit observed:

> Congress entrusted the Commission with significant enforcement responsibilities in respect to Title VII. *See* 42 U.S.C. § 2000e–5(a). To fulfill the core purposes of the statutory scheme, "it is crucial that the Commission's ability to investigate charges of systemic discrimination not be impaired." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984). Clearly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered.
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> … In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation. Thus, any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest. *See Cosmair*, 821 F.2d at 1090 (stating that "an employer and an employee cannot agree to deny to the EEOC the information it needs to advance this public interest")…. [W]eighing the significant public interest in encouraging communication with the EEOC against the minimal adverse impact that opening the channels of communication would have on settlement, we agree wholeheartedly with the lower court that non-assistance covenants which prohibit communication with the EEOC are void as against public policy.

Astra, 94 F.3d at 744-45. *See also id.* at 744 n.5 (rejecting Astra's argument that *Cosmair*'s holding was inapposite because it arose under the ADEA and not Title VII; "In contrast

to the individual right to recover damages, [] an employee's right to communicate with the EEOC must be protected not to safeguard the settling employee's entitlement to recompense but instead to safeguard the public interest. Hence, it is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer. Thus, a waiver of the right to assist the EEOC offends public policy under both the ADEA and Title VII."); *EEOC v. Sundance Rehab. Corp.*, 466 F.3d 490, 499 (6th Cir. 2006) (observing that the Sixth Circuit "has noted approvingly the Fifth Circuit's rule that a waiver of the right to file a charge with the EEOC is void as against public policy") (citing and quoting *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 456 (6th Cir. 1999)); *EEOC v. Bd. of Governors of State Colls. & Univs.*, 957 F.2d 424, 431 (7th Cir. 1992) (holding that the ADEA's antiretaliation provision "prohibits policies that penalize employees who exercise their statutory rights under the ADEA…. To hold for the Board would allow it to deter its employees' exercise of their ADEA rights by imposing adverse employment consequences.").

As both the plain language of Section 704(a) and the case law reflect, the right to file a charge with the EEOC and the right to participate freely in EEOC investigations are "rights secured by" Title VII. Accordingly, pursuant to Section 707(a), when 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" these rights, the agency may bring an enforcement action in court to protect them.

B. A Reasonable Fact-Finder Could Find that CVS's Use of the Separation Agreement Constitutes a Pattern or Practice of Resistance to Employees' Title VII Rights.

In this case, a reasonable fact-finder could find that CVS's use of the SA since at least August 2011 constitutes an intentional pattern or practice of resistance to the signatories' full enjoyment of their rights under Title VII. With the language of the SA viewed in the light most favorable to the EEOC as the nonmoving party and all reasonable inferences drawn in the EEOC's favor, *see Burnell*, 647 F.3d at 707, a reasonable fact-finder could find that a reasonable CVS employee would be deliberately misled as to his/her Title VII rights.

The SA is reproduced in the Appendix to this brief at A-17-21, and its relevant provisions are summarized *supra* at 3-6. The document is five pages long, single-spaced, in a small font, and drafted entirely in "legalese." This is the first sentence of Paragraph 7, the SA's "general release of claims":

> Employee hereby releases and forever discharges CVS Caremark Corporation and each of its divisions, affiliates, subsidiaries and operating companies, and the respective officers, directors, employees, agents and affiliates of each of them (collectively, the "Released Parties") from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee ever had, now has or which Employee or Employee's heirs, executors, administrators, successors or assigns may have prior to the date this Agreement is signed by Employee, due to any matter whatsoever relating to Employee's employment, compensation, benefits, and/or termination of Employee's employment with CVS Caremark (collectively, the "Released Claims").

SA, ¶7, at 2; A-18. The next sentence of the same paragraph states that the Released Claims include, among many others, "any claim that any of the Released Parties violated … Title VII of the Civil Rights Act of 1964," as well as claims for violations of the Americans with Disabilities Act and the Age Discrimination in Employment Act. *Id.* After another sentence, the last sentence of the paragraph begins with the cryptic provision that, "[n]otwithstanding the foregoing, this release does not include any rights that Employee cannot lawfully waive," and ends by listing three specific types of exempt claims, none of which involves the right to file a charge. *Id.*

The immediate next paragraph, Paragraph 8, begins by stating that the employee "represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related Parties in any federal, state, or local court *or agency*." SA, ¶8, at 2; A-18 (emphasis added). In the next sentence, the employee "agrees not to initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties." *Id.* Two sentences later, "Employee agrees to promptly reimburse the Company for any legal fees that the company incurs as a result of any breach of this paragraph by Employee." *Id.* Then, two sentences after that, Paragraph 8 states: "Moreover, 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 any such agency in its investigation." *Id.*

The language of Paragraphs 7 and 8, taken together, could readily and reasonably confuse the average contracts lawyer, much less a non-attorney CVS employee. Paragraph 7 states explicitly that all Title VII "claims" are released, while the "clarifying" provision in the last sentence merely refers generally to "rights that Employee cannot lawfully waive."[11] Paragraph 8 then states specifically that the employee has not filed and will not file *any* claims with *any* federal, state, or local agencies, but the next-to-last sentence states that nothing in that paragraph "is intended to or shall interfere with Employee's right to participate in a proceeding" with an agency enforcing discrimination laws, "nor shall this Agreement prohibit Employee from cooperating with any such agency in its investigation." Does CVS consider filing a charge with the EEOC "participating in a proceeding"? The language is unclear, and

[11] As we explained to the district court (R.27 at 13 n.11), the EEOC has issued a technical assistance publication on the subject of waivers, including a sample waiver and general release that meets the requirements of the Older Workers Benefit Protection Act with respect to group layoffs of employees over 40. *Understanding Waivers of Discrimination Claims in Employee Severance Agreements*, Appendix B (revised Apr. 2010), http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html ("Waiver Q&A"). Although the EEOC's sample waiver contains one sentence that superficially resembles part of one sentence in Paragraph 7 of CVS's SA, the sample is otherwise utterly dissimilar: it contains simple terms written in plain English, prints out at approximately two pages in length, nowhere mentions agency proceedings or cooperation, and never requires notice of any communication from the EEOC to employer personnel or payment of attorneys' fees in the event of a breach. *See* Waiver Q&A, par. 6 ("Except as to claims that cannot be released under applicable law, you waive and release any and all claims you have or might have against the Company.").

the stakes are high for the signatory, as Paragraph 8 states: if s/he gets it wrong, CVS will hold him or her liable for its legal fees incurred in responding to the charge. A reasonable employee, confronted with this choice, might readily conclude that the more prudent course would be to keep silent and refrain from communicating with the EEOC at all.

If Paragraphs 7 and 8 are profoundly confusing at best, the language of Paragraphs 13 and 14 is even more deeply problematic with respect to cooperation with the EEOC. Paragraph 13(a) first defines "confidential information" extremely broadly, including "pharmacy policies and practices" as well as "information concerning the Corporation's personnel, including the skills, abilities and duties of the Corporation's employees, wage and benefit structures, succession plans, [and] information concerning affirmative action plans or planning." SA, ¶13(a), at 3; A-19. It then provides that the employee "shall not disclose to any third party … any Confidential Information without the *prior written authorization* of CVS Caremark's Chief Human Resources Officer ('CHRO')." *Id.* (emphasis added). Paragraph 13(d) states that the employee "will not make any statements that disparage the business or reputation of the Corporation and/or any officer, director or employee of the Corporation," but then adds that, "[n]otwithstanding the foregoing, nothing in this Agreement shall prohibit Employee from (i) making *truthful* statements or disclosures that are *required* by applicable law …." SA, ¶13(d), at 4; A-20 (emphases added). Here, again, the reasonable employee is

confronted with a Hobson's choice: cooperate with the EEOC, knowing that s/he could get in serious trouble for anything said, even in the best of faith, if CVS later deemed it to be "untruthful" or "disparaging," or keep his or her mouth shut and avoid the risk entirely.

Paragraph 13(e)(i) then provides that, if the employee receives any type of inquiry "relating to any civil, criminal or administrative investigation, suit, proceeding, or other legal matter relating to the Corporation from any investigator, attorney or any other third party," s/he "agrees to promptly notify the Company's General Counsel by telephone and in writing." SA, ¶13(e)(i), at 4; A-20. It specifies further procedures to be followed if the inquiry "requires *or may reasonably be construed to require* Employee to produce Confidential Information," and states that "[i]f the Company objects to the subpoena, deposition notice, interview request, inquiry, process, or order, Employee shall cooperate to ensure that there shall be no disclosure until the court or other applicable entity has ruled upon the objection, and then only in accordance with the ruling so made." *Id.* (emphasis added). The last sentence of the paragraph states that "[n]othing in this Agreement shall be construed to prohibit Employee from testifying *truthfully* in any legal proceeding." *Id.* (emphasis added).[12]

[12] Under the current statutory and regulatory scheme, when an employee is contacted by the EEOC, that employee's response is entirely voluntary. In effect, Paragraph 13 of CVS's SA functions to require the EEOC to issue a subpoena and obtain a court order enforcing it in order to secure employee cooperation. In *Astra*, the First Circuit recognized that "it would be most peculiar" to insist on such a regime, "given that

Paragraph 14 then spells out the consequences to the employee for any conduct that CVS determines to have breached the "Employee Covenants" in Paragraph 13: in addition to liability for injunctive and equitable relief, "Employee agrees promptly to reimburse the Company for all reasonable attorneys fees incurred by CVS in connection with obtaining such equitable relief or damages." SA, ¶14, at 4; A-20. Convoluted though the language may be, there can be little question as to the general message Paragraphs 13 and 14 deliver to CVS employees who sign the SA: cooperate with the EEOC at your own risk. Although you may retain the right to "testify truthfully" in a "legal proceeding," anything you share with the EEOC that may be "Confidential Information" could subject you to a lot of trouble, including a lawsuit by CVS and liability for damages and CVS's attorney's fees.

Threats of the sort in CVS's SA are extremely troubling to the EEOC because they carry a significant chilling effect in their own right, regardless of whether the threats are ultimately acted upon. Although this Court has not had occasion to consider this particular issue in the Title VII context, it has repeatedly recognized that overly broad or ambiguous rules can have a significant deterrent effect on the exercise of protected rights, particularly by laypeople. For example, in the context of enforcement actions brought under Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C.

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public policy so clearly favors the free flow of information" with the agency and that "such a protocol would not only stultify investigations but also significantly increase the time and expense of a probe." *Astra*, 94 F.3d at 745.

§ 158(a)(1), this Court has reiterated that employers' imposition of overly broad no-solicitation and no-distribution rules violates employees' rights under Section 7 of the NLRA to form unions and engage in other organization-related activities—even where "there was no evidence that the rule was enforced." *NLRB v. Gen. Thermodynamics, Inc.*, 670 F.2d 719, 721 (7th Cir. 1982) (citing *Utrad Corp. v. NLRB*, 454 F.2d 520, 523 (7th Cir. 1972)); *see also Brandeis Mach. & Supply Co. v. NLRB*, 412 F.3d 822, 831 (7th Cir. 2005) (observing that "[i]t is incumbent upon employers to use language that is not reasonably subject to an interpretation that would unlawfully affect the exercise of Section 7 rights") (internal citation and quotation marks omitted); *NLRB v. Rich's Precision Foundry, Inc.*, 667 F.2d 613, 622 (7th Cir. 1981) ("The existence of an overly broad rule may violate § 8(a)(1) even without a showing that it had been enforced because its mere existence may chill the exercise of § 7 rights.") (citing *Utrad*). As this Court put it in *General Thermodynamics*, the employer's overly broad rules at issue in that case "'might well have deterred' their employees or they might have 'reasonably assume(d) that (they) acted at (their) peril.'" 670 F.2d at 721 (alterations in *Gen. Thermodynamics*) (quoting *NLRB v. Walton Manuf. Co.*, 289 F.2d 177, 180 (5th Cir. 1961)).

This Court voiced analogous concerns in *Mercatus Group, LLC v. Lake Forest Hospital*, 641 F.3d 834 (7th Cir. 2011), a case analyzing whether statements made by one competitor about another during and in relation to local zoning proceedings may subject the speaker to antitrust liability or whether the statements are protected by the

First Amendment and the *Noerr-Pennington* doctrine. *Id.* at 837. The parties agreed that the statements were protected insofar as they were "truthful," but plaintiff-appellant Mercatus argued that the statements were actually false and therefore should fall under the "sham" exception to *Noerr-Pennington*. *Id.* at 842. In rejecting the plaintiff's argument that the "sham" exception should apply, the Court observed, in relevant part:

> Regardless of its source, the greater the uncertainty, the more likely that laypeople will hesitate to seek redress, out of fear that their petitioning activity will subject them to legal liability. Given the "broad spectrum of possibilities" implicated whenever a person contemplates engaging in legitimate First Amendment petitioning activity, a law's chilling effect is particularly great when it is unclear whether that law actually forbids the contemplated activity. *See Schirmer v. Nagode*, 621 F.3d 581, 586 (7th Cir. 2010).

Id. at 847.

It is for these kinds of reasons that those courts that have considered severance provisions like the ones at issue here have concluded that they do have an impermissible chilling effect on the exercise of Title VII rights. Thus, in *Astra*, the court affirmed entry of an injunction prohibiting enforcement of an anti-cooperation provision in Astra's settlement agreement, even though the company "claims that the injunction is unnecessary because it now interprets the settlement agreements to permit various types of communication with the EEOC." 94 F.3d at 743. Rather, the court concluded, "any agreement that materially interferes with communication between an employee and the Commission sows the seeds of harm to the public interest." *Id.* at 744. Another court enjoined enforcement of a settlement agreement provision that permitted

an employee to testify adversely to the defendant only with a subpoena and after notice to the company, as well as an employee handbook provision that required notice to the company of any government inquiry and threatened termination for failure to comply. *Morgan Stanley*, 2002 WL 31108179, at *1-*2. As the *Morgan Stanley* court put it, "[t]he agreement clearly could have a chilling impact on claimants, and the Court therefore finds that a non-assistance clause directed at the EEOC violates public policy." *Id.* at *2. *Cf. Hamad v. Graphic Arts Ctr., Inc.*, No. 96-cv-216, 1997 WL 12955, at *2 (D. Or. Jan. 3, 1997) (finding against public policy provision of settlement agreement preventing former employee from testifying pursuant to plaintiff's subpoena in private Title VII action). And it has long been the EEOC's position that employees' rights to file charges and participate in EEOC investigations categorically are not waivable, under any of the statutes the EEOC enforces. Enforcement Guidance on Non-Waivable Employee Rights Under Equal Employment Opportunity Commission (EEOC) Enforced Statutes, No. 915.002, 1997 WL 33159165 (Apr. 10, 1997).[13]

In this case, the district court simply dismissed the EEOC's concerns regarding the chilling effect of the anti-charge-filing and -cooperation provisions in the SA, stating that "even if the Separation Agreement explicitly banned filing charges, those provisions would be unenforceable and could not constitute resistance to [Title VII]." Op., R.33 at 5 n.3; A-5 (citing *Astra* and *Morgan Stanley*). But the fact that such

[13] *Available at* http://www.eeoc.gov/policy/docs/waiver.html.

provisions are legally unenforceable does nothing to counter the chilling and deterrent effect that their inclusion in the SA has on a lay person who receives and signs it. The fact that a lawyer might know these provisions to be void as against public policy in no way mitigates the damage to the operation of the remedial scheme that Congress established in Title VII. The non-lawyer signatories who take CVS at its word will simply avoid participating in that remedial scheme because of the risks it appears to entail.

This Section 707 case arose because the EEOC had reasonable cause to believe that CVS used the challenged language in its SA intentionally to deter workers from filing charges or otherwise communicating with the EEOC. And the appropriate standard to apply in determining liability is an objective one: whether CVS's use of the challenged provisions in the SA "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N.*, 548 U.S. at 68 (internal citation and quotation marks omitted). As the Supreme Court explained in *Burlington Northern*, the objective standard's focus on "reactions of a reasonable employee" is "judicially administrable" and "avoids the uncertainties and unfair discrepancies that can plague a judicial effort" to apply a subjective standard. *Id.*

Thus, the ultimate question in this appeal is whether a reasonable fact-finder could find that the challenged provisions in CVS's SA would deter a reasonable CVS employee from filing a charge or otherwise cooperating with the EEOC. Because a

reasonable fact-finder could so find, the district court's grant of summary judgment to CVS should not be affirmed on this alternate ground.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,731 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Palatino Linotype 12 point.

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CIRCUIT RULE 30(D) STATEMENT

Pursuant to Seventh Circuit Rule 30(d), counsel certifies that all materials required by Seventh Circuit Rules 30(a) and 30(b) are included in the Appendix.

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APPENDIX

APPENDIX CONTENTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMISSION,	)	
	)	Case No. 14-cv-863
Plaintiff,	)	
v.	)	Judge John W. Darrah
CVS PHARMACY, INC.,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Equal Employment Opportunity Commission (the "EEOC") filed suit against Defendant CVS Pharmacy, Inc. ("CVS"), alleging a pattern or practice of resistance to the full enjoyment of rights secured by Title VII of the Civil Rights Act of 1964 in violation of 42 U.S.C. 2000-e6(a). On April 18, 2014, CVS filed a Motion to Dismiss or, in the Alternative, for Summary Judgment. For the reasons set forth below, CVS's Motion for Summary Judgment [15] is granted.

LOCAL RULE 56.1

Local Rule 56.1(a)(3) requires the moving party to provide "a statement of material facts as to which the party contends there is no genuine issue for trial." *Ammons v. Aramark Uniform Servs.*, 368 F.3d 809, 817 (7th Cir. 2004). Local Rule 56.1(b)(3) requires the non-moving party to admit or deny every factual statement proffered by the moving party and to concisely designate any material facts that establish a genuine dispute for trial. *See Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940, 944 (7th Cir. 2005). Pursuant to Local Rule 56.1(b)(3)(C), the nonmovant may submit additional statements of material facts that "require the denial of

summary judgment. Local Rule 56.1(b)(3)(C) further permits the nonmovant to submit a statement "of any additional facts that require the denial of summary judgment . . . ." To the extent that a response to a statement of material fact provides only extraneous or argumentative information, this response will not constitute a proper denial of the fact, and the fact is admitted. *See Graziano v. Vill. of Oak Park*, 401 F. Supp. 2d 918, 936 (N.D. Ill. 2005). Similarly, to the extent that a statement of fact contains a legal conclusion or otherwise unsupported statement, including a fact that relies upon inadmissible hearsay, such a fact is disregarded. *Eisenstadt v. Centel Corp.*, 113 F.3d 738, 742 (7th Cir. 1997).

BACKGROUND

The majority of the facts are undisputed. The following facts are taken from the Rule 56.1 statement of facts filed by CVS. CVS is a Delaware corporation, doing business in Chicago, Illinois. (SOF ¶ 2.) This Court has federal jurisdiction over this matter pursuant to 28 U.S.C. § 1331, and venue is proper pursuant to 28 U.S.C. § 2000e-6. (SOF ¶¶ 3-4.)

Tonia Ramos is a former CVS Pharmacy manager who was discharged in July 2011. (SOF ¶ 5.) On July 27, 2011 Ms. Ramos signed a separation agreement with CVS[1], (Compl. Ex. A). (SOF ¶ 6). Soon thereafter, Ms. Ramos filed a charge with EEOC alleging that CVS terminated her due to her sex and race. (SOF ¶ 7).

On June 13, 2013, the EEOC dismissed Ramos's charge. (SOF ¶ 9). However, the EEOC sent CVS a letter, stating there was reasonable cause to believe that, based on the

[1] The Retail Litigation Center, Inc., notes in its *amicus curiae* brief that similar severance agreements are used nationwide in both the private and public sector and have been widely upheld. (*Amicus* Br. at 6-7). They also argue that invalidating the CVS Severance Agreement would have "far-reaching and dramatic implications across multiple industries." (*Amicus* Br. at 7).

severance agreement, CVS was engaged in a pattern or practice *of resistance* to the full enjoyment of rights secured by Title VII. (Emphasis added.) (SOF ¶ 8; Affidavit of Joseph McConnell Exh. H).

The EEOC and CVS engaged in settlement negotiations via telephone on June 27, 2013, and July 16, 2013. (Resp. SOF ¶ 8). The EEOC filed the present lawsuit on February 7, 2014. (SOF ¶ 12).

It is undisputed that no conciliation procedure was implemented. (Resp. SOF ¶¶ 10-11). The EEOC contends it is not required to engage in conciliation procedures in this case. As more fully discussed below, the resolution of this issue is dispositive of Defendant's summary judgment motion.

LEGAL STANDARD

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Courts deciding summary judgment motions must view facts "in the light most favorable to the nonmoving party only if there is a 'genuine' dispute as to those facts." *Scott v. Harris*, 550 U.S. 372, 380 (2007). A genuine dispute as to any material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party has the initial burden of establishing that there is no genuine dispute as to material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Then, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256 (quotation omitted). The

adverse party must do so by "submitting admissible, supporting evidence in response to a proper motion for summary judgment." *Harney v. City of Chicago*, 702 F.3d 916, 925 (7th Cir. 2012).

ANALYSIS

The EEOC claims that CVS is engaging in a pattern or practice *of resistance* to the full enjoyment of rights secured by Title VII of the Civil Rights Act of 1964 by conditioning certain employees' severance pay on the signing of the separation agreement. (Emphasis added.) (Compl. ¶ 1) [2]. Specifically, the EEOC claims the Agreement deters the filing of charges and interferes with the employees' ability to communicate voluntarily with the EEOC and Fair Employment Practices Agencies[3]. (Compl. ¶ 7). The complaint alleged that this action was brought pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended,

[2]EEOC attempts to expand the meaning of the term "resistance" in § 707(a) beyond acts of discrimination and retaliation. EEOC argues that the term resistance should be given its plain meaning and interpreted as an effort to keep an employee from exercising their rights under the Act. EEOC cites several cases that deal with non-employers frustrating the purposes of the Act, and claims that the cases show that "resistance" is more than the unlawful conduct prohibited by §§ 703-704. *See U.S. v. Gulf-State Theaters, et al.*, 254 F. Supp. 549, 557-58 (N.D. Miss. 1996); *U.S. v. Original Knights of the Ku Klux Klan*,250 F. Supp. 330, 356 (N.D. Miss. 1996); *U.S. v. Board of Educ. for School Dist. of Philadelphia*, 911 F.2d 882, 891-93 (3d Cir. 1990). However, in *Burlington N. & Santa Fe Ry. Co. v. White*, the Supreme Court stated that the antiretaliation provision is designed to keep employers from interfering with the enforcement of the Act "through retaliation." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). Moreover, the antiretaliation provision is interpreted broadly and "extends beyond workplace-related or employment-related retaliatory acts and harm." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67, 126 S. Ct. 2405, 2414, 165 L. Ed. 2d 345 (2006). Simply put, the term "resistance" is encompassed by the antiretaliation and discrimination provisions and requires some retaliatory or discriminatory act.

[3] The "covenant not to sue" provision (¶ 8), prohibits an employee from "initat[ing] or fil[ing] … a complaint or proceeding asserting any of the Released Claims." (SA at ¶ 8.) The general release of claims is set out in ¶ 7 of the Agreement, but that section also includes the caveat that the release does not limit "any rights that the Employee cannot lawfully waive." (SA ¶ 7). However, there is a specific carve out for an employee's "right to participate in a proceeding with any appropriate federal, state or local government agency enforcing discrimination laws";

42 U.S.C. § 2000e-6 ("Section 707"). (Compl. ¶ 4).

In 1972, Congress amended the enforcement procedures of Title VII of the Civil Rights Act of 1964 and transferred authority under § 707 from the Attorney General to the EEOC to institute "pattern or practice lawsuits." *E.E.O.C. v. Harvey L. Walner & Assoc.*, 91 F.3d 963, 968 (7th Cir. 1996). Under Section 707(a), the Attorney General had the power to bring civil complaints when there was "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" Title VII and "that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a). Effective March 1974, the functions of the Attorney General under Section 707 transferred to the EEOC. 52 U.S.C. § 2000e-6(c).

Under Section 707(e), "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." 42 U.S.C. § 2000e-6(e). Any "such actions shall be conducted in accordance with the procedures set forth in [Section 706]."

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and further provides, "nor shall this Agreement prohibit [the employee] from cooperating with any such agency in its investigation." (SA ¶8). As CVS points out, "participate" is a broad term. *See Russello v. United States*, 464 U.S. 16, 21-22 (1983). The verb participate is defined as "to be involved with others in doing something" and "to take part in an activity… with others." http://www.merriam-webster.com/dictionary/participate. It is not reasonable to construe "the right to participate in a proceeding with any appropriate federal … agency," (SA at ¶ 8), to exclude the right of the employee from filing an EEOC charge. And, even if the Separation Agreement explicitly banned filing charges, those provisions would be unenforceable and could not constitute resistance to the Act. *See EEOC v. Astra* 94 F.3d 738, 746 (1st Cir. 1996); *EEOC v. Morgan Stanley & Co.*, No. 01-CV-8421, 2002 WL 31108179, at *1-2 (S.D.N.Y. Sept. 20, 2002).

42 U.S.C. § 2000e-6(e). When there is a reasonable belief that a person or persons has engaged in an unlawful employment practice, the EEOC "shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, *conciliation*, and persuasion." 42 U.S.C. § 2000e-5(b) (emphasis added).

EEOC argues that claims brought under Section 707(a) are distinct from Section 707(e) and that conciliation is not required in an action brought under Section 707(a). (Resp. ps.19-20). EEOC cites to the legislative history of the transfer of power from the Attorney General to the EEOC under the 1972 amendments. The United States Supreme Court discussed that legislative history in *General Telephone Company of the Northwest, Inc. v. E.E.O.C.*, 446 U.S. 318 (1980):

> Senator Williams then noted that, upon the transfer, "[t]here will be no difference between the cases that the Attorney General can bring under section as a 'pattern or practice' charge and those which the [EEOC] will be able to bring." *Id.*, at 4081. Senator Javits agreed with both Senators: "The EEOC . . . has the authority to institute exactly the same actions that the Department of Justice does under pattern or practice."

Gen. Tel. Co. of the Nw., Inc. v. Equal Employment Opportunity Comm'n, 446 U.S. 318, 328 (1980). The EEOC argues that since the Attorney General was not required to bring a charge or engage in conciliation, the transfer of that office's authority to the EEOC under Section 707(a) is not constrained by the procedures required under Section 706. The EEOC also cites to the Seventh Circuit which stated, "Congress also transferred to EEOC authority previously vested in the Attorney General under Section 707 of Title VII to institute 'pattern or practice' lawsuits on its own initiative – i.e., without certain of the prerequisites to a civil action under 2000e-5(f)." *Harvey L. Walner & Assoc.*, 91 F.3d at 968.

However, courts have interpreted Section 707(a) as granting authority to the EEOC to bring charges of a pattern or practice of discrimination and not as creating a separate cause of action. *See Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 964-65 (11th Cir. 2008) ("Section 707(a) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–6(a), entitles the Government to bring a pattern or practice claim . . . against an *ongoing act of intentional discrimination* in violation of Title VII.") (emphasis added)); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) ("And, because it alleged a systemwide pattern or practice of resistance to the full enjoyment of Title VII rights, the Government ultimately had to prove more than the mere occurrence of isolated or "accidental" or sporadic discriminatory acts.").

The EEOC argues that the Seventh Circuit recognized their authority to proceed without "certain prerequisites," *i.e.*, without following the procedures in Section 706. But the lack of prerequisites noted by the Seventh Circuit refers to ability of the EEOC to proceed without a charge filed with the Commission. *See Harvey L. Walner & Assoc.*, 91 F.3d at 968 (Amendments transferred authority to institute "pattern or practice" lawsuits on its own initiative.).

Thus, it is clear that the transfer of prosecutorial authority in 707(a) from the Attorney General was not intended to create a cause of action for the EEOC other than those specifically conferred on the commission pursuant to 707(e) and subject to the procedures provided in 706, including the obligation of conciliation. Moreover, the EEOC cites to no case law distinguishing actions brought under Section 707(a) and actions brought under 707(e), nor has any case been found that supports the distinction between the two sections as argued by the EEOC. That Section 707(a) and Section 707(e) use slightly different language, *i.e.* "pattern or practice of

resistance" in 707(a) and "pattern or practice of discrimination" in 707(e), is not controlling. *See* 42 U.S.C. §§ 2000e-6(a), (e). The Seventh Circuit has commented that "'Congress' special care in drawing so precise a statutory scheme' as Title VII 'makes it incorrect to infer that Congress meant anything other than what the text does say.'" *E.E.O.C. v. Mach Min., LLC*, 738 F.3d 171, 174 (7th Cir. 2013) cert. granted, 134 S. Ct. 2872 (U.S. 2014) (quoting *University of Texas Southwestern Med. Ctr. v. Nassar*, 133 S.Ct. 2517, 2530 (2013)).

While the 1972 Amendment did authorize the EEOC to proceed without a charge on "pattern or practice" claims, the Amendment did not authorize the EEOC to forego the procedures in Section 706. *See* 42 U.S.C. § 2000e-6(e). As this court has held, "[t]he Commission's new authority under 707(c), unlike the Attorney General's authority under 707(a), is required to be exercised in accordance with the procedures set forth in section 706(b), which includes efforts to conciliate with the respondent prior to the institution of suit." *E.E.O.C. v. United Air Lines, Inc.*, 73 C 972, 1975 WL 194, *2 (N.D. Ill. June 26, 1975). Moreover, the EEOC's own regulations require the agency to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred or is occurring. *See* 29 C.F.R. § 1601.24(a). As such, EEOC was required to follow the procedures in 706, including conciliation. *See* 42 U.S.C. § 2000e-6(e). The EEOC failed to do so.

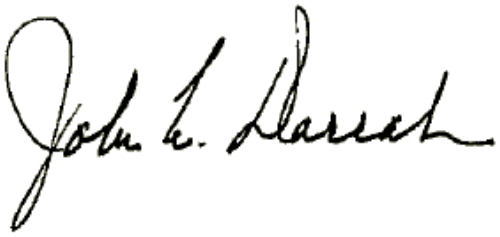
The EEOC may sue only after it has attempted to secure a conciliation agreement acceptable to the Commission. *See Mach Min.*, 738 F.3d at 174. As mentioned above, it is undisputed that the EEOC did not engage in any conciliation procedure. (Resp. SOF ¶¶ 10-11).

Therefore, the EEOC was not authorized to file this suit against CVS; and CVS is entitled to judgment as a matter of law.

CONCLUSION

For the reasons set forth above, CVS's Motion for Summary Judgment [15] is granted. The case is terminated.

Date: October 7, 2014



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,**	)	**CIVIL ACTION NO. 1:14-CV-863**
v.	)	**COMPLAINT**
CVS PHARMACY, INC. **Defendant**	)	

NATURE OF THE ACTION

1. This is an action under Title VII of the Civil Rights Act of 1964, as amended ("Title VII") to correct a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII in violation of Section 707(a) of Title VII. Specifically, as alleged with greater detail below, since at least August 2011, CVS Pharmacy, Inc. ("CVS") conditioned non-store FLSA exempt employees' receipt of severance pay on an overly broad, misleading and unenforceable Separation Agreement ("Separation Agreement") that interferes with its employees' right to file charges with the U.S. Equal Employment Opportunity Commission ("EEOC" or "Commission") and Fair Employment Practices Agencies ("FEPAs") and communicate voluntarily with and participate in the proceedings conducted by the EEOC and FEPAs.

JURISDICTION AND VENUE

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, and 1345. This action is authorized and instituted pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-6 ("Section 707").

3. The alleged unlawful employment practices were and are now being committed within the jurisdiction of the United States District Court for the Northern District of Illinois.

PARTIES

4. Plaintiff EEOC is the agency of the United States of America charged with the administration, interpretation, and enforcement of Title VII and is authorized to bring this action by Section 707(a) of Title VII, 42 U.S.C. § 2000e-6.
5. At all relevant times, Defendant has continuously been a corporation under the laws of the State of Delaware, doing business in the city of Chicago, IL, having its headquarters and registered office at One CVS Drive, Woonsocket, RI 02895.
6. Defendant is a person within the meaning of 42 U.S.C. § 2000e(a).

STATEMENT OF CLAIMS

7. During the time period from at least August 2011 to the present, Defendant has been engaged in a pattern or practice of resistance to the full enjoyment of the rights secured by Title VII, in violation of Section 707. This pattern or practice of resistance includes 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.
8. Among other things, the *five-page single spaced* Separation Agreement (attached as Exhibit A with identifying information for the affected employee redacted) states:
   a. **Cooperation.** "In the event Employee receives a subpoena, deposition notice, interview request, or another inquiry, process or order relating to any civil, criminal or *administrative investigation*, suit, proceeding or other legal matter relating to the Corporation from *any investigator*, attorney, or any other third party, *Employee agrees to*

promptly notify the Company's General Counsel by telephone and in writing." (emphasis added)

b. **Non-Disparagement**. "Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director, or employee of the Corporation."

c. **Non-Disclosure of Confidential Information.** "Employee shall not disclose to any third party or use for himself or anyone else Confidential information without the prior written authorization of CVS Caremark's Chief Human Resources Officer." Such information includes "information concerning the Corporation's personnel, including the skills, abilities, and duties of the Corporation's employees, wages and benefit structures, succession plans, information concerning affirmative action plans or planning . . ."

d. **General Release of Claims.** "Employee hereby releases and forever discharges CVS Caremark Corporation . . . from any and all causes of action, lawsuits, proceedings, complaints, *charges*, debts contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee has ever had, now has or which the Employee . . . may have prior to the date [of] this Agreement . . . . *The Released Claims include . . . any claim of unlawful discrimination of any kind . . . .*" (emphasis added) .

e. **No Pending Actions; Covenant Not to Sue.** "Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed, or initiated, any *complaint*, claim, action or lawsuit of any kind against any of the Related parties in any federal, state, or local court, or *agency*. Employee agrees *not to initiate or file, or cause to be initiated or file, any action, lawsuit, complaint or proceeding*

asserting any of the Released Claims against any of the Released Parties. . . . Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee."

f. The preceding paragraph entitled "No Pending Actions; Covenant Not to Sue" contains a single qualifying sentence that is not repeated anywhere else in the Agreement (though the other limitations are contained in separate paragraphs), noting that "[n]othing 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 any such agency in its investigation."

g. If the Employee breaches CVS's Separation Agreement, the Agreement requires that the "Employee acknowledges that a breach . . . will result in irreparable injury to some or all of the Corporation . . . . In the event that a court issues a temporary restraining order, preliminary injunction, permanent injunction, or issues any other similar order enjoining Employee from breaching this Agreement, or awards CVS any damages due to Employee's breach of this Agreement, Employee agrees to promptly reimburse the Company for all reasonable attorneys fees incurred by CVS . . . ."

9. Defendant reported that more than 650 employees entered into Separation Agreements based on the attached form in 2012.

10. The use of this Separation Agreement constitutes resistance to the full enjoyment of rights secured by Title VII because the Separation Agreement interferes with an employee's right to file a charge with the EEOC or FEPAs, and to participate and cooperate with an investigation conducted by the EEOC or FEPAs.

11. CVS, through its pattern or practice of using this Separation Agreement with non-store employees, has intended to deny the full exercise of these Title VII rights. Limiting employees' right to file charges and participate and cooperate with the EEOC and FEPAs interferes with the EEOC and the FEPAs' statutorily assigned responsibility to investigate charges of discrimination.

12. All conditions precedent to the filing of this lawsuit have been met.

PRAYER FOR RELIEF

Therefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant, its officers, successors, assigns, and all persons in active concert or participation with it, from engaging in a pattern or practice of resistance to the right to file a charge and participate and cooperate with investigations by the EEOC or FEPAs including but not limited to enjoining Defendant from using the current version of its Separation Agreement described in this Complaint (or any substantially equivalent Release) or from prohibiting employees from filing charges with or cooperating with EEOC or FEPAs.

B. Order Defendant to reform its Separation Agreement consistent with the provisions of Section 707 of Title VII both as to employees who are subject to the Agreement and as to any future Agreements.

C. Order Defendant to institute and carry out policies, practices, and programs that provide for the full exercise of the right to file a charge and participate and cooperate with the EEOC and FEPAs, including but not limited to a corrective communication with the Company's workforce informing all employees that they retain the right to file a charge

of discrimination and to initiate and respond to communication with the EEOC and state FEPAs and are not required to keep certain information confidential in those communications or to notify the Company's Human Resources Department or General Counsel about such communications and the addition of the same language to the Company's anti-discrimination policy; and training for the Company's human resources and management personnel and any personnel who write, negotiate or execute Employment Agreements about employees' right to file charges and communicate with the EEOC and state FEPAs:

D. Provide three-hundred days to file a charge of discrimination with EEOC or a FEPA for any former employee who was subject to the Separation Agreement described in this Complaint (or any substantially equivalent Release).

E. Grant such further relief as the Court deems necessary and proper in the public interest.

F. Award the Commission its costs in this action.

Dated: February 7, 2014

Respectfully submitted,

s/P. David Lopez

P. David Lopez
General Counsel

James L. Lee
Deputy General Counsel

Gwendolyn Young Reams
Associate General Counsel

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
131 M Street, N.E.
Washington, D.C. 20507

s/John Hendrickson

John Hendrickson
Regional Attorney

s/Gregory Gochanour

Gregory Gochanour
Supervisory Trial Attorney

s/Deborah Hamilton

Deborah Hamilton, No. 6269891
Trial Attorney

s/Laura Feldman, No. 6296356

Laura Feldman
Trial Attorney

SEPARATION AGREEMENT

This Separation Agreement ("Agreement") between or "Employee") and CVS Pharmacy, Inc. ("CVS Caremark" or the "Company") shall be effective as of the end of the Revocation Period defined below (the "Effective Date"), so long as the Agreement is also signed by an authorized representative of the Company.

WHEREAS, Employee has been employed by CVS Caremark or one of its subsidiaries;

WHEREAS, Employee and CVS Caremark desire to enter into an agreement setting forth the terms of Employee's separation from the Company;

WHEREAS, Employee has thoroughly reviewed this Agreement, has entered into it voluntarily, and has had the opportunity to consult with legal counsel of Employee's choice before signing this Agreement.

NOW THEREFORE, in consideration of the covenants below, including but not limited to the General Release of Claims, and for other good and valuable consideration as set forth in this Agreement Employee and the Company agree as follows:

1. **TERMINATION OF EMPLOYMENT.**
Employee's last date of employment with the Company (the "Separation Date") shall be Promptly following the Separation Date, CVS Caremark shall pay Employee any remaining accrued but unused vacation time or paid time off to which Employee may be entitled in accordance with CVS Caremark policy.

2. **SALARY CONTINUATION PAYMENTS.**
Subject to Employee's compliance with the obligations hereunder, CVS Caremark agrees to pay Employee at the rate of per month during the "Severance Period", which is the eight (8) week period beginning immediately after the Separation Date. The final day of the Severance Period shall be referred to as the "Severance End Date".

3. **BENEFITS.**
Effective immediately after the Separation Date, Employee may elect to continue Employee's Medical (including prescription), Dental, and/or Vision coverage in effect as of the Separation Date pursuant to COBRA. If Employee elects to continue health care coverage under COBRA by completing the required COBRA documents, CVS Caremark shall subsidize such coverage by paying the health insurance provider an amount equal to the current Company contribution for active employees for coverage during the Severance Period or the date on which Employee becomes eligible for health care coverage from another employer, whichever is earlier. After the end of the Severance Period or after Employee becomes eligible for health care coverage from another employer, whichever is earlier, Employee shall be solely responsible for any health insurance Employee elects to obtain, and, if eligible, Employee may continue coverage at the full premium rate plus a 2% administrative fee to the extent permitted under COBRA. Employee understands and agrees that CVS Caremark may modify its premium structure, the terms of its Plans, and the coverage of the Plans at any time subject only to applicable law.

4. **STOCK OPTIONS.**
The terms and conditions of Employee's previously-granted stock options shall be governed by the applicable CVS Caremark Corporation Incentive Compensation Plan (the "ICP") and the applicable Stock Option Agreements with Employee.

5. **OUTPLACEMENT ASSISTANCE.**
As part of its severance benefits to Employee, CVS Caremark will provide Employee with 2 months of outplacement assistance.

6. **NO OTHER PAY OR BENEFITS; SUFFICIENCY OF CONSIDERATION.**
Except as specifically set forth in this Agreement, Employee shall be entitled to no other wages, salary, vacation pay, bonuses, incentive awards, commissions, benefits, stock, restricted stock units, stock options, or any other compensation of any kind, except as required by law. Employee acknowledges that the severance pay and benefits subsidy described in this Agreement are in excess of any earned wages and any other amounts due and owing to Employee, and are good and valuable consideration for the general release of claims and the other covenants and terms in this Agreement.

7. **GENERAL RELEASE OF CLAIMS.**
Employee hereby releases and forever discharges CVS Caremark Corporation and each of its divisions, affiliates, subsidiaries and operating companies, and the respective officers, directors, employees, agents and affiliates of each of them (collectively, the "Released Parties") from any and all causes of action, lawsuits, proceedings, complaints, charges, debts, contracts, judgments, damages, claims, and attorneys fees against the Released Parties, whether known or unknown, which Employee ever had, now has or which Employee or Employee's heirs, executors, administrators, successors or assigns may have prior to the date this Agreement is signed by Employee, due to any matter whatsoever relating to Employee's employment, compensation, benefits, and/or termination of Employee's employment with CVS Caremark (collectively, the "Released Claims"). The Released Claims include, but are not limited to, any claim that any of the Released Parties violated the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, Sections 1981 through 1988 of Title 42 of the United States Code, the Employee Retirement Income Security Act, the Immigration Reform and Control Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act, and/or the Occupational Safety and Health Act; any claim that any of the Released Parties violated any other federal, state or local statute, law, regulation or ordinance; any claim of unlawful discrimination of any kind; any public policy, contract, tort, or common law claim; and any claim for costs, fees, or other expenses including attorney's fees incurred in these matters. For the avoidance of doubt, this release includes any claims by Employee under the following laws: the West Virginia Human Rights Act, the New Jersey Law Against Discrimination, or the New Jersey Conscientious Employee Protection Act. Notwithstanding the foregoing, this release does not include any rights that Employee cannot lawfully waive, and will not release any rights Employee has to (a) defense and indemnification from CVS Caremark or its insurers for actions taken by Employee in the course and scope of Employee's employment with CVS Caremark; (b) claims, actions, or rights arising under or to enforce the terms of this Agreement; and/or (c) vested benefits under any retirement or pension plan and/or deferred compensation plan.

8. **NO PENDING ACTIONS; COVENANT NOT TO SUE.**
Employee represents that as of the date Employee signs this Agreement, Employee has not filed or initiated, or caused to be filed or initiated, any complaint, claim, action or lawsuit of any kind against any of the Related Parties in any federal, state, or local court or agency. Employee agrees not to initiate or file, or cause to be initiated or filed, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties. Employee further agrees not to be a member of any class or collective action in any court or in any arbitration proceeding seeking relief against the Released Parties based on claims released by this Agreement, and that even if a court or arbitrator rules that Employee may not waive a claim released by this Agreement, Employee will not accept any money damages or other relief. Employee agrees to promptly reimburse the Company for any legal fees that the Company incurs as a result of any breach of this paragraph by Employee. Nothing in this Agreement is intended to or shall interfere with Employee's right to challenge the Company's compliance with the waiver requirements of the Age Discrimination Act, as amended by the Older Workers Benefit Protection Act. Moreover, 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 any such agency in its investigation. Employee shall not, however, be entitled to receive any relief, recovery or monies in connection with any Released Claim brought against any of the Released Parties, regardless of who filed or initiated any such complaint, charge or proceeding.

9. **NO FMLA OR FLSA CLAIMS.**
Employee acknowledges that the Company has provided Employee with any leave to which Employee may be or may have been entitled under the Family and Medical Leave Act. Employee represents that Employee is not aware of any facts that would support a claim by Employee against any of the Released Parties for any violation of the Family and Medical Leave Act. Employee further acknowledges that Employee has been properly paid for all time worked and is unaware of any facts that would support a claim by Employee against any of the Released Parties for any claim of unpaid overtime or any other violation of the Fair Labor Standards Act.

10. **UNDERSTANDING OF AGREEMENT; ADVICE OF COUNSEL.**
Employee acknowledges and confirms that Employee has entered into this Agreement of Employee's own free will, without duress or coercion. Employee acknowledges that Employee has read and fully understands the meaning and intent of this Agreement and is competent to execute it. The Company hereby advises Employee to seek the advice of legal counsel concerning this Agreement before signing this Agreement, and Employee represents that Employee has had the opportunity to do so prior to signing this Agreement.

11. **TIME TO CONSIDER AND REVOKE AGREEMENT.**
Employee shall have twenty-one (21) days from the date of receipt (the "Consideration Period") to consider whether to enter into this Agreement. Any modifications to this Agreement, whether material or immaterial, will not restart the Consideration Period. If Employee chooses to sign and thereby accept this Agreement, Employee may revoke the acceptance within seven (7) calendar days of the date on which Employee signed the Agreement (the "Revocation Period"). To revoke the acceptance of the Agreement, Employee must send written notice stating that "I revoke my acceptance of the Separation Agreement," or words to that effect, to Mr. David L. Casey, Vice President Human Resources, or his successor, at the address listed below, before the end of the Revocation Period. This Agreement shall take effect on the day following the expiration of the Revocation Period (the "Effective Date"). Employee agrees that, promptly after signing this Agreement, Employee shall send the entire original signed agreement to Mr. David L. Casey, VP Human Resources, One CVS Drive, Woonsocket, RI 02895.

12. **OLDER WORKERS BENEFIT PROTECTION ACT INFORMATION.**

(a) In the Company's desire to be in compliance with the Older Workers Benefit Protection Act ("OWBPA"), the Company advises Employee as follows. Employee has the opportunity to evaluate the terms of this Agreement for not less than 21 days prior to Employee's execution of this Agreement. Should Employee decide not to use the full 21 days, then Employee knowingly and voluntarily waives any claim that Employee was not given that period of time or did not use the entire 21 days to consult an attorney or consider this Agreement. Employee is hereby advised to consult with an attorney prior to executing this Agreement. This Agreement constitutes written notice that the Employee has been advised to consult with an attorney prior to executing this Agreement and that the Employee has carefully considered other alternatives to executing this Agreement.

(b) By signing this Agreement, Employee represents and certifies that:

i) Employee is relying solely upon the contents of this Agreement and is not relying on any other representations whatsoever of the Released Parties as an inducement to enter into this Agreement.

ii) Employee's execution of this Agreement is a representation that Employee (A) has read this Release, (B) has been provided a full and ample opportunity to study it, including a period of at least 21 days within which to consider it, (C) has been advised in writing to consult with an attorney prior to signing it, and (D) is signing it voluntarily with full knowledge that it is intended, to the maximum extent permitted by law, as a complete release and waiver of any and all claims.

iii) Without limiting the scope of this Agreement in any way, this Agreement constitutes a knowing and voluntary waiver of any and all rights or claims that exist or that Employee has or may claim to have under the Federal Age Discrimination in Employment Act ("ADEA"), as amended by the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which is set forth at 29 U.S.C. § 621, et seq. This Agreement does not govern any rights or claims that may arise under the ADEA after the date this Agreement is signed by Employee.

13. **EMPLOYEE COVENANTS.**
Employee acknowledges, represents and agrees as follows:

(a) **NON-DISCLOSURE OF CONFIDENTIAL INFORMATION.**
During the course of Employee's employment with CVS Caremark or any of its subsidiaries or affiliates, Employee has learned and had access to valuable non-public information concerning CVS Caremark Corporation and its predecessors, related entities, operating companies, subsidiaries, and affiliates (such entities hereafter referred to as the "Corporation") (such information, "Confidential Information"). For purposes of this Agreement, Confidential Information includes, but is not limited to, the Corporation's business plans, real estate plans and strategies, contracts, financial information, sales and marketing information, pharmacy policies and practices, information concerning the Corporation's personnel, including the skills, abilities and duties of the Corporation's employees, wage and benefit structures, succession plans, information concerning affirmative action plans or planning, information concerning vendors and suppliers, information pertaining to lawsuits and charges, IS programs, applications, strategic plans and information, trade secrets, and other information which could affect the Corporation's business. Employee has not, as of the date Employee signs this Agreement, disclosed to any third party or used, except as required in the course of performing work for CVS Caremark, any Confidential Information. Employee shall not disclose to any third party or use for himself/herself or anyone else any Confidential Information without the prior written authorization of CVS Caremark's Chief Human Resources Officer ("CHRO").

(b) **NON-SOLICITATION AND NON-HIRE OF EMPLOYEES.**
Employee will not, directly or indirectly, for 12 months following the Separation Date: (i) solicit, cause, induce, or encourage, or attempt to solicit, cause, induce, or encourage, any then-current employee of the Corporation to leave his or her employment; (ii) hire or otherwise engage the services of any then current employee of the Corporation or any individual who was employed by the Corporation in the six (6) months preceding the termination of Employee's employment; or (iii) assist, cause, induce or encourage, or attempt to assist, cause, induce or encourage, any third party to take any of the actions described in subsections (i) or (ii) above.

(c) **RETURN OF PROPERTY.**
On or before the Separation Date Employee shall return to CVS Caremark all property of the Corporation in Employee's control or possession, including but not limited to the originals and copies of any information provided to or acquired by Employee in connection with the performance of work for the Corporation, including but not limited to all files, correspondence, communications, memoranda, e-mails, slides, records, and all other documents, no matter how produced or reproduced, all computer equipment, programs and files, and all office keys and access cards, it being hereby acknowledged that all of said items are the sole and exclusive property of the Corporation.

(d) **NON-DISPARAGEMENT.**
Employee will not make any statements that disparage the business or reputation of the Corporation, and/or any officer, director or employee of the Corporation. Notwithstanding the foregoing, nothing in this Agreement shall prohibit Employee from (i) making truthful statements or disclosures that are required by applicable law, regulation or legal process; or (ii) requesting or receiving confidential legal advice.

(e) **COOPERATION.**

i) In the event Employee receives a subpoena, deposition notice, interview request, or any other inquiry, process or order relating to any civil, criminal or administrative investigation, suit, proceeding or other legal matter relating to the Corporation from any investigator, attorney or any other third party, Employee agrees to promptly notify the Company's General Counsel by telephone and in writing. Without limiting the generality of the preceding sentence, in the event Employee receives a subpoena, deposition notice, interview request, or any other inquiry, process or order which requires or may reasonably be construed to require Employee to produce Confidential Information, Employee shall promptly: (a) notify the Company's General Counsel of the item, document, or information sought by such subpoena, deposition notice, interview request, or other inquiry, process or order; (b) furnish the Company's General Counsel with a copy of said subpoena, deposition notice, interview request, or other inquiry, process or order; and (c) provide reasonable cooperation with respect to any procedure that the Company may initiate to protect Confidential Information or other interests. If the Company objects to the subpoena, deposition notice, interview request, inquiry, process, or order, Employee shall cooperate to ensure that there shall be no disclosure until the court or other applicable entity has ruled upon the objection, and then only in accordance with the ruling so made. Nothing in this Agreement shall be construed to prohibit Employee from testifying truthfully in any legal proceeding.

ii) Employee shall cooperate fully with the Corporation and its legal counsel in connection with any action, proceeding, or dispute arising out of matters with which Employee was directly or indirectly involved while serving as an employee of the Corporation. This cooperation shall include, but shall not be limited to, meeting with, and providing information to, the Corporation and its legal counsel, maintaining the confidentiality of any past or future privileged communications with the Corporation's legal counsel (outside and in-house), and making himself/herself available to testify truthfully by affidavit, in depositions, or in any other forum on behalf of the Corporation. CVS Caremark agrees to reimburse Employee for any reasonable and necessary out-of-pocket costs associated with such cooperation.

14. **BREACH OF EMPLOYEE COVENANTS AND INJUNCTIVE RELIEF.**
Without limiting the remedies available to CVS Caremark, Employee acknowledges that a breach by Employee of any of the covenants set forth above in the section entitled Employee Covenants will result in irreparable injury to some or all of the Corporation for which there is no adequate remedy at law, that monetary relief will be inadequate, and that, in the event of such a material breach or threat thereof, CVS Caremark shall be entitled to obtain, in addition to any other relief that may be available, a temporary restraining order and/or a preliminary or permanent injunction, restraining Employee from engaging in activities prohibited by any of the sections of this Agreement identified in this paragraph, as well as such other relief as may be required specifically to enforce any of the sections of this Agreement identified in this paragraph, without the payment of any bond. In the event that a court issues a temporary restraining order, preliminary injunction, permanent injunction, or issues any other similar order enjoining Employee from breaching this Agreement, or awards CVS any damages due to Employee's breach of this Agreement, Employee agrees promptly to reimburse the Company for all reasonable attorneys fees incurred by CVS in connection with obtaining such equitable relief or damages.

15. **NONADMISSION OF WRONGDOING.**
Employee and CVS Caremark agree that neither this Agreement nor the furnishing of consideration hereunder shall be deemed or construed at any time for any purpose as an admission by either party of any liability, wrongdoing or unlawful conduct, and Employee and CVS Caremark expressly deny any such liability, wrongdoing or unlawful conduct.

16. **GOVERNING LAW.**
This Agreement shall be governed by and conformed in accordance with the laws of the State of Rhode Island without regard to its conflict of laws provisions. Any actions brought to enforce the terms of this Agreement shall be brought in a court of competent jurisdiction located in the State of Rhode Island.

17. **JURY TRIAL WAIVER.**
Employee and CVS Caremark irrevocably and unconditionally waive the right to a trial by jury in any action or proceeding seeking to enforce, or alleging the breach of, any provision of this Agreement.

18. **COUNTERPARTS.**
This Agreement may be executed in counterparts and each counterpart will be deemed an original.

19. **SECTION HEADINGS.**
Section headings contained in this Agreement are for convenience of reference only and shall not affect the meaning of any provision herein.

20. **SEVERABILITY.**
If any of the provisions of the section entitled Employee Covenants are deemed unenforceable by a court of competent jurisdiction because they are overly broad, then the court shall have the ability to modify the offending provision in order to make it enforceable. Should any term or provision of this Agreement be declared illegal, invalid or unenforceable by any court of competent jurisdiction and if such provision cannot be modified to be enforceable, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against either of the parties.

21. **RESPONSIBILITY FOR TAXES.**
All payments set forth in this Agreement are subject to applicable withholdings and deductions. Employee acknowledges and agrees that Employee is solely responsible for all taxes on the payments and benefits described in this Agreement. The parties intend for the terms of this Agreement to be paid in such a manner to be compliant with Section 409A of the Internal Revenue Code of 1986, as amended ("Code Section 409A"), or, as applicable, to be exempt from Code Section 409A (including as necessary for the salary continuation payments to satisfy the involuntary separation pay exception set forth in Treasury Regulation Section 1.409A-1(b)(9)). Notwithstanding the foregoing, CVS Caremark makes no representations or guarantees with respect to the taxation of any of the payments or benefits set forth herein, including taxation pursuant to Code Section 409A.

22. **DEBTS TO THE COMPANY.**
Employee acknowledges that, in the event Employee is indebted to the Company or an affiliate thereof, the severance payments provided for in the Agreement may be reduced, offset, withheld or forfeited up to the amount of the debt.

23. **ENTIRE AGREEMENT.**
This Agreement; the ICP; and any compensation, equity or benefit plan or agreement referred to herein set forth the entire agreement between the parties hereto and fully supersede any and all prior and/or supplemental understandings, whether written or oral, between the parties concerning the subject matter of this Agreement. Employee has not relied on any representations, promises or agreements of any kind made to Employee in connection with Employee's decision to accept the terms of this Agreement, except for the representations, promises and agreements herein. Any modification to this Agreement must be in writing and signed by Employee and CVS Caremark's CHRO or her authorized representative.

IN WITNESS WHEREOF, the parties knowingly and voluntarily executed this Separation Agreement as of the dates set forth below.

CVS PHARMACY, INC.

By: _____
David L. Casey
Vice President, Human Resources

Date: 7/27/11

Date: 8/4/2011

CERTIFICATE OF SERVICE

I, Elizabeth E. Theran, hereby certify that I electronically filed the foregoing brief and appendix with the Court via the appellate CM/ECF system and filed fifteen copies of the foregoing brief with the Court by next business day delivery, postage pre-paid, this 30th day of April, 2015. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief and appendix via the appellate CM/ECF system:

Counsel for Defendant/Appellee:
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