



Commission Opinion Letter: Section 707

September 3, 2020

[Address]

Dear [Redacted]:

In a recent letter, you requested an opinion from the Equal Employment Opportunity Commission (the “Commission” or “EEOC”) on the Commission’s “interpretation and enforcement of § 707(a) of Title VII.”^[1] In response, I am providing this opinion letter^[2] which describes the Commission’s interpretation of section 707. This opinion letter was approved by vote of the Commission on August 27, 2020 as a written interpretation or opinion of the Commission. Pursuant to Section 713 of Title VII and EEOC Regulations at 29 C.F.R. § 1601.93(a), “in any action or proceeding based on any alleged unlawful employment practice, no [employer] shall be subject to any liability or punishment” for actions taken “in good faith, in conformity with, and in reliance on” the matters addressed in this letter. 42 U.S.C. § 2000e-12(b). If such a defense is established, it “shall be a bar to the action or proceeding, notwithstanding that ... after such act or omission, [the opinion expressed in this letter] is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.” *Id.*

There are two primary questions concerning section 707 actions brought by the Commission. First, does a pattern or practice claim under section 707(a) require allegations of violations of section 703 or section 704? And second, does a claim under section 707 require the pre-suit requirements of section 706 be satisfied before the EEOC can file suit? The best reading of the relevant statutory text is that the answer to both questions is yes.

The Commission, like all agencies, is a “creature of statute” that only has the authority that Congress has given it. *Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Therefore, in performing its duties, the Commission must follow the statutory language that Congress has provided. “The people are entitled to rely on the law as written, without fearing that courts [and agencies] might disregard its plain terms based on some extratextual consideration.” *Bostock v. Clayton County*, 140 S.Ct. 1731, 1749 (2020).^[3] These principles guide the Commission’s analysis below.

As your letter notes, the EEOC has previously filed lawsuits^[4] advocating that section 707 provided its own independent basis on which to assert a violation of Title VII, and that the Commission's suits under section 707 were not subject to the pre-suit requirements set out in section 706. In the only Circuit Court to rule on the issue, the Seventh Circuit rejected the EEOC's arguments.^[5]

Although, there are reasonable arguments for EEOC's previous interpretation, as more fully explained below, the Commission believes that the better reading of the statutory text is that it does not support such a reading of section 707.

I. Section 707(a) does not provide a freestanding violation of Title VII.

Section 707(a), as amended,^[6] allows the Commission to bring suit when “a 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.” 42 U.S.C. § 2000e-6(a) (emphasis added).^[7] The “subchapter” referenced in this portion is Title VII itself and the rights secured by Title VII are the rights against prohibited conduct made unlawful by sections 703 (discrimination) and 704 (retaliation). Therefore, the “pattern or practice” language in section 707 is read most naturally as signifying a pattern or practice (as distinct from an act or acts identifiable in isolation) of unlawful discrimination as defined in sections 703 and 704, not an otherwise undefined Title VII violation to be known as “resistance” to Title VII rights. In the text of 707(a), “resistance” is directly tied to the statutory rights specified elsewhere in Title VII.

Such “resistance” is indeed actionable, but only as a form of violation of sections 703 or 704, taking the shape of a “pattern or practice.” Rather than giving the Commission wide-ranging power to bring suit against undefined practices that it believes facilitate unlawful “resistance” in some way, but may not be themselves unlawful discrimination, section 707 gives the Commission the important power of acting against acts of discrimination in violation of sections 703 or 704. Any pattern or practice claim the Commission brings under section 707 is focused on proving “an employer regularly and purposefully discriminates against a protected group.” *Council 31, American Federation of State, County, and Mun. Employees, AFL-CIO v. Ward*, 978 F.2d 373, 378 (7th Cir. 1992).

This is the same conclusion that the Seventh Circuit came to in *EEOC v. CVS* when it rejected an expansive reading of the EEOC's powers under section 707(a). “[S]uits under Section 707(a) must challenge practices that threaten the employee's right to be free from workplace discrimination and retaliation for opposing discriminatory employment practices—the only rights secured by Title VII.” 809 F.3d 335, 341 (7th Cir 2015). “Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII (i.e., unlawful employment practices involving discrimination or retaliation defined in Sections 703 and 704) in one consolidated proceeding.” *Id.*^[8]

In *International Brotherhood of Teamsters v. U.S.*, the Supreme Court found that to establish a *prima facie* case of a violation of section 707(a)'s "pattern or practice of resistance" language 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." 431 U.S. 324, 336 (1977). "The plaintiff in a pattern-or-practice action is the Government, and its initial burden is to demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." *Id.* at 360. As the Court's discussion of the pattern or practice provisions in *Teamsters* demonstrated, "references to 'pattern-or-practice' in the statute do not confer a particular right *per se*—rather they enable the government to enforce Title VII on behalf of groups of employees by alleging a 'regular procedure or policy' of unlawful employment discrimination under [sections 703 and 704]." *Parisi*, 710 F.3d at 488 (citing 431 U.S. at 343, 360).

The Commission's limited authority is even more evident when looking outside the text of section 707(a). The structure of the 1972 amendments put very specific caveats on the Commission's authority under section 707 and indicate that any action the Commission pursues under section 707 must be based on a pattern or practice of discrimination. As discussed in more detail below, the amendments funneled all the Commission's authority into section 707(e), which only specified that the Commission could act on "a pattern or practice of *discrimination*." *Id.* at § 2000e-6(e) (emphasis added); see also *id.* at § 2000e-6(c) ("The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section.").

Based on the relevant statutory language and the caselaw, section 707(a)'s "pattern or practice of resistance" does not create an independent basis for a lawsuit untethered to other violations of Title VII. Instead, any suit that the Commission brings pursuant to section 707(a) must be based on an alleged pattern or practice of conduct that violates either section 703 or section 704.

II. Claims under Section 707 are Subject to Section 706's Pre-suit Requirements.

In 1972, when transferring to the EEOC the Attorney General's enforcement authority under section 707, Congress added sections 707(c), (d) and (e). Section 707(e) provides:

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

42 U.S.C. § 2000e-6(e). Section 707(e)'s language applies to all actions that the Commission can take under section 707 by virtue of section 707(c), which states explicitly: "[t]he Commission shall carry out such functions in accordance with subsections (d) and (e) of this section." *Id.* at § 2000e-6(c).

These provisions indicate that upon EEOC’s assumption of the Attorney General’s previous authority to bring pattern or practice cases against non-government employers under section 707, the Commission was required to follow the procedural requirements of section 706 (such as, a charge, reasonable cause finding, and an attempt to conciliate the dispute) that applied to all other suits that the EEOC sought to bring under Title VII. To find that section 706 procedures do not apply to actions under section 707 would have the effect of reading section 707(e) “out of the statute.” *CVS*, 809 F.3d at 340.

i. A charge must precede an action under section 707.

Section 707(e) explicitly states that the Commission’s pattern or practice actions will follow a charge, either “by or on behalf of a person claiming to be aggrieved or by a member of the Commission.” Indeed, the requirement of a charge is referenced throughout section 706, including in the provision discussing the Commission filing suit. 42 U.S.C. 2000e-5(b)-(f). The Commission’s own regulation acknowledges that the Commission can file a civil action under Title VII only after a charge has been filed. 29 C.F.R. § 1601.27 (“The Commission may bring a civil action against any respondent *named in a charge*..”) (emphasis added). The requirement of a charge includes Commissioner charges brought pursuant to Title VII. See 29 C.F.R. § 1601.11.[9]

These statutory and regulatory provisions demonstrate that the Commission’s requirement to follow section 706 procedures for actions pursuant to section 707 includes “proceeding on the basis of a charge.” *CVS*, 809 F.3d at 343.[10]

ii. Section 707 also requires that the Commission attempt to conciliate a claim before filing suit.

Section 706 also requires the Commission to attempt to conciliate any claim after it finds reasonable cause and that the Commission attempt to conciliate before filing suit. 42 U.S.C. § 2000e-5(b), (f) (1); see also *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 482-83 (2015) (“Before suing an employer for discrimination, the EEOC must try to remedy unlawful workplace practices through informal methods of conciliation.”). EEOC’s regulations are in accord. “Where the [EEOC] determines that there is reasonable cause to believe that an unlawful employment practice has occurred or is occurring, the [EEOC] shall endeavor to eliminate such practice by informal methods of conference, conciliation and persuasion.” 29 C.F.R. § 1601.24(a). The regulations further provide that the EEOC may bring a civil action only if it is unable to secure “a conciliation agreement acceptable to the [EEOC.]” *Id* at § 1601.27. There is no exception for actions brought under section 707.

III. Conclusion

While the Commission recognizes that it has previously asserted in a small number of cases that a section 707 claim need not be tied to allegations of violations of sections 703 or 704, nor comply with

the procedural prerequisites of section 706, the Commission now believes the better view of section 707 is that a “pattern or practice of resistance” claim must be tethered to a violation of section 703 or section 704. Furthermore, as required by section 707(e), any claim the Commission pursues under section 707 must follow the procedures of section 706. This includes that a charge has been filed and an attempt to conciliate has been made.

If you have any questions or would like to discuss this or any related matter in more detail, you may reach me at 202-663-4609.

On behalf of and as approved by the Commission,

/s/

Andrew F. Maunz
Legal Counsel

[1] See 29 C.F.R. §§ 1601.91-92.

[2] This letter is a “pre-enforcement ruling” as defined by Executive Order 13891, section 2(d), because it was written in response to an inquiry from a person concerning compliance with legal requirements under a specific set of facts. Therefore, it is exempt from the notice and comment requirements and Office of Management and Budget review otherwise potentially required by the Executive Order. See E.O. 13891, sec. 4(b), 84 Fed. Reg. 55,235, 55,237 (exempting pre-enforcement rulings from sections 4(a)(iii) and 5 of the Executive Order). “This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.” See 84 Fed. Reg. 55,235 (October 9, 2019); Office of Management and Budget, M-20-02, Guidance Implementing Executive Order 13891, Titled “Promoting the Rule of Law Through Improved Agency Guidance Documents” (Oct. 31, 2019) (instructing agencies to modify otherwise mandated guidance disclaimer language if “binding guidance is authorized by law”).

[3] See also *NLRB v. SW General, Inc.*, 137 S.Ct. 929, 942 (2017) (“What Congress ultimately agrees on is the text that it enacts, not the preferences expressed by certain legislators.”).

[4] *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir 2015); *EEOC v. Doherty Group, Inc.*, Case No, 14-81184-CIV-MARRA (S.D. Fl.) (The Commission filed an appeal in this case to the 11th Circuit Court of Appeals in 2018, but the Commission filed a motion to voluntarily dismiss this appeal on August 21, 2020.). Notably, in neither of these cases did the Commission proceed with litigation based on an

underlying charge of discrimination, not even a Commissioner's charge. Both cases were, however, submitted to the Commission for a vote to authorize the litigation.

[5] *CVS*, 809 F.3d at 343. On a subsequent appeal, the Seventh Circuit overturned a fees award to CVS, recognizing that fees should only be awarded to prevailing defendants in Title VII litigation in "exceptional cases," and that the EEOC's position was not "frivolous." *EEOC v. CVS Pharmacy, Inc.*, 907 F.3d 968, 973-75 (7th Cir. 2018).

[6] Section 707(a) originally authorized the Attorney General to bring suit when he had "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[.]" Section 707(c), enacted in 1972, transferred the authority to the Commission to pursue such actions against non-governmental employers, subject to the requirements of section 706, which, as more fully discussed below, is specified in sections 707(c) and (e). The Attorney General has the authority to pursue actions under section 707 against State or local governments or political subdivisions. See Reorganization Plan No. 1 of 1978 § 5; see also Exec. Order 12086, 43 FR 28971 (1978). Such actions are not subject to the pre-suit procedural requirements that the EEOC must follow under section 707. See *United States v. State of New Jersey*, 473 F. Supp. 1199, 1205 (D.N.J. 1979) ("Section 707 nowhere mandates that the Attorney General follow EEOC procedures before initiating suit."). Notably, any actions taken by the Attorney General pursuant to section 707 must be tied to a "'pattern or practice' of discrimination." *Laws Enforced by the Employment Litigation Section*, <http://www.justice.gov/crt/about/emp/overview.php>. This opinion letter expresses no opinion about the Department of Justice's authority under section 707.

[7] Section 707(a)'s use of "person" has allowed the Attorney General to pursue claims against non-employers. See *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882, 892 (3d Cir. 1990) ("One need not be the employer of the employees whose Title VII rights are endangered in order to be liable under this section."); *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965).

[8] See also *Parisi v. Goldman Sachs, Co.*, 710 F.3d 483, 487 (2d Cir. 2013).

[9] The Commissioner charge provision is an important enforcement mechanism in the statute. If the Commission has evidence of a "pattern or practice" of discrimination and "that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described" it can take action on its own, via a Commissioner's charge, without having to wait for someone to file a charge, if ever, with the Commission.

[10] The decision in *General Telephone Co. of the Northwest, Inc. v. EEOC*, does not compel a different result. At issue in *General Telephone* was whether class actions brought by the Commission pursuant

to section 706 need to meet the requirements of Federal Rule of Civil Procedure 23. 446 U.S. 318 (1980). As the CVS court noted, this decision cannot stand for the proposition that the EEOC may file suit without following the procedures set forth in section 706; otherwise, it would read “Section 707(e) - which requires all actions under Section 707 to be ‘conducted in accordance with the procedures set forth in [Section 706]’ - out of the statute.” 809 F.3d at 340 (alteration in original). Other cases that have mentioned the Commission proceeding under section 707 without a charge have done so only in passing while focusing on other issues, and without close analysis of the statutory text. See *Serrano v. Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012); *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843 (5th Cir. 1975).