No. 15-20078

United States Court of Appeals

for the

Fifth Circuit

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

BASS PRO OUTDOOR WORLD, LLC,
and TRACKER MARINE RETAIL, LLC,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Texas, Houston Division

REPLY BRIEF OF APPELLANTS

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I. The *Teamsters* Method of Proof is Not a Manageable or Constitutional Way to Try this Case.

The *Teamsters* method of proof is nothing more than "a pragmatic tool created by judges, who have the responsibility to manage their cases consistently with the Constitution and applicable statutes." ROA.8101. The EEOC has no right to use any particular method of proof, and whatever method is used must be fair, manageable, and constitutional.

The EEOC's Complaint seeks compensatory and punitive damages and a jury trial on behalf of every unsuccessful Black and Hispanic applicant to any Bass Pro store since at least 2005. During this time, Bass Pro managers across the country made over 60,000 hiring decisions involving more than 1,000,000 applicants. ROA.2335. The EEOC admits there may be 50,000 (or more) unsuccessful applicants eligible to participate as claimants in Stage II of a *Teamsters* trial. ROA.10648. The EEOC does not assert that all potential claimants are victims of discrimination. To the contrary, based on undisclosed statistical analyses,[1] it alleges a "shortfall" of 4,000 Black or Hispanic hires. ROA.7128. By the EEOC's own estimates, therefore, 46,000 (92%) of the potential claimants could not have been victims of

[1] The EEOC has refused to disclose the data and methodology used in its analyses. ROA.6122-406. The EEOC's "analyses" cannot be accepted at face value. *See, e.g., EEOC v. Kaplan Higher Educ. Corp.,* 748 F.3d 749, 753 (6th Cir. 2014) (affirming exclusion of EEOC's expert testimony based on "a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself"); *EEOC v. Freeman*, 778 F.3d 463, 467 (4th Cir. 2015) (excluding EEOC's expert testimony where the "sheer number of mistakes and omissions in [his] analysis renders it outside the range where experts might reasonably differ"); *id.* at 468, 470 (Agee, J., concurring) (writing separately to express "concern with the EEOC's disappointing litigation conduct" including knowing reliance on expert who "fully intended to skew the results").

discrimination even if the EEOC's allegations were true. *See* Appellants' Br. 3-4.

Whatever proof method is applied, Supreme Court precedent requires at least the following: (1) the "actual victims of discrimination" be identified, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 327 (1977); (2) the defendant have "individualized determinations of each [claimant's] eligibility for backpay," *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2560-61 (2011);[2] and (3) the defendant have an opportunity to present its defenses as to liability and damages "at a meaningful time and in a meaningful manner," *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citation and internal quotation omitted). Neither the EEOC nor the district court has succeeded in formulating a plan that meets these criteria.

A. Neither the EEOC nor the district court has been able to devise a viable trial plan.

The EEOC claims that "[t]he district court is currently working with the parties to develop a case management plan." Appellee's Br. 13. That is wrong. The district court twice ordered the EEOC to submit a

[2] Title VII defendants are also entitled to individualized determinations of compensatory and punitive damages. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402 (5th Cir. 1998).

viable case management order prior to commencing discovery. ROA.10062; ROA.10450. In May 2013, it ordered the EEOC to propose a plan within 60 days. ROA.10062. The district court rejected the EEOC's suggestion that discovery begin without a plan, agreeing Bass Pro is entitled to first know how the case can be fairly adjudicated. ROA.10039-40, 10043-45. It later clarified that any plan must comply with manageability principles and the Seventh Amendment. ROA.9374-75, 9403. The EEOC did not submit a proposed plan.

On March 26, 2015, the district court again ordered the EEOC to submit a plan. In response, the EEOC proposed a bifurcated case management order containing unlawful Stage I procedures (including class-wide adjudication of backpay and punitive damages). ROA.10649-50; CM/ECF, Doc. 214 at 17-19. Moreover, the plan did not even attempt to explain how Stage II, where Bass Pro would first learn the identities of claimants and be allowed to present its defenses to individual claims, could be managed. ROA.10689. Rather, the EEOC advocated postponing manageability considerations until after Stage I, *id.*, by which time it believes Bass Pro is "virtual[ly] certain" to have succumbed to settlement pressures created by this procedure.

ROA.10308. Bass Pro objected to the EEOC's proposed plan on jurisdictional grounds and on the plan's many legal and constitutional defects. CM/ECF, Doc. 214.

At a July 21, 2015 hearing, the district court described this case as "probably the most procedurally difficult case I've ever handled in 16 years on the bench." CM/ECF, Doc. 226 at 4. Following extensive argument, the district court declined to enter the EEOC's proposed plan – or any plan at all. Instead, it abandoned its prior rulings and ordered nationwide pattern or practice discovery begin without addressing the manageability or constitutional issues raised by Bass Pro. CM/ECF, Doc. 224. The district court stated that the order "shall remain in effect until the earliest of the expiration of 24 months, or the decision by the Court of Appeals in the pending interlocutory appeal." *Id.* at 2. Thus, contrary to the EEOC's representations, the district court is not "working with the parties" on a manageable plan, but has decided to proceed without one. Bass Pro is now faced with 24 months of enormously expensive discovery without any explanation of how this case can be fairly tried. These issues call for prompt resolution by this Court. *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 426 (5th Cir.

2004) (condemning district court's adoption of "a figure-it-out-as-we-go-along approach that *Castano* criticized and that other Fifth Circuit cases have not endorsed") (citing *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996)).[3]

B. EEOC suits are subject to manageability requirements and to *Allison*.

The EEOC does not dispute that *Allison* would preclude class certification in this case, and thus the use of *Teamsters*, were it brought by private parties. Appellants' Br. 42-44. Nor does the EEOC attempt to distinguish *Allison* on the merits. Rather, the EEOC tries to brush *Allison* aside because it was decided under Rule 23. Appellee's Br. 36. *See also* CM/ECF, Doc. 218 at 1-2. ("Bass Pro's position is premised on the erroneous notion that the Court must decide whether this case is manageable, as if the instant matter were subject to Rule 23.") But the same factors that led the *Allison* Court to conclude that *Teamsters* is not a manageable way of proving large Title VII cases (the availability of legal damages and jury trials in § 706 suits) are present here. 151 F.3d at 407, 409-10, 419-20.

[3] These issues are before this Court despite the district court's decision not to resolve them. Appellants' Br. 42 n.16.

As the district court recognized, EEOC lawsuits are not exempt from manageability requirements. ROA.9403. ("While this Court need not concern itself with superiority and the other strictures of Rule 23, the tension between ensuring manageability and respecting the Seventh Amendment is no less significant here."). Manageability is a key consideration of all Federal Rules of Civil Procedure, as the very first Rule makes clear:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts . . . . They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

Fed. R. Civ. P. 1; *cf. Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 334 n.16 (1980) ("We by no means suggest that the Federal Rules generally are inapplicable to the EEOC's § 706 actions"). Nothing in *General Telephone* empowers the EEOC to bring patently unmanageable claims requiring tens of thousands of individualized resolutions and demand that the defendant or court figure out how to try them if the case does not settle.

In *Wal-Mart*, the Supreme Court disallowed a private class action on behalf of 1.5 million women seeking only equitable relief (including

backpay) given the individualized inquiries involved. 131 S. Ct. 2541. "Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury . . . gives no cause to believe that all their claims can productively be litigated at once." *Id.* at 2551. Taken to its logical conclusion, however, the EEOC's position would mean the agency could bring that same lawsuit on behalf of those same 1.5 million women, but add the complicating factors of compensatory and punitive damages and a jury to the mix, and the defendant or court would somehow have to manage it.

C. Using *Teamsters* would violate due process.

1. Bass Pro has no meaningful opportunity to present its defenses to individual claims.

Neither the district court nor the EEOC answers the question how, if the EEOC succeeds in Stage I, discovery and adjudication of tens of thousands of individualized liability and damages claims could occur at all, let alone at a meaningful time and in a meaningful manner. They would save such concerns until later. The EEOC suggests that "an appropriate case management plan would ensure Bass Pro's ability to challenge the validity of each claim for relief." Appellee's Br. 38. But the EEOC has had years to devise such a plan and has failed to do so.

ROA.10689. If the EEOC had a feasible plan, it would have presented it by now.

Nor did the district court or EEOC answer how the case could be managed using *Teamsters* even if it were limited to equitable relief. Bass Pro does not dispute the availability of backpay using a *Teamsters* approach under § 707 if the defendant is afforded a meaningful opportunity to have "individualized determinations of each employee's eligibility for backpay." *Wal-Mart*, 131 S. Ct. at 2560-61. *Teamsters* was such a case. 431 U.S. at 327 (directing district court on remand "to identify which of the [300+] minority members were actual victims of discrimination").[4] But the EEOC has not shown how the enormous number of discovery and trial proceedings required in this case, involving witnesses and claimants spread across the country, could occur even using special masters. Indeed, in one of the few pre-CRA 1991 Title VII cases in which Stage II trials occurred, the court lamented the 23 years the case had been pending, 10 years of which had

[4] The Supreme Court recognized that even this presented a formidable task. *Teamsters*, 431 U.S. at 371-72 ("The task remaining for the District Court on remand will not be a simple one. Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices.").

been devoted to Stage II proceedings to resolve backpay for 173 claimants, only 64 of whom were actually tried before a special master. *Berger v. Iron Workers Reinforced Rodmen, Local 201*, 170 F.3d 1111, 1124 (D.C. Cir. 1999).

The EEOC's proposal that a formula be used to determine class-wide backpay in Stage I is foreclosed by *Wal-Mart*, 131 S. Ct. at 2560-61. ROA.10678. The EEOC made a similar suggestion to the *Cintas* district court, stating that backpay could be calculated based on the number of alleged statistical shortfalls (125) and distributed *pro rata* to all 5,000-6,000 female rejected applicants. *EEOC v. Cintas Corp.,* No. 2:04-cv-40132-SFC-RSW, EEOC Submission of Class Member List, Doc. 1131 at 1-2 (E.D. Mich. Apr. 20, 2015). In this way, it argued, "it should not be necessary to conduct individual proceedings to assess full backpay for each individual." *Id.* at 2. The district court did not adopt this "'trial by formula'" approach. *EEOC v. Cintas Corp.*, No. 2:04-cv-40132-SFC-RSW, Order, Doc. 1142 at 5 n.2. (E.D. Mich. Aug. 20, 2015). Nor could it. *See Davis v. Cintas Corp.,* 717 F.3d 476, 490-91 (6th Cir. 2013) (describing "'shortfall-based model'" as "worse than the [trial-by-formula] system that the Supreme Court unanimously rejected in

Dukes"). The Sixth Circuit's opinion allowing the EEOC to use *Teamsters* in a § 706 action seeking compensatory and punitive damages has put the *Cintas* district court and parties in the untenable position of having to manage anywhere from approximately 800 (the number of currently identified claimants) to 6,000 (the potential number of claimants) liability and damages jury trials should the EEOC succeed in Stage I.

The EEOC's suggestion that reversing the Order would somehow leave "grand scale" discrimination beyond Title VII's reach is incorrect. Appellee's Br. 35. Section 707 exists precisely to address such cases. Moreover, the statute's fee-shifting provision and high damages cap ensure these are not negative-value suits, and actual discrimination victims can (and do) sue individually. *Allison*, 151 F.3d at 415.

2. Shifting the burden of proof to Bass Pro would be arbitrary and unfair.

The EEOC has not contested that if its allegations are true and its estimates are accurate, 46,000 of the 50,000 potential claimants (92%) were not denied a job based on their race or national origin and would not be entitled to Title VII relief. As the EEOC itself pointed out,

Teamsters is a tool designed to satisfy the requirement that "any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." Appellee's Br. 22. Evidence that 92% of unsuccessful Black or Hispanic applicants were not actual victims of discrimination is not "adequate to create an inference" of discrimination in each case. Shifting the burden to Bass Pro to disprove discrimination in these circumstances would be arbitrary, unfair, and a deprivation of due process. *W. & Atl. R.R. v. Henderson*, 279 U.S. 639, 641-44 (1929).

3. Applying *Teamsters* here creates settlement pressures amounting to judicial blackmail.

In defense of the *Teamsters* approach, the EEOC cites the public policy favoring settlements. Appellee's Br. 36-37. The agency believes it is "virtual[ly] certain" that a Stage I finding of pattern or practice liability would force Bass Pro to settle before Stage II. ROA.10308. But Stage II is where, according to the EEOC, Bass Pro would first learn the identities of claimants for whom the EEOC seeks relief. And under *Teamsters*, Stage II is where Bass Pro would have the

opportunity to present its defenses to liability and damages. In other words, the EEOC argues for a procedure it believes would force Bass Pro to settle before it knows the names of individuals for whom the EEOC seeks monetary relief, much less has an opportunity to present its defenses. Such settlement pressure resulting from the procedural framework rather than the merits of the case is fundamentally unfair and amounts to "judicial blackmail." *Castano*, 84 F.3d at 746. *See also AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting risk of "in terrorem settlements" "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once"; "[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims").

Moreover, compensatory damages may not be presumed and "may be awarded only if the plaintiff submits proof of actual injury." *Allison*, 151 F.3d at 417. "[T]hey are an individual, not class-wide, remedy." *Id.* Similarly, punitive damages require "proof of how discrimination was inflicted on each plaintiff." *Id.* at 417-18. Backpay is also individualized, as the EEOC admits. ROA.10295-96. ("[T]he question of what . . . wages . . . those class members are entitled to is entirely

individualized no less so than compensatory damages.") A procedure that would force Bass Pro to settle before even learning who the claimants are cannot possibly yield a resolution "reflect[ing] the relative merits of the parties' claims." Appellee's Br. 37 (quoting *Allison*, 151 F.3d at 422 n.17).

D. Using *Teamsters* would violate the Seventh Amendment.

The EEOC does not contest that the Seventh Amendment prohibits a trial structure where a Stage I jury determines pattern or practice liability and different Stage II juries determine punitive damages. Appellee's Br. 40-41. *See also* ROA.2216-17 (noting "potentially inconsistent results"). However, *Allison* unambiguously held that "[p]unitive damages cannot be assessed merely upon a finding that the defendant engaged in a pattern or practice of discrimination." 151 F.3d at 417-18. Rather, they must be assessed in connection with the liability and compensatory damage determinations in Stage II. *Id.* Accordingly, the only way to avoid a Seventh Amendment violation is to have one jury hear all stages. *See Smith v. Texaco, Inc.*, 263 F.3d 394,

415 (5th Cir. 2001), *withdrawn due to settlement*, 281 F.3d 477 (5th Cir. 2002). That is not feasible in this case.

The EEOC's argument that *Allison*'s language is *dicta* is frivolous. Appellee's Br. 41. *Allison's* holding regarding the individualized nature of compensatory and punitive damages was central to its decision. 151 F.3d at 410. *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004).

Nor was *Allison*'s holding disturbed by *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154 (5th Cir. 2008). The *Abner* panel could not have overturned *Allison* even if it wanted to, *United States v. Ruff*, 984 F.2d 635, 640 (5th Cir. 1993), and *Abner* did not purport to do any such thing. *Abner* was an unbifurcated case where one jury considered liability and damages. The Court upheld a jury award of punitive damages despite the jury's decision not to award compensatory damages. *Abner*, 513 F.3d at 156, 160. It did not hold or suggest that punitive damages could be awarded without knowing the facts surrounding the alleged discrimination or divorced from the liability and compensatory-damages inquiries. To the contrary, questions of liability, compensatory damages, and punitive damages are inextricably

intertwined in employment-discrimination actions. *Hardin v. Caterpillar, Inc.*, 227 F.3d 268, 272 (5th Cir. 2000).

The EEOC *concedes* that "[t]here may be some factual overlap between the issues tried" in Stage I and Stage II but dismisses the Seventh Amendment implications of this fact because overlap would not "necessarily" occur in every individual's case. Appellee's Br. 40. The EEOC has the standard backwards – even the *risk* of overlap is impermissible, and the absence of overlap in some areas does not excuse the overlap in others. It is not enough to follow the Constitution only some of the time. *See David v. Signal Int'l, LLC*, No. 08-1220, 2012 WL 10759668, at *35 (E.D. La. Jan. 4, 2012) (denying class certification where "at the very least the claim for punitive damages would carry the risk of Seventh Amendment problems in a bifurcated scenario"); *Roussell v. Brinker Int'l, Inc.*, No. H-05-3733, 2008 WL 7835721, at *2 (S.D. Tex. Sept. 30, 2008) (Ellison, J) (decertifying collective action with "some risk" of Seventh Amendment violation), *aff'd*, 441 F. App'x 222 (5th Cir. 2011).

II. The EEOC Misinterprets Title VII.

The EEOC's argument that "[n]othing in the plain language of § 706 limits the ability of the Commission to use the *Teamsters* method of proof" misses the point. Appellee's Br. 17. Title VII nowhere addresses methods of proof, which are judicially created procedural tools. But the *effect* of allowing the EEOC to use *Teamsters* to prove a pattern or practice claim for compensatory and punitive damages is to create a non-existent cause of action, flout Congress's allocation of remedies, and render § 707 superfluous. Moreover, the EEOC overstates the precedential landscape in arguing that "every court of appeals to address the issue has recognized that the Commission may use the *Teamsters* proof framework when it brings suit under § 706." Appellee's Br. 18. As the EEOC conceded below, only the Sixth Circuit has ruled on this issue. ROA.8099.[5] The Sixth Circuit's reasoning in *Cintas* is badly flawed and inconsistent with the statute. Appellants' Br. 36-40.

[5] The other appellate decisions upon which the EEOC relies either did not address the EEOC's method of proof at all, *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894 (7th Cir. 1999), or were pre-CRA 1991 decisions involving bifurcated bench trials that did not raise the many issues involved in this appeal. *EEOC v. Olson's Dairy Queens, Inc.*, 989 F.2d 165 (5th Cir. 1993); *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981); *EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980).

A. The EEOC may not bring its pattern or practice cause of action under § 706.

The EEOC admits that it is attempting to assert a single pattern or practice cause of action under § 706 and § 707 simultaneously. Appellee's Br. 5; Appellants' Br. 21-22. It also admits that § 707 creates a substantive pattern or practice cause of action, whereas § 706 does not. *See* ROA.9912 ("Under 707 [pattern or practice] is a claim and a proof model. Under Section 706 it's a proof model"); ROA.2962 n.19. ("The EEOC submits that 'claim' and 'cause of action' are synonymous for present purposes"); Appellee's Br. 15 ("there is no free-standing pattern or practice 'cause of action' under § 706").

The EEOC argues that "a pattern or practice of discrimination is a violation of § 703, and § 706 simply provides the vehicle by which the Commission may enforce Title VII's substantive prohibitions" and that "the premise that the phrase 'pattern or practice' necessarily refers to a cause of action grounded only in § 707 . . . is a faulty one." Appellee's Br. 12. To the extent the EEOC is trying to argue that § 703 includes a stand-alone pattern or practice cause of action enforceable under § 706, it is wrong for many reasons. *First*, § 707 explicitly creates a "pattern

or practice" cause of action, and it is the only provision in Title VII that does so. *Second*, the plain language of § 703(a)(1) bars discrimination against "any individual" and does not include a pattern or practice cause of action. *Third*, as demonstrated by § 707, when Congress wanted to create such a cause of action, it knew how to do so explicitly. *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."); *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 62-63 (2006) ("Congress intended its different words to make a legal difference"). *Fourth*, Bass Pro is not aware of a single case recognizing a § 703 pattern or practice cause of action. *Fifth*, *Celestine* said no such cause of action exists. *Celestine v. Petroleos de Venezuella SA,* 266 F.3d 343, 355-56 (5th Cir. 2001). Thus, there is no basis to argue that § 703 includes a pattern or practice cause of action that may be enforced under § 706.

In denying there is any dichotomy between individual and pattern or practice suits under § 706 and § 707, the EEOC ignores *Shell Oil*,

which the Supreme Court decided after *General Telephone*. *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (recognizing Commissioner Charges alleging a pattern or practice of discrimination are issued pursuant to § 707 while Commissioner Charges issued pursuant to § 706 are on behalf of specific victims). And the EEOC's attempts to distinguish *Allegheny-Ludlum* because it addressed intervention rights and not methods of proof are unavailing. Appellee's Br. 30. The reason *Allegheny-Ludlum* held there is no intervention right under § 707, unlike § 706, is precisely because of this dichotomy. *See United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843 (5th Cir. 1975); Appellants' Br. 22-24.

Regarding intervention, the EEOC fails to address why, if its pattern or practice action is properly brought under § 706, there is no aggrieved individual with a right to intervene. ROA.1153 ¶ 6; ROA.10202, 10253; ROA.10676 ¶ 6. Under § 706(f)(1), "[t]he person or persons aggrieved shall have the right to intervene" in the EEOC's lawsuit. The EEOC ignores this argument, which compels the conclusion that the EEOC has not brought a § 706 action at all. Appellants' Br. 23-24.

The EEOC downplays the significance of the Attorney General's description of the "dichotomy between individual and pattern or practice enforcement" under the statute because it comes from a "thirty-eight-year-old legal brief." Appellant Br. 6; Appellee's Br. 30. Yet the Department of Justice continues to interpret the Attorney General's enforcement powers the same. *See* http://www.justice.gov/crt/overview-employment-litigation (last visited Sept. 12, 2015) (explaining Attorney General "initiates Title VII litigation in two ways": suits alleging a "pattern or practice of discrimination" under "Section 707 of Title VII" and suits "based upon an individual charge of discrimination" under "Section 706 of Title VII").

B. The EEOC is not entitled to legal damages or a jury trial for its pattern or practice claim.

The EEOC does not explain why, if Congress intended the agency to recover compensatory and punitive damages for pattern or practice claims, it would not have written § 1981a(a)(1) as follows: "In an action brought by a complaining party under section 706**, 707** or 717 of the Civil Rights Act of 1964 . . . the complaining party may recover

compensatory and punitive damages . . . .” Congress’s deliberate omission of the bold language cannot be ignored.

The EEOC does not even attempt to defend the district court’s conclusion that Congress *did* intend the EEOC to be entitled to compensatory and punitive damages for pattern or practice claims, *see* Appellants’ Br. 34-36, but simply ignores this key point. Congress’s intent is plain from the statutory language.

The EEOC’s argument rests almost entirely on the re-enactment (or acquiescence) doctrine. It reasons that because the EEOC used *Teamsters* in § 706 cases before CRA 1991, and because Congress was presumably aware of those cases but did not legislatively overrule them, Congress must have intended that the EEOC continue to use *Teamsters* in § 706 cases and recover compensatory and punitive damages for pattern or practice suits. Appellee’s Br. 22-27. This argument does not withstand scrutiny.

First, it does not explain Congress’s exclusion of § 707 from the 1991 Amendments. 42 U.S.C. § 1981a(a)(1). The omission of § 707 – the provision empowering the EEOC to bring pattern or practice suits – speaks far more loudly to Congressional intent than Congress’s failure

to address cases regarding methods of proof in amendments having nothing to do with methods of proof. *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) ("[I]t would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope.").

Second, the EEOC badly misstates *General Telephone*'s holding. The defendant there did not, as the EEOC states, "challenge[] the Commission's ability to use the *Teamsters* proof method under § 706." Appellee's Br. 17. And the Supreme Court did not "reject[] the defendant's argument that the Commission needed Rule 23 certification *to proceed under the Teamsters framework*." *Id.* (emphasis added). The method of proof, while alluded to in *dicta*, was not challenged. *Gen. Tel.,* 446 U.S. 318.[6] There is nothing in the legislative history to suggest, and it is not reasonable to believe, that Congress was aware of

[6] The EEOC's reliance on *Waffle House* is even more tenuous. *See EEOC v. Waffle House*, 534 U.S. 279, 297 (2002) ("The only issue before this Court is whether the fact that Baker has signed a mandatory arbitration agreement limits the remedies available to the EEOC.").

the district court's use of *Teamsters* on remand and meant to silently signal its approval in CRA 1991.[7]

Third, even if there were evidence that Congress considered methods of proof when enacting CRA 1991, the Supreme Court's "observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent." *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). "It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the [courts'] statutory interpretation." *Id.* (citations and internal quotations omitted). *See also Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle").

Fourth, Congress was certainly aware that private plaintiffs brought Title VII class actions when it enacted CRA 1991, and *Allison*

[7] That *Teamsters* derived from *Franks*, a private class action case decided before CRA 1991, is irrelevant. *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976). Indeed, if Congress was really aware of and thought about proof methods when enacting CRA 1991, it would have understood that *Scarlett,* decided after *General Telephone*, recognized that *Teamsters* was appropriate in "a 'pattern and practice' suit by the government under section 707" or in "a private class action". *Scarlett v. Seaboard Coast Line R.R. Co.*, 676 F.2d 1043, 1053 (5th Cir. Unit B 1982).

nonetheless held that CRA 1991 rendered class certification and the *Teamsters* method of proof inappropriate. 151 F.3d at 409-10.

C. The district court's Order renders § 707 functionally superfluous.

The EEOC argues that it is not required to follow § 706(b)'s administrative prerequisites before filing suit under § 707 and that this distinction saves § 707 from becoming superfluous. This argument ignores the statutory text. *See* § 707(c), (e); Appellants' Br. 30.

The EEOC also ignores both its and the Attorney General's prior judicial admissions that the EEOC, unlike the Attorney General, must satisfy § 706(b) procedures prior to filing § 707 actions. *See* Appellants' Br. 31-32. *See also*, Br. for Petitioner, *EEOC v. Assoc. Dry Goods Corp.*, No. 79-1068, 1980 WL 339324, at *4-5 (U.S. June 11, 1980). ("[T]he filing of a complaint with the Commission *is a condition precedent* to securing relief under Title VII. Sections 706 *and 707* of Title VII, 42 U.S.C. 2000e-5, 2000e-6") (emphases added). *Cf. Young v. UPS, Inc.,* 135 S. Ct. 1338, 1352 (2015) (rejecting EEOC view "inconsistent with positions for which the Government has long advocated"). Nor does the agency explain why, if its § 707 authority is not constrained by § 706(b)

prerequisites, it only discovered these expanded powers four decades after supposedly obtaining them. *See* Appellants' Br. 32-33.

The EEOC inaccurately states that the law is "well-settled" in its favor and that Bass Pro failed to "cit[e] to any decision" to the contrary. Appellee's Br. 31. In fact, Bass Pro cited three illustrative decisions. *See* Appellants' Br. 32 n.12. Many more support Bass Pro's position.[8]

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[8] *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (noting in a case involving a § 707 Commissioner's charge that Title VII's "integrated, multistep enforcement" process "begins with the filing of a charge with the EEOC"); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093 (D. Haw. 2012) ("EEOC's ability to act under § 707 is necessarily dependent upon the existence of a properly filed charge of discrimination."); *EEOC v. Bloomberg, LP*, 751 F. Supp. 2d 628, 644 (S.D.N.Y. 2010) (Section 706's procedural requirements "are incorporated by reference into the EEOC's authority to bring 'pattern or practice' claims under Section 707"); *United States v. City of Yonkers*, 592 F. Supp. 570, 583 (S.D.N.Y. 1984) ("The President seems unlikely to have intended to shackle the Attorney General [under § 707] with the administrative machinery to which the Commission is subject."); *EEOC v. Sears, Roebuck and Co.*, 490 F. Supp. 1245, 1250 n.9 (M.D. Ala. 1980) ("According to at least one treatise, [Section 707(e)] '(c)learly envisions that prior to a pattern or practice suit there must be an individual or commissioner's charge and that all of the § 706 (2000e-5) prerequisites to suit must be complied with.'"); *United States v. New Jersey*, 473 F. Supp. 1199, 1205 (D.N.J. 1979) (only EEOC, not Attorney General, is bound by § 706's procedures in § 707 cases); *United States v. New York*, No. 77-CV-343, 1977 WL 15467, at *6-7 (N.D.N.Y. Nov. 18, 1977) ("Congress has now seen fit to provide that the EEOC afford all respondents a chance at voluntary compliance or conciliation before court action is taken pursuant to § 2000e-5 and/or § 2000e-6 of Title VII."); *EEOC v. United Airlines*, No. 73-C-972, 1975 WL 194, at *2 (N.D. Ill. June 26, 1975) (The EEOC'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)"); Lindemann, Grossman, and Weirich, EMPLOYMENT DISCRIMINATION LAW 30-21 (5th ed. 2012) ("Section 707(e) thus provides that there must be an individual or commissioner charge and compliance with all of the § 706 prerequisites to suit before EEOC may file a pattern-or-practice suit.").

The EEOC also misquotes cases that supposedly support its position. For example, it refers to the following language in *Cintas* without including the italicized language or noting the omission: "§ 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.*" Appellee's Br. 31 (citing *Serrano v. Cintas*, 699 F.3d 884, 896 (6th Cir. 2012)). *Cintas* did not say that no charge is required before the EEOC can file a § 707 suit; it said the charge did not have to be filed by an aggrieved individual. 699 F.3d at 896. The EEOC also relies upon *Allegheny-Ludlum* without noting that opinion's explicit refusal to decide this issue. Appellee's Br. 31-32; Appellants' Br. 30-31.[9]

Finally, the EEOC's argument that § 707's "resistance" language expands its substantive reach to individual defendants is incorrect and another novel interpretation of its powers. Appellee's Br. 33. The EEOC points to no case where it (as opposed to the Attorney General) has ever sued an individual, nor would such a suit be authorized given

[9] In *EEOC v. Doherty Enters., Inc.,* No. 14-81184-CIV-MARRA, 2015 WL 5118067, at *3-4 (S.D. Fla. Sept. 1, 2015), the district court believed it was bound by *Allegheny-Ludlum* without citing the language where the Court expressly declined to resolve this issue. *See* 517 F.2d at 869. The remaining authorities cited by the EEOC were *dicta*. Appellee's Br. 31-32 (citing cases).

that its (and not the Attorney General's) lawsuits must be predicated upon a valid charge, which may only be filed against employers (and other identified entities) for substantive violations of the statute. § 706(b).

D. The EEOC did not satisfy the administrative prerequisites for its § 706 claim.

1. The EEOC misstates the record.

Remarkably, the EEOC states that it "identified, during the investigation, approximately 100 specific individuals who allegedly were victims of the discrimination" and that "[t]he record is clear" on this point. Appellee's Br. 49 & n.8. To the contrary, EEOC counsel admitted to the district court that the agency did not investigate specific people. *See* ROA.10135-52. And the only declaration the EEOC submitted opposing Bass Pro's renewed summary judgment motion did not say the EEOC identified or investigated any individual prior to suit. ROA.9018-19.[10] The district court concluded the EEOC's allegation that it identified 100 victims "directly contradicts prior statements by

[10] The only "evidence" the EEOC cites is a declaration from a Bass Pro attorney, who stated Deputy District Director Ebel *told her* the EEOC had identified 100 people. Appellee's Br. 5 (citing ROA.6092, 6099). Mr. Ebel's failure to include this statement in his declaration is telling. ROA.9018-19.

another EEOC lawyer at an earlier hearing" and that the EEOC's declaration was consistent with those earlier representations. ROA.9706-07. The EEOC's unsupported statements to the contrary here do not create an issue of fact.

2. The EEOC's lawsuit is limited to the substantive scope of the claim it investigated, found cause to be true, and conciliated.

The EEOC erroneously claims the issue presented "is whether courts should examine the sufficiency of [its] investigations" and cites a recent Second Circuit opinion for the proposition they should not. *See* Letter from EEOC to Clerk of 09/01/15 at 1 (citing *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782, 2015 WL 5233636, at *3 (2d. Cir. Sept. 9, 2015). But Bass Pro has not challenged the "sufficiency" of either investigation or conciliation in this appeal. Rather, Bass Pro challenges the EEOC's failure to conduct *any* § 706 investigation, issue *any* § 706 determination, or engage in *any* § 706 conciliation.[11] *Sterling* specifically held that "courts may review *whether* the EEOC conducted

[11] The EEOC argues that if this Court affirms the Order on the *Teamsters* Question, then the Prerequisites Question becomes moot. Appellee's Br. 42. Although related, the questions do not rise or fall together. Even if this Court held *Teamsters* were a permissible proof method, it could nonetheless hold that the EEOC did not conduct *any* investigation of a § 706 claim.

an investigation." *Id.* at *1. To do this, "[i]t is especially important for the court and the parties to understand the contours of an EEOC investigation" because "the EEOC investigation must be pertinent to the allegations that it ultimately includes in the complaint." *Id.* at *5 n.2. Even the EEOC admits that courts must ensure compliance with "claim-specific" prerequisites to suit. *See Mach Mining, LLC v. EEOC*, No. 13-1019, Br. for Respondent at 53 n.23, 2014 WL 5464087 (U.S. Oct. 27, 2014). Yet, here it argues that an investigation that did not identify a single individual as a victim of discrimination is pertinent and claim-specific to a lawsuit seeking damages on behalf of thousands of individuals.

The EEOC's position that a statistical pattern or practice investigation in which no specific victim is identified constitutes an investigation of a § 706 claim writes the aggrieved individual requirement out of the statute and confirms that the EEOC is treating § 706 and § 707 the same for both satisfaction of administrative prerequisites and judicial enforcement. Indeed, the EEOC has not cited

a case, like this one, where it was allowed to bring a § 706 case *without a single aggrieved individual*.[12]

The EEOC admits that "the whole point of the investigation" is to determine whether reasonable cause exists and "to notify the employer of the EEOC's findings and to provide a basis for later conciliation." Appellee's Br. 47 (citing cases). If the EEOC need not investigate who was harmed or how when seeking individualized remedies (as opposed to changes to broad policies and practices), it cannot later "give the employer an opportunity to remedy the allegedly discriminatory practice" through reinstatement or appropriate compensation. *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1656 (2015). *See also Marshall v. Sun Oil Co. (Del.)*, 605 F.2d 1331, 1335 (5th Cir. 1979) ("The [government] must of course investigate the allegations of terminated employees; otherwise conciliation would not be meaningful").

For this reason, the Eighth Circuit affirmed dismissal of claims on behalf of those individuals the EEOC did not identify until after filing

[12] The EEOC's claim that "*General Telephone* . . . indicates no individualized-investigation requirement exists" again overstates that decision's reach. Appellee's Br. 53. *General Telephone* neither addressed administrative prerequisites nor involved compensatory and punitive damages claims. 446 U.S. 318.

its § 706 "class" suit. *See EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 672-77 (8th Cir. 2012).[13] Notably, the Second Circuit implicitly endorsed *CRST* (and Bass Pro's position here) by distinguishing it as a case where "the EEOC did not investigate the specific allegations of *any* of the 67 allegedly aggrieved persons . . . until *after* the Complaint was filed." *Sterling,* 2015 WL 5233636, at *5 (citation and internal quotation omitted). Thus, *Sterling* concluded: "[*CRST*] determined that the EEOC failed to take any steps to investigate. That is plainly not the case here." *Id.*

Courts routinely enforce Title VII's claim-specific conditions precedent to suit through dismissal when they are not met. Appellants' Br. 63-65. Neither *Sterling* nor *Mach Mining* disturbs this precedent.

III. The EEOC's anecdotal allegations are unproven and irrelevant to this appeal.

The EEOC attempts to inflame this Court with unnecessary details of its allegations, including egregious and offensive remarks allegedly made by five of the more than 60,000 employees Bass Pro

[13] Although *CRST* expressed "no view" as to whether the investigation would "would be sufficient to support a pattern-or-practice lawsuit," it was referring to a pattern-or-practice lawsuit alleging "a violation of Section 707 of Title VII" 679 F.3d at 676 n.13.

hired during the relevant time period. This is not the forum to adjudicate the merits of these disputed allegations. ROA.7843, 7845, 7847-48; ROA.8195, 8197, 8200-01. However, Bass Pro is compelled to point out the EEOC's omission of facts that are inconsistent with its false allegation of a company-wide policy to discriminate: When Bass Pro learned of such incidents, it investigated and, if warranted, took prompt remedial action, including terminating one of the referenced employees long before the EEOC filed its Commissioner's Charge. ROA.7844; ROA.8195-97. This Court should not take the EEOC's allegations at face value, as parties in other cases have explained. *See, e.g., EEOC v. Pioneer Hotel, Inc.,* No. 2:11-cv-01588-LRH, Mot. to Dismiss, Doc. 162 at 3, 11-15 (D. Nev. Mar. 27, 2015), (documenting instances where witnesses refuted testimony the EEOC attributed to them in sworn interrogatory responses, including denying being called a "stupid Mexican" or hearing someone say "Mexicans piss and shit everywhere"). *See also* ROA.9042-44, 9048-54.

CONCLUSION

The district court's Order should be reversed and the § 706 claim dismissed.

Respectfully submitted this 14th day of September, 2015.

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that on September 14, 2015, the foregoing brief was served, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon the following registered CM/ECF users:

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