No. 10-3022

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee,

v.

SCHWAN'S HOME SERVICE,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Minnesota

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT AND STATEMENT OF FINANCIAL INTEREST

Pursuant to Rule 26.1 and Eighth Circuit Local Rule 26.1A, *Amici Curiae* Equal Employment Advisory Council, National Association of Manufacturers and Chamber of Commerce of the United States of America 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.

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The Equal Employment Advisory Council, National Association of Manufacturers, and Chamber of Commerce of the United States of America respectfully submit this brief *amici curiae* with the consent of the parties. The brief urges this Court to reverse the decision below, and thus supports the position of Defendant-Appellant Schwan's Home Service.

INTEREST OF THE *AMICI CURIAE*

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

The National 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.

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

Amici's members are employers or representatives of employers that are subject to Title VII of the Civil Rights Act (Title VII) of 1964, 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 appeal, which concern the authority of the Equal Employment Opportunity Commission (EEOC) to compel the production of evidence in the absence of a valid charge.

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 constituencies they represent.

STATEMENT OF THE CASE

This case centers on the EEOC's investigation of an individual charge of discrimination filed by Kim Milliren against Schwan's Home Service, Inc. alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964 (Title VII). *EEOC v. Schwan's Home Service*, 707 F. Supp.2d 980, 982-83 (D. Minn. 2010). Schwan's hired Milliren for the position of Local General Manager, contingent upon her successful completion of the company's General Manager Development Program (GMDP). *Id.* at 982. After Milliren had received both classroom and on-site training, Schwan's found Milliren's performance lacking and informed her that she would not graduate from the GMDP with her class. *Id.* at 983. Although Schwan's offered to continue her employment, Milliren chose instead to resign. *Id.*

One month later, Milliren filed a charge with the EEOC alleging sexual harassment by a manager at a stand-alone profit center or "depot" where she had trained. *EEOC v. Schwan's Home Service*, 692 F. Supp.2d 1070, 1073 (D. Minn.

2010). Milliren also alleged that she was demoted and constructively discharged in retaliation for having complained about harassment. *Id.*

During its investigation, the EEOC requested a variety of information and documents, including information about "how persons are selected for the GMDP." *Id.* at 1075-76. Schwan's objected to a number of the requests, in part because the information sought related to hiring and, therefore, was not relevant to Milliren's charge. *Id.*

Nearly two years after Milliren had filed her charge, the EEOC served Schwan's with an amended charge containing allegations of class-wide discrimination. *Schwan's*, 707 F. Supp.2d at 984. Milliren's amended charge states, in pertinent part, "[i]t is also my belief that the Respondent discriminates against females as a class, in regard to its General Manager Development Program in violation of Title VII . . . ." *Id.* The agency issued a subpoena seeking class-wide information, including information about the company's hiring practices, thus prompting Schwan's to file a Petition to Revoke or Modify the Subpoena. *Id.* at 985.

The EEOC eventually sought enforcement in federal court by filing an Application to Show Cause Why a Subpoena Should Not Be Enforced. *Id.* At the show cause hearing, counsel for the EEOC confirmed that Milliren had filed the amended charge alleging class-wide hiring discrimination based on information

she received from the EEOC. *Id.* The magistrate judge who presided over the hearing granted the EEOC's application. *Id.* at 986. The district court then adopted the magistrate's recommendations on June 30, 2010. *Id.* at 997-98. Schwan's appealed.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act (Title VII) of 1964, 42 U.S.C. §§ 2000e *et seq*., which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The EEOC is permitted to investigate alleged employment discrimination only upon receipt of a legally sufficient charge of discrimination, which may be filed by 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. 42 U.S.C. § 2000e-5.

The EEOC's procedural regulations require that charges include a "clear and concise statement of facts, including pertinent dates, constituting the alleged unlawful employment practices" and that the agency must serve a notice of the

charge, including "the date place and circumstances of the alleged unlawful employment practices" on the employer within ten days. 29 C.F.R. §§ 1601.12(a)(3), 1601.14(a). Milliren's amended charge, which serves as the basis for the agency's expanded investigation into alleged class-wide hiring discrimination against women does not satisfy the content requirements for a valid Title VII charge. The amendment not only fails to provide "a clear and concise statement of the facts," it does not even identify which employment practices are the subject of the agency's investigation. The amendment, if found to be valid, would authorize an open-ended audit of the company's employment practices, thus thwarting "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 65, 72 (1984).

The amended charge is also deficient because Millerin does not claim to be personally aggrieved by class-wide hiring discrimination. In order to have standing to file, an aggrieved individual must allege she has been directly injured by the discriminatory employment practice that is the subject of the charge. 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.7, 1601.11. Millerin does not claim to be a victim of the alleged class-wide hiring discrimination, consistently maintaining instead that she was demoted and constructively discharged in retaliation for complaining about a sexually offensive work environment. She has never alleged,

and indeed cannot contend, that the company failed to hire her because she is a woman.

The investigatory power granted to the EEOC under Title VII 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, the charging party's claims.

The district court's ruling below failed to hold the agency to this relevancy standard by permitting it to expand the investigation well beyond the scope of Milliren's hostile environment and retaliation claims to include a demand for class-related information, including information concerning the company's hiring practices. If the EEOC wishes to pursue a form of discrimination not alleged by the charging party, the appropriate course of action is for it to obtain a valid charge that would support such an investigation, which it failed to do here.

It is critically important that the courts require the EEOC to have appropriate jurisdictional authority before conducting *any* investigation. When the EEOC exceeds its statutory authority by issuing subpoenas for information pertaining to issues outside the bounds of the allegations being investigated, it unilaterally

dispenses with these statutory requirements and robs employers of the basic protections they afford. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977).

ARGUMENT

I. THE DISTRICT COURT INCORRECTLY RULED THAT THE EEOC MAY ENFORCE AN ADMINISTRATIVE SUBPOENA THAT IS NOT PREDICATED ON A VALID CHARGE OF DISCRIMINATION

A. The Existence Of A Valid Charge Is A Jurisdictional Prerequisite To Judicial Enforcement Of A Subpoena Issued By The EEOC

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress in Title VII of the Civil Rights Act (Title VII) of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*., which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "an 'integrated, multistep enforcement procedure' that . . . begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co*., 466 U.S. 54, 62 (1985) (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 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; *see also EEOC v. Univ. of Pa*., 493 U.S. 182, 190 (1990) ("[t]he Commission's enforcement responsibilities are triggered by the filing of a specific sworn charge of discrimination"). 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, including pertinent dates, constituting the alleged unlawful employment practices" and that the agency must serve a notice of the charge, including "the date place and circumstances of the alleged unlawful employment practices" on the employer within ten days. 29 C.F.R. §§ 1601.12(a)(3), 1601.14(a).

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. Interpreting the EEOC's charge filing regulation, the U.S. Supreme Court in *EEOC v. Shell Oil* held that:

> Insofar as he is able, the [charging party] should identify the groups of persons that he has reason to believe have been discriminated against,

> the categories of employment positions from which they have been excluded, the methods by which the discrimination may have been effected, and the periods of time in which he suspects the discrimination to have been practiced.

Id. The reviewing court then "has a responsibility to satisfy itself that the charge is valid and that the material requested is 'relevant' to the charge . . ." before the subpoena is enforced. *Id*. at n.26. If a submission fails to satisfy these requirements, it will not constitute a "charge" over which the EEOC has authority to investigate.

B. The Amended Charge Does Not Comport With The Content Requirements For A Valid Charge Under Title VII, And Therefore The Subpoena Should Not Be Enforced

The amendment to Milliren's charge, which serves as the predicate for the EEOC's expanded, nationwide investigation into alleged discrimination against women "as a class" does not, on its face, satisfy the content requirements for a valid charge under Title VII. The amendment, which is both sweepingly broad and calculated to convey as little information as possible, states without elaboration that the company "discriminates against females, as a class, *in regard to* its General Manager Development Program." 692 F. Supp.2d at 1076. Not only does the amendment fail to provide "a clear and concise statement of the facts" constituting the alleged unlawful employment practices, as EEOC regulations require, it does not even bother to identify the alleged unlawful employment practices. Indeed, the allegation is tantamount to a claim that Schwan's

discriminates against women "in regards to employment," because arguably it would encompass any and all employment policies, practices and decisions affecting GMDP applicants and participants, including those involving recruitment, hiring, compensation and benefits, work assignments, performance evaluations, discipline, discharge or any other term or condition of employment.

The importance of the statutory and regulatory provisions governing the contents of a valid Title VII charge is not merely academic. The allegations in the charge govern the scope of any subsequent investigation by the EEOC. As the Supreme Court observed in *Shell Oil*, the charge allegations and the subpoena are "closely related" in the sense that the agency may only access evidence that is "relevant to the charge under investigation." 466 U.S. at 64 (citation omitted). Accordingly, permitting charge-filers "merely to allege that an employer violated Title VII," *id.* at 72, would "render nugatory the statutory limitation of the Commission's investigative authority to materials 'relevant to a charge,'" *id.*, and thereby thwart "Congress' desire to prevent the Commission from exercising unconstrained investigative authority." *Id.* at 65.

The amendment to Milliren's charge contains no meaningful boundaries whatsoever and, if found to be valid, would essentially authorize the agency to launch a full-scale, unconstrained audit of all employment practices at Schwan's. Moreover, if not held accountable to its own regulations, the EEOC undoubtedly

will continue (even formalize) the practice of crafting vague and indefinite charges for the purpose of conducting unfettered "fishing expeditions" – in direct contravention of its statutory mandate. *See Shell Oil* at 90 ("Experience teaches that Government administrative agency investigations can be prone to abuse" and are "likely to be conducted more reasonably, more carefully, and more fairly, when the concerned parties are adequately notified of the causes of the investigation that are in progress") (O'Connor, J., dissenting).

Such a result would deny employers any meaningful opportunity to respond to charges and unfairly rob them of the "due process guaranties" to which they are entitled. *EEOC v. Bailey Co.*, 563 F.2d 439, 450 (6th Cir. 1977). As the Supreme Court observed in *Shell Oil*, Title VII's requirement of a valid charge, together with the statute's notice provision, are intended to serve a number of important congressional objectives. First, they "give employers fair notice of the existence and nature of the charges against them." 466 U.S. at 77. Second, they "inform[] the employer of the areas and time periods in which the [charging party] suspects that the employer has discriminated," *id.* at 79, thus enabling a well-intentioned respondent "to undertake its own inquiry into its employment practices and to comply voluntarily with the substantive provisions of Title VII." *Id.* Finally, they "alert the employer to the range of personnel records that might be relevant to the Commission's impending investigation and thus would ensure that those records

were not inadvertently destroyed." *Id.* (footnote omitted). None of these objectives are met in instances such as this where the agency shirks its responsibility to appropriately draft the content of the charge.

Moreover, requiring the EEOC to adhere to its own regulations governing charge content would not impose a particularly onerous burden on the agency or its investigators. The EEOC's *Compliance Manual* already instructs investigators to draft charges "in sufficient general detail to identify the statutes, bases, and issues involved and to preserve the private suit rights of all aggrieved persons covered by the charge." EEOC Compl. Man., Investigative Procedures § 2-5 (2002 & Supp. 2010). It also cautions investigators that they should "not leave out allegations which aggrieved persons might wish to pursue in court even though EEOC might not fully investigate them." *Id.* In keeping with these instructions, the EEOC investigator who drafted Milliren's original charge provided a fair amount of detail, for example, including the alleged statements she found to be sexually offensive and the specific employment actions she felt had been the result of alleged unlawful retaliation, specifically that she was demoted and constructively discharged. There is no reason why the agency should not be required to put the same care into drafting an amendment that alleges class-wide discrimination.

On its face the amended charge does not satisfy the content requirements of Title VII and, therefore, the subpoena may not be enforced.

C. Because Milliren Does Not Claim To Be "Personally Aggrieved" By Class-Based Hiring Discrimination, The Amended Charge Is Not Valid And May Not Serve As The Basis For The Agency's Subpoena Demand

Another aspect of this case that *amici* find particularly troubling are the facts that Milliren did not allege in her original charge hiring discrimination against women, only added the claim at the behest of the EEOC, and has never contended that she was "personally aggrieved" by class-wide hiring discrimination on the basis of her sex. Under Title VII, the EEOC is authorized to investigate charges filed by "aggrieved parties" or by members of the Commission. 42 U.S.C. § 2000e-5(b); 29 C.F.R. §§ 1601.7, 1601.11.[1] In order to have standing to file a charge of discrimination, an individual must allege that she has been directly injured by the discriminatory employment practice. *EEOC v. Quick-Shop Markets*, 396 F. Supp. 133, 135 (E.D. Mo.), *aff'd*, 526 F.2d 802 (8th Cir. 1975) (*per curiam*). Milliren has never alleged that she was denied entry to the GMDP and,

[1] Although Title VII and the EEOC's regulations also provide that a charge may be filed by an individual, agency or organization "on behalf of" an aggrieved individual, 29 C.F.R. §§ 1601.7, 1601.11, those provisions do not apply here. The EEOC does not contend that Millerin brought her charge under those provisions. Additionally, the regulations require that any charge-filer who brings a charge on behalf of someone else "must provide the Commission with the name, address and telephone number of the person on whose behalf the charge is made." 29 C.F.R. § 1601.7(a). The purpose of this requirement is to permit Commission staff to "verify the authorization of such charge by the person on whose behalf the charge is made" before proceeding with an investigation. *Id.* The facts of this case suggest that neither Milliren, nor the EEOC, are aware of any specific individual who claims to be aggrieved by alleged class-wide gender discrimination.

indeed, cannot make such a claim. Nor does she contend that she did not graduate from the program either because of her sex or because of gender-based bias against women as a class. Instead, Milliren consistently has maintained that Schwan's did not permit her to graduate from the GMDP in retaliation for having complained about sexual harassment.

In other words, there is a fundamental difference between the claim Milliren has brought, and has standing to bring, and the investigation EEOC would like to pursue. Milliren's charge alleges a violation of Title VII's antiretaliation provision, which "seeks to prevent harm to individuals based on what they do, *i.e.*, *their conduct*." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (emphasis added). Under this provision, an "unlawful employment practice" is defined as discrimination against any employee because he has either opposed discriminatory employment practices or has "made a charge, testified, assisted, or participated in any manner" in a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a). The EEOC seeks to investigate a different type of case involving Title VII's nondiscrimination provision, however, which bars discrimination on the basis of an individual's status as member of a protected class – in this case, sex. 42 U.S.C. § 2000e-2(a)(1) (this section of Title VII, Section 703, defines "unlawful employment practice" as discrimination "because of" an individual's race, color, religion, sex or national origin). Milliren does not claim to

have been "personally aggrieved" by class-wide hiring discrimination against women, and in fact she *was* hired. Therefore, the EEOC may not pursue this type of case through its investigation of the Milliren charge and, instead, must look to other statutory authority to accomplish its objective.

The court's ruling in *EEOC v. Quick Shop Markets, Inc*. is instructive. There the court enforced an EEOC subpoena as to sex-based discrimination, but refused to enforce the agency's demand for information relating to alleged race discrimination against African-Americans where both complainants were Caucasian. 396 F. Supp. at 135. The court reasoned that while the charging parties had "gratuitously added to the charge of sex discrimination a further statement that the employer is guilty of discriminating against blacks," neither had been "personally aggrieved" by race discrimination and, therefore, did not have standing to bring such a charge. *Id.* Instead, the court suggested the agency more appropriately could have explored the issue of race by filing a valid Commissioner charge, which it elected not to do. *Id*. at 135-36. Flatly rejecting the agency's effort to base the enforcement of its subpoena demand on individual charges that lacked standing, the court stressed that "[f]ishing expeditions per se are not authorized." *Id.* at 136.

It is important to note, as the court did in *Quick Shop*, that the EEOC has a variety of statutory tools at its disposal for the purpose of investigating and

eradicating employment discrimination. The very purpose of a Commissioner charge, for example, 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).

The EEOC should not be permitted to circumvent the statute's requirement that it obtain a Commissioner charge where it otherwise lacks the authority to investigate, and certainly it should not be permitted to do so by soliciting charging parties to amend their charges to include claims they have no standing to bring. Many charging parties would not know to question the propriety of such a request and likely would acquiesce out of deference to the agency.

Because Milliren does not claim to be personally aggrieved by hiring discrimination against a "class of women," her amended charge is invalid and may not support the EEOC's demand for class-related information.

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE EEOC MAY DEMAND, THROUGH A SUBPOENA ENFORCEMENT ACTION, INFORMATION THAT IS NOT RELEVANT TO THE CHARGING PARTY'S CLAIMS

A. The EEOC's Investigative Authority Under Title VII Is Not Plenary; It Is Limited To Investigation Of Issues Related To The Claims of the Charging Party

Title VII expressly limits the scope of an EEOC investigation to matters that are relevant to the charge under investigation. 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).[2] As the U.S. Supreme Court has observed, "unlike other federal agencies that possess plenary authority to demand

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[2] Congress granted the same investigative authority to the EEOC that exists for the National Labor Relations Board (NLRB). 42 U.S.C. § 2000e-9. Section 11 of the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*, provides that "[t]he Board, or its duly authorized agents or agencies, shall at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1). Section 11 further provides that, "[w]ithin five days after the service of a subpoena on any person requiring the production of any evidence . . . such person may petition the Board to revoke, and the Board *shall revoke such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings . . . .*" *Id.* (emphasis added).

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 (emphasis added) (citation and footnote omitted). 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).

Accordingly, the charge of discrimination plays an important role in the EEOC's enforcement procedure by defining the scope of the investigation. *Id.* at 68. The charge must do more than "merely to allege that an employer has violated [the law]," *id.* at 72, as the lack of specificity would "render nugatory the statutory limitation o[n] the Commission's investigative authority *to materials 'relevant' to a charge*." *Id*. (emphasis added). Moreover, courts must "strive to give effect to Congress' purpose in establishing a linkage between the Commission's investigatory power and charges of discrimination," *id.* at 65, which is intended to "prevent the Commission from exercising unconstrained investigative authority." *Id.*

Even the agency's own *Compliance Manual* counsels investigators against collecting irrelevant information and data that exceeds the scope of the charging party's allegations, 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." EEOC Compl. Man. § 602.4 (2002 & Supp. 2010). 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) (2002 & Supp. 2010). Evidence is *relevant* "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b) (2002 & Supp. 2010).

Accordingly, the manual explains that where the charging party alleges the employer denied "training, assignments, pay increases, retention rights, transfer, and promotion . . . to laid off employees eligible to retire but made available to younger employees," material evidence would include "information on [the charging party] and his/her performance; information on the ages, positions, and performance of laid off employees, remaining employees, and recalled employees; copies of company benefit plans and policy statements; any actuarial data used to support benefit reductions; and testimony" but would *not* include "[v]oluminous data" that "has nothing to do with [the] employment practices [being] investigated." EEOC Compl. Man. § 602.4(b) (2002 & Supp. 2010).

B. An EEOC Subpoena Demanding Information About Employment Practices Beyond The Scope Of The Charge Allegations Is Overbroad And Must Be Denied

Also at the core of this dispute is the question of relevance, and whether the EEOC is "entitled to any material which [it] deems relevant in its discretion."

EEOC v. Ford Motor Credit Co., 26 F.3d 44, 47 (6th Cir. 1994). The agency's investigative authority is not so broad.

When an EEOC subpoena exceeds the bounds of relevancy, courts will either deny enforcement of the agency's demand or, as the district court below has done in this case, will scale back the agency's request to reflect a more appropriate scope of investigation. In *General Insurance Co. v. EEOC*, for example, the Ninth Circuit refused to enforce an EEOC subpoena issued in connection with a sex-based wage discrimination charge, where the subpoena requested nearly eight years of records and "demanded evidence going to forms of discrimination not even charged or alleged." 491 F.2d 133, 136 (9th Cir. 1974). Similarly, in *EEOC v. Packard Electric Division*, the Fifth Circuit rejected a subpoena for plant-wide statistical data where it was not "immediately evident" how the data was relevant to the individual complaints under investigation. 569 F.2d 315, 318 (5th Cir. 1978).

In refusing to enforce a similarly overbroad EEOC subpoena, 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 [the court] to

disregard the Congressional requirement that the investigation be based on the charge." *Id*. at 655. *See also EEOC v. City of Milwaukee*, 919 F. Supp. 1247, 1259 (E.D. Wis. 1996) (declining to enforce portions of subpoena seeking the medical records of third parties where such evidence was not reasonably relevant to the charge); *EEOC v. Ford Motor Credit Co*., 26 F.3d 44, 47 (6th Cir. 1994) (refusing to enforce subpoena in its entirety where temporal scope was too broad and would have required the production of information not relevant to the charge, including information concerning employees not similarly-situated to charging party); *Joslin Dry Goods Co. v. EEOC*, 483 F.2d 178, 183-84 (10th Cir. 1973) (restricting the subpoena demand to information concerning the retail store where the charging party worked).

Courts also have refused to allow the EEOC to drift from one theory of discrimination to another.[3] 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, 211-12 (5th Cir. 2001). The court observed that the EEOC's authority to demand information is not unlimited, but rather must be based on the specific claims raised

[3] *See, e.g., EEOC v. Southern Farm Bureau Cas. Ins. Co*., 271 F.3d 209 (5th Cir. 2001); *EEOC v. United States Fidelity & Guar. Co*., 414 F. Supp. 227, 250 (D. Md.), *aff'd*, 538 F.2d 324 (4th Cir. 1976).

in a valid charge. *Id. See also EEOC v. Kronos, Inc.*, No. 09-3219, 2010 U.S. App. LEXIS 18694, at *30 (3d Cir. Sept. 7, 2010) (inquiry into potential race discrimination is not a reasonable expansion of a disability discrimination charge).

Applying these principles here, the district court erred when it concluded that the information demanded in the EEOC's subpoena was relevant to the scope of its investigation of Milliren's claims, which specifically alleged demotion and constructive discharge in retaliation for having complained about sexual harassment. The subpoena requests a variety of information and documents, for example, that relate to how "how persons are selected for the GMDP." Yet nowhere in the charge does Milliren contend (nor can she) that Schwan's failed to select her for the GMDP program because of her sex. Accordingly, materials related to Schwan's hiring selection process will do nothing to shed light upon Milliren's sexual harassment and retaliation claims. The agency's subpoena also seeks information and records without any geographic limitations – other than to restrict its inquiry to the United States. Here again, the demand is spectacularly broad given the isolated nature of Milliren's harassment claim, which allegedly took place at a single, stand-alone profit center, and her retaliation claim, which involved a small group of decisionmakers, who allegedly based their decisions on circumstances unique to Milliren.

The EEOC's attempt to compel production of information wholly irrelevant to Milliren's specific claims of discrimination has no legal foundation. 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 Southwest v. Falcon*, 457 U.S. 147, 158-59 (1982). In addition, if the agency suspects another form of discrimination is at play, it must obtain a valid charge in order to investigate, such as the issuance of a "Commissioner charge." *Id.* at 211. *See also EEOC v. United Air Lines, Inc.*, 287 F.3d 643 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, even the EEOC's own *Compliance Manual* recognizes that agency investigators are not at liberty to expand individual charge investigations to include issues beyond the scope of the charging party's allegations and specifically counsels investigators to consider the appropriate statutory authority before investigating other forms of suspected discrimination. EEOC Compl. Man., Investigative Procedures, § 25.7 (2001 & Supp. 2010) (investigators should consider "seeking a commissioner charge to address . . . new bases/issues" that go beyond those already being investigated).

The district court below based its ruling in part on its view that other federal courts "routinely" authorize the enforcement of EEOC subpoenas that extend "beyond information directly tied to the charging party's personal experiences and circumstances." *EEOC v. Schwan's Home Serv.*, 707 F. Supp.2d at 995. *Amici* disagree with this assessment and would point out that none of the cases cited by the district court would support such a conclusion, including this Court's ruling in *EEOC v. Technocrest Sys., Inc.*, 448 F.3d 1035 (8th Cir. 2006) and the line of cases that has developed from the Fourth Circuit's ruling in *EEOC v. General Electric Co.*, 532 F.2d 359 (4th Cir. 1976).

Indeed, the district court's reliance on these cases is misplaced. In *Technocrest*, this Court enforced a subpoena for personnel records relating to the six charging parties (all of whom were Filipino), as well as for all other employees in the charging parties' job categories (who were also Filipino), in the context of charges that alleged the employer's pay practices discriminated against all Filipino employees. Unlike the case at hand, there was a clear tie between the subpoena request and the charging parties' personal experiences with each of them having alleged that they were "personally aggrieved" by the same allegedly discriminatory

pay practices. Because Milliren does not allege to have been personally aggrieved by the class-based hiring discrimination claim, the case is easily distinguishable.[4]

Moreover, the court's reliance on *General Electric* and its progeny is equally misguided. As an initial matter, *General Electric* did not arise in the context of an EEOC subpoena enforcement action, but rather had to do with the appropriate scope of an EEOC civil lawsuit. *General Electric*, 532 F.2d at 362. The Fourth Circuit ruled that the EEOC need not "turn a blind eye" to discrimination if a "*reasonable [charge] investigation*" uncovers facts to support some other type of discrimination not alleged in the charge. *Id*. at 364-65. Where other forms of discrimination become apparent through a reasonable investigation, and are included in the agency's findings and conciliation efforts, the court said the EEOC may pursue them in a civil lawsuit. *Id.*

Notably, however, *General Electric* did *not* give the EEOC unfettered discretion to seek out other forms of discrimination not alleged by the charging party and outside the scope of its investigation of the charging party's claims. Quite to the contrary, the Fourth Circuit reiterated the rule 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. Only evidence gathered pursuant to a

[4] The court's reliance on *EEOC v. United Parcel Service*, 2006 U.S. Dist. LEXIS 95339, at *2 (D. Minn. Sept. 1, 2006), which involved a "blanket exclusionary policy barring applicants and employees with insulin-dependent diabetes from holding positions as mechanics," is misplaced for the same reason.

"reasonable investigation" – *e.g.,* one that is *relevant* to the charge under investigation – may be included in the civil suit. *Id.* The court further explained that the EEOC lacks the power to "*carte blanche*" expand a charge as it might please. *Id*. at 367-68. The test is whether new allegations "appear[] to be one[s] 'initiated' by the agency," the court said, as opposed to ones that "grow[] reasonably out of the investigation of the initial charge." *Id*. at 368.

The *General Electric* case is easily distinguished from the present action. Most obviously, this case involves a subpoena enforcement action and, unlike *General Electric*, does not involve the question of whether the agency may include in a lawsuit new forms of discrimination discovered during the course of a reasonable investigation. Moreover, there *is no evidence* of new forms of discrimination. Rather, the EEOC's subpoena is intended to explore whether such evidence exists.

In short, the district court's reliance on *General Electric* 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*, 466 U.S. at 64. The statutory framework created by Congress simply does not permit the EEOC to issue subpoenas in the hope of identifying information that might provide the basis for the agency to bring a subsequent charge.

Finally, the fact that the EEOC managed to successfully lobby Milliren to amend her charge to include claims that are wholly at odds with her own personal experience (*e.g.*, those relating to hiring discrimination) should not automatically render those claims "relevant" to the agency's investigation. If that were the case, the EEOC would be free to manipulate Title VII's relevancy requirement at its own pleasure through ad hoc amendments to individual charges. Charging parties, who are not well-versed in the law or the appropriate scope of the EEOC's authority, and whose own best interests require cooperation with the agency, are not likely to object to the agency's over-reaching. Accordingly, the relevance of an EEOC inquiry must be inextricably tied to the harm allegedly suffered by the individual charge-filer. This interpretation is most consistent with Title VII and its requirement that the charging party be "personally aggrieved." It is also most consistent with Title VII's provision of other statutory tools, including Commissioner charges, which enable the agency to pursue other forms of discrimination that are not the subject of an individual charge.

Because the subpoena seeks information beyond the scope of the investigation of Milliren's claims, it should not be enforced.

C. 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. The EEOC is not authorized to police employers' compliance with Title VII 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 an "aggrieved" person or by the Commission itself. Title VII did not "establish the EEOC as a regulatory watchdog agency with an unlimited mandate to seek out unlawful employment discrimination." *EEOC v. Brown Transportation Corp*., 1976 U.S. Dist. LEXIS 16557, at *25 (N.D. Ga. 1976).

Moreover, Title VII expressly requires 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). As the Sixth Circuit recognized:

> If an EEOC investigation of an employer uncovers possible unlawful 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 of the statutory notice requirement and unfairly robs employers of the "due process guarantees" to which they are entitled.

The EEOC should not be permitted to abuse its authority by initiating over-reaching charge investigations, the underpinnings of which are not *clearly* supported by a valid charge. Such investigations deny employers statutory due process protections.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL complies with Fed. R. App. P. 32(a)(7)(B) and pertinent provisions of Eighth Circuit Rule 28A. The brief contains 6,900 words, from the Interest of the *Amici Curiae* through the Conclusion, according to the word processing program Microsoft Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2010, I electronically served a copy of the foregoing on Counsel for Defendant-Appellant Schwan's Home Service and Plaintiff-Appellee Equal Employment Opportunity Commission, as follows:

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