No. 09-3764, 09-3765, 10-1682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

JANET BOOT,

Plaintiff-Intervener, and

REMCEY JEUNENNE PEEPLES & MONIKA STARKE,

Plaintiffs-Interveners-Appellants,

v.

CRST VAN EXPEDITED, INC.,

Defendant-Appellee.

On Appeal From The United States District Court
For The Northern District Of Iowa

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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September 7, 2010

CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Rule 26.1A, *Amici Curiae* Equal Employment Advisory Council, Chamber of Commerce of the United States of America, the Society for Human Resource Management, and the National Federation of Independent Business Small Business Legal Center make the following disclosures:

1) For non-governmental corporate parties please list all parent corporations and all subsidiary corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Respectfully submitted,

s/Rae T. Vann

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The Equal Employment Advisory Council, Chamber of Commerce of the United States of America, the Society for Human Resource Management, and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to affirm the decision below, and thus supports the position of Defendant-Appellee, CRST Van Expedited, Inc.

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes more than 300 of the nation's largest private sector companies, collectively providing employment to approximately 20 million people throughout the United States. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing approximately 300,000 direct

members and underlying membership of over three million businesses and organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members by filing *amicus* briefs in cases involving issues of vital concern to the nation's business community.

The Society for Human Resource Management (SHRM) is the world's largest association devoted to human resource management. Representing more than 225,000 individual members, SHRM's mission is to serve the needs of HR professionals by providing the most essential and comprehensive resources available. As an influential voice, SHRM's mission also is to advance the human resource profession to ensure that HR is recognized as an essential partner in developing and executing organizational strategy. Founded in 1948, SHRM currently has more than 550 affiliated chapters and members in over 100 countries.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate

and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

Amici's members are employers or representatives of employers that are subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, as well as other labor and employment statutes and regulations. *Amici's* members have a direct and ongoing interest in the issues presented in this matter regarding the U.S. Equal Employment Opportunity Commission's (EEOC) statutory duty to satisfy Title VII's administrative prerequisites to suit. *Amici* seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Because of their experience in these matters, *amici* are well situated to brief the Court on the relevant concerns of the business community and the substantial significance of this case to the constituencies they represent.

STATEMENT OF THE CASE

This case began with the filing of a charge of discrimination by Monika Starke with the U.S. Equal Employment Opportunity Commission (EEOC) in December of 2005. *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS

71396, at *3-4 (N.D. Iowa Aug. 13, 2009). Starke, who worked for CRST Van Expedited, Inc. (CRST) as a newly-hired truck driver, alleged that she had been sexually harassed by Bobb Smith and David Goodman, trainers or "lead drivers" for the company. *Id.* at *3.

Although the EEOC's investigation initially focused on Starke, the agency subsequently broadened its inquiry to include other female drivers who worked with Smith and Goodman and then later to other female drivers who had filed formal complaints of discrimination against the company. *Id.* at *6-*16. Toward the end of its investigation, the EEOC requested (and the company provided) contact information for all female drivers and student drivers employed by the company during a two-year timeframe. *Id.* at *16.

Roughly two months later, the EEOC issued a Letter of Determination, which stated the agency had "reasonable cause" to believe CRST had subjected Starke and "a class of employees and prospective employees" to sexual harassment, although it did not provide their identities or size of the alleged class. *Id.* at *20, *28. The letter also extended an invitation to CRST to participate in the conciliation process, to which the company responded by requesting a meeting and expressing its desire to reach a voluntary resolution. *Id.* at *21-*22.

The EEOC refused to meet with the company until it submitted a conciliation "proposal." *Id.* at *22. When the company asked the EEOC to take

the lead, the agency responded by phone that it would seek the appointment of a monitor to "examine the employer's workplace to discover and eliminate sexual harassment, and relief for the class." *Id.* at *22. When CRST asked for more information about the class, the EEOC responded that it "was not able to provide the names of all class members . . . or an indication of the size of the class," but that it would "require as part of conciliation that CRST send a letter to past and present employees to help identify class members so settlements could be paid to them." *Id.* One week after this call, CRST notified the EEOC that "it did not appear conciliation would be successful," prompting the agency to declare conciliation a failure. *Id.* at *23.

The EEOC subsequently filed a lawsuit under Section 706 of Title VII on behalf of Starke and "'a class of similarly situated female employees'" seeking compensatory and punitive damages, in addition to other forms of relief available under the statute. *Id.* at *24, *27-*28. More specifically, the complaint alleged that Starke and other similarly situated women were subjected to a sexually hostile work environment and that the company had failed to prevent and correct the harassment. *Id.* at *24. The EEOC's complaint did not identify the class or its numbers. *Id.* at *28.

While the class seemed "relatively small" at the start, it later became clear to the district court that the EEOC "did not know how many allegedly aggrieved

persons on whose behalf it was seeking relief" and that it "was using discovery to find them." *Id.* at *29-*30. During discovery, the agency mailed close to 3,000 letters to former female CRST employees and invited them to participate in the suit. *Id.* at *30. With CRST in the "untenable" position of facing a "continuously moving target of allegedly aggrieved persons," the court set a firm deadline for the EEOC to identify its class. *Id.* at *30.

When the deadline arrived, the EEOC had identified approximately 270 women, a figure that increased dramatically as the deadline approached. *Id.* at *31. Even after the deadline had passed, the EEOC advised CRST that its "investigation" was "continuing" and that it planned to amend its list as its "investigation and discovery . . . [was] conducted." *Id.* at *31-*32 n.16.

In the end, the EEOC made only 150 women available for deposition, and the court limited any recovery only to these individuals. *Id.* at *35. The court ruled, through a series of dispositive motions, that the EEOC was barred from seeking relief for the majority of them, including Starke. *Id.* at *35-*36.

The company then filed a Motion for Order to Show Cause why the EEOC's claim on behalf of the remaining 67 women should not also be dismissed on grounds that the agency had failed to exhaust the statute's administrative remedies. *Id.* at *37. The trial court granted the motion, ruling that the EEOC had "wholly abandoned" its statutory duty to investigate and conciliate the claims of all 67

women prior to instituting its lawsuit. *Id.* at *51. The court declared CRST the prevailing party and ordered the EEOC to reimburse CRST $4.46 million in attorneys' fees and expenses, having determined the agency's actions were contrary to Title VII's procedures and imposed "an unnecessary burden upon CRST and the court." *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125, at *25 (N.D. Iowa Feb. 9, 2010). The EEOC appealed.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, which prohibits discrimination in employment on the basis of "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure'" that begins with the filing of a charge with the EEOC, followed by an investigation, a post-investigation determination of the merits, and where reasonable cause is found, an attempt to resolve the charge informally through conciliation. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). In 1972, Congress amended Title VII to authorize the EEOC to bring civil lawsuits, but in doing so retained the statute's administrative enforcement scheme as a prerequisite to suit. Pub. L. No. 92-261, 86 Stat. 103 (1972).

The district court correctly ruled in this case that the EEOC disregarded Title VII's mandatory pre-suit enforcement process by failing to investigate and conciliate the 67 claims that are the subject of this appeal. In direct contravention of the statute, the EEOC instead used the court's discovery process as a means to uncover alleged violations.

The EEOC's failure to investigate necessarily prevented it from engaging in meaningful conciliation, as the law requires. *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1260 (11th Cir. 2003). The EEOC also failed to negotiate in good faith, as evidenced in part by its refusal to provide the employer with basic information about the case, including the legal and factual underpinnings of the agency's determination and the size and scope of the class for whom it sought relief.

The EEOC's reliance on "pattern or practice" cases under Section 707 of Title VII as a means to avoid the statute's administrative prerequisites is misplaced. Because the EEOC chose to pursue this litigation under Section 706 of the law, to which these prerequisites unquestionably apply, the cases are not applicable. Moreover, the agency's position rests on the faulty assumption that pattern or practice cases are not subject to the same stringent administrative enforcement procedures contained in Section 706, when in fact they are.

When the EEOC flagrantly disregards the pre-suit administrative process to conduct its inquiries through litigation, as it has done here, employers are deprived of "due process guarantees." *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977) (citation omitted). Notice of the charge allegations, a genuine investigation, and an opportunity to participate in meaningful conciliation discussions all serve the important goal of obtaining voluntary compliance with Title VII. To permit the EEOC to circumvent these steps would result in "undue violence to the legal process that Congress established" and encourage costly and time-consuming litigation at great expense to employers, the judiciary, and taxpayers. *Id.* at 448.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE EEOC FAILED TO SATISFY ITS STATUTORY DUTY UNDER TITLE VII TO INVESTIGATE, FIND REASONABLE CAUSE AND CONCILIATE PRIOR TO FILING SUIT IN FEDERAL COURT

A. The EEOC's Duty To Investigate, Find Cause And Conciliate A Charge Is A Condition Precedent To Initiating A Public Enforcement Action Under Title VII

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*, as amended, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The law sets forth "'an integrated, multistep

enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). Upon the filing of a charge, Title VII provides in relevant part:

> [T]he Commission shall serve a notice of the charge . . . within ten days, and shall make an investigation thereof . . . . If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge . . . . If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.

42 U.S.C. § 2000e-5(b).

When first enacted, Title VII gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation. § 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Pub. L. No. 92-261, 86 Stat. 103 (1972).

Even in granting EEOC the authority to litigate, however, Congress retained the statute's administrative enforcement scheme as a prerequisite to suit. 42

U.S.C. § 2000e-5(f)(1). The legislative history of the 1972 amendments confirms Congress's preference for the administrative process as the primary vehicle for enforcing Title VII:

> The conferees contemplate that the Commission will continue to make every effort to conciliate as required by existing law. Only if conciliation proves to be *impossible* do we expect the Commission to bring action in federal district court to seek enforcement.

118 Cong. Rec. H1861 (Mar. 8, 1972), *quoted in EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978) (emphasis added). The U.S. Supreme Court similarly observed:

> Congress created the EEOC and established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.' Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions in § 706 of the amended Act.

Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 368 (1977) (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974)).

The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission." 29 C.F.R. § 1601.15(a) (emphasis added). Whenever the agency "completes its

investigation . . . and finds no reasonable cause to believe that an unlawful employment practice has occurred . . . the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a). Where the EEOC does find reason to believe discrimination occurred, the EEOC may issue a determination "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a). Only when the EEOC is "unable to obtain voluntary compliance" through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. §§ 1601.24-1601.25.

Accordingly, the EEOC's pre-suit administrative process involves several distinct stages: 1) providing notice of the charge; 2) undertaking an investigation; 3) conducting a post-investigation determination of the merits of the charge; and 4) if reasonable cause is found, attempting to eliminate unlawful practices through conciliation. 42 U.S.C. § 2000e-5(b). Every step in the statutory scheme "is intended to be a condition precedent to the following step and, ultimately, to suit." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1304 (W.D. Pa. 1977). *See also EEOC v. Jillian's of Indianapolis, Inc*., 279 F. Supp.2d 974, 979 (S.D. Ind. 2003). Indeed, the "completion of the full administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *EEOC v. Am. Nat'l Bank*, 652 F.2d

1176, 1186 (4th Cir. 1981); *see also EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

B. The EEOC May Not Use The Court's Discovery Process As A "Fishing Expedition" And May Litigate Only Those Claims That Have Been The Subject Of A Reasonable Investigation, Cause Determination And Unsuccessful Conciliation

In its brief to this Court, the EEOC characterizes the decision below as merely critical of its handling of the conciliation phase of the pre-suit administrative process. EEOC Opening Brief at 57. In fact, while the district court appropriately did find the agency's conciliation efforts lacking, its ruling went a great deal further than that, excoriating the EEOC for "wholly abandon[ing]" its role in the *entire* administrative process. *EEOC v. CRST Van Expedited, Inc.*, 2009 U.S. Dist. LEXIS 71396, at *51 (N.D. Iowa Aug. 13, 2009) ("the EEOC did not conduct *any* investigation of the specific allegations . . . let alone issue a reasonable cause determination as to those allegations or conciliate them").

Remarkably, the facts in this case indisputably show that, prior to issuing its determination, the EEOC had conducted *no investigation* into any of the 67 claims that are the subject of this appeal. *Id.* Indeed, at the time the determination was issued, 27 women had not yet experienced any workplace harassment, their claims having arisen only *after* the EEOC filed its complaint. *Id.* at 52. Although 40 of the women had allegedly been harassed by that time, the EEOC did not know about 38 of them and instead "used discovery . . . to find them." *Id.* at *53. As for

the remaining two women, whose allegations apparently were known, the EEOC simply did not bother to assess the veracity of their claims, having failed to interview even a single witness, not even the women themselves. *Id.* at *52-*53.

While this Court and others have permitted the EEOC to pursue in litigation any violation uncovered during a "reasonable investigation" of a charge, provided they are included in the agency's reasonable cause finding and conciliation efforts, the EEOC must do just that – *discover discrimination* in the course of a reasonable investigation, make a reasonable cause finding to that effect, and attempt to achieve voluntary compliance through conciliation. *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992). The "reasonable investigation rule" does not allow the agency to altogether circumvent Title VII's "integrated, multi-step enforcement procedure," however, by including in a lawsuit matters that have never before been the subject of an investigation, reasonable cause determination, or conciliation. *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 567 (N.D. Ga. 1975). *See also EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp.2d 1250, 1264 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, Inc.*, 279 F. Supp.2d 974, 979-81 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-89 (W.D. Pa. 1978); *EEOC v. Target Corp.*, 2007 U.S. Dist. LEXIS 35762, at *7 (E.D. Wis. May 16, 2007) (unpublished).

Courts have made abundantly clear that an EEOC lawsuit must be "the product of the investigation that reasonably grew out of underlying charges," as distinguished from facts gathered for the first time in litigation. *Jillian's*, 279 F. Supp.2d at 980. *See also Target Corp*., 2007 U.S. Dist. LEXIS 35762, at *3. In short, the EEOC may not use discovery "as a fishing expedition" to uncover violations. *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 971-72 (7th Cir. 1996).

The EEOC's failure to investigate prior to suit in this case is inexplicable given the wide range of tools at its disposal for this purpose. The agency's investigatory authority is broad and includes the ability to access and copy evidence "relevant to the charge under investigation," 42 U.S.C. § 2000e-8(a), and to compel the production of such evidence, including witness testimony, through the issuance of administrative subpoenas. 42 U.S.C. § 2000e-9 (citing 29 U.S.C. § 161); *see also Shell Oil*, 466 U.S. at 63-64. The agency can (and frequently does) perform investigations "on-site" at the employer's facility and holds "fact-finding conferences" at its own offices to facilitate the gathering of testimony and other evidence. EEOC Compl. Man. § 25.1, *On Site Investigation: General* (2001 & Supp. 2010); 29 C.F.R. § 1601.15(c).

Unlike private litigants, the EEOC is statutorily required to carefully evaluate the merits of every case *before* undertaking costly and resource-intensive

litigation. As the Supreme Court explained in *Occidental Life Insurance Co. v. EEOC*:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. *Unlike the typical litigant[,] . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties*.

432 U.S. 355, 368 (1977) (emphasis added).

The EEOC offers little in the way of explanation for its failure to investigate, other than to suggest the company prevented it from doing so by "significantly underreport[ing]" the number of the sexual harassment complaints it received. EEOC Opening Brief at 61. Even assuming this had been the case, such underreporting would in no way have *prevented* the EEOC from investigating prior to suit. As the agency is well aware, it is not required to blindly accept an employer's account and can (indeed should) use its investigatory tools to verify the claims of all parties involved. During the investigation of this case, the EEOC requested (and the company went to considerable trouble to produce) a complete list of female drivers, including home contact information. The agency could have contacted all of these women as part of its investigation, but it chose not to *until*

after it had already filed suit. Any limitations in the EEOC's investigation were, therefore, entirely self-imposed.

Accordingly, because the EEOC failed in its obligation to conduct a genuine investigation prior to suit, the district court correctly dismissed the action.

C. The EEOC Failed To Undertake Conciliation Meaningfully And In Good Faith Prior To Bringing Suit As Mandated By Title VII

Hand in hand with the investigation is the EEOC's duty to conciliate. The EEOC does not satisfy its administrative duties under Title VII merely by inviting a respondent to participate in conciliation. In order to fulfill its statutory mandate, the agency's conciliation efforts both must be "meaningful" and undertaken "in good faith." *EEOC v. Asplundh Tree Expert Co*., 340 F.3d 1256, 1260 (11th Cir. 2003). Although the statute does not define the steps the EEOC must take in conciliation, at a minimum this effort must "make clear to the employer the basis for the EEOC's charges against it . . . . Otherwise, it cannot be said that the Commission has provided a meaningful conciliation opportunity." *Id*. (citation omitted). Additionally, "good faith" conciliation requires that the agency afford the employer an opportunity to comply, as well as respond in a "reasonable and flexible manner to the reasonable attitudes of the employer." *EEOC v. Klingler Electric Corp*., 636 F.2d 104, 107 (5th Cir. 1981) (citation omitted).

Where, as here, the EEOC fails to investigate before issuing a reasonable cause finding and inviting the employer to conciliate, it cannot seriously contend that it has engaged in conciliation efforts that are by any measure *meaningful*. At the time the EEOC's determination was issued, not only did CRST have no real appreciation for the scope of the EEOC's case, *neither did the EEOC.* By its own admission, the agency was "unaware of most of [the alleged] complaints until discovery in this lawsuit." EEOC Opening Brief at 27 n.21. Under the circumstances, the EEOC could not possibly have explained to CRST "the basis for [its] charges" because it did not know what it was.

As evidenced by its conduct in this case, the EEOC "views [its] power of suit and its administrative process as unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII." *EEOC v. E.I. DuPont de Nemours & Co*., 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975). Under this scheme, "if conciliation is to work properly, charges of discrimination must be fully investigated . . . ." *EEOC v. Bailey Co.*, 563 F.2d 439, 449 (6th Cir. 1977). As one district court ruling astutely observed:

> "[T]he quality of the investigation has a bearing, not only on the scope of the determination, but also on the sufficiency of the Commission's attempt to conciliate specific issues. The investigation and determination are supposed to provide a framework for conciliation. Conciliation is the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. *Each step in the process – investigation, determination,*

> *conciliation, and if necessary, suit – is intimately related to the others*."

EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added). Accordingly, when the EEOC wholly abandons its responsibility to investigate, as it did here, it undermines its own ability to perform the next steps in the process. The investigation serves as the foundation for all that comes after, and without one, the agency necessarily denies the employer a meaningful opportunity to conciliate a claim in lieu of litigation.

Moreover, the heavy-handed negotiation tactics used by the EEOC in this case further undermine the agency's claim that it engaged in a good faith effort to conciliate. After providing CRST only a cursory letter of determination that neither identified the alleged class nor its size and scope, the agency refused to meet unless and until the company submitted a written conciliation proposal. With virtually no information to formulate such a proposal, the company unsurprisingly asked EEOC to take the lead. Rather than provide clear and specific written terms for the company to consider, however, the EEOC instead responded with a demand tantamount to a request for a blank check, which the agency said would be used to compensate an unidentified (and apparently undetermined) class of aggrieved individuals.

It is inconceivable that when Congress first instructed the agency to "endeavor to eliminate" discrimination through conciliation, it would have had

such strong-armed tactics in mind. 42 U.S.C. § 2000e-5(b). Employers should not be required to make a "conciliation proposal in an evidentiary vacuum." *EEOC v. First Midwest Bank*, 14 F. Supp.2d 1028, 1032 (N.D. Ill. 1998). The relevant issue to any settlement discussion, including the conciliation negotiations that should have occurred in this case, is the nature, scope and quality of the EEOC's finding of reasonable cause. Without an understanding of the specific legal and factual underpinnings of the EEOC's case against it, the company could not have been in a position to evaluate its own settlement position, much less respond to the EEOC's.

Nor is it reasonable for the agency to require a company to enter into an open-ended settlement proposal that in no way defines the scope of the alleged violation, the number of potential victims, or the amounts to be paid to them. A company has a fiduciary responsibility to act in the best interest of its shareholders and cannot simply agree to compensate an undetermined number of unidentified individuals – and for violations it knows nothing about and cannot verify. Before a company can justify entering into any settlement, it must have some way to "value" the case, which would require among other things a clear understanding of the agency's findings, the size and scope of the effected class, and whether they took steps to mitigate any damages.

Employers are not omniscient and should not be expected to guess what the EEOC has in mind when it renders a determination and undertakes conciliation.

The agency's refusal to provide any meaningful information with which to evaluate this case clearly undermined the conciliation process. Employers would have greater incentive to conciliate, and confusion could be avoided, if the EEOC took "the simple precaution of putting in writing the . . . scope of the claims against defendant-employers, so as to make sure all parties are on the same page during conciliation." *Outback Steak House*, 520 F. Supp.2d at 1268 (footnote omitted).

Because the EEOC did not undertake conciliation meaningfully and in good faith, the district court correctly ruled that the EEOC did not satisfy its statutory obligation in this regard.

D. The EEOC's Reliance On The "Pattern Or Practice" Line Of Cases Under *Teamsters* Does Nothing To Absolve The Agency Of Its Statutory Duty To Exhaust Title VII's Administrative Process Prior To Suit

When the EEOC filed this lawsuit, its complaint asserted a claim of class-based sex discrimination under Section 706 of Title VII, 42 U.S.C. § 2000e-5. *CRST*, 2009 U.S. Dist. LEXIS 71396, at *25 n.13. Section 706 permits the EEOC to sue a private employer on behalf of a "person or persons aggrieved" by an unlawful employment practice. 42 U.S.C. § 2000e-5(f)(1). Notably, the complaint did not allege that CRST engaged in a "pattern or practice" of discrimination or otherwise plead a violation of Section 707 of the statute, 42 U.S.C. § 2000e-6. *CRST*, 2009 U.S. Dist. LEXIS 71396, at *25 n.13. Consistent with its decision to only plead a violation of Section 706, the agency sought compensatory and

punitive damages pursuant to 42 U.S.C. § 1981a, which are not available in a Section 707 action. *CRST*, 611 F. Supp.2d at 931, 933.

As the litigation progressed, however, it became clear to the district court that the Commission also intended to pursue class-based "pattern or practice" relief under Section 707, in addition to seeking individual remedies under Section 706. *Id.* at 933. The trial court permitted the agency to do so, assuming for the sake of argument that Section 706 might authorize a pattern or practice claim or, alternatively, that the EEOC had constructively plead one. *Id.* at 934. It then dismissed the pattern or practice case with prejudice, ruling that no reasonable jury could find that it was CRST's "standard operating procedure" to tolerate sexual harassment. *EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp.2d 918, 952 (N.D. Iowa 2009). The EEOC never appealed this ruling.

A Section 707 pattern or practice case differs considerably from a class-based Section 706 claim. To make out a Section 707 claim, the EEOC must show that alleged discriminatory conduct was the company's standard operating procedure – *e.g.*, a "regular policy or procedure" followed by the employer, as opposed to isolated violations. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977). Importantly, liability in a Section 707 case does not hinge on the particularized experience of the individual claimant, as it does in a Section 706 claim.

In addition, while Section 706 actions always have been adjudicated under the burden-shifting framework of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), pattern or practice cases are decided under the two-phased approach set forth in the Supreme Court's 1977 ruling in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). Under the *Teamsters* framework, the EEOC must establish in an initial "liability" phase the existence of "an objectively verifiable policy or practice of discrimination," as opposed to isolated violations. *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998). This phase typically focuses on class-based evidence, usually in the form of statistics. *Teamsters*, 431 U.S. at 360.

If the agency meets this burden, the employer is then given an opportunity to defeat the agency's *prima facie* case by "demonstrating that the Government's proof is either inaccurate or insignificant." *Id.* If the employer fails to make this showing, liability attaches, warranting a broad injunction to benefit the entire class. *Id.* The case then moves to a second "remedial" phase to determine what if any relief should be granted to individual class members based on an individualized assessment. *Id.*

Notwithstanding the district court's earlier dismissal of the EEOC's constructive pattern or practice claim, the agency looks to a number of pattern or practice cases analyzed under the *Teamsters* framework in support of its contention

that the district court erroneously held the agency must "investigate, issue a cause finding, and conciliate each individual instance of . . . harassment" prior to filing a lawsuit. EEOC Opening Brief at 62. This Court should decline the EEOC's invitation to import the *Teamsters* line of cases into a Section 706 case.

As an initial matter, *amici* disagree with the assumption implicit in the EEOC's brief that the agency is not required to investigate specific instances of alleged discrimination when a claim involves a pattern or practice of discrimination. As the EEOC concedes, when Congress amended Section 707 to transfer the authority to bring pattern or practice suits from the Department of Justice to the EEOC, it expressly provided that Section 707 actions "shall be conducted in accordance with the procedures set forth in [S]ection 706 . . . ," which requires among other things, a timely charge, investigation, cause finding and conciliation. 42 U.S.C. § 2000e-6(e). There is nothing in the statute to suggest the EEOC can bring a pattern or practice lawsuit without first having conducted a genuine investigation and conciliation, and while *Teamsters* provides a framework for ordering proof in a pattern or practice lawsuit, it says nothing about the EEOC's pre-suit administrative enforcement obligations.

Moreover, in the context of a pattern or practice claim alleging hostile work environment, a genuine investigation into individual instances of alleged harassment is particularly critical. This is so because, due to their highly

individualized nature, hostile environment cases simply do not fit neatly into the *Teamsters* framework. As one legal commentator explains:

> There is a question as to whether . . . harassment can be the basis of a pattern-or-practice suit because there is no stage of a hostile work environment case in which individualized issues can take a back-seat to class issues. In practice, statistical proof is foreign to such cases. Even in theory, such proof could only be compiled after determining on a case-by-case basis whether employees worked in a hostile work environment – a determination that, in turn, would require individualized inquiry. . . . [T]here is greater intrinsic difficulty in establishing the existence and common reach of a subjectively based practice, such as harassment.

Donald Livingston, *EEOC Litigation and Charge Resolution* 666-67 (BNA 2005). Without an investigation into individual claims of harassment, it is difficult to conceive of how the agency could even determine the existence of an "objectively verifiable policy or practice" of discrimination in the first phase of a pattern or practice case. Accordingly, to the extent the EEOC suggests the *Teamsters* framework might offer a short-cut around Title VII's pre-suit administrative process, the contention should be rejected.

Furthermore, even assuming the *Teamsters* line of cases might permit the agency to proceed to court without a genuine investigation, those cases are inapplicable here. The EEOC unquestionably pursued this case under Section 706. The agency's complaint *only* alleged violations of Section 706 and specifically sought remedies available only in a Section 706 action. Although the district court initially allowed the EEOC to pursue a constructive pattern or pattern claim, that

claim was eventually dismissed for lack of evidence – a ruling the EEOC elected not to appeal.

The Court should not now permit the EEOC to blur the lines between these two distinctly different causes of action and thereby selectively avail itself of the advantages of both. Indeed, allowing the agency to do so in the context of this appeal would formalize the agency's end-run around the administrative prerequisites to suit, which it could effectively bypass simply by including a pattern or practice allegation in any subsequent court complaint. The district court below already has taken the agency to task for attempting to "have its cake and eat it too" by trying to use the *Teamsters* model while also seeking compensatory and punitive damages under Section 706. *CRST*, 611 F. Supp.2d at 934. Other courts similarly have rejected the EEOC's attempt to "manipulate the clearly-defined contours of Title VII" to its own advantage. *Serrano v. Cintas Corp*., 2010 U.S. Dist. LEXIS 10960, at *15 (E.D. Mich. Feb. 9, 2010) (unpublished).

II. CONDONING THE EEOC'S FAILURE TO FULFILL TITLE VII'S PRE-SUIT REQUIREMENTS WOULD UNDERMINE THE ADMINISTRATIVE ENFORCEMENT PROCESS ENVISIONED BY CONGRESS AND ENCOURAGE COSTLY AND TIME-CONSUMING LITIGATION AT GREAT EXPENSE TO EMPLOYERS, THE COURTS, AND TAXPAYERS

Condoning the EEOC's conduct in this case would defeat the important public policy objectives inherent in Congress' stated preference for the informal resolution of Title VII charges and, as the district court aptly noted, "expand the

power of the EEOC far beyond what Congress intended . . . ." *CRST*, 2009 U.S. Dist. LEXIS 71396, at *57. When the EEOC flagrantly disregards the pre-suit administrative process to conduct its inquiries through litigation, employers are deprived of "due process guaranties [sic]." *Bailey Co.*, 563 F.2d at 450 (citation omitted). Notice of the charge allegations, a genuine investigation, and an opportunity to participate in meaningful conciliation discussions all serve the important goal of obtaining voluntary compliance with Title VII. Permitting the EEOC to circumvent these steps and proceed directly to court would result in "undue violence to the legal process that Congress established to achieve equal employment opportunities in this country." *Bailey*, 563 F.2d at 448.

In addition, allowing the EEOC to side-step the administrative enforcement process of investigation, determination, and conciliation unquestionably would encourage the agency to pursue costly and time-consuming litigation instead of promoting voluntary dispute resolution in a less adversarial environment. One need only look to the district court's award of fees and costs to appreciate the crushing financial impact on employers when the EEOC conducts investigations through federal court litigation. *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125, *8-*42 (N.D. Iowa Feb. 9, 2010). CRST incurred roughly

$8.4 million in costs, attorney's fees and expenses[1] in having to defend this lawsuit. *Id*. Much of this expenditure, including costs associated with deposing countless women whose claims were either unsubstantiated or lacked merit, likely would have been avoided if the EEOC had conducted a genuine investigation prior to suit.

Even beyond the cost savings, an employer managing an EEOC charge investigation has a strong interest, from an employee relations standpoint, in preserving goodwill between the company and the charging party, as well as other affected individuals. An early and meaningful effort by the agency to resolve discrimination charges through investigation and conciliation not only serves the agency's aim of preventing and correcting discrimination, but also can help to repair an employer-employee relationship that now may be merely strained, but could be destroyed irretrievably by the acrimony and scorched earth tactics of litigation.

Not only is the administrative process, including the pursuit of good faith conciliation of charges, in the parties' mutual best interest, it also serves the interest of the judiciary in preventing a logjam of employment discrimination suits that, if properly attended to by the EEOC, could be resolved successfully at the

[1] The court's award of $4.46 million in this case covered roughly half of the costs actually incurred by the company.

administrative level. *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 968 (7th Cir. 1996).

Employment discrimination litigation already comprises a sizeable portion of the federal court docket. Recent federal court litigation statistics show that in the 12-month period ending March 31, 2009, for example, a total of 32,740 "civil rights" cases were filed, of which 14,636 (or 45%) involved claims of employment discrimination. Admin. Ofc. of the U.S. Courts, Fed. Judicial Caseload Statistics, Table C-2 [Civil Rights, Total: Employment + ADA—Employment] (Mar. 31, 2009).[2] Between 2008 and 2009, the percentage of employment discrimination lawsuits filed in federal court rose by 6.2% as a percentage of all suits filed.[3] Overall, employment discrimination actions comprised the fourth largest single category of civil cases filed in the federal district courts. *Id.*

As the district court observed, to accept the EEOC's view of its own authority ultimately would impose an "untenable [additional] burden upon the federal district courts, as the EEOC might avoid administrative proceedings for the

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[2] *Available at* http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2009/tables/C02Mar09.pdf

[3] Suits alleging violation of the Americans with Disabilities Act of 1990, which are tracked separately, rose by 9.1%. Admin. Ofc. of the U.S. Courts, Judicial Bus. of the U.S. Courts, Table C-2A (FY 2005-09) at 2, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf

vast majority of allegedly aggrieved persons." *CRST*, 2009 U.S. Dist. LEXIS 71396, at *57. Had the EEOC committed the same level of resources toward the investigation and conciliation of the Starke charge as it did to litigate it, the agency might have avoided suit altogether, thereby sparing itself and the courts (as well as the American taxpayer) the extraordinary and unnecessary costs associated with this litigation.

Accordingly, to permit the EEOC's conduct in this case would only promote antagonism between employers and employees, as well as between the EEOC and its own stakeholders, by discouraging voluntary compliance and cooperation in favor of time-consuming and costly litigation.

CONCLUSION

For the foregoing reasons, the district court ruling below should be affirmed.

Respectfully submitted,

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