No. 18-11776

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff – Appellant,

v.

THE DOHERTY GROUP, INC., d/b/a DOHERTY ENTERPRISES, INC.,

Defendant – Appellee.

On Appeal from the United States District Court
for the Southern District of Florida, No. 14-cv-81184
Hon. Kenneth A. Marra, Senior United States District Judge

OPENING BRIEF OF PLAINTIFF – APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to 11th Circuit Rules 26.1-1(a)(1) and 27-1(a)(9), Plaintiff-Appellant the Equal Employment Opportunity Commission hereby submits the following Certificate of Interested Persons and Corporate Disclosure Statement, and pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-2(a), hereby certifies that the following is a complete list of the Trial Judge, Magistrate Judge, all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

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Cruz, Kimberly A. (Attorney for plaintiff-appellant)

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Hon. Matthewman, William Donald (United States Magistrate Judge)

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Pursuant to Federal Rule of Appellate Procedure 26.1, the Equal Employment Opportunity Commission, as a government entity, is not required to file a corporate disclosure statement. There are no publicly traded corporations or companies that have an interest in the outcome of this case or appeal.

s/ James M. Tucker

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Statement Regarding Oral Argument

This case involves what the Equal Employment Opportunity Commission (EEOC) believes was an employer's attempt to use a mandatory arbitration agreement to interfere with individuals' administrative charge-filing and cooperation rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Because these rights are vital to Title VII's enforcement scheme, the EEOC brought this enforcement action under § 707(a) of Title VII, 42 U.S.C. § 2000e-6(a). That provision authorizes the EEOC to challenge a "pattern or practice of resistance to the full enjoyment of any of the rights secured by" Title VII.

The district court recognized the EEOC's authority to bring this action, but nonetheless granted summary judgment to the employer. In so ruling, the court interpreted the arbitration agreement narrowly, despite language, and other indicia of intent, that a reasonable person would understand as more broadly prohibiting resort to the EEOC.

The unduly narrow interpretation of agreements limiting resort to government agencies is an important issue for the EEOC. The EEOC believes oral argument will assist the Court in addressing this issue.

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Statement of Subject-Matter and Appellate Jurisdiction

The Equal Employment Opportunity Commission ("EEOC") brought this action against The Doherty Group d/b/a Doherty Enterprises, Inc. ("Doherty"), alleging it violated § 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a). The alleged violation occurred within the jurisdiction of the United States District Court for the Southern District of Florida, pursuant to 28 U.S.C. § 1391(b). The district court had jurisdiction over this matter pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343, 1345, and 42 U.S.C. § 2000e-6. The district court entered final judgment on February 26, 2018. Appendix volume ("Vol.") I, District Court Docket No. ("R.") 337. On April 26, 2018, the EEOC timely appealed from the final judgment. R.341.

Statement of the Issue

Whether a reasonable fact-finder could conclude that Doherty engaged in a pattern or practice of resistance to the full enjoyment of its employees' and applicants' Title VII rights by implementing a mandatory arbitration agreement in 2013 that led them to believe they could not file discrimination charges or otherwise cooperate with civil rights enforcement agencies.

Statement of the Case

1. Course of Proceedings Below

The EEOC alleges that Doherty violated § 707(a) of Title VII, 42 U.S.C. § 2000e-6(a), by implementing a mandatory arbitration policy in 2013 that interfered with its applicants' and employees' rights to file discrimination charges and to otherwise communicate with the EEOC and state fair employment practices agencies ("FEPAs"). Vol.I, R.1; Vol.I, R.124 at 1. The EEOC filed its complaint on September 18, 2014. Vol.I, R.1. On November 21, 2014, Doherty moved to dismiss, arguing that the EEOC lacked authority to bring suit under § 707(a) without a predicate administrative charge or conciliation and without alleging that Doherty had itself engaged in unlawful discrimination or

retaliation. R.8. On September 1, 2015, the district court denied Doherty's motion. Vol.I, R.32 at 13.

On February 16, 2017, Doherty filed a motion to dismiss on mootness grounds, and the parties each filed summary judgment motions. R.255; R.257; R.260. On January 22, 2018, the court ruled the case was not moot and denied Doherty's motion to dismiss. Vol.I, R.333. On February 26, the court granted Doherty's motion for summary judgment and denied the EEOC's, concluding that there was no dispute that the agreement's terms did not prevent Title VII charge filing. Vol.I, R.336 at 8. On April 26, the EEOC timely appealed from the judgment. R.341. On May 10, 2018, Doherty filed a cross-appeal, which this Court dismissed on June 22, 2018.

2. Statement of facts

Doherty is a food service company and franchisee that provides management services to various affiliated restaurants in New Jersey, New York, Florida, and Georgia. Vol.I, R.259-1 at 6, 17. In 2015, Doherty had roughly 17,000 employees at its restaurants, which include Applebee's, Panera Bread, and several other similar brands. Vol.I, R.259-14; Vol.I, R.259-1 at 6. The types of jobs available at Doherty's

restaurants include Servers, Bartenders, Hosts/Hostesses, Line Cook/Food Prep employees, and General Utility employees. Vol.I, R.259-6 at 2.

From approximately 1999 forward, Doherty has required all its employees to sign an arbitration agreement as a condition of employment. Vol.I, R.259-9 at 8-10; Vol.I, R.259-11 at 10. Prior to 2013, Doherty's mandatory arbitration agreement stated:

> I understand that various claims that may arise during the course of my employment would entitle me to a proceeding in a court of law or equity. As a condition of employment at Doherty Enterprises or any of its related companies, I hereby agree to waive my rights to pursue such claims in the judicial and administrative court system.
>
> * * *
>
> By signing this agreement, . . . I am waiving any right to be heard in a federal or state forum (court), which also allows a right to trial by jury. It is understood that I am waiving the right to trial by jury by having my claims arbitrated.
>
> * * *
>
> I fully understand that by signing this document I am waiving the right to proceed in any judicial or administrative proceeding, other than arbitration . . . .

Vol.I, R.259-12.

During this same pre-2013 period, Doherty's employee handbook—a separate document from the arbitration agreement—specifically advised employees of their right to file charges of discrimination with the EEOC, clarifying any ambiguities in the arbitration agreement. Vol.I, R.259-11 at 11-12; Vol.I, R.259-13. The handbook provided:

> At the time you applied for employment with Doherty, you signed an Arbitration Agreement which requires that all disputes between you and Doherty must be submitted to and determined exclusively by binding arbitration. Nothing in this binding Arbitration Agreement between you and Doherty prevents you from first filing a charge or complaint, communicating with, or cooperating in an investigation or proceeding conducted by, the Equal Employment Opportunity Commission ("EEOC"), the National Labor Relations Board ("NLRB"), or any other federal, state, or local agency charged with the enforcement of any laws.

Vol.I, R.259-13.

In 2012 or 2013, Doherty began discussions with counsel regarding possible changes to its arbitration agreement. Vol.I, R.259-9 at 12-13. Doherty's counsel then drafted a revised version of the agreement, which Doherty implemented in May 2013 by adding it to its job applications and asking existing employees to sign it. Vol.I, R.259-9

at 15-16, Vol.I, R.259-10 at 3. The 2013 agreement provided, in relevant part:

> I acknowledge that Doherty enterprises utilizes a system of alternate dispute resolution which involves binding arbitration to resolve any dispute, controversy or claim arising out of, relating to or in connection with my employment with Doherty Enterprises.
>
> * * *
>
> I and Doherty Enterprises both agree that any claim, dispute, and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII and all other applicable federal, state, or local statute, regulation, or common law doctrine) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and Doherty Enterprises . . . (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, [and] claims for medical and disability benefits under applicable state and/or local law) shall be submitted to and determined exclusively by binding arbitration.

Vol.I, R.256-3 at 4.

In addition, sometime in or after 2013, Doherty revised its employee handbook. Notably, it deleted the language providing that the arbitration agreement did not interfere with individuals' right to file charges or to communicate with the EEOC or FEPAs, or to participate in agency proceedings. Vol.I, R.259-11 at 10-11.

Doherty also informed its employees that the 2013 arbitration agreement precluded their ability to file charges with enforcement agencies. Henry Portoreiko, a General Manager at an Applebee's restaurant in Florida, stated that when Doherty purchased that restaurant in 2013, it told the existing staff that Doherty would not re-hire them unless they signed the mandatory arbitration agreement. Vol.I, R.284-1 at 1-2. According to Portoreiko, Doherty informed the staff that "all claims had to be filed through Doherty and that was the only option," and that they "were not allowed to file any claims outside of Doherty because of the arbitration agreement." *Id.* at 2. Portoreiko related that he "did not complain elsewhere, including at the EEOC, because I was told that all claims had to be filed through and with Doherty only because of the arbitration agreement we were all required to sign." *Id.*

When asked why the company revised its arbitration agreement, Kathleen Coughlin, Doherty's Vice-President of Human Resources, Training, and Recruiting, stated that Doherty was acquiring more restaurants and entering into two new states and wanted to make sure that "everything was current and in compliance." Vol.I, R.259-9 at 12-

13. Coughlin further explained that, since one of Doherty's franchisees "maybe had some legal issues in the past," she had "a heightened sense to start off on the right foot" and ensure that location was "strong in the HR Area." Vol.I, R.259-9 at 12-14.

Coughlin also pointed to "Ban the Box," "NLRB case law," "some social media law and also some New Jersey medical law" as examples of the "changing landscape" and "climate in our industry" that led Doherty to consult with counsel about revising the arbitration agreement. Vol.I, R.259-9 at 12-13. Notably, however, Coughlin offered no explanation for why Doherty decided to alter the EEOC and FEPA charge filing and other related aspects of the earlier agreement. Nor did Coughlin, or anyone else, explain why Doherty chose to delete the clarifying language regarding those rights from the employee handbook. *See generally* Vol.I, R.259-9 at 12-14.

In June 2014, while investigating an unrelated charge regarding a Doherty-operated restaurant in Florida, the EEOC learned of the language in Doherty's mandatory arbitration agreements. Vol.I, R.259-3 at 4; Vol.I, R.259-4 at 16. Thereafter, the EEOC began a Rule 11 investigation regarding Doherty's use of the arbitration agreement and

discovered the 2013 agreement through a Google search. Vol.I, R.259-3 at 4; Vol.I, R.259-5 at 1.

On August 6, 2014, the EEOC informed Doherty by letter that it considered the 2013 agreement to be a violation of § 707(a) of Title VII, 42 U.S.C. § 2000e-6(a), and offered Doherty the opportunity to resolve the matter by entering into a consent decree. Vol.I, R.259-8. Doherty rejected this proposal, R.8 at 27-32, and on September 18, 2014, the EEOC commenced this action. Vol.I, R.1.

In its complaint, the EEOC claimed that Doherty's use of the 2013 agreement constituted a pattern or practice of resistance to the full enjoyment of rights secured by Title VII in violation of § 707(a). Vol.I, R.1 at 1. The complaint alleged that the 2013 agreement "interferes with [Doherty's] applicants' and/or employees' right to: (1) file charges with the [EEOC and FEPAs]; and (2) communicate with and participate in the proceedings conducted by the EEOC and FEPAs." *Id.*; *see also* Vol.I, R.124 at 1 (same).

In January 2015, in the midst of litigation, Doherty again revised its arbitration agreement. Doherty's 2015 agreement, like the pre-2013 employee handbook, explicitly stated that the agreement did not

prohibit charge filing, communication, or cooperating in investigations with the EEOC or FEPAs:

> I understand that nothing in this binding Arbitration Agreement prevents me from first filing a charge or complaint, communicating with, or cooperating in an investigation or proceeding conducted by, the Equal Employment Opportunity Commission ("EEOC"), the National Labor Relations Board ("NLRB"), or any other federal, state or local agency charged with the enforcement of any laws.

Vol.I, R.259-17.

Doherty stated that it made the 2015 change to "show good faith" regarding the EEOC's concern at the lack of an "explicit 'carve-out'" acknowledging charge-filing rights, and to satisfy the EEOC's request that the agreement mention the agency. Vol.I, R.259-1 at 21: Vol.I, R.259-11 at 9. Doherty maintained that it never intended the 2013 agreement to restrict administrative charge filing, but only to require arbitration rather than going to court. Vol.I, R.259-1 at 21; Vol.I, R.259-9 at 11: Vol.I, R.259-11 at 9.

Doherty asserts that in early January 2015 it shared "carve-out" language with its employees and requested that they sign the carve-out. Vol.I, R.259-11 at 9-10; Vol.I, R.259-9 at 20. According to Doherty, it informed them that they have the right to contact the EEOC and that, if

they believed the 2013 agreement restricted them from doing so, such restriction was not Doherty's intent. Vol.I, R.259-9 at 19. Doherty also began including the new agreement in all its employment applications. Vol.I, R.259-11 at 9.

3. District court decisions

In November 2014, Doherty moved to dismiss. It asserted that the EEOC lacked standing to sue under Title VII because there was no charge or aggrieved party and because the EEOC failed to satisfy its conciliation obligation. Doherty also argued that the complaint failed to allege an unlawful employment practice—that is, discrimination or retaliation—that violated Title VII. R.8 at 2, 15.

The court denied Doherty's motion, concluding that the EEOC could bring suit under § 707(a) "in the absence of a charge and conciliation." Vol.I, R.32 at 5. It recognized that controlling authority from the former Fifth Circuit provided that "'[s]ection 707 does not make it mandatory that anyone file a charge against the employer or follow administrative timetables before the suit may be brought.'" Vol.I, R.32 at 5 (quoting *United States v. Allegheny-Ludlum Indus., Inc.*, 517

F.2d 826, 843 (5th Cir. 1975)).[1] According to the court, *Allegheny-Ludlum* recognized that § 707 of Title VII provided the government with "a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *Id.* (quoting *Allegheny-Ludlum*, 517 F.2d at 843). It contrasted that provision with § 706 of Title VII, 42 U.S.C. § 2000e-5, which is oriented more towards addressing "individual grievances[,] . . . with its attendant requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded the respondent." *Id.* The court also identified decisions from the Sixth, Seventh, and Tenth Circuits that supported this understanding of §§ 706 and 707. *Id.* (citations omitted).

The court noted that the Supreme Court had confirmed the EEOC's ability under § 707 "'to bring pattern-or-practice suits on [its] own motion'" and without the predicate charge required for § 706 suits. *Id.* at 6-7 (citing *Gen. Tel. Co. of the NW, Inc. v. EEOC*, 446 U.S. 318, 327-28, 100 S. Ct. 1698, 1705 (1980)). It further recognized that Title

[1] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the former Fifth Circuit issued prior to October 1, 1981.

VII "provides that the EEOC only needs 'reasonable cause'" before it may file a § 707 resistance claim: neither a charge nor conciliation is required. *Id.* at 7 (citing 42 U.S.C. § 2000e-6(a)).

The district court criticized Doherty's reliance on two out-of-circuit district court decisions holding that the charge-filing and/or conciliation procedures of § 706 are applicable to resistance claims under § 707(a): *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014), and *EEOC v. Freeman*, No. 09-2573, 2010 WL 1728847 (D. Md. 2010). R.32 at 10-11 & n.8. The court stressed that *CVS*'s holding requiring conciliation under § 707(a) was both contrary to *Allegheny-Ludlum* and internally inconsistent, as the same decision held that the EEOC could proceed under § 707(a) without a charge at all. *Id.* at 10-11.

The court next rejected Doherty's assertion that § 707(a) claims are limited to challenging "unlawful employment practices" of discrimination and retaliation, as opposed to the broader category of "resistance" to the exercise of statutory rights. "Significantly," the court observed, "Congress chose not to use the term 'unlawful employment practices' with respect to section 707(a) which is in stark contrast to the use of the term 'unlawful employment practices' in section 706." *Id.* at

9. Therefore, "because Congress chose to use different language in the two sections, it manifested different intent; namely, that a resistance claim is not limited to cases involving an unlawful employment practice." *Id.* *See also id. at* 10 & n.7 (noting support from early § 707(a) suit challenging Ku Klux Klan practice of deterring African-Americans from exercising their Title VII rights, as well as from other analogous federal civil rights statutes that provide for "resistance" causes of action).

Doherty moved to dismiss on mootness grounds, and the parties each filed motions for summary judgment on the merits. R.255; R.257; R.260. In its motion to dismiss, Doherty argued that its January 2015 agreement and notice to all employees of their charge-filing and other rights rendered the matter moot.[2] The district court disagreed, recognizing that a case does not become moot merely by the defendant's "'voluntary cessation of a challenged practice.'" Vol.I, R.333 at 4 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*,

[2] In an earlier motion to dismiss, Doherty had argued that the 2015 agreement and notice to employees rendered the case moot. R.19 at 11-12. The court declined to address Doherty's mootness argument at that time. Vol.I, R.32 at 4 n.1.

528 U.S. 167, 189, 120 S. Ct. 693, 708 (2000)). Rather, the court stated that it must determine if the party asserting mootness has carried the heavy burden of establishing that the challenged conduct "'cannot reasonably be expected to start up again.'" *Id.* at 6-7 (quoting *Friends of the Earth*, 528 U.S. at 189).

The court identified several factors relevant to the mootness inquiry, including "(1) whether the challenged conduct was isolated or unintentional as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Id.* at 5 (quoting *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1184 (11th Cir. 2007)). "[A] defendant must show that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting *Sheely*, 505 F.3d at 1184).

Concluding that Doherty had not met this burden, the court noted that Doherty's assertion that it had no intention ever to resume use of the challenged arbitration provision was insufficient to establish

mootness. *Id.* at 5 (citation omitted). The court also found it particularly relevant that Doherty abandoned the challenged provision just before it filed its reply memorandum on its motion to dismiss. *Id.* at 6. It stated, "[s]uch timing does not signify a change in heart, but instead an attempt to avoid liability," comparing the situation to cases in which this Court concluded the matter was moot when the challenged conduct has ceased *prior* to suit. *Id.* at 6-7 (citations omitted). The court noted that other factors weighed against mootness, including Doherty's failure to acknowledge any wrongdoing, the fact that the conduct was not isolated, and Doherty's intent to subject individuals to the arbitration agreement. *Id.* at 6-8.

On February 26, 2018, the court ruled on the meaning of the agreement. It granted Doherty's motion for summary judgment and denied the EEOC's, concluding that the 2013 agreement did not "prevent [Doherty's] applicants or employees from filing charges with the EEOC or FEPAs." Vol.I, R.336 at 8. It first noted that the parties did not dispute that "mandatory arbitration of Title VII claims is lawful" or that the term "charge" did not appear in the agreement. *Id.* at 5 (citations omitted). The court also observed that the Supreme

Court had recognized, in the ADEA context, that claimants subject to an arbitration agreement could still file charges with the EEOC. *Id.* (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 111 S. Ct. 1647, 1653 (1991)).

The court defined the question before it as "whether the agreement can be interpreted to deprive applicants or employees of [Doherty] of their right to file a charge." *Id.* at 5. It then examined the agreement "to determine the intent of the parties": "not [their] inner, subjective intent . . . , but rather the intent a reasonable person would apprehend in considering the parties' behavior." *Id.* at 5 (citation omitted). The court added that it would determine the parties' intent by looking at the agreement as a whole, with reference to dictionary definitions of the terms used. *Id.* at 6 (citations omitted).

The court found that "[the 2013 agreement] was intended to inform all of Defendant's applicants or employees that any and all disputes would be *resolved* solely by arbitration." *Id.* at 6. Focusing on the 2013 agreement's use of the terms "resolve" and "determined," it stated that "the intent of the agreement was to ensure that any employment dispute by an applicant or employee would be subject to

mandatory arbitration and no final decision could be reached in any other forum, with the exception of those forums which the agreement carved out." *Id.* at 7. According to the court, the "[f]iling of charges and participating in investigations do not resolve disputes and therefore the agreement does not address these activities." *Id.* It added that there is no requirement "that the agreement affirmatively state that it is not a waiver of the right to file charges with the EEOC or FEPAs." *Id.* (citation omitted). "Simply put," the court stated, "each paragraph in this agreement provides that arbitration is the sole forum for applicants or employees to obtain a final determination of the merits of any employment dispute. Nothing else can be read into this clear, unambiguous language." *Id.* at 7-8.

4. Standard of Review

This Court reviews "an entry of summary judgment de novo, construing all facts and drawing all reasonable inferences in favor of the nonmoving party." *Jefferson v. Sewon Am., Inc.*, 881 F.3d 911, 919 (11th Cir. 2018).

Summary of the Argument

Between the face of Doherty's 2013 mandatory arbitration agreement itself and the circumstances surrounding its adoption, the record evidence was sufficient to permit a reasonable fact-finder to conclude that Doherty engaged in a pattern or practice of resistance to individuals' full exercise of their Title VII rights. Employees' and applicants' rights to file charges of discrimination and cooperate with the EEOC and FEPAs are essential parts of the enforcement procedure Congress adopted in Title VII. Accordingly, the question before this Court is whether a reasonable person could interpret the 2013 agreement to preclude charge filing and/or cooperation with the EEOC and FEPAs.

In granting summary judgment to Doherty, the district court failed to apply the reasonable person standard and to view the evidence in the light most favorable to the EEOC as the nonmovant, instead substituting its own narrow reading of the 2013 agreement. Applying the correct standards, however, a reasonable fact-finder could readily interpret the 2013 agreement to require any matter that an individual might bring before the EEOC or a FEPA instead be "submitted to and

determined *exclusively* by binding arbitration." Vol.I, R.259-6 at 4 (emphasis added). The court wholly disregarded the evidence that Doherty's 2013 agreement and accompanying employee handbook had been redrafted to obscure, not clarify, the status of individuals' Title VII rights as they related to the arbitration policy. The court also ignored witness testimony that Doherty informed its employees that the 2013 agreement required all claims to be submitted solely to Doherty.

Nor are there any alternate bases for affirming the court's summary judgment ruling. Doherty's further revision of its arbitration policy during the course of this litigation, and specifically *because* of this litigation, did not moot the EEOC's claim. Based on this Court's longstanding and binding precedent, there is no genuine dispute that the EEOC satisfied all necessary preconditions to suit under § 707(a). The district court also correctly held that § 707(a) provides the government with a cause of action for a pattern or practice of resistance to the full exercise of individuals' Title VII rights, which is not limited to statutorily defined "unlawful employment practices." And, finally, there was more than sufficient evidence that Doherty acted with the requisite intent to violate the statute.

Argument

I. A reasonable fact-finder could conclude that Doherty's use of its 2013 mandatory arbitration agreement constituted a pattern or practice of unlawful resistance to the full exercise of rights secured by Title VII.

Section 707(a) of Title VII provides that the government may bring a civil action "[w]henever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a). In the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972), Congress transferred to the EEOC the powers of the Attorney General to bring § 707 enforcement actions against non-governmental entities. *See* 42 U.S.C. § 2000e-6(c).

Thus, by the plain terms of the statute, to establish a claim under § 707(a) the EEOC must: (1) identify a right secured by Title VII; (2) establish that the defendant engaged in conduct that did and was intended to resist the full exercise or enjoyment of that right; and (3) establish that the defendant's conduct was not individualized or

isolated, but instead constituted a pattern or practice of unlawful conduct. *Cf. Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 97 S. Ct. 1843, 1855 (1977) (describing plaintiff's burden in § 707(a) case alleging pattern or practice of discrimination). Here, the district court's summary judgment ruling recognized that charge filing, if not agency cooperation, is a right secured by Title VII that cannot be abrogated by an arbitration agreement. R.336 at 5 (citing *Gilmer*, 500 U.S. at 28, 111 S. Ct at 1653). And the parties did not dispute whether Doherty's use of a company-wide arbitration agreement over a period of years constitutes a "pattern or practice," assuming it were otherwise unlawful.[3] *Cf.* R.333 at 8 (in order denying motion to dismiss on mootness grounds, observing that Doherty's use of the 2013 agreement "was not isolated or unintentional" but "a deliberate practice" and the company's "policy").

Rather, the district court's grant of summary judgment rested solely on its interpretation of the agreement. It concluded that the

[3] As there can be no reasonable dispute on this point, we will not address it further. *See Teamsters*, 431 U.S. at 336, 97 S. Ct. at 1855 (describing "pattern or practice" as defendant's "standard operating procedure[,] the regular rather than the unusual practice").

EEOC could not show that the 2013 agreement constituted resistance to the full exercise or enjoyment of Doherty's employees' and applicants' Title VII rights. In so ruling, the court effectively made a finding of fact, based on its own narrow interpretation of the terms "resolve" and "determine" in the 2013 agreement, and its focus on those words in isolation ignored other indicia within the agreement of its meaning. In particular, the court failed to consider language requiring all claims, disputes, and controversies be submitted exclusively to arbitration; precluding resort to a "governmental dispute resolution forum;" and excepting the NLRB – but not the EEOC – from the agreement's reach.

On summary judgment, the court's finding that the agreement did not interfere with charge-filing or other Title VII rights was both inappropriate and unwarranted. When viewed under the correct, reasonable-person standard, with all inferences properly drawn in the EEOC's favor as the non-movant, a reasonable fact-finder could conclude that the 2013 agreement was intended to, and did, interfere with aggrieved individuals' Title VII charge-filing and cooperation rights.

A. Aggrieved individuals' rights to file charges and cooperate with the EEOC and FEPAs not only are rights secured by Title VII, but also are vitally important parts of the Title VII enforcement scheme established by Congress.

Section 706 of Title VII provides aggrieved individuals the right to file discrimination charges and to invoke the EEOC's administrative enforcement mechanism for resolving discrimination complaints. 42 U.S.C. § 2000e-5(b). The statute also expressly protects individuals' rights to "[make] a charge, testif[y], assist[], or participate[] in any manner in an investigation, proceeding, or hearing" brought under Title VII. 42 U.S.C. § 2000e-3(a).

The right to file charges and utilize the remedial mechanism Congress established is essential to Title VII, which "depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67, 126 S. Ct. 2405, 2414 (2006). "'Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.'" *Id.* (quoting *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292, 80 S. Ct. 332, 335 (1960)). *See also, e.g.*, *Mach Mining, Inc. v. EEOC*, 135 S. Ct. 1645, 1649-50 (2015) (describing how Title VII enforcement process is initiated by charge-

filing); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 n. 11, 122 S. Ct. 754, 765 n. 11 (2002) ("We have generally been reluctant to approve rules that may jeopardize the EEOC's ability to investigate and select cases from a broad sample of claims."). As a result, interference with individuals' charge-filing rights could have a profound adverse impact on the EEOC's ability to enforce Title VII.

For just these reasons, courts have long recognized that waivers of the right to file a discrimination charge are void as against public policy. *See, e.g.*, *EEOC v. Cosmair*, 821 F.2d 1085, 1090 (5th Cir. 1987) (waiver of the "right to file a charge" is void as against public policy). Indeed, the Supreme Court has specifically recognized that aggrieved individuals retain the right to file charges of discrimination, notwithstanding the existence of a mandatory arbitration agreement. *See Gilmer*, 500 U.S. at 28, 111 S. Ct. at 1653 (noting that "[a]n individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action[,]" and that "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief").

B. A reasonable fact-finder could conclude that Doherty's 2013 agreement was intended to and did interfere with its employees' and applicants' charge-filing and cooperation rights under Title VII.

1. The 2013 agreement should be interpreted based on the governing reasonable person standard.

As the district court recognized, the central question here is whether the 2013 agreement "can be interpreted to deprive applicants or employees of Defendant of their right to file a charge with the EEOC and FEPAs." Vol.I, R.336 at 5. This Court interprets an arbitration agreement "by reading the words of [the] contract in the context of the entire contract and construing the contract to effectuate the parties' intent . . . , as determined by the objective meaning of the words used." *Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1353 (11th Cir. 2014) (internal citation and quotation marks omitted). "'In reviewing a document, a court must consider the document as a whole, rather than attempting to isolate certain portions of it.'" *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1022 (11th Cir. 2014) (citation omitted). The district court correctly noted the objective nature of this inquiry; rather than searching for the "inner, subjective intent of the parties," the Court should consider "the intent a reasonable person

would apprehend in considering the parties' behavior." *Defenders of Wildlife v. Salazar*, 877 F. Supp. 2d 1271, 1292 (M.D. Fla. 2012) (citing *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, 636 F.3d 69, 75-76 (3d Cir. 2011)).

In analogous claims arising under the National Labor Relations Act, courts have routinely interpreted arbitration agreements under a reasonable person standard. Like § 707(a)'s prohibition on interference with rights secured by Title VII, § 8 of the NLRA, 29 U.S.C. § 158(a)(1), makes it an unlawful labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" under § 7 of the NLRA. Courts have concluded that "[e]ven 'in the absence of express language prohibiting section 7 activity, a company nonetheless violates § 8 (a)(1) if "employees would reasonably construe the [arbitration agreement] language to prohibit section 7 activity."'" *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 363 (5th Cir. 2013) (quoting in part *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007)).

Similarly, in *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015), *aff'd on other grounds sub nom. Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the court applied a reasonable-person

standard in ruling that one of the arbitration agreements at issue violated the NLRA. The court concluded that the arbitration agreement's "broad 'any claims' language can create '[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well.'" *Murphy Oil*, 808 F.3d at 1019 (quoting in part *D.R. Horton*, 737 F.3d at 363-64).

Likewise, as the Supreme Court has explained, the reasonable-person standard also governs in another closely analogous area involving charge filing and agency cooperation: Title VII retaliation claims. In *Burlington Northern*, the Court noted that Title VII's antiretaliation provision "seeks to prevent employer interference with 'unfettered access' to Title VII's remedial mechanisms." 548 U.S. at 68, 126 S. at 2415 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S. Ct. 843, 848 (1997)). "It does so by prohibiting employer actions that are likely 'to deter victims of discrimination from complaining to the EEOC,' the courts, and their employers." *Id.* Accordingly, the Court held, to establish retaliation "a plaintiff must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable

worker from making or supporting a charge of discrimination." *Id.* (internal citations and quotation marks omitted). The Court further noted that the objective standard's focus on "reactions of a reasonable employee" is "judicially administrable" and "avoids the uncertainties and unfair discrepancies that can plague a judicial effort" to apply a subjective standard. *Id.*

Notably, with respect to both NLRA interference claims and Title VII retaliation claims, a clear implication of the objective standard is that the agreement at issue need not be 100% successful at deterring or blocking protected activity to violate the statute. Indeed, if complete deterrence of charge filing were a prerequisite for a Title VII retaliation claim, no such claim could ever exist, since administrative exhaustion is a prerequisite for a private suit. *See* 42 U.S.C. § 2000e-5(e)(1). Similarly, here, it is of no consequence whether no one filed a charge against Doherty, ten people did, or a hundred did—in fact, small numbers of charges are exactly what one would expect to see from a successful effort to deter one's employees from charge filing. So long as Doherty's conduct was intended to and would have deterred a

reasonable person from charge filing or cooperation, it may be found liable under § 707(a).

2. A fact-finder could conclude that a reasonable person would interpret the 2013 agreement to preclude charge filing with the EEOC or FEPAs.

A reasonable applicant or employee readily could have concluded, based on the 2013 agreement itself, that she would have been required to submit any discrimination dispute exclusively to arbitration instead of filing a discrimination charge with the EEOC or a FEPA. In relevant part, the 2013 agreement stated that Doherty uses "binding arbitration to resolve *any dispute, controversy or claim*." Vol.I, R.259-6 at 4 (emphasis added); *see supra* at 5. Moreover, the agreement expressly stated that the arbitration requirement applied to "any claims of employment discrimination, harassment, and/or retaliation under Title VII . . . which would otherwise require or allow resort to any court *or other governmental dispute resolution forum*." *Id.* at 5 (emphasis added).

The agreement's explicit reference to Title VII is unmistakable. Similarly, there can be no genuine dispute over whether the EEOC or FEPAs constitute a "governmental dispute resolution forum."

Throughout Title VII's history, Congress, the courts, and the EEOC itself have all understood the EEOC's administrative process as offering aggrieved individuals an opportunity to resolve discrimination disputes without resort to litigation. *See Occidental Life Ins. Co. v. EEOC,* 432 U.S. 355, 366, 97 S. Ct. 2447, 2454 (1977) (in discussing legislative history of 1972 amendments to Title VII, noting remark in conference report that "[i]t is hoped that recourse to the private lawsuit will be the exception and not the rule, and that the vast majority of complaints will be handled through the offices of the EEOC") (quoting 118 Cong. Rec. 7168 (1972)).

As the Supreme Court put it, the power to receive, investigate, and resolve charges through determinations of reasonable cause is a critical part of the EEOC's "integrated, multistep enforcement procedure." *Occidental Life,* 432 U.S. at 359, 97 S. Ct. at 2451. When the Commission receives a charge, it investigates and decides whether it has found reasonable cause to believe that the respondent violated the law. 42 U.S.C. § 2000e-5(b); *Occidental Life*, 432 U.S. at 359, 97 S. Ct. at 2451. "If [the Commission] does find reasonable cause, it must try to eliminate the alleged discriminatory practice 'by informal

methods of conference, conciliation, and persuasion.'" *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 595, 101 S. Ct. 817, 820-21 (1981) (quoting 42 U.S.C. § 2000e-5(b)). If the Commission does not find reasonable cause or is unable to resolve the matter in conciliation, it dismisses the charge and issues a right-to-sue notice. *See* 29 C.F.R. § 1601.28.[4]

The Supreme Court has long recognized that the EEOC's informal administrative process was Congress' preferred method of resolving discrimination claims. *See, e.g.*, *Occidental Life*, 432 U.S. at 367-68, 97 S. Ct. at 2455 ("When Congress first enacted Title VII in 1964 it selected '(c)ooperation and voluntary compliance . . . as the preferred means for achieving' the goal of equality of employment opportunities. To this end, Congress . . . established an administrative procedure whereby the EEOC 'would have an opportunity to settle disputes through conference, conciliation, and persuasion before the aggrieved party was permitted to file a lawsuit.'" (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S. Ct. 1011, 1017 (1974))). Thus, as the

[4] The Commission may also issue a right-to-sue notice on request of the charging party under various circumstances. 29 C.F.R. § 1601.28.

Occidental Life Court explained, the EEOC "is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion." 432 U.S. at 368, 97 S. Ct. at 2455.

Similarly, this Court and others have long, and routinely, recognized the EEOC's function of resolving disputes raised in charges. *See EEOC v. Asplundh Tree Expert Co.,* 340 F.3d 1256, 1260 (11th Cir. 2003) (Title VII requires EEOC to make reasonable effort "to resolve with the employer the issues raised by the complainant"); *see also Tademy v. Union Pac. Corp*., 614 F.3d 1132, 1151 (10th Cir. 2008) ("Title VII's administrative filing requirement encourages employees and employers to . . . resolve their claims without litigation."); *Doe v. Oberweis Dairy*, 456 F.3d 704, 708-09 (7th Cir. 2006) (noting that "[m]any disputes are resolved at this [administrative] stage, reducing the burden on the courts of enforcing Title VII; last year the Commission received 55,976 Title VII charges, of which 10,286, or almost 20 percent, were resolved without any litigation"); *EEOC v. Univ. of Pa.*, 850 F.2d 969, 978 (3d Cir. 1988) ("[T]he EEOC is charged with a duty to resolve discrimination disputes by conciliation."). And

this is also the way the EEOC presents to the public its Title VII charge-processing function—by reference to charge resolution. *See* All Statutes (Charges filed with EEOC), FY 1997 - FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm (last visited August 26, 2018) (chart identifying "the total number of charges filed and resolved under all statutes enforced by EEOC," including the category of charge "resolutions").

Given how Congress, the courts, and the EEOC itself understand the EEOC's Title VII administrative process, it cannot be said that the term "resolve" precludes that administrative process as a matter of law. To the contrary, a reasonable person could easily interpret Doherty's reference to a "governmental dispute resolution forum" to include the EEOC or a FEPA carrying out Title VII's charge-resolution function.

The 2013 agreement's express exemption for NLRA claims, which contrasts with its mandate of arbitration for Title VII claims, underscores such an interpretation. Vol.I, R.259-6 at 4. This is particularly so given that the court was required to examine the agreement as a whole, and not interpret select terms out of context. *Winn-Dixie*, 746 F.3d at 1022. The 2013 agreement specified that

claims under the NLRA, and state-law medical and disability benefits claims, were the "sole exception" to the arbitration agreement. Vol.I, R.259-6 at 4. Under these circumstances, it would be reasonable for an individual to understand the agreement as requiring all other claims falling outside that "sole exception" to be "submitted to and determined exclusively by binding arbitration." *Id.*

Accordingly, the district court erred in granting Doherty summary judgment based on the rationale that no reasonable employee or applicant could interpret the 2013 agreement to preclude charge filing or cooperation. The language of the agreement is nowhere near that one-sided, or that clear.

Although the court articulated the correct legal standards in its summary judgment opinion, it ultimately failed to follow them. Instead, it made a factual finding that the 2013 agreement was not intended to, and did not, encompass charge filing, based largely on its definition of two terms in the agreement: "determined" and "resolve." Vol.I, R.336 at 6-8. But the court's selective focus caused it to misinterpret the 2013 agreement in two significant ways.

First, the court characterized the relevant agreement language as its provision that claims would be "*determined* exclusively by binding arbitration." Vol.I, R.336 at 7 (emphasis by court). But the actual agreement language provides that all claims "*shall be submitted to* and determined exclusively by binding arbitration." Vol.I, R.259-13 (emphasis added). In other words, viewed in its full context, this part of the 2013 agreement expressly prohibits even the *submission* of a claim to any entity other than an arbitrator. Vol.I, R.259-13. A reasonable employee or applicant, reading this phrase as a whole, could thus understand it to encompass charge filing with the EEOC or a FEPA, regardless of whether her charge ever reached a final "determination." In reading "determined" out of context, the court failed to honor basic principles of contractual interpretation and to view the contract in the light most favorable to the EEOC, as appropriate on summary judgment.

The district court's second error was in giving an unduly narrow interpretation to the term "resolve." According to the court, "[f]iling of charges and participating in investigations do not resolve disputes and therefore the agreement does not address these activities." Vol.I, R.336

at 7. However, the question before the court was not whether charge filing or cooperation *themselves* "resolve disputes," but whether the EEOC and the FEPAs do—i.e., whether they are "governmental dispute resolution fora." Moreover, as explained *supra* at 29-32, the court's contrary conclusion flies in the face of Title VII itself and decades' worth of Supreme Court precedent construing it.

We note that the district court's interpretation of this part of the 2013 agreement bears a strong resemblance to the Third Circuit's interpretation of a somewhat similar arbitration agreement in *Parilla v. IAP Worldwide Services, VI, Inc.*, 368 F.3d 269 (3d Cir. 2004). In *Parilla*, the Third Circuit considered whether an arbitration agreement was unconscionable where an employee had filed a charge of discrimination, but the arbitration agreement provided that the employee's charge could not be "resolved" by the EEOC. 368 F.3d at 282. Specifically, the arbitration agreement at issue provided that "[a]ny controversy or claim . . . shall be resolved by arbitration and not in a court or before an administrative agency." *Id.* The Third Circuit held that this provision did not preclude charge filing because "the

EEOC has no power to enter any judgment resolving a dispute between employee or employer." *Id.*

As an initial matter, the arbitration agreement in *Parilla* is distinguishable because, unlike Doherty's agreement, it did not prohibit the submission of claims to the EEOC. *See id.* Further, as an out-of-circuit decision, *Parilla* does not bind this Court; nor should this Court find it persuasive. In narrowly construing the agreement's use of the term "resolve" only to refer to final, binding adjudications, the Third Circuit made the same mistake the district court did here: ignoring the text of Title VII and the role the EEOC and FEPAs play in enforcing it. *See supra* at 29-32. *Parilla*'s interpretation of Title VII cannot be reconciled with the Supreme Court and other authority cited above.

Several other factors the district court noted also fail to support its interpretation of the 2013 agreement. For example, the court observed that the parties did not dispute that "mandatory arbitration of Title VII claims is lawful" or that the term "charge" did not appear in the agreement. Vol.I, R.336 at 5. But neither fact precludes the conclusion that the 2013 agreement deterred individuals from exercising their charge-filing and cooperation rights.

Similarly, the court pointed to the Supreme Court's recognition in *Gilmer* that claimants subject to an arbitration agreement could still file charges with the EEOC. Vol.I, R.336 at 5. But *Gilmer*'s holding has no bearing on whether a reasonable person would have understood the agreement not to impinge on that right under Title VII. And the same holds true for the district court's observation (Vol.I, R.336 at 7) that arbitration agreements are not required to state that they *cannot* waive signatories' charge-filing rights. Even if so, that fact provides no safe harbor for the employer who creates an agreement that suggests otherwise to a reasonable person. *See, e.g.*, *Murphy Oil*, 808 F.3d at 1019 (observing that while an "express statement . . . that an employee's right to file Board charges" is not required, "[s]uch a provision would assist, though, if incompatible or confusing language appears in the contract") (citing *D.R. Horton*, 737 F.3d at 364).

3. A reasonable fact-finder could conclude that the circumstances surrounding Doherty's 2013 revision and implementation of its arbitration agreement constitute evidence that the agreement was intended to, and did, interfere with Title VII rights.

Prior to 2013, Doherty did not single out Title VII claims as subject to mandatory arbitration. Vol.I, R.259-12. To the contrary, the

pre-2013 agreement repeatedly stated that individuals were only waiving their right to take claims, generally, to court. *Id.* In its employee handbook, Doherty explained the limited scope of the arbitration agreement in a clear and accessible manner, specifying that the agreement did not encroach on individuals' charge-filing and cooperation rights under Title VII. Vol.I, R.259-13 ("Nothing in this binding Arbitration Agreement between you and Doherty prevents you from first filing a charge or complaint, communicating with, or cooperating in an investigation or proceeding conducted by, the Equal Employment Opportunity Commission ("EEOC"), the National Labor Relations Board ("NLRB"), or any other federal, state, or local agency charged with the enforcement of any laws. However, you shall not be entitled to file a complaint in Court related to such charge or complaint, communication or investigation.")

But in 2013, Doherty abruptly changed course, making substantial changes to its arbitration policy and employee handbook. In the revised agreement, the only statute Doherty explicitly identified as covered by mandatory arbitration was Title VII. Vol.I, R.259-6 at 4. By contrast, the agreement now specifically *exempted* NLRB claims. *Id.*

While the pre-2013 agreement made repeated reference to "court" or trial proceedings as the right being waived with the agreement, *see* Vol.I, R.259-12, in the 2013 agreement almost all references to "court" were removed. In their place, Doherty introduced a new qualifier on claims that would be subject to mandatory arbitration: not just claims that could be taken to court, but "any claim, dispute, and/or controversy . . . which would otherwise require or allow resort to any court *or other governmental dispute resolution forum*." R.259-6 at 4. As explained *supra* at 29-32, a reasonable person could certainly understand "governmental dispute resolution forum" to include the EEOC.

The 2013 agreement also included language requiring all covered claims to be "submitted to and determined exclusively by binding arbitration"—language absent from the pre-2013 agreement, and by its plain terms precluding the submission of claims to the EEOC or FEPAs. *See* Vol.I, R.259-6 at 4. Prior to 2013, Doherty did use the phrase "submitted to and determined exclusively by binding arbitration," but not in the arbitration agreement itself. It used this phrase in the employee handbook, to describe the scope of the arbitration agreement—where it immediately thereafter explained that the

arbitration agreement nevertheless did *not* prevent charge filing. Vol.I, R.259-13; *see supra* at 4.

Thus, in creating the 2013 agreement, Doherty chose to incorporate the "submitted to and determined exclusively by binding arbitration" language from the earlier employee handbook, while excluding the handbook's clarifying language regarding charge-filing rights. Vol.I, R.259-6 at 4. At the same time, Doherty also deleted this charge-filing clarification from the 2013 handbook, leaving employees with no explanation that the agreement's broad scope did not encroach upon their charge-filing rights. Vol.I, R.259-6 at 4; Vol.I, R.259-11 at 10-11.

Based on this entire course of conduct, a reasonable fact-finder could conclude that Doherty's 2013 revision to its arbitration agreement and employee handbook were intended to confuse or deter its employees and applicants about their charge-filing and cooperation rights. In the pre-2013 handbook, Doherty apparently believed the requirement that all claims be "submitted to and determined exclusively by binding arbitration" suggested that the agreement prohibited charge filing and cooperation, such that Doherty needed to clarify it. Yet Doherty

imported this same phrase into the 2013 agreement without any clarification as to charge-filing rights, and then deleted all reference to that clarification from the handbook.

These inferences about the intent behind, and effects of, Doherty's actions draw further strength from the general composition of the company's workforce. The employees and applicants who signed the 2013 agreement—from Servers to Bartenders, Hosts/Hostesses, Line Cook/Food Prep employees, and General Utility employees, Vol.I, R.259-6 at 2—were unlikely to have had any sophisticated legal training. As this Court has recognized, "the provisions of Title VII were not designed for the sophisticated or the cognoscenti . . . . [P]rotection must be extended to even the most unlettered and unsophisticated. It cannot be doubted that 'a large number of the charges filed with (the) EEOC are filed by ordinary people unschooled in the technicalities of the law." *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970).

Thus, it is equally unlikely that Doherty's employees and applicants would understand, absent some explanation from Doherty, that their charge-filing rights were not waivable regardless of the terms of the arbitration agreement. As one commentator has noted, it is

precisely the vulnerability of these kinds of workers that leads employers to include provisions like charge-filing bans in employment contracts, even when the companies know them to be unenforceable. *See* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 Ohio St. L.J. 1127, 1127 (2009) (explaining that the inclusion of unenforceable provisions in modern contracts is an "especially acute" problem in the employment context); *id.* at 1136-37 ("Empirical evidence that employees are unaware of even their most basic rights—whether their employer needs a good reason to discharge them—suggests that it would not be hard to convince employees that an overbroad noncompetition clause is valid (or that a slanted arbitration regime is all they are entitled to.")).

Doherty itself maintained that it never intended the 2013 agreement to restrict charge filing. Vol.I, R.259-11 at 9. However, Doherty drafted the new agreement and purposely placed in it language that obscured individuals' charge-filing rights. Moreover, a fact-finder could credit the record evidence that Doherty told its applicants and employees the 2013 agreement specifically required all claims to be filed with Doherty for arbitration, and such claims could not be filed other

than with Doherty itself. *See supra* at 6. This is evidence that Doherty employees did in fact understand the 2013 agreement to mean they could only present their claims in arbitration and could not file charges with the EEOC or FEPAs.

In sum, applying the proper evidentiary and interpretive standards, a fact-finder could reasonably conclude that the 2013 agreement precluded charge filing and other communication with the EEOC and FEPAs. This is reflected in the plain language of the agreement itself, and further supported by the evidence regarding the circumstances surrounding Doherty's 2013 revisions. Accordingly, the court erred in granting summary judgment to Doherty.

II. The district court's summary judgment ruling should not be upheld on alternative grounds.

Doherty presented a number of arguments throughout the litigation below challenging the EEOC's ability to prosecute its § 707(a) claim—all of which the district court, correctly, rejected. This Court should do the same.

A. Doherty's decision to revise the 2013 agreement in the midst of this litigation does not render the EEOC's claim moot.

Prior to filing this lawsuit, the EEOC offered Doherty the opportunity to resolve the matter by entering into a consent decree. *See supra* at 8. The proposed decree, which was for injunctive relief only, would have provided, inter alia, that the company would revise its arbitration agreement to state that it does not prohibit charge filing. Vol.I, R.259-8 at 1. It also would have provided that signatories to the 2013 agreement could file charges with the EEOC pertaining to the period when that agreement was in effect, without being deemed untimely. *Id.* at 2.

In January 2015, after Doherty rejected the EEOC's proposal and the agency brought suit, the company again revised its arbitration agreement. *See* R.19. The newly revised agreement specified that the arbitration agreement did not infringe upon individuals' ability to file charges with the EEOC, the NLRB, or FEPAs. Vol.I, R.259-17. Doherty announced this revision to the EEOC and the district court through its January 23, 2015, reply brief in support of its first motion to dismiss. *See* R.19 at 11.

In that reply brief, Doherty also argued for the first time that the case should be dismissed as moot, based on its 2015 revision of the arbitration agreement. R.19 at 11-12. The court declined to address Doherty's mootness argument as improperly timed. Vol.I, R.32 at 4 n.1. Later, when Doherty again moved to dismiss on mootness grounds, the court rejected the motion on the merits. The court found that Doherty's decision, mid-litigation, to revise its arbitration agreement yet again—this time in a manner that comported with the EEOC's request—did not render the case moot. *See generally* Vol.I, R.333.

The EEOC approves of the language change Doherty made when it revised the agreement in 2015. That change removed the ambiguity Doherty had previously created in 2013. But without the injunctive relief the EEOC has sought, there is no remedy for those affected by the 2013 agreement and no certainty that the current, clearer agreement will remain in place once the threat posed by this litigation has passed. The district court therefore was correct to conclude that under this Court's settled precedent, Doherty's decision to revise its arbitration agreement mid-litigation did not moot the suit.

"'The doctrine of voluntary cessation provides an important exception to the general rule that a case is mooted by the end of the offending behavior." *Troiano v. Supervisor of Elections in Palm Beach Cnty., Fla.*, 382 F.3d 1276, 1282 (11th Cir. 2004). "It long has been the rule that 'voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot.'" *Id.* at 1283 (quoting *Sec'y of Labor v. Burger King Corp.*, 955 F.2d 681, 684 (11th Cir. 1992) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S. Ct. 894, 897 (1953))).

As this Court has noted, in the case of a party's voluntary cessation of challenged conduct, "the defendant is 'free to return to his old ways.'" *Harrell v. The Florida Bar*, 608 F.3d 1241, 1265 (11th Cir. 2010) (quoting in part *W.T. Grant*, 345 U.S. at 632, 73 S. Ct. at 897)). Accordingly, a private-party defendant "bears a 'heavy burden' of demonstrating that his cessation of the challenged conduct renders the controversy moot."[5] *Id.* (quoting *Friends of the Earth*, 528 U.S. at 189,

[5] When addressing mootness, "government actors receive the benefit of a rebuttable presumption that the offending behavior will not recur," while "private citizens are not entitled to this legal presumption." *Sheely*, 505 F.3d at 1183 (citing *Troiano*, 382 F.3d at 1283).

120 S. Ct. at 708). "A defendant's assertion that it has no intention of reinstating the challenged practice 'does not suffice to make a case moot.'" *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1182 (11th Cir. 2007) (quoting *W.T. Grant*, 345 U.S. at 633, 73 S. Ct. at 897)).

Instead, the movant must establish that: "(1) it can be said with assurance that there is no reasonable expectation . . . that the alleged violation will recur, and (2) interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation." *Harrell*, 608 F.3d at 1265 (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383 (1979)) (emphasis added). "In other words, . . . the case will be moot only if it is '*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (quoting in part *Ala. v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1131 (11th Cir. 2005)) (emphasis added by court). "More generally, the 'timing and content' of a voluntary decision to cease a challenged activity are critical in determining the motive for the cessation and therefore 'whether there is [any] reasonable expectation . . . that the alleged violation will recur.'" *Id.* at 1266 (citation omitted).

In *Sheely*, this Court held that the plaintiff's claims for injunctive and declaratory relief were not rendered moot by the defendant's voluntary cessation, in the midst of litigation, of the challenged conduct. 505 F.3d at 1181-83. This Court stated that in assessing whether the defendant had carried its heavy burden to establish mootness due to voluntary cessation, the Court had previously found relevant "at least the following three factors: (1) whether the challenged conduct was isolated or unintentional, as opposed to a continuing and deliberate practice; (2) whether the defendant's cessation of the offending conduct was motivated by a genuine change of heart or timed to anticipate suit; and (3) whether, in ceasing the conduct, the defendant has acknowledged liability." *Id.* at 1184.

The district court's conclusion that Doherty had failed to carry its heavy burden to prove mootness tracked this Court's assessment of these mootness factors in *Sheely*. As to the first factor, the *Sheely* Court explained that "courts are more likely to find that the challenged behavior is not reasonably likely to recur where it constituted an isolated incident, was unintentional, or was at least engaged in reluctantly." *Id.* "Conversely, we are more likely to find a reasonable

expectation of recurrence when the challenged behavior constituted a 'continuing practice' or was otherwise deliberate." *Id.* at 1184-85 (citations omitted). Here the district court concluded that the 2013 agreement "was a condition of employment from approximately June 2013 through January 2015 at all its restaurants and was approved by [Doherty's] vice-president," and this showed the arbitration policy was "a deliberate practice and is not an isolated incident." Vol.I, R.32 at 8 (citation omitted).

As for the second factor, *Sheely* stated that "we are more likely to find that cessation moots a case when cessation is motivated by a defendant's genuine change of heart rather than his desire to avoid liability." 505 F.3d at 1186. In this case, Doherty only revised its arbitration policy after the EEOC requested that it change the language, it refused to do so, and it was then sued, and it first raised mootness only in a reply memorandum on its motion to dismiss. The district court concluded, echoing *Sheely*, that "[s]uch timing does not signify a change of heart, but instead an attempt to avoid liability." Vol.I, R.32 at 6. The district court looked to this Court's mootness decisions that were "relevant to timing and highlighted by [*Sheely*],"

recognizing that where this Court had found the case moot, there had been a cessation of the objectionable conduct prior to suit. *Id.* at 6-7 (citing cases).

As for the third factor, *Sheely* recognized that "under controlling law, a defendant's failure to acknowledge wrongdoing similarly suggests that cessation is motivated merely by a desire to avoid liability, and furthermore ensures that a live dispute between the parties remains." 505 F.3d at 1187 (citing cases). Here, the district court concluded that the evidence suggested the cessation was "motivated by a desire to avoid liability," offering as an example that Doherty's chief financial officer testified that "after conversations with attorneys, [Doherty] 'decided to modify our arbitration agreement to satisfy the EEOC . . . even though we felt the existing agreement was clear.'" Vol.I, R.32 at 7 (quoting R.253-3). The court also noted that in its briefing Doherty did not identify any evidence on this factor, instead only offering the "cursory" statement that it never intended to violate Title VII. Vol.I, R.32 at 7 & n.3.

As noted *supra* at 46, the EEOC has ongoing concerns regarding Doherty's future conduct. There currently exists no restriction on

Doherty's ability to roll back its 2015 arbitration agreement and reinstate the 2013 version. Additionally, any individuals who may have interpreted the 2013 agreement to prohibit them from filing charges with the EEOC or FEPAs are without any remedy. This not only deprives such individuals of their rights under the law, but also interferes with the EEOC's ability, through receipt of such charges, to seek to eliminate employment discrimination. *See supra* at 22-24.

Considering all of these factors together, the district court correctly concluded that Doherty had failed to meet this Court's standard for establishing mootness.

B. The EEOC satisfied all necessary preconditions to suit under § 707(a).

Doherty argued below that the EEOC could not bring this action because there was no underlying charge of discrimination and because the agency did not attempt to resolve the matter through conciliation prior to filing suit. The district court correctly rejected these arguments as well. Vol.I, R.32 at 2.

As explained *supra* at 20, § 707(a) of Title VII provides the EEOC with the authority to bring suit whenever it "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." 42 U.S.C. § 2000e-6(a). The statutory language, its legislative history, and Supreme Court and this Court's precedent all support the EEOC's position that § 707 has its own, unique pre-suit requirements. Accordingly, the government may bring suit under § 707 without a predicate charge of discrimination and, in the absence of a charge, without following § 706's pre-suit procedures, including conciliation. 42 U.S.C. §§ 2000e-5(b), (f)(1). The district court agreed, rejecting Doherty's motion to dismiss that challenged this understanding of § 707(a). *See generally* Vol.I, R.32 at 4-12. The district court's ruling was based on sound, controlling authority, and this Court should not disturb it.

Understanding how §§ 706 and 707 relate to one another requires a brief review of the amendments made to the statute after its initial enactment in 1964. "Prior to 1972, the only civil actions authorized [under Title VII] other than private lawsuits were actions by the Attorney General upon reasonable cause to suspect 'a pattern or

practice' of discrimination. These actions did not depend upon the filing of a charge with the EEOC." *Gen. Tel.*, 446 U.S. at 327, 100 U.S. at 1704-05. As the *General Telephone* Court noted, however, "Congress became convinced that the failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII." *Id.* at 325 (internal citation and quotation marks omitted).

Accordingly, "[t]he 1972 amendments, in addition to providing for a § 706 suit by the EEOC pursuant to a charge filed by a private party, transferred to the EEOC the Attorney General's authority to bring pattern-or-practice suits on his own motion." *Id.* at 328. In transferring § 707 suit authority from the Attorney General to the EEOC, Congress "intended the EEOC to proceed in the same manner" as had the Attorney General before it. *Id.* at 329.

In contrast, § 706(b) states plainly that, if a charge is filed, and "[i]f the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b); *see also Mach Mining*, 135 S. Ct. at

1651 ("Title VII, as the Government acknowledges, imposes a duty on the EEOC to attempt conciliation *of a discrimination charge* prior to filing a lawsuit.") (emphasis added). Section 707(e) then incorporates § 706(b)'s procedures into § 707 actions *where charges have been filed*. 42 U.S.C. § 2000e-6(e). By the plain language of the statute, these are the only circumstances under which Title VII obliges the EEOC to engage in the statutory conciliation procedure: where there has been a charge and reasonable cause has been found. There are no others.

Likewise, this Court has long recognized that the EEOC's pre-suit requirements under § 706 do not apply to all suits brought by the EEOC under § 707(a). Instead, "[u]nder [§] 707, the EEOC (formerly the Attorney General) may institute a 'pattern or practice' suit anytime that it has 'reasonable cause' to believe such a suit necessary." *United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843 (5th Cir. 1975), (citing *United States v. Jacksonville Terminal*, 451 F.2d 418, 438 (5th Cir. 1972)). "Section 707 does not make it mandatory that anyone

file a charge against the employer or follow administrative timetables before the suit may be brought."[6] *Id.*

In sum, it has been settled law in this Court for over forty years that a § 707(a) action may commence upon a finding of reasonable cause, without a predicate charge or conciliation. Doherty sought to sidestep this precedent by arguing that *Allegheny-Ludlum* was overruled by *EEOC v. Shell Oil Co.*, 466 U.S. 54, 104 S. Ct. 1621 (1984), which ostensibly meant that the EEOC was limited to bringing § 707 actions only under § 707(e), not § 707(a). *See* Vol.I, R.32 at 8-9. The district court was correct to reject this assertion. As the court

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[6] Other courts have similarly recognized this distinction between §§ 706 and 707. *See EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 794-96 (5th Cir. 2016) (discussing distinction between EEOC's enforcement authority under §§ 706 and 707(a)); *Serrano v. Cintas Corp.*, 699 F.3d 884, 896 (6th Cir. 2012) ("[Section] 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."); *EEOC v. Cont'l Oil Co.*, 548 F.2d 884, 887 (10th Cir. 1997) (contrasting distinct pre-suit obligations under §§ 706 and 707(a)); *United States v. Fresno Unified Sch. Dist.*, 592 F.2d 1088, 1096 n.5 (9th Cir. 1979) (distinguishing § 706's charge-filing requirement: "Section 707, however, contains no requirement that anyone file a charge."). *But see EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 339, 342 (7th Cir. 2015) (requiring the EEOC to "comply with all of the pre-suit procedures contained in Section 706, including conciliation," when bringing suit under § 707(a)).

recognized, Doherty misinterpreted *Shell Oil*, a decision addressing the EEOCs authority to enforce its administrative subpoenas and which had no relevance to *Allegheny-Ludlum*. *Id.*; *see also Shell Oil*, 466 U.S. at 65, 104 S. Ct. at 1629 (holding that "the existence of a charge that meets the requirements set forth in § 706(b) . . . is a jurisdictional prerequisite to judicial enforcement of [an EEOC] subpoena").

The district court was also correct to disregard Doherty's invocation of *EEOC v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014), an out-of-circuit, noncontrolling district court decision, as both contrary to *Allegheny-Ludlum* and "internally inconsistent." Vol.I, R.32 at 10-12. And while the Seventh Circuit ultimately affirmed the district court's ruling in *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 339, 341-43 (7th Cir. 2015), the court of appeals, like the district court, was not bound by *Allegheny-Ludlum* either. As the district court here correctly recognized, *Allegheny-Ludlum* is the law of this Court, and as such this Court must follow it. Vol.I, R.32 at 8-9; *see also, e.g.*, *United States v. Fred Smith*, 122 F.3d 1355, 1359 (11th Cir. 1997) ("[W]e are not free to judge the [applicable] rule in light of case law from other circuits. Under the prior panel precedent rule, we are bound by earlier panel

holdings . . . unless and until they are overruled en banc or by the Supreme Court.") (citations omitted).

C. Section 707(a) provides the EEOC with a cause of action for a pattern or practice of resistance to the full exercise of Title VII rights.

The district court correctly rejected Doherty's argument that § 707(a) does not provide a cause of action for "resistance" to an individual's Title VII rights separate and apart from unlawful employment practices as defined in § 706 of the statute. *See* Vol.I, R.32 at 9 (citing 42 U.S.C. § 2000e-5). As the court concluded, "because Congress chose to use different language in the two sections [706 and 707(a)], it manifested different intent; namely, that a resistance claim is not limited to cases involving an unlawful employment practice. Instead, a resistance claim may be brought to stop a pattern and practice of resistance to the full enjoyment to Title VII rights." Vol.I, R.32 at 9.

While a pattern or practice of "unlawful employment practices" is prohibited under § 706, § 707(a) is addressed more broadly than § 706, to "a pattern or practice of resistance." Congress did not define the term "resistance" in Title VII; thus, the Court must give the term its

ordinary meaning. *FCC v. AT&T Inc.*, 562 U.S. 397, 403, 131 S. Ct. 1177, 1182 (2011). The ordinary meaning of "resistance" includes "the act or an instance of resisting: passive or active opposition," and "resist" is similarly understood as "to exert oneself to counteract or defeat: strive against." Webster's Third New Int'l Dictionary (1993). Therefore, Congress' use of the phrase "resistance to the full enjoyment of any of the rights secured by this subchapter" should be understood to reach efforts to stop or prevent an individual from exercising Title VII rights.

Had Congress intended § 707(a) to refer to a pattern or practice of "unlawful employment practices," it presumably would have used that phrase in § 707(a). But it did not. Likewise, when Congress meant to address "a pattern or practice of discrimination" in § 707(e), as compared to "a pattern or practice of resistance," it used that specific phrase.[7] *See* 42 U.S.C. § 2000e-6(e) ("[T]he Commission shall have the authority to act on a charge of a pattern or practice of discrimination.").

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[7] The district court also recognized that "resistance" actions such as that in § 707(a) are not unique to Title VII. Both the Fair Housing Act, 42 U.S.C. § 3614(a), and Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-5(a), also "allow the government to target broader

Similarly, Congress' use of the broad term "person" in § 707(a), as compared to its narrower definition of possible illegal actors in § 706, further demonstrates how § 707(a) is not limited to "unlawful employment practices." Under § 706, only employers, employment agencies, labor organizations, joint labor management committees, controlling apprenticeships, or other training programs are prohibited from committing "unlawful employment practices." 42 U.S.C. § 2000e-5(b). In contrast, § 707(a) prohibits resistance by "any person or group of persons." 42 U.S.C. § 2000e-6(a).

The Supreme Court has stressed that Congress' "special care in drawing so precise a statutory scheme" as Title VII—a statute that is "precise, complex, and exhaustive"—"makes it incorrect to infer that Congress meant anything other than what the text does say." *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 355-56, 133 S. Ct. 2517, 2530 (2013); *see also Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300 (1983) ('[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act,

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patterns and practices of resistance and provides relief as it 'deems necessary to insure the full enjoyment of rights herein described.'" Vol.I, R.32 at 10 n.7 (quoting 42 U.S.C. § 2000e-6(a)).

it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted).

Finally, early § 707 litigation confirms that the courts understood "resistance" to reach conduct beyond the unlawful employment practices addressed through § 706. For example, in *United States v. Original Knights of the Ku Klux Klan*, 250 F. Supp. 330 (E.D. La. 1965), the Attorney General sought and received an injunction against the Klan under several statutory civil rights provisions, including § 707. 250 F. Supp. at 335. The court observed, "[a]s clearly as words can say, these provisions reach any person and any action that interferes with the enjoyment of civil rights secured by the Act." *Id.* at 349. Accordingly, the court granted the government's request for an injunction based, inter alia, on the defendants' admission that they "beat and threatened Negro pickets to prevent them from enjoying the right of equal employment opportunity. . . . Such acts not only deter Negroes but intimidate employers who might otherwise wish to comply with the law but fear retaliation and economic loss." *Id.* at 356.

Approximately twenty-five years later, the Third Circuit recognized the availability of a § 707 cause of action against the

Commonwealth of Pennsylvania for "prophylactic relief" from a policy that "endangered" a public school teacher's Title VII rights. *United States v. Bd. of Educ. for Sch. Dist. of Phila.*, 911 F.2d 882 (3d Cir. 1990). The court held that, under § 707, "[o]ne need not be the employer of the employees whose Title VII rights are endangered in order to be liable under this section, but the Attorney General must demonstrate the existence of a 'pattern or practice' in order to obtain the prophylactic relief provided." *Id.* at 892.

D. A reasonable fact-finder could conclude that Doherty acted with the requisite intent to establish a violation of § 707(a).

The district court did not reach the question of whether there was sufficient evidence to support a fact-finder's conclusion that Doherty had acted with the requisite intent to violate § 707(a). *See generally* Vol.I, R.336. Doherty argued it did not, but the record shows there was sufficient evidence of unlawful intent to support a finding of liability.

Section 707(a) requires that prohibited resistance conduct be "intended to deny the full exercise of the rights herein described." 42 U.S.C. § 2000e-6(a). Courts have long recognized that intent under § 707(a) is a straightforward proposition, for "[t]he requisite intent may be inferred from the fact that the defendants persisted in the conduct

after its [unlawful] implications had become known to them. Section 707(a) [42 U.S.C.A. § 2000e-6(a)] demands no more." *Jacksonville Terminal*, 451 F.2d at 443 (quoting *Local 189, United Papermakers & Paperworkers, AFL-CIO, CLC v. United States by Mitchell*, 416 F.2d 980, 996-97 (5th Cir. 1969)).

Between the face of the 2013 agreement itself and the circumstances surrounding its adoption, there was more than enough evidence to support a factual finding that Doherty intended to interfere with individuals' Title VII charge-filing and communication rights. As described *supra* at 5, the 2013 agreement stated that binding arbitration applied "to resolve *any dispute, controversy or claim* arising out of, relating to or in connection with my employment with Doherty Enterprises." (Emphasis added.) It also specifically highlighted "any claims of *employment discrimination, harassment, and/or retaliation under Title VII* . . . which would otherwise require or allow resort to any court *or other governmental dispute resolution forum*" as being covered. (Emphases added.) It then contrasted Title VII claims with the "*sole exception*" to coverage: "claims arising under the National Labor Relations Act which are brought before the *National Labor Relations*

Board, [and] claims for medical and disability benefits under applicable state and/or local law." (Emphases added.)

A reasonable fact-finder could infer, based on this language alone, that Doherty knew exactly what it was doing in drafting the 2013 agreement, and that it did so intentionally: leaving signatories with the impression that their only avenue for vindicating their Title VII rights was through arbitration. Nonetheless, this is far from the only evidence in the record. As described *supra* at 5-6, there is also Doherty's revision of the employee handbook around the same time to delete the language explaining that the arbitration agreement did not preclude individuals from filing charges or communicating with the EEOC or FEPAs. Vol.I, R.259-11 at 10-11. There is witness testimony that Doherty specifically told its employees the 2013 agreement *did* require all claims to be filed solely with Doherty and precluded filing claims anywhere else. *See supra*, at 6; Vol.I, R.284-1 at 1-2**.**

In addition, as described *supra* at 6-7, the explanations Doherty did offer about the reasons behind the 2013 revisions to its arbitration agreement utterly failed to account for why it would have altered the language around charge filing, cooperation, and Title VII as it did.

None of the reasons Coughlin advanced for the changes to the agreement—acquiring new restaurants in new states, Ban the Box, new social media or NLRB case law, franchisees' past legal issues—could reasonably have justified those changes. *Cf. Combs v. Plantation Patterns*, 106 F.3d 1519, 1528 (11th Cir. 1997) (noting that discrimination may be proven by evidence "sufficient to permit a reasonable factfinder to conclude that the reasons given by the employer were not the real reasons for the adverse employment decision") (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 1095 (1981), and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S. Ct. 1817, 1825 (1973)).

Conclusion

The EEOC respectfully requests that this Court vacate the grant of summary judgment to Doherty and remand the matter for further proceedings.

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume requirements set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) and Eleventh Circuit Rule 32-4. This brief contains 12,880 words, from the Statement of the Issue through the Conclusion, as determined by the Microsoft Word 2016 word processing program, with 14-point proportionally spaced type for text and 14-point proportionally spaced type for footnotes.

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Certificate of Service

I hereby certify that on this 27th day of August, 2018, I filed the foregoing brief electronically in PDF format through the Court's CM/ECF system, and caused to be sent seven hard copies of this brief by U.P.S. Next Day Air delivery, postage prepaid, to the Clerk, U.S. Court of Appeals for the 11th Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303. I further certify that on this day, service of this brief on counsel for Defendant – Appellee was accomplished via the Court's CM/ECF system.

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General Information

Court	United States Court of Appeals for the Eleventh Circuit; United States Court of Appeals for the Eleventh Circuit
Federal Nature of Suit	Civil Rights - Employment[1442]
Docket Number	18-11776