No. 09-3219

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Applicant-Appellant,

v.

KRONOS INCORPORATED,

Respondent-Appellee.

On Appeal From The United States District Court
For The Western District Of Pennsylvania

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

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

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

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

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

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: None.

4) The instant appeal is not a bankruptcy appeal.

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

INTEREST OF THE *AMICI CURIAE*

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

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation, representing an underlying membership of

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

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

The National Federation of Independent Business Small Business Legal Center, a nonprofit, public interest law firm established to be the voice for small business in the nation's courts and the legal resource for small business, is the legal arm of the National Federation of Independent Business (NFIB). NFIB is the nation's leading small business advocacy association, with offices in Washington, DC and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member

businesses nationwide. As the legal arm of NFIB, the 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 National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

Amici's members are employers or representatives of employers that are subject to Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq*. and the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq*., as well as other labor and employment statutes and regulations. *Amici's* members have a direct and ongoing interest in the issues presented in this matter regarding the U.S. Equal Employment Opportunity Commission's (EEOC) authority to compel the production of evidence that is not relevant to the particular charge under investigation.

Amici seek to assist the Court by highlighting the impact its decision in this case may have beyond the immediate concerns of the parties. Accordingly, this brief brings to the attention of the Court relevant matters that have 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 substantial significance of this case to the constituency they represent.

STATEMENT OF THE CASE

Vicky Sandy filed a charge of discrimination with the EEOC accusing a West Virginia Kroger food store of disability discrimination in violation of the Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. §§ 12101 *et seq*. *EEOC v. Kronos Inc.*, 2009 U.S. Dist. LEXIS 45449 (W.D. Pa. June 1, 2009). She claims that she applied for several open positions (including those of bagger, cashier, and stocker) at a Kroger store in Clarksburg, West Virginia, but was told she was not a "good fit for any openings because of the way that [she] speak[s]." Brief of the Equal Employment Opportunity Commission as Appellant (EEOC Brief) at 4. Although the charge does not identify Ms. Sandy's alleged disability, the EEOC asserts that Ms. Sandy is clinically deaf and suffers from a speech impairment. *Id.* at 3.

During its investigation of the Sandy charge, the EEOC learned that Ms. Sandy had taken two written employment tests, which were developed by Kronos Incorporated (Kronos), a non-party testing consultant. *Kronos*, 2009 U.S. Dist. LEXIS 45449, at *2. Although Ms. Sandy had passed both of the assessments, and had proceeded to the interview stage of Kroger's application process, the EEOC nevertheless decided to focus its investigation at least in part on the assessments. EEOC Brief at 5-6.

To that end, the EEOC served a third-party administrative subpoena on Kronos seeking a wide range of commercially sensitive documents that included test assessments, job analyses, validation studies and other related documents. *Id.* at 7. While the subpoena was pending, the EEOC advised Kroger that it had expanded its investigation of the Sandy charge to include suspected class-based, nationwide disability discrimination by the company. *Id.* at 7. It later purported to expand the investigation further to include possible nationwide race discrimination against African-American test-takers, *id.* at 8, and issued a new, even broader subpoena based on its twice-expanded investigation. *Id.* at 8-9. After Kronos refused to comply with the subpoena, the EEOC sought judicial enforcement in federal district court. *Id.* at 10.

The district court refused to enforce the agency's request in its entirety and instead re-drafted the subpoena to impose temporal and geographic limits, so as to

narrow the inquiry to disability discrimination only and to restrict the agency to information that relates only to Kroger Foods. *Kronos*, 2009 U.S. Dist. LEXIS 45449, at *3-4. In addition, the district court required the EEOC and Kronos to enter into a confidentiality agreement "to protect any trade secret/confidential information of Kronos and the personal information of persons taking the Assessment Tests." *Id.* at *6. This appeal ensued.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency charged with enforcing, *inter alia*, the Americans with Disabilities Act (ADA) of 1990, which prohibits discrimination against qualified individuals with disabilities. 42 U.S.C. §§ 12101 *et seq*. Patterned upon the enforcement and remedial scheme of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e-8, the ADA expressly limits the scope of an EEOC investigation to those issues bearing upon resolution of the specific allegations raised in the underlying charge. 42 U.S.C. § 12117(a).

The investigatory power granted to the EEOC under the ADA is not plenary, and the agency is entitled *only* to information that is "*relevant to the charge under investigation*." 42 U.S.C. § 2000e-8(a) (emphasis added). Thus, unlike some other federal agencies, the EEOC may compel the production only of information that is

relevant to, and within the scope of a reasonable investigation of, a specific charge that has been filed with the agency.

When an EEOC subpoena exceeds the bounds of relevancy, as it did here, courts will either deny enforcement of the agency's demand or limit its request to a more appropriate scope of investigation. *See General Ins. Co. v. EEOC*, 491 F.2d 133 (9th Cir. 1974); *EEOC v. United Air Lines, Inc.*, 287 F.3d 643 (7th Cir. 2002); *EEOC v. Southern Farm Bureau Cas. Ins. Co*., 271 F.3d 209 (5th Cir. 2001). Accordingly, the district court acted well within its discretion when it declined to fully enforce a third-party administrative subpoena containing no restrictions in time, geographic scope or job categories, and which sought information relating to the employment practices of other companies that have no connection to the parties in this case or the charge under investigation.

The EEOC's bald assertion that it may "expand" charge investigations beyond the scope of an individual's charge has no legal foundation, and courts are particularly reluctant to allow the EEOC to expand the scope of a charge investigation from one theory of discrimination to another (*e.g.*, from disability to race discrimination), especially when the expanded inquiry does not assist in resolving the underlying claim. *EEOC v. Southern Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001). If the EEOC wishes to pursue another form of discrimination, the appropriate course of action is for the agency to obtain a valid

charge that would support such an investigation. *Southern Farm*, 271 F.3d at 211-12; *see also* 42 U.S.C. § 12117; 29 C.F.R. § 1601.11(a).

The development, validation and subsequent monitoring of employment tests come at considerable expense to employers that use them. To the extent that even a minor breach in test security can compromise the integrity and future use of that test, it is reasonable for courts to impose confidentiality requirements on parties seeking access to such information. Therefore, the district court's confidentiality order also was proper.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT THE EEOC MAY NOT JUDICIALLY ENFORCE AN ADMINISTRATIVE SUBPOENA SEEKING INFORMATION THAT IS IRRELEVANT TO THE CHARGE OF DISCRIMINATION UNDER INVESTIGATION

A. The EEOC's Investigative Authority Under The ADA Is Predicated Upon The Existence Of A Valid Charge Of Discrimination

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Section 107(a) of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 *et seq.*, which prohibits discrimination against qualified individuals with disabilities, incorporates Section 709(a) of Title VII, 42 U.S.C. § 2000e-8(a). Section 107(a) provides:

> The powers, remedies, and procedures set forth in sections . . . 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 shall be the powers, remedies, and procedures this title provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this Act, or regulations promulgated [thereunder . . . section 12116], concerning employment.

42 U.S.C. § 12117(a). As the U.S. Supreme Court has observed, Congress directed the EEOC, in enforcing the ADA, "to exercise the same enforcement powers, remedies, and procedures that are set forth in Title VII . . . Accordingly, the provisions of Title VII defining the EEOC's authority provide the starting point for our analysis." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285-86 (2002) (citation and footnote omitted); *see also* 29 C.F.R. § 1601.1 (EEOC procedural regulations for enforcing Title VII and the ADA).

Title VII and the ADA set forth "'an integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977)) (footnote omitted). A discrimination charge may be filed with the EEOC by or on behalf of any individual claiming to be aggrieved or by a member of the Commission itself where he or she has reason to believe unlawful discrimination has occurred but for which an individual charge alleging the specific type of discrimination has not been filed. *Id.*

The EEOC is permitted to investigate alleged employment discrimination only upon receipt of a legally sufficient discrimination "charge." 42 U.S.C. § 2000e-5. A valid charge under the Act is one that is submitted in writing, under oath or affirmation, 42 U.S.C. § 2000e-5(b), and signed by the charging party. 29 C.F.R. § 1601.9.

In addition, the EEOC's procedural regulations require that charges include a "clear and concise statement of facts . . . constituting the alleged unlawful employment practices." 29 C.F.R. § 1601.12(a)(3). The "evident purpose of the regulation [is] to encourage complainants to identify with as much precision as they can muster the conduct complained of." *Shell Oil*, 466 U.S. at 72.

B. The EEOC's Investigative Authority Under The ADA Is Not Plenary; Rather, It Is Limited To Investigation Only Of Those Issues Related To The Underlying Charge Of Discrimination

Contrary to the EEOC's assertions, the ADA expressly limits the scope of an EEOC investigation to the specific allegations raised in the charge. 42 U.S.C. § 2000e-8. The applicable statutory authority provides:

> In connection with any investigation of a charge filed under section 2000e-5 of this title, the Commission or its designated representative shall at all reasonable times have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter *and is relevant to the charge under investigation.*

42 U.S.C. § 2000e-8(a) (emphasis added). As the U.S. Supreme Court has observed, "unlike other federal agencies that possess plenary authority to demand to see records relevant to matters within their jurisdiction, the EEOC is entitled to access only evidence '*relevant to the charge under investigation.*'" *Shell Oil*, 466 U.S. at 64 (citation and footnote omitted) (emphasis added). In this respect, the EEOC's investigatory power is "significantly narrower than that of [some other federal agencies] who are authorized to conduct investigations, inspect records, and issue subpoenas, whether or not there has been any complaint of wrongdoing." *Id.* at 64-65 (citation omitted).

Because of the important role a discrimination charge plays in the EEOC's enforcement procedure, it must do more than "merely allege that an employer has violated [the law]," as such a lack of specificity would "render nugatory the statutory limitation o[n] the Commission's investigative authority *to materials 'relevant' to a charge*." *Id*. at 72 (emphasis added). Thus, courts must "strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination," which is intended to "prevent the Commission from exercising unconstrained investigative authority." *Id.*

When an EEOC subpoena exceeds the bounds of relevancy, courts will either deny enforcement of the agency's demand or will scale back the agency's

request to reflect a more appropriate scope of investigation. In refusing to enforce a particularly overbroad EEOC subpoena, for instance, the Seventh Circuit in *EEOC v. United Air Lines, Inc.* reasoned that the "requirement of relevance, like the charge requirement itself, is designed to cabin the EEOC's authority and prevent 'fishing expeditions.'" 287 F.3d 643, 653 (7th Cir. 2002) (quoting *EEOC v. K-Mart Corp*., 694 F.2d 1055, 1066 (6th Cir. 1982)). To permit the EEOC to conduct such a broad investigation "would require us to disregard the Congressional requirement that the investigation be based on the charge." *Id*. at 655; *see also EEOC v. Ford Motor Credit Co*., 26 F.3d 44, 47 (6th Cir. 1994); *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178, 183-84 (10th Cir. 1973); *EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1259 (E.D. Wis. 1996).

Courts also have refused to allow the EEOC to drift from one theory of discrimination, *e.g.*, disability, to another, *e.g.*, race.[1] In *EEOC v. Southern Farm Bureau Casualty Insurance Co*., for instance, the Fifth Circuit refused to enforce an EEOC subpoena seeking information concerning gender in connection with the investigation of a race discrimination charge filed by an African-American male. 271 F.3d 209 (5th Cir. 2001). The court observed that the EEOC's authority to

[1] *See, e.g., EEOC v. Southern Farm Bureau Cas. Ins. Co*., 271 F.3d 209 (5th Cir. 2001); *EEOC v. U.S. Fid. & Guar. Co.*, 414 F. Supp. 227, 250 (D. Md.), *aff'd*, 538 F.2d 324 (4th Cir. 1976); *EEOC v. Quick-Shop Markets, Inc.*, 396 F. Supp. 133, 135 (E.D. Mo.), *aff'd*, 526 F.2d 802 (8th Cir. 1975) (*per curiam*).

demand information is not unlimited, but rather must be based on the specific claims raised in a valid charge. *Id.* at 211-12.

Even the agency's own Compliance Manual counsels investigators against collecting irrelevant information and data that exceed the scope of the allegations raised in the charge, instructing them, for example, to collect only evidence that is both "material to the charge" and "relevant to the issue(s) raised in the charge." 2 EEOC Compl. Man. § 602.4 (2002 & Supp. 2009). Evidence is *material*, the agency explains, "when it relates to one or more of the issues raised by a charge . . . or by a respondent's answer to it." *Id*. at § 602.4(a). Evidence is *relevant* "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b).

Accordingly, the Manual explains that relevant evidence would *not* include "[v]oluminous data" that "has nothing to do with [the] employment practices [being] investigated." *Id.* at § 602.4(a). Likewise, "in a charge alleging failure to hire on the basis of race, evidence offered by the respondent to show that its workforce is 50% female is not material." *Id.*

Applying these principles to the facts of this case, the district court below did not err when it declined to enforce in its entirety a subpoena that the court accurately described as "breathtaking" in its scope. Indeed, the EEOC's administrative subpoena was so broad that it sought information and records

without any temporal or geographic limits whatsoever and with no reference to the particular positions for which Ms. Sandy applied. The subpoena also demanded information relevant to race, which indisputably is *irrelevant* to Ms. Sandy's claims, which pertain exclusively to the issue of disability. Accordingly, the district court correctly determined that the EEOC's investigation into possible race discrimination had no connection to the Sandy charge, and therefore, should be so limited.

It is especially troubling that the EEOC – which chose to direct its subpoena not to Kroger, but to a third-party professional services provider not named as a respondent to the charge – appears to be using the subpoena as a means to investigate *other employers* that have no connection whatsoever with either Ms. Sandy or Kroger Foods. Among other things, the EEOC's subpoena demands "any and all documents discussing, analyzing or measuring potential adverse impact," whether or not they relate to employment tests taken by Ms. Sandy or administered by Kroger Foods, as well as a catalogue and description of "each and every assessment offered" by Kronos.

As the district court astutely points out, these requests could conceivably include "most of Kronos' business documents, *covering its entire client base*." *EEOC v. Kronos Inc.*, 2009 U.S. Dist. LEXIS 45449, at *4 (W.D. Pa. June 1, 2009) (footnote omitted) (emphasis added). Although *amici* will assume for the

purposes of this brief that the EEOC has authority to subpoena information from a non-party such as Kronos, the few courts that have addressed the question are not in agreement. *Compare EEOC v. Bellemar Parts Indus., Inc.*, 865 F.2d 780, 781 (6th Cir. 1989) (upholding award of attorney's fees against EEOC where subpoena sought evidence from a company not named in the charge) *with EEOC v. Illinois Dep't Employment Sec.*, 995 F.2d 106, 107 (7th Cir. 1993) (enforcing subpoena for information from third-party state agency). Assuming the agency does have the authority to demand information from a third-party such as Kronos, information relating to other Kronos clients is in no way relevant to the agency's investigation of the Sandy charge. *See EEOC v. ABM Janitorial-Midwest, Inc.*, 2009 U.S. Dist. LEXIS 112039, at *14 (N.D. Ill. Dec. 2, 2009) (rejecting EEOC subpoena for information concerning third-party employer, court ruled that the employment practices of an "unrelated entity" are "not reasonably relevant to the underlying charge"). In this regard, the agency's subpoena is tantamount to an unauthorized "fishing expedition" into the employment practices of other unrelated entities.

Given the extraordinary breadth of the EEOC's subpoena demand, *amici* can only speculate that the agency views the Sandy charge as an opportunity to "raid" Kronos' client database for other prospective enforcement targets. Yet, the EEOC's approach puts the cart before the horse. A valid charge is a *condition precedent* to the issuance of a subpoena – not the other way around. *Shell Oil* at

64. The statutory framework created by Congress simply does not permit the EEOC to issue subpoenas in the hopes of identifying information that might provide the basis for the agency to bring a charge against some other employers.

Given the unreasonably broad scope of the agency's subpoena, the district court's decision to curb the agency's demand was not an abuse of discretion, and it is consistent with the intention of Congress to "prevent the Commission from exercising unconstrained investigative authority . . . ." *Shell Oil* at 72.

C. The EEOC May Not Informally "Expand" Its Investigation Of A Disability Discrimination Charge To Justify A Demand For Race Information – Or Any Other Evidence Not Relevant To The Charge Under Investigation

The EEOC's bald assertion that it may informally "expand" an investigation to include issues unrelated to the allegations of the underlying charge and, as such, *compel* production of information wholly irrelevant to the charge has no legal foundation. While the EEOC correctly observes in its brief that some courts afford the agency fairly broad access to "virtually any material that might cast light on the allegations against the employer," even this standard requires that the information sought have some connection to *"the allegations"* as stated in the charge. *Shell Oil*, 466 U.S. at 68-69 (footnote omitted) (emphasis added). In other words, the EEOC may not "expand" or otherwise transform an individual charge into an

"across-the-board attack" on a company's employment practices. *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 158-59 (1982).

Courts have shown particular reluctance in permitting the EEOC to expand the scope of charge investigations from one theory of discrimination to another (*e.g.*, from disability to race discrimination), especially when, as here, the expanded inquiry does not assist at all in resolving the underlying claim. In *EEOC v. Southern Farm Bureau Casualty Insurance Co*., 271 F.3d 209 (5th Cir. 2001), the EEOC sought to expand its investigation of a race discrimination charge brought by an African-American male to include an inquiry into possible sex discrimination against women. As in this case, the EEOC in *Southern Farm* did so simply by writing an informal letter to the company stating the investigation had been "expanded." *Id.* at 210. The Fifth Circuit upheld the district court's decision not to enforce the subpoena, ruling that the agency had not demonstrated how the information about gender was relevant to the charging party's allegations concerning race discrimination. *Id.* at 211-12. It correctly observed that the EEOC's authority to demand information is not unlimited, but rather is based on a valid charge. *Id.*

That is not to say that the EEOC may never act when it suspects another form of discrimination may be at play. However, as the Fifth Circuit found in *Southern Farm*, the proper course of action under those circumstances is for the

agency to obtain a valid charge that would permit such an investigation, which in some cases may be accomplished through the issuance of a "commissioner's charge." *Id.* at 211. *See also EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 655 n.7 (7th Cir. 2002) (if EEOC discovers a pattern or practice of discrimination during the investigation of a narrower charge, it would be "free to file a commissioner's charge incorporating those allegations and broaden its investigation accordingly"). Indeed, the very purpose of a Commissioner charge is to enable the agency to investigate possible discrimination in situations where either no individual charge has been filed or where discrimination is believed to be "more widespread than the specific allegations made by an individual charge." Donald R. Livingston, *EEOC Litigation and Charge Resolution* 243-44 (BNA 2005).

Nevertheless, the EEOC argues in this case that it should not be required to obtain a Commissioner charge before launching an entirely new Title VII or ADA investigation. EEOC Brief at 32. The agency apparently feels that having to obtain a charge would be "waste of time" and "inconvenient." *Id.* Instead, the EEOC relies on the Fourth Circuit's decision in *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976), in support of its position that any individual charge of discrimination may be used as a "springboard" to investigate virtually any employment practices of the respondent without limitation. EEOC Brief at 26.

The EEOC's reliance on *General Electric*, however, is misplaced. As an initial matter, *General Electric* did not arise in the context of a subpoena enforcement action, but rather pertained to the appropriate scope of an EEOC civil lawsuit. *General Electric*, 532 F.2d at 362. Furthermore, the Fourth Circuit in that case did *not* give the EEOC unfettered discretion to seek out other forms of discrimination not alleged in the charge. To the contrary, it reiterated the principle that the EEOC's authority to compel the production of evidence is limited to materials "relevant" to the allegations in the charge. *Id.* at 364-65.

The EEOC also rests its argument to a great extent on language in *General Electric* describing the company's testing practices as a "root source of discrimination." EEOC Brief at 29. The EEOC's understanding of the court's holding in that case appears to be that the sex discrimination claim "reasonably grew out of" of the race discrimination investigation, because both involved challenges to the employer's testing instrument (*e.g.*, a "root source of discrimination"). *Id.* The agency further contends that, like the *General Electric* case, its investigation into the racial impact of the Kronos assessment has "reasonably [grown] out of the EEOC's investigation of the Sandy charge." *Id.*

The EEOC's characterization of *General Electric's* holding misses the mark entirely. In deciding whether the sex claim "reasonably grew out of" the investigation of the race charge, the *General Electric* court focused on how the

evidence came to the EEOC's attention in the first place and whether that was reasonable, in light of the charge under investigation. 532 F.2d at 368. The court ultimately concluded that the sex claim had reasonably grown out of the investigation, because the company had *voluntarily* disclosed the tests (including the gender-based differences in those instruments). *Id.* In other words, the company essentially *chose to concede* the relevance of the gender information by voluntarily providing it to the agency. *Id.*

Unlike the situation described in *General Electric*, the EEOC's investigation of the Sandy charge has not led to the discovery of *any* evidence of race discrimination. By its own admission, the only evidence the EEOC has (or claims to have) in support of an inquiry into possible race discrimination is: 1) an article about the Kronos assessment test, which the agency found "in the public domain" – *i.e., not as part of its investigation of Sandy's disability charge;* and 2) the asserted existence of two undisclosed race discrimination charges against Kroger Foods that (if they exist) have no connection to the Sandy investigation at all. EEOC Brief at 7-8, 15. The EEOC's insistence that its investigation into possible race discrimination has "reasonably [grown] out of the EEOC's investigation of the Sandy charge" thus is simply unfounded. *Id.* at 29.

Accordingly, the district court did not err when it rejected the EEOC's attempt to expand the investigation of Sandy's disability discrimination charge to

include possible race discrimination. The Sandy charge provides no jurisdictional basis for conducting such an investigation, and the agency's attempted use of the charge as a vehicle to compel information about race is overreaching and an unwarranted abuse of the agency's investigative authority.

D. The EEOC Must Obtain Appropriate Jurisdictional Authority To Conduct *Any* Investigation If Employers Are To Be Afforded Due Process Guarantees

The EEOC may not conduct unfettered fishing expeditions in which it seeks to investigate possible discrimination wholly unrelated to the allegations of the underlying charge. Nor is it authorized to police employers' compliance with Title VII or the ADA in the absence of a charge that states with some degree of specificity the legal theory of the alleged violation and the factual underpinnings of such a claim, whether filed by or on behalf of an "aggrieved" person or by the Commission itself through a Commissioner charge.

In addition, both Title VII and the ADA expressly require the EEOC to serve an employer with notice of a discrimination charge, on which it is expected to base its investigation, within ten days of its filing date. 42 U.S.C. § 2000e-5(e)(1). The statutory notice provision exists for good reason – it provides employers with "due process guaranties [sic]." *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977) (citation omitted).

As the Sixth Circuit recognized:

> If an EEOC investigation of an employer uncovers possible discrimination of a kind not raised by the charging party and not affecting that party, then the employer should be given notice [in the form of a charge] if the EEOC intends to hold the employer accountable before the EEOC and in court.

Id.

Without proper notice, employers are deprived of any meaningful opportunity to respond to the charge, which typically begins with a prompt and thorough internal investigation of the allegations. Such investigations allow employers to take appropriate corrective action in the event discrimination is substantiated, and if it is not, to defend against a meritless claim before the relevant evidence becomes stale. When the EEOC exceeds its authority by demanding information pertaining to issues outside the boundaries of the charge being investigated, it disposes with the statutory notice requirement and unfairly deprives employers of the "due process guarantees" to which they are entitled.

II. BECAUSE OF THE UNDISPUTED AND IMPORTANT INTEREST OF EMPLOYERS IN MAINTAINING TEST SECURITY, THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY REQUIRING THE PARTIES TO ENTER INTO A CONFIDENTIALITY AGREEMENT PROTECTING INFORMATION PRODUCED IN RESPONSE TO THE SUBPOENA

A. A Properly Validated Employment Test Is An Important Hiring Tool Used By Employers, The Public Disclosure Of Which Would Destroy Its Validity And Commercial Value

Title VII permits employers to utilize professionally-developed tests as part of their employment selection procedures, as long as they are not "designed, intended or used to" discriminate on the basis of an individual's membership in a protected class. 42 U.S.C. § 2000e-2(h). For many companies, employment tests are an important tool used in the hiring process. When administered properly, a well-designed test that is properly validated for the job can measure an individual's knowledge, skills and ability with respect to a particular job more accurately and objectively than other methods, thus enhancing workforce quality, reducing hiring efforts and saving costs associated with on-the-job training.

Employment tests, validity studies, and related documents generally are considered highly sensitive and commercially valuable. The development, validation and subsequent monitoring of employment tests come at considerable expense to firms which develop them and employers that use them. Companies that use such tests often hire or retain highly specialized professionals to assist with

test development and implementation, as well as to monitor compliance with legal standards. Thus, test confidentiality is critical to an employer's testing program, as even a minor breach can compromise the integrity of the test.

B. Federal Courts – Including The Supreme Court – Have Recognized The Need To Safeguard Employer Tests And Related Materials

Because the information a company provides to the EEOC ultimately may fall into the hands of a charging party (often a former employee with an axe to grind), most companies understandably are concerned about protecting *any* confidential business information provided to the agency over the course of an investigation. Concerns about confidentiality loom particularly large in the case of employment testing and selection practices, which courts have recognized "present an extraordinarily compelling case for confidentiality." *EEOC v. Aon Consulting, Inc.*, 149 F. Supp.2d 601, 608 (S.D. Ind. 2001). As the Supreme Court observed in *Detroit Edison Co. vs. NLRB*, employers have an "undisputed and important" interest in maintaining the security of their tests. 440 U.S. 301, 316 (1979).

Courts have exercised similar caution in cases involving the EEOC. In *EEOC v. C&P Telephone Co.*, 813 F. Supp. 874, 876 (D.D.C. 1993), for example, the court held that the employer had "an extremely strong interest" in protecting information responsive to the EEOC's subpoena, which included copies of the employer's tests, all documents relating to the validation studies and research

performed in connection with the tests, and the test results for individual job applicants. As in this case, the court conditioned enforcement of the subpoena upon the EEOC's signing of a confidentiality agreement, which among other things, barred the agency from disseminating the information to the union, prohibited the agency from copying the materials, and required that the documents be returned to the employer at the conclusion of the investigation. *Id.* at 876-77.

C. The District Court's Confidentiality Order Is Needed To Protect The Testing Materials At Issue In This Case And The EEOC's Investigation Of The Sandy Charge Will Not Be Compromised As A Result

In light of these important concerns, the district court below did not abuse its discretion by requiring the EEOC to take specific steps to protect the confidentiality of test-related information sought in its subpoena. Indeed, the EEOC's remarkably cavalier approach to the treatment of Kronos' confidential testing materials in this case underscores why the confidentiality order was appropriate.

If left to its own devices, the EEOC apparently would advocate a much wider distribution of the testing materials – beyond those of its employees connected with the Sandy investigation and who have a "need to know." EEOC Brief at 42. Because the EEOC's ability to investigate and even litigate the Sandy charge is in no way compromised by the confidentiality order, and given the vital

importance to Kronos that its test data not be divulged to the public, the order was reasonable and proper and should be affirmed by this Court.

CONCLUSION

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

Respectfully submitted,

/s Rae T. Vann

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December 14, 2009

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

/s Rae T. Vann

December 14, 2009 Rae T. Vann

CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF RESPONDENT-APPELLEE AND IN SUPPORT OF AFFIRMANCE complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B). This brief is written in Times New Roman 14-point typeface using MS Word 2003 and contains 5,039 words.

I further certify that the text of the electronic brief in .pdf format and the text of hard copies of this brief are identical and that a virus check was performed using the following virus software: VIPRE 3.1.2775 (updated December 14, 2009).

/s Rae T. Vann

December 14, 2009 Rae T. Vann

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2009, the undersigned filed one (1) electronic original using the CM/ECF system and ten (10) true and correct copies of the foregoing brief via Federal Express Priority Overnight with the Clerk of the Court. Electronic service via the CM/ECF system will send notification of such filing to the following:

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