No. 13-2365

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

FREEMAN,

Defendant-Appellee.

On Appeal from the United States District Court
For the District of Maryland
Roger W. Titus, District Judge
No. 8:09-cv-02573

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND RETAIL LITIGATION CENTER IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*
National Federation of
Independent Business
Small Business Legal Center

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 600-2067

Attorney for *Amicus Curiae*
Retail Litigation Center, Inc.

April 9, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-2365 Caption: Equal Employment Opportunity Commission v. Freeman

Pursuant to FRAP 26.1 and Local Rule 26.1,

Equal Employment Advisory Council (EEAC); NFIB Small Business Legal Center (NFIB); and
(name of party/amicus)

Retail Litigation Center, Inc. (RLC)

who is amici, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/Rae T. Vann Date: April 9, 2014

Counsel for: EEAC, NFIB, RLC amici curiae

CERTIFICATE OF SERVICE

****

I certify that on April 9, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/Rae T. Vann (signature) April 9, 2014 (date)

Print Save Reset Form

RULE 29(c)(5) STATEMENT

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

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

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

Respectfully submitted,

s/ Rae T. Vann

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent Business
Small Business Legal Center

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 600-2067

Attorney for *Amicus Curiae*
Retail Litigation Center, Inc.

April 9, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

OTHER AUTHORITIES

The Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center, and Retail Litigation Center respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges the Court to affirm the district court's ruling below and thus supports the position of the Defendant-Appellee, Freeman.

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 nearly 300 major U.S. corporations. 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, as well as 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 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 350,000 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.

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings which affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Amici's members are employers or representatives of employers 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. As

potential defendants to claims of workplace pattern-or-practice or disparate impact discrimination, *amici* have a direct and ongoing interest in the issues presented in this appeal. The district court ruled correctly that the EEOC could not maintain its disparate impact action, which was predicated on the employer's consideration of criminal and credit history in selection decisions, without proffering reliable statistical evidence of adverse impact on qualified protected group members. This issue is of great importance to the many private sector employers that routinely conduct background checks, including those that consider an applicant's criminal conviction history, as part of their employment selection processes.

Because of their interest in the application of the nation's equal employment laws, *amici* have filed numerous briefs as *amicus curiae* in cases before the U.S. Supreme Court, this Court, and others involving the proper construction and interpretation of Title VII and other federal laws. Thus, they have an interest in, and a familiarity with, the issues and policy concerns involved in this case. *Amici* seek to assist the Court by highlighting the impact its decision may have beyond the immediate concerns of the parties to the case.

Accordingly, this brief brings to the attention of the Court relevant matter that has not already been brought to its attention by 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 significance of this case to employers.

STATEMENT OF THE CASE

Freeman has conducted criminal background and/or credit history investigations as part of its hiring process for certain jobs since 2001. JA 1049. For "general" employees whose jobs did not involve handling client credit card or other financial information, the company conducted only a criminal background check, usually at the post-offer, pre-employment stage of the selection process. *Id.* Criminal history would be evaluated using a multi-step process designed to determine whether a conviction rendered the applicant unsuitable for employment. JA 1051. Individuals who failed to disclose or misrepresented the nature of prior criminal history were automatically disqualified from continued consideration. *Id.*

For credit-sensitive jobs in which employees had access to sensitive client and financial information, Freeman also would conduct a credit check, applying a list of criteria to determine whether or not the applicant should be excluded, including for instance the number of active, delinquent accounts and car repossessions or home foreclosures within the last three years. JA 1049-50. Credit checks were run for roughly forty percent of Freeman's positions. JA 1050.

In January 2008, Katrina Vaughn filed a discrimination charge with the EEOC claiming that she was not hired for a position with Freeman based on her

credit history — which the company had examined as part of the selection process. JA 1052. The EEOC investigated, and on September 30, 2009, filed suit in federal court accusing Freeman of having engaged in a pattern-or-practice of unlawful race discrimination in violation of Title VII. *Id.*

Specifically, the EEOC claimed that Freeman's use of credit history disproportionately excludes African-Americans from consideration and is not job-related and consistent with business necessity. JA 1052-53. Although not an issue raised by Vaughn in her underlying charge, the EEOC also accused the company of discriminating against African-Americans, Hispanics, and males in relying on criminal history in making selection decisions. *Id.* In support of its claim, the EEOC submitted statistical reports purporting to establish disparate impact against those groups, which Freeman challenged as grossly inaccurate and unreliable. The company accordingly moved to exclude the reports and for summary judgment. JA 460-66. It also urged the court to limit the scope of the EEOC's claims on statute of limitations grounds. JA 1053.

After concluding that the plain text of Title VII requires the EEOC to comply with the statute's charge-filing limitations period, the district court dismissed all of the EEOC's claims relating to conduct that occurred 300 days prior to the date on which Vaughn filed her charge. *Id.* The district court also

excluded the reports and granted Freeman's motion for summary judgment. JA 1059, JA 1063.

In doing so, the court pointed out that in order to prevail on a Title VII disparate impact claim, the EEOC must be able to point to the specific practice within the selection process that is the cause of adverse impact against a protected group; evidence that an overall selection process may have adverse impact and that criminal or credit history was used as part of that overall process is simply not enough. JA 1070-72. Furthermore, once meaningful statistics showing adverse impact are presented, the plaintiff still must "separate out and identify" the specific practice giving rise to the adverse impact, especially where employers "combine objective and subjective hiring criteria." JA 1048.

The trial court determined that the EEOC failed to establish a threshold case, noting among other things that the EEOC's expert reports failed to isolate the particular aspect of Freeman's criminal and credit check process causing disparate impact, and that the data used were "rife with analytical errors." JA 1057. It further found that one of the EEOC's experts, Kevin Murphy, blatantly manipulated the data so as to produce the most EEOC-favorable result possible. JA 1063. The trial court concluded that Murphy's "cherry-picking" of data for purposes of establishing disparate impact rendered his analysis completely unreliable. *Id.*

Moreover, the "mind-boggling number of errors contained in Murphy's database could alone render his disparate impact conclusions worthless." JA 1064. Among other errors, individuals were missing from, and race and/or gender misidentified and miscounted in, Murphy's original report, and a supplemental report did not correct those mistakes. *Id.* This "continued pattern of producing a skewed database plagued by material fallacies" requires that Murphy's analysis be disregarded in its entirety, the trial court concluded. JA 1065-66. This appeal ensued.

SUMMARY OF ARGUMENT

The EEOC has claimed that Freeman's facially nondiscriminatory consideration of criminal and credit history in its hiring procedures constitutes a "pattern or practice" of unlawful disparate impact discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Inasmuch as a "pattern or practice" disparate impact discrimination cause of action is not cognizable under Title VII, the district court did not have jurisdiction to hear the agency's action. Accordingly, the action properly was dismissed.

Disparate treatment discrimination occurs under Title VII when an employer intentionally takes an adverse employment action against an applicant or employee "because of" that person's membership in a statutorily protected group. The "pattern or practice" theory of discrimination simply is "a particular vehicle" under

Title VII to bring an intentional, disparate treatment cause of action. *See EEOC v. Bloomberg LP*, 778 F. Supp. 2d 458, 468 (S.D.N.Y. 2011) ("A pattern or practice claim is a particular vehicle to bring a Title VII case," which focuses on "allegations of widespread acts of intentional discrimination against individuals"); *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977); *accord Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 762 (4th Cir. 1998), *vacated in part on other grounds*, 527 U.S. 1031 (1999).

In contrast, a disparate impact claim is established when an employer utilizes an employment test or other selection device that has a statistically significant adverse impact on a protected group as a whole, which cannot be justified by business necessity. The difference between intentional, "pattern or practice" disparate treatment discrimination and unintentional, disparate impact discrimination is manifest.

Among other things, pattern or practice claims are litigated under the burden-shifting framework established by the U.S. Supreme Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), whereas disparate impact claims are subject to a different, less onerous burden of proof scheme. 42 U.S.C. § 2000e-2(k)(1)(A). In particular, a defendant can avoid liability for disparate impact discrimination by demonstrating that its continued reliance on a procedure having adverse impact is job-related for the particular job in question

and justified by business necessity. Therefore, a plaintiff cannot argue that a particular adverse action is intentionally discriminatory under a pattern or practice theory *and* at the same time is nondiscriminatory on its face under a disparate impact theory. Indeed, such a claim is barred by the plain text of the statute. Dismissal of the EEOC's lawsuit therefore was warranted and appropriate.

Jurisdictional problems aside, the district court correctly held that the EEOC could not rely on deeply flawed and unrepresentative data – supplemented only by statistics showing that certain minority groups and men tend to be disproportionately represented in the criminal justice system generally – in attempting to establish a threshold case of disparate impact. It also properly rejected the EEOC's contention that Title VII's charge-filing limitations periods do not apply to EEOC pattern or practice discrimination claims at all, or alternatively, are subject to the "continuing violation" doctrine. In addition to conflicting with the plain text of the statute, such an argument also "is foreclosed by *National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101 … (2002), which holds that an employee must file a charge of discrimination within the appropriate limitations period as to each discrete act of discrimination that occurred." *Williams v. Giant Food, Inc.*, 370 F.3d 423, 429 (4th Cir. 2004). As this Court observed in *Williams v. Giant Food*, "Such discrete acts of discrimination 'are not actionable if

time-barred, even when they are related to acts alleged in timely filed charges.'" *Id.* (citation omitted).

As the district court below aptly observed, the EEOC's misguided attempts (which have been directed not only to Freeman, but also to the universe of employers subject to Title VII generally) to manufacture liability under Title VII based on the legitimate use of criminal and/or credit history in employment selection decisions "has placed many employers in the Hobson's choice of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers." *EEOC v. Freeman*, 961 F. Supp. 2d 783, 803 (D. Md. 2013). Such tactics threaten to undermine the legitimate efforts of many employers to avoid hiring decisions that could pose safety risks to employees or customers, or otherwise harm business operations.

ARGUMENT

I. THE EEOC'S PROFFERED LEGAL THEORIES OF PROOF, LIABILITY AND DAMAGES ARE CONTRARY TO, AND THUS FORECLOSED BY, THE PLAIN TEXT OF TITLE VII

A. The EEOC Improperly Conflated Disparate Impact And Disparate Treatment, Two Mutually Exclusive Theories Of Discrimination Under Title VII

The U.S. Equal Employment Opportunity Commission (EEOC) is authorized by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*., which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). In addition to proscribing intentional, disparate treatment discrimination, Title VII also prohibits "in some cases, practices *that are not intended to discriminate* but in fact have a dis-proportionately adverse effect on minorities (known as 'disparate impact')." *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (emphasis added); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

The Supreme Court thus has held repeatedly "that a prima facie *Title VII* violation may be established by policies or practices *that are neutral on their face and in intent* but that nonetheless discriminate in effect against a particular group." *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 349 (1977) (citations

omitted) (second emphasis added); *see also Ricci*, 557 U.S. at 577*; Lewis v. City of Chicago*, 560 U.S. 205, 208 (2010).

While the disparate treatment and disparate impact theories are both used to root out discriminatory employment practices, they are mutually exclusive concepts, subject to different standards of proof, defenses, and liability. *Compare* 42 U.S.C. § 2000e-2(k)(1) (burden of proof in disparate impact cases) *with* 42 U.S.C. § 2000e-2(k)(2) ("A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter"). Indeed, "[a]lthough it is clear that the same set of facts can support both theories of liability, it is important to treat each model separately because each has its own theoretical underpinnings." *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 297 (7th Cir. 1991) (citation omitted).

In this case, the EEOC has failed to "structure[] its argument to clearly fit within these principles, which gives the impression that it has a stronger case than it actually does." *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 308 (7th Cir. 1988).

B. Because Title VII Does Not Authorize A "Pattern-Or-Practice Of Disparate Impact Discrimination" Cause Of Action, The District Court Lacked Jurisdiction To Hear The EEOC's Claim

Section 707 of Title VII provides:

> Whenever the [EEOC] has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to

> the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature *and is intended to deny the full exercise of the rights herein described*, the [EEOC] may bring a civil action in the appropriate district court of the United States by filing with it a complaint … setting forth facts pertaining to such pattern or practice….

42 U.S.C. § 2000e-6(a) (emphasis added). On its face, Section 707 applies only to practices "*intended* to deny the full exercise" of Title VII rights, not to practices that are facially nondiscriminatory, but that in their application have a statistically significant adverse impact on protected group members. *Id.* (emphasis added). Inasmuch as the EEOC's entire theory of proof, liability, and damages rests on an incorrect notion that disparate impact claims can be challenged under Section 707, its case cannot survive.

The EEOC cites no legal authority in support of its contention that a facially nondiscriminatory practice, such as a credit or criminal history check policy, somehow can constitute a "pattern or practice" of unlawful discrimination under Section 707. To the contrary, and as this Court has observed, "a 'pattern or practice' claim is not a separate cause of action, but merely another method by which *disparate treatment* can be shown." *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742, 762 (4th Cir. 1998) (emphasis added) (quotations and citations omitted), *vacated in part on other grounds*, 527 U.S. 1031 (1999); *see also EEOC v. Bloomberg LP*, 778 F. Supp. 2d 458, 469 (S.D.N.Y. 2011) ("Pattern-or-practice

disparate treatment claims focus on allegations of widespread acts of intentional discrimination against individuals") (citations omitted).

Procedurally, a Section 707 pattern-or-practice case differs considerably from a class-based Section 706 claim. As a threshold matter, "the plaintiff in a pattern-or-practice action under Section 707 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." *Teamsters*, 431 U.S. at 360. 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 by the Supreme Court in *Teamsters*, under which the EEOC must establish in an initial "liability" phase the existence of an "objectively verifiable" policy or practice of intentional discrimination – as opposed to a collection of individual instances of – disparate treatment. 431 U.S. at 360*; see also EEOC v. Mitsubishi Motor Mfg. of Am., Inc.*, 990 F. Supp. 1059, 1070 (C.D. Ill. 1998).

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." *Teamsters*, 431 U.S. at 360. 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 relief, if any, should be granted to individual class members based on an individualized assessment. *Id.* at 361.

The *Teamsters* method of allocating proof is fundamentally at odds with the statutory burdens of proof that apply to disparate impact cases. Whereas under *Teamsters* a presumption of discrimination arises once the government establishes a "standard operating procedure" of intentional discrimination, for disparate impact claims:

> An unlawful employment practice … is established under this subchapter *only* if—
>
> (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin *and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity*….

42 U.S.C. § 2000e-2(k)(1)(A) (emphasis added).

Unlike a threshold showing of statistical adverse impact, "the finding of a pattern or practice [of unlawful discrimination] change[s] the position of the employer to that of a proved wrongdoer." *Hohider v. UPS, Inc.*, 574 F.3d 169, 179 (3d Cir. 2009) (citing *Teamsters*, 431 U.S. at 359-60) (quotations omitted). Thus, when the EEOC purports to apply the *Teamsters* burden-shifting scheme to a *disparate impact* case, it undercuts the plain text of 42 U.S.C. § 2000e-2, which allows an employer to avoid liability where continued use of a procedure having

statistically significant adverse impact is job-related for the job in question and justified by business necessity.

Moreover, the notion that the EEOC can bring a Title VII pattern-or-practice lawsuit, with all its attendant presumptions, against any covered business based on a purported showing of adverse impact gives it a significant tactical advantage over employers defending such claims. As this case aptly demonstrates, for employers with a large number of employees, the EEOC will nearly always be able to aggregate employment decisions to manufacture proof of adverse impact. That, in turn, places tremendous pressure on employers to settle, so as to minimize the substantial cost and disruption that frequently accompanies EEOC class-based enforcement actions – even those that have no legal basis and have little or no likelihood of success. As one commentator observed, "Unsuccessful frivolous litigation is expensive for employers and society; successful frivolous litigation is even more expensive. And, as frivolous litigation mounts, so will successful frivolous litigation." Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism From Employment: The Reality and the Rhetoric*, 59 Alb. L. Rev. 1, 51 (1995) (footnote omitted).

C. The EEOC's Action Is Time-Barred, Because Challenges To Discrete Acts Of Alleged Discrimination, Whether Brought By The EEOC Or A Private Litigant, Are Subject To Title VII's 180/300 Day Filing Limitations Period

This Court has not decided whether Title VII's charge-filing limitations period applies to pattern-or-practice claims brought under Section 707. The EEOC has maintained in this action that it does not. The district court rejected that argument below, and numerous other district courts, including some within the Fourth Circuit, have flatly rejected the idea that the time within which the EEOC may bring a pattern-or-practice claim is limitless. *See, e.g.*, *EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 546 (W.D. Va. 2001); *EEOC v. Burlington Med. Supplies, Inc.*, 536 F. Supp. 2d 647, 659 (E.D. Va. 2008); *EEOC v. Kaplan Higher Educ. Corp.*, 790 F. Supp. 2d 619, 623 (N.D. Ohio 2011); *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 352 (M.D.N.C. 2012). Because the plain language of Title VII can support no other reading, the district court correctly held that Title VII's statutory limitations period applied and that the EEOC was barred from pursuing any claims that were not raised in a timely charge.

Section 2000e-6(e) provides that the EEOC:

> [S]hall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. 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 2000e-5, in turn, provides, "A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred …." 42 U.S.C. § 2000-e(5)(e)(1). Accordingly, "a literal reading of the text would indicate that pattern or practice suits brought under 2000e-6(e) 'shall be conducted in accordance with the' 180-day limitations period set out in 2000e-5(e)." *EEOC v. Optical Cable Corp*., 169 F. Supp. 2d 539, 546 (W.D. Va. 2001).

Contrary to the plain language of the statute, the EEOC would apparently have this Court hold that government pattern-or-practice actions may reach as far back in time as the agency in its own discretion sees fit. The Court should decline the invitation to read Title VII so broadly. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (where the EEOC argued, and the court held, that its pre-suit conciliation efforts are immune to judicial review); *EEOC v. Propak Logistics, Inc.*, 2014 U.S. App. LEXIS 5463, at *10 (4th Cir. Mar. 25, 2014) (where the EEOC argued, unsuccessfully, that the doctrine of laches can never be applied when the government is the plaintiff).

Here, the EEOC not only has attempted to conflate two entirely separate legal concepts — pattern-or-practice and disparate impact — without any legal basis for doing so, it also seeks to exempt itself from a statutory limitations period whose applicability to agency Section 707 actions is plain on its face. As Judge Wilkinson observed recently, however, "Applying a different standard to the EEOC in the absence of any statutory differentiation would simply encourage sub-optimal agency behavior." *Propak Logistics*, 2014 U.S. App. LEXIS 5463, at *25.

Permitting the EEOC to prosecute sweeping disparate impact discrimination claims (whether or not under the *Teamsters* framework) that fall outside of the statutory limitations period would undermine the purposes and goals underlying Title VII, including the efficient and expeditious resolution of discrimination claims. It also would arm the agency with yet another powerful weapon for forcing employers to settle even questionable claims so as to avoid the risk of having to defend a costly and lengthy lawsuit where the size of the potential class, and thus the cost of defense, is inflated artificially and unreasonably. Expanding the EEOC's Title VII authority in such a manner thus would be unwise. As Chief Justice Roberts observed recently:

> The administrative state 'wields vast power and touches almost every aspect of daily life.' The Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities. '[T]he administrative state with its reams of regulations would leave them rubbing their eyes.'

City of Arlington, Tex. v. FCC, __ U.S. __, 133 S. Ct. 1863 (2013) (Roberts, C.J., dissenting) (citations omitted).

The EEOC also argues that, despite the plain language of the statute, its overreaching approach is authorized by the so-called "continuing violation" doctrine. This argument fails as well, because the non-discriminatory application of a facially-neutral employment selection procedure does not constitute a "continuing violation" for purposes of Title VII's limitations period. The continuing violation doctrine "is based on the idea that some discriminatory employment practices — namely hostile environment claims — are 'composed of a series of separate acts that collectively constitute one unlawful employment practice.'" *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d 334, 352 (M.D.N.C. 2012) (quoting *Natl. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002)). As the Supreme Court observed in *Morgan*, the doctrine does not apply to discrete acts, including a failure to hire or promote. Rather, each adverse action "constitutes a separate actionable 'unlawful employment practice.'" *Morgan*, 536 U.S. 101 at 114.

Nor does the continuing violation doctrine apply "to discrete acts of discrimination merely because the plaintiff asserts that such discrete acts occurred as part of a policy of discrimination." *EEOC v. PBM Graphics Inc.*, 877 F. Supp. 2d at 352 (quoting *Williams v. Giant Food, Inc.*, 370 F.3d 423, 429 (4th Cir.

2004)). Thus, the EEOC's contention to the contrary "is foreclosed by *Morgan*." *Williams*, 370 F.3d at 429.

The EEOC's reliance on *Chin v. Port Authority of N.Y. & N.J.*, 685 F.3d 135 (2d Cir. 2012) for the proposition that pre-limitations data may be relied upon in a "disparate impact promotion case," Br. of Plaintiff-Appellant at 54, also is misplaced. Contrary to what the EEOC suggests, the Second Circuit in *Chin* actually held:

> With regard to the plaintiffs' *individual disparate treatment* allegations, we hold that the district court properly admitted background evidence predating the onset of the limitations period and that there was sufficient evidence for a reasonable juror to conclude that the Port Authority discriminated against the seven prevailing plaintiffs within the limitations period. *The district court erred, however, in … concluding that the "continuing violation" doctrine applied to the plaintiffs' disparate impact theory* so that the jury could award back pay and compensatory damages for harms pre-dating the onset of the statute of limitations.

Chin v. Port Auth. of N.Y. & N.J., 685 F.3d 135, 141 (2d Cir. 2012) (emphasis added). To the extent that the weight of authority rejects – and the EEOC can cite to no authority sanctioning – the application of the "continuing violation" doctrine to a so-called "disparate impact pattern or practice" discrimination claim, its action against Freeman was properly dismissed.

II. THE DISTRICT COURT PROPERLY EXCLUDED THE EEOC'S DEEPLY FLAWED EVIDENCE OF ADVERSE IMPACT

In addition to general, national criminal conviction statistics, the EEOC's purported proof of disparate impact consisted of two statistical reports by its experts, Kevin Murphy and Beth Huebner. Inasmuch as the reports were based on statistical analyses that not only failed to isolate the particular aspect of Freeman's criminal and credit check process causing disparate impact, but also were so "rife with analytical errors" that they were entirely unreliable, the district court properly excluded them. The district court also correctly concluded that the general, non-specific national statistics offered by the EEOC had little to no relationship to the pool of applicants to which the challenged selection procedures in this case were applied, and thus were insufficient to establish a prima facie case of disparate impact discrimination.

In order to establish a threshold claim, Title VII disparate impact plaintiffs must identify a particular procedure giving rise to the alleged adverse impact. 42 U.S.C. § 2000e-2(k)(1)(A)(i); *see also Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). In *Wards Cove*, for instance, the Supreme Court held that "giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory," *Wal-Mart Stores, Inc. v. Dukes*, __ U.S. __, 131 S. Ct. 2541, 2555 (2011) (citation omitted), but "*conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or

sexual disparity *is not enough*. '[T]he plaintiff must begin by identifying the specific employment practice that is challenged.'" *Id.* (citation omitted).

After identifying a specific procedure, plaintiffs next must demonstrate that the employer's use of the challenged procedure has a statistically significant adverse impact on a statutorily-protected class. Determining the appropriate employee or applicant population is crucial to conducting a statistically sound adverse impact analysis. "In the typical disparate impact case the proper population for analysis is the applicant pool or the eligible labor pool." *Smith v. Xerox Corp.*, 196 F.3d 358, 368 (2d Cir. 1999), *overruled on other grounds*, *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134 (2d Cir. 2006). As this Court has observed, "applicant data are normally highly relevant evidence of an employer's labor market. Those who apply constitute the pool from which employees are selected." *United States v. County of Fairfax, Va.*, 629 F.2d 932, 940 (4th Cir. 1980) (citation and footnote omitted).

In this case, the EEOC argues that it satisfied Title VII's particularity requirement simply "by identifying Freeman's credit and criminal background check policies." Br. of Plaintiff-Appellant at 28. Despite the fact that applicant credit and criminal conviction history was evaluated differently by Freeman depending upon a number of factors – including, for instance, the position sought and the nature and severity of the offense in question – the EEOC failed to identify

and analyze the specific step along the selection process that it suspected of causing adverse impact. According to the EEOC, it "separated out two sub-elements of a *single step* (background checks) of Freeman's selection process for challenge: credit and criminal checks," Br. of Plaintiff-Appellant at 33, and that doing so was sufficient to satisfy Title VII's particularity requirement. The EEOC calls any requirement to further isolate the practices purporting to cause adverse impact unnecessary "slicing and dicing," which it contends is contrary to legislative intent. *Id.* at 34. Congress never intended Title VII's particularity requirement to be "unduly burdensome," the EEOC explains, noting that "a 100-question intelligence test may be challenged as a whole." *Id.* (citing 137 Cong. Rec. H9505-01 (daily ed. Nov. 7, 1991) (statement of Rep. Hyde)) (internal quotations omitted). True enough.

What the EEOC ignores here, however, is that Freeman's practice of considering criminal conviction history is more multifaceted than simply administering a single, 100-question pre-employment test. While certain types of recent convictions might disqualify applicants for particular jobs, criminal conviction history alone does not operate as a categorical bar to employment. In addition, consistent with longstanding EEOC guidance, Freeman instructs its managers "that individual circumstances might sufficiently mitigate the seriousness of the findings such that an applicant could be hired." Br. of

Defendant-Appellee at 4. Only those who lie about or distort their criminal conviction history during the selection process are automatically disqualified from further consideration. *Id.*

As the district court below observed:

> [I]t is not the mere use of any criminal history or credit information generally that is a matter of concern under Title VII, but rather what specific information is used and how it is used. Because of this, it is simply not enough to demonstrate that criminal history or credit information has been used. Rather, a disparate impact case must be carefully focused on a specific practice with an evidentiary foundation showing that it has a disparate impact because of a prohibited factor.

EEOC v. Freeman, 961 F. Supp. 2d 783, 786 (D. Md. 2013).

Compounding its error, the EEOC failed to utilize actual applicant pool data in its analysis of potential adverse impact. Instead, its statistical analysis relied predominantly on national statistics showing that, in general, "Blacks have worse credit histories than Whites and minorities and men are disproportionately convicted of crimes and incarcerated." Br. of Plaintiff-Appellant at 24. As the EEOC itself has recognized, however, "national-level statistical disparities in conviction rates do not necessarily appear in local labor markets." *State of Texas v. EEOC*, No. 5:13-cv-00255-C, Doc. 16 (N.D. Tex. Jan. 27, 2014) (EEOC Brief/Memorandum of Law in Support of Motion to Dismiss, at 3 n.1).

Analyzing an employer's selection decisions using general demographic data outside of that employer's control and irrelevant to its decision-making

certainly will produce a result, but that result has absolutely no bearing on *that employer's* compliance with Title VII. In particular, nationwide statistics long have shown that certain protected groups (including men and African-Americans) are disproportionately more likely than women and whites to have had contact with the criminal justice system. If those are the only data used to determine whether an employer's consideration of criminal conviction history in employment selections has an adverse impact on those protected groups, the answer always will be yes – regardless of the actual racial and gender composition and, more importantly, the criminal conviction history, of the qualified applicant pool in question.

As the Supreme Court observed in a related context in *Ward's Cove*, "[s]uch a result cannot be squared with our cases or with the goals behind the statute." 490 U.S. at 652. It would mean that:

> [A]ny employer who had a segment of his workforce that was--for some reason--racially imbalanced, could be haled [sic] into court and forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the other members of his workforce.

Id.

The only sure means of avoiding an EEOC disparate impact challenge based on national statistics thus would be to abandon the use of criminal (or credit) history in the employment selection process altogether – both an unwise and impractical suggestion.

III. PERMITTING THE EEOC TO MOUNT FACIAL ATTACKS ON HIRING PROCEDURES THAT CONSIDER APPLICANT CRIMINAL HISTORY WOULD PLACE EMPLOYERS IN THE UNTENABLE POSITION OF EITHER ABANDONING SUCH ASSESSMENTS ENTIRELY, OR INVITING LENGTHY, EXPENSIVE AGENCY ENFORCEMENT ACTIONS

As the district court below aptly observed, "[c]areful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States." 961 F. Supp. 2d at 786. Here, the EEOC continued to litigate, despite the fact that (1) its statistical case was flawed from the outset and (2) Freeman proactively made meaningful adjustments to its background investigation policies, changes which had a significant positive impact on the selection rate of individuals with certain adverse background information. Apart from the fact that the EEOC could not meet its threshold burden of proof and that Freeman's current practices in all material respects are consistent with the EEOC's own enforcement guidance on lawful use of criminal history, it is unclear whether the EEOC, if allowed to proceed, would be able to identify with any specificity an actual "class" of victims on whose behalf it could seek relief.

One can only surmise that the real reason behind the EEOC's dogged pursuit of this case is to discourage Freeman and other employers, on threat of a federal government enforcement action, from considering criminal history *at all* in employment selection decisions. That is, the EEOC is attempting to usurp the role

of Congress and cause, through litigation policy, changes that are not grounded in legislation. This effort flies in the face of Title VII, which expressly authorizes employers to use selection procedures that are job-related and consistent with business necessity, even if they have adverse impact against protected groups. As the district court below observed:

> For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable.

961 F. Supp. 2d at 785.

At the same time, *amici* are equally mindful of their obligation to ensure that all of their selection procedures, criminal background checks included, operate as intended and in a nondiscriminatory manner or, that if they have discriminatory effect, they are demonstrably job related. In fact, many of *amici's* members already independently monitor their selection procedures to determine whether they have an adverse impact on women or minorities and, if they have adverse impact, either make changes to the procedures or ensure that their job-relatedness is manifest.

The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. pt. 1607, are instructive insofar as they speak to proactive evaluations of tests and

other selection procedures, contemplating that employers will undertake "[r]easonable self analys[es] ... to determine whether employment practices do, or tend to, exclude, disadvantage, restrict or result in adverse impact ...." 29 C.F.R. § 1608.4(a); *see also* 29 C.F.R. § 1608.4(c)(1) ("[w]hen an employer has reason to believe that its selection procedures have … exclusionary effect ..., it should initiate affirmative steps to remedy the situation").

Voluntary measures such as these are precisely what Congress intended in passing Title VII, and what the EEOC and the Supreme Court have encouraged. Congress intended voluntary compliance to be the "preferred means of achieving the objectives of Title VII." *See, e.g., Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 515 (1986) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975)). The EEOC's regulations provide that in enacting Title VII Congress "strongly encouraged employers … to act on a voluntary basis to modify employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action." 29 C.F.R. § 1608.1(b).

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

EEOC's regulations explicitly recognize this need in stating that "persons subject to title VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of title VII." 29 C.F.R. § 1608.1(c) (cited in *Local No. 93*, 478 U.S. at 519).

This Court should not sanction the EEOC's litigation tactics (or disguised policy-making efforts) in this case, which divert resources and attention from meaningful EEO enforcement generally and private employers' proactive compliance efforts in particular. Indeed, the EEOC has been the subject of increasing criticism by the courts for its pattern of questionable litigation strategy, including in cases involving the alleged illegal consideration of criminal conviction history in hiring decisions. *See, e.g.*, *EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013) (order requiring the EEOC reimburse nearly $800,000 in attorney's fees for continuing to pursue lawsuit claiming the defendant maintained a categorical bar on hiring individuals with criminal records even after it became clear that no such blanket policy existed); *EEOC v. TriCore Reference Labs*, 493 Fed. App'x 955 (10th Cir. 2012) (attorney's fees award for prevailing defendant affirmed where EEOC continued prosecuting a disability discrimination lawsuit even though it knew it would not be able to establish a threshold case); *EEOC v. CRST Van Expedited*, 2013 U.S. Dist. LEXIS 107822, at *68 (N.D. Iowa Aug. 1, 2013) (EEOC required to pay $4.6 million in attorney's fees for forcing the defendant to

defend a frivolous pattern-or-practice sex discrimination lawsuit). As those cases illustrate, the EEOC can and should be held accountable for prosecutorial overreach.

This is especially true given the fact that the EEOC benefits from certain advantages in litigation that simply are not available to private parties. For example, in addition to access to federal government resources and procedural advantages, the EEOC has "the ability to exact, albeit unintentionally, high costs on a private employer throughout the investigative process and potential subsequent litigation." *EEOC v. Propak Logistics, Inc.*, 2014 U.S. App. LEXIS 5463, at *26 (4th Cir. Mar. 25, 2014) (Wilkinson, J., concurring). As Judge Wilkinson observed recently, those advantages "have the potential to combine with the more dubious aspects of bureaucratic culture in a way that can be particularly toxic." *Id.*

CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council, NFIB Small Business Legal Center, and Retail Litigation Center respectfully urge the Court to affirm the district's court's decision below.

Respectfully, submitted,

s/ Rae T. Vann

Karen R. Harned
Elizabeth Milito
NATIONAL FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER
1201 F Street, N.W.
Washington, DC 20004
(202) 406-4443

Attorneys for *Amicus Curiae*
National Federation of Independent Business
Small Business Legal Center

Rae T. Vann
Counsel of Record
NORRIS, TYSSE, LAMPLEY & LAKIS, LLP
1501 M Street, N.W., Suite 400
Washington, DC 20005
rvann@ntll.com
(202) 629-5600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

Deborah R. White
RETAIL LITIGATION CENTER, INC.
1700 N. Moore Street, Suite 2250
Arlington, VA 22209
(703) 600-2067

Attorney for *Amicus Curiae*
Retail Litigation Center, Inc.

April 9, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2365 **Caption:** EEOC v. Freeman

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)
Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. **Type-Volume Limitation:** Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines. Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines. Any Reply or Amicus Brief may not exceed 7,000 words or 650 lines. Counsel may rely on the word or line count of the word processing program used to prepare the document. The word-processing program must be set to include footnotes in the count. Line count is used only with monospaced type.

   This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   ☑ this brief contains 6,950 [*state number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   ☐ this brief uses a monospaced typeface and contains _____ [*state number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. **Typeface and Type Style Requirements:** A proportionally spaced typeface (such as Times New Roman) must include serifs and must be 14-point or larger. A monospaced typeface (such as Courier New) must be 12-point or larger (at least 10½ characters per inch).

   This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   ☑ this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 [*identify word processing program*] in Times New Roman 14-point [*identify font size and type style*]; **or**

   ☐ this brief has been prepared in a monospaced typeface using _____ [*identify word processing program*] in _____ [*identify font size and type style*].

(s) Rae T. Vann

Attorney for EEAC, NFIB and RLC amici curiae

Dated: April 9, 2014

Print Save Reset Form

04/13/2012
SCC

CERTIFICATE OF SERVICE

I certify that on April 9, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Rae T. Vann
Signature

April 9, 2014
Date

Reset Form Print Form Save Form