UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(SOUTHERN DIVISION)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, **Plaintiff,** **v.** **FREEMAN,** **Defendant.**	**Case No. 8:09-CV-02573-RWT**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANT'S PARTIAL MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

EEOC opposes Defendant's Motion to Dismiss all claims of hiring discrimination that occurred more than 300-days prior to the charge of discrimination that provides the predicate for EEOC's lawsuit. It argues that Defendant's motion should be denied because EEOC's "pattern or practice" actions under § 707 of Title VII, 42 U.S.C. § 2000e-6, are exempt from the charge filing deadlines applicable to other EEOC lawsuits. EEOC contends that Defendant's position – that EEOC can challenge only acts of discrimination that occurred within 300 days of the underlying EEOC charge – misreads the statute, is contrary to the legislative history and case law, and ignores the public policy behind "pattern or practice" lawsuits.

EEOC is wrong on all of these counts. *First*, Defendant's motion is based on a plain reading of straightforward statutory language. Section 707(e)(1) of Title VII, 42 U.S.C. § 2000e-6(e), states that the "procedures set forth in section [706]" of Title VII are applicable to "all" actions brought by EEOC under § 707. One of these § 706 procedures is the requirement in § 706(e)(1) that the charge of discrimination on which the lawsuit is based be "filed within one hundred and eighty days [or 300 days

in Maryland] after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). The plain meaning of § 707(e) is that this requirement applies to § 707 actions.

While EEOC disputes this interpretation, it does not deny that the most natural reading of the text of § 707(e) supports Defendant's motion. Indeed, EEOC appears to acknowledge that the outcome it seeks can only be reached "notwithstanding the language of Section 707(e)." (Plaintiff EEOC's Memorandum in Opposition to Defendant's Partial Motion to Dismiss for Failure to State a Claim ("EEOC's Opposition") at 10).

Second, EEOC's assertion that Defendant's motion is contrary to the case law is incorrect. As Defendant's opening brief makes clear, the case authority is divided on the issue. No court of appeals has decided it.

With respect to the legislative history, it cannot be used to override the clear statutory language in § 707(e). *National Coalition For Students With Disabilities Educ. and Legal Defense Fund v. Allen*, 152 F.3d 283, 292 (4th Cir. 1998); *In re Moore,* 907 F.2d 1476, 1478-79 (4th Cir. 1990). In any event, the legislative history does not support EEOC here. In 1972, Congress amended Title VII to give EEOC authority to bring "pattern or practice" actions, which previously had been the province of the Justice Department. As discussed more fully below, Congress concluded that "the procedures set forth in section [706]" (to quote the statutory language), which had not applied to Justice Department "pattern or practice" actions, serve valuable purposes. In particular, Congress recognized that the charge filing and processing procedures ensure that claims of discrimination are brought promptly to the attention of the employer and EEOC, so that they can be resolved, either informally or through litigation.

The timely filing of a charge is central to this purpose. Thus, the legislative history supports what the plain language of § 707(e) makes clear: Congress intended to incorporate the timely charge-filing requirement into § 707.

Third, with respect to public policy, EEOC argues that because it sues in the public interest, and not as a surrogate for individual victims, it should be exempt from a charge-filing period when it alleges a "pattern or practice" of discrimination under § 707. In EEOC's view, its "unique, primary role in identifying and redressing systemic discrimination" (EEOC's Opposition at 4) entitles it to challenge employment actions that took place as far back as 1972, when EEOC first was given authority to bring lawsuits.

However, the public policy EEOC identifies applies equally to actions under § 706 of Title VII, which unquestionably is subject to a 300-day charge filing limitation. *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 371-72 (1977). Indeed, EEOC concedes that § 706, under which it also brings this lawsuit, is governed by time-limited charge-filing period. (EEOC's Opposition at 5-6). Section 706 suits also serve important public interests – here the identical interests served by the § 707 "pattern or practice" incarnation of the same lawsuit. Yet, Congress was satisfied that a statute of limitations does not stand in the way of vindicating these interests.

Moreover, EEOC overlooks public policy considerations that militate strongly in favor of incorporating the charge-filing deadline of § 706(e) into § 707, as Congress did through § 707(e). The Supreme Court has recognized that § 706(e) reflects Congress's "concern for the need of time limitations in the fair operation of the Act," as reflected in the "short time periods within which charges were to be filed with the EEOC and notice given to the employer." *Occidental Life*, 432 U.S. at 371.

EEOC would override this congressional concern in any case it can brand a "pattern or practice" suit. Allowing it to do so runs counter to sound public policy.

For these reasons, this Court should adhere to the plain language of § 707(e) and reject EEOC's claim that the charge filing procedures of § 706 do not apply to § 707. It should, accordingly, dismiss EEOC's case to the extent it seeks relief for claims that relate to hiring decisions made outside of the period 300 days before the filing of the administrative charge that gave rise to this action.

A. Title VII's Charge Filing Period Applies to "Pattern or Practice" Cases.

1. By its plain terms, Section 707(e) incorporates the requirement of Section 706 that lawsuits be based on, and limited by, a timely-filed charge.

In 1972, Congress amended § 707 of Title VII to transfer to EEOC from the Department of Justice the power to bring "pattern or practice" lawsuits. Congress set up no special procedures for the EEOC's § 707 actions, and neither has the EEOC. Congress instead added § 707(e) to make § 707 actions subject to the procedures in § 706 ("All [§ 707] actions shall be conducted in accordance with the procedures set forth in section [706]").[1] Through this unambiguous means, Congress incorporated the procedures of § 706 into § 707. EEOC recognizes as much; it has established *no* procedural regulations, rules, or policy guidance unique to § 707 cases.

The incorporating language of § 707(e), "in accordance with," is commonly used by legislatures and regulatory bodies, presumably because it creates no ambiguity. For example, "in accordance with" is used 38 times in the Local Rules of this Court to command that specific procedures be incorporated and followed without exception. *See, e.g.*, Rule 109(2)(b) ("Any motion for attorneys' fees in civil

[1] EEOC misquotes this provision, omitting the words "in accordance." (EEOC's Opposition at 9).

rights and discrimination cases shall be prepared *in accordance with* the Rules for Guidelines For Determining Attorneys' Fees in Certain Cases that are an appendix to these Rules"); Rule 112 (2)(b)("All communications shall be directed to and filed with the Clerk and a copy of them served upon the opposing party or counsel *in accordance with* Fed. R. Civ. P. 5") (emphasis added). Similarly, the term is also used throughout state and federal statutes for the same purpose. *See, e.g.*, MD Code, § 5-103(i) ("Forest mitigation banking under this section shall be conducted *in accordance with* standards adopted under Subtitle 16 of this title"); MD Code, § 12-206 ("Except as otherwise provided in this article, a hearing under the Maryland Vehicle Law shall be conducted *in accordance with* Title 10, Subtitle 2 of the State Government Article); 16 U.S.C. § 3373(b) ("Hearings held during proceedings for the assessment of civil penalties shall be conducted *in accordance with* section 554 of Title 5"); 42 U.S.C. § 10155(c)(3) ("Judicial review of any environmental impact statement or environmental assessment prepared pursuant to this subsection shall be conducted *in accordance with* the provisions of section 10139 of this title") (emphasis added).

Because EEOC must admit that § 707(e) means *something*, it argues that § 707(e) is "simply intended to set up an administrative investigation and conciliation process for pattern or practice charges, but was never intended to restrict the scope of EEOC's remedies under Section 707." (EEOC's Opposition at 11; *see also id.* at 9) ("subsequent administrative functions [for § 707 charges] must be conducted in accordance with Section 706 procedures"). But, the plain language of § 707(e) makes no such distinction. It is untenable to read a statute that says "all ["pattern or practice"] actions shall be conducted in accordance with the procedures set forth in section [706]," to mean that such actions shall be conducted with only *some* of the procedures of Section 706 – namely those procedures that set forth the "administrative function" of EEOC.

EEOC's argument depends on somehow excluding the act of bringing a lawsuit as the result of its processing a charge from the concept of "acting on a charge" as set forth in § 707(e). Plainly, though, when EEOC litigates in response to a charge, EEOC is "acting on" that charge. EEOC's position to the contrary flies in the face of Supreme Court pronouncements about EEOC's role in the Title VII enforcement process. For example, in *EEOC v. Shell Oil*, 466 U.S. 54 (1984), a Section 707 case, the Court stated that Title VII's "integrated, multistep enforcement" process "begins with the filing of a charge with the EEOC." 466 U.S. at 61. It then described the "steps of [this] integrated procedure" as including: (1) notice to the employer of the charge, (2) an investigation, (3) where an investigation leads to a determination of "reasonable cause," the use of informal methods of "conference, conciliation, and persuasion" to resolve the matter, and (4) where these methods prove ineffectual, the bringing of a lawsuit should EEOC decide to do so. *Id.* at 63-64.

There is no merit, then, to EEOC's attempt to divorce its litigation efforts from the integrated, multi-step enforcement process triggered by a charge. The filing of an EEOC lawsuit is as much "an act on a charge" as the other steps in the enforcement process described by the Supreme Court in *Shell Oil*. Thus, it falls within the plain meaning of Section 707(e).

Applying the EEOC's proposed line of demarcation between the procedures it says are incorporated into § 707 actions, and those it says are not incorporated, raises three serious additional problems for EEOC. *First*, while EEOC states that § 707(e) was not intended to limit its remedies, it concedes that the two-year limitation on back pay in § 706(g), 42 U.S.C. § 2000e-5(g) – a clear restriction on the scope of EEOC's remedies that is pegged to the date of the filing of a charge – applies to EEOC's "pattern or practice" actions under § 707. (EEOC's Opposition at 7 and 11) (arguing that

§ 706(g) restricts the back pay period in a "pattern or practice" case under § 707). But § 706(g) applies only because § 707(e) incorporates it into § 707. Thus, EEOC erases its own line of demarcation.

Second, EEOC's line of demarcation between the investigation and conciliation procedures in § 706 (which it deems incorporated into § 707) and all other procedures contained in § 706 (which it deems not incorporated) would not permit the incorporation of § 706's litigation procedures into § 707. For example, under EEOC's formulation, procedures in § 706(f)(2), 42 U.S.C. § 2000e-5(f)(2), that authorize it to obtain emergency court injunctions would not apply to § 707 cases. Nor would the jurisdictional and venue provisions in § 706(f)(3), 42 U.S.C. § 2000e-5(f)(3), or the right to seek a jury trial, which was incorporated into § 706 by 42 U.S.C. § 1981(a).

Moreover, when Congress enacted 42 U.S.C. § 1981(a) in 1991 to authorize EEOC to litigate for compensatory and putative damages (subject to the remedial limitation of a damages cap), it provided these remedies only for disparate treatment litigation under § 706. Section § 1981(a) makes no mention of § 707. If these monetary remedies are not incorporated into § 707 by § 707(e), it follows that the 1991 Congress did not intend these remedies to apply to § 707 actions, and that they are not available to EEOC in "pattern or practice" cases. Yet, EEOC has never taken this view of the statute. Indeed, to suppose that Congress provided for compensatory and punitive damages under § 706 but not under § 707 would make a mockery of EEOC's assertions about the importance of "pattern or practice" litigation. Only adherence to the plain meaning of § 707(e), and rejection of EEOC's attempts to depart from that meaning, allows EEOC to seek such remedies under § 707.

Plainly, EEOC's interpretation of § 707(e) is unworkable as a rule for determining which § 706 procedures are (or are not) incorporated into § 707. EEOC seeks, in effect, the right to pick and choose

which provisions of § 706 are incorporated into § 707, guided only by its quest for the broadest powers and the fewest restrictions, in the name of "public policy." This approach should be rejected.

Third, even if the Court were to accept EEOC's demarcation between those portions of § 706 that pertain to administrative procedures and those that pertain to litigation, the timely charge-filing requirement in § 706(e) would be incorporated into § 707 because it lies at the core of EEOC's procedures. Under Title VII, "all EEOC actions "begin[] with the filing of a charge with the EEOC." *Shell Oil*, 466 U.S. at 62. Indeed, nothing in EEOC's regulations authorizes EEOC to act under Title VII in the absence of a timely filed charge. *See generally* 29 C.F.R. § 1600. The charge that triggers the administrative process can be filed by an aggrieved individual or, when EEOC "has reason to think an employer has engaged in a 'pattern or practice' of discriminatory conduct," by one of EEOC's five Commissioners "on his own initiative." *Shell Oil*, 466 U.S. at 62, citing 42 U.S.C. § 2000e-6(e).

In either scenario, EEOC's power to proceed in "pattern or practice" cases "is tied to charges filed with the Commission." *Id.* at 64. Such charges are the beginning of what the Supreme Court has called "an integrated, multistep enforcement procedure culminating in the EEOC's authority to bring a civil action in a federal court." *Occidental Life*, 432 U.S. at 359. Thus, even if Congress had intended through § 707(e) to incorporate only § 706 procedures associated with the administrative process, this would still mean that the provision in § 706 that requires the filing of a charge within 180-days (or 300-days) is incorporated.

Finally, there is no merit to EEOC's argument that the charge-filing requirement is not "procedural" because it limits remedies. A limitations period, though it may affect remedies, is a procedural device. *See Jones v. Saxon Mortgage, Inc.*, 537 F.3d 320, 326 (4th Cir. 1998) ("a statute of limitations is a procedural device that operates as a defense to limit the remedy available in a cause of

action"); *Thornton v. Cessna Aircraft Co.*, 886 F.2d 85, 88 (4th Cir. 1989) ("statutes of limitation are procedural in that they 'serve interests particular to the forum and are considered as going to the remedy not the fundamental right itself.'").

2. EEOC's position is inconsistent with the relevant legislative history.

EEOC relies on the legislative history associated with the 1972 amendments to Title VII. These amendments empowered EEOC to sue, and transferred the power to bring "pattern or practice" suits from the Justice Department to EEOC. EEOC attempts to infer from this history an intention to incorporate into § 707 only some of the procedures of Section 706, namely those relating to the "administrative function." Such an interpretation is unwarranted.

The Supreme Court has explained that the purpose of the 1972 amendments was not merely to give EEOC the authority to litigate, but also to promote the "integrated, multi-step enforcement process" that is triggered by a charge. *Shell Oil*, 466 U.S. at 62; *Occidental Life*, 432 U.S. at 368. In furtherance of this process, "Congress . . . express[ed] concern for the need of time limitations in the fair operation of the Act." *Occidental Life* 432 U.S. at 371. This concern was manifested by the timeliness requirements regarding "the initial filing of a charge with the EEOC and prompt notification thereafter to the alleged violator." *Id*. Thus, in *Occidental Life*, the Supreme Court recognized the need for the prompt filing of a charge as the underpinning of the overall EEOC enforcement procedure. *Id.* at 372. It would conflict with the intent of Congress, as described by the Supreme Court, to dispense with the time limitations of § 706(e) in § 707 cases.

EEOC relies on the following statement from the legislative history:

> There will be no difference between the cases that the Attorney General can bring under section 707 as a 'pattern or practice' charge and those which the [EEOC] will be able to bring. . . .The EEOC. . .has the authority to institute exactly the same actions that the Department of Justice does

> under pattern or practice. . . [I]f [the EEOC] proceeds by suit, then it can proceed by class suit. If it proceeds by class suit, it is in the position of doing exactly what the Department of Justice does in pattern and practice suits. . .[T]he power to sue. . .fully qualifies the [EEOC] to take precisely the action now taken by the Department of Justice.

(EEOC's Opposition at 8) (quoting 118 Cong. Rec. 4080-82 (1972)). But this statement stands only for the proposition that the *types* of the "pattern or practice" suits EEOC can bring after the 1972 amendments do not differ from the *types* of the "pattern or practice" suits the Justice Department had been authorized to bring pre-amendment. It is not a statement about the conditions precedent for an EEOC "pattern or practice" suit.

As is clear from the statutory language, and as the Supreme Court made clear in *Shell Oil*, EEOC suits under Section 707 are subject to conditions that did not apply to the Department of Justice. Thus, the leading treatise on Title VII explains, "although there had been no procedural prerequisites for the Attorney General to bring a pattern-or-practice suit, the 1972 amendments added § 707(e), which provides. . .that there must be an individual or commissioner charge and compliance with all of the § 706 prerequisites to suit before a pattern-or-practice suit can be filed." Lindemann & Grossman, Employment Discrimination Law 1960 (4th ed. 2007).

EEOC relies on *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 843-44 (5th Cir. 1975), a 1975 case in which the Fifth Circuit ruled that § 707(e) does not incorporate those procedures of § 706 that pertain to private intervention in an EEOC "pattern or practice" suit. The court based this decision on its view that Congress intended the broad language of § 707(e) – which incorporates "the procedures set forth in section [706]" – to incorporate only procedures "at the administrative level."

This view is inconsistent with the plain language of § 707(e), and with EEOC's concession that the two-year limit on monetary relief contained in § 706(g) applies to its § 707 actions.[2] But even if *Allegheny-Ludlum* were correctly decided, it would not assist EEOC here. For while the right of parties to intervene in "pattern or practice" suits (the issue in *Allegheny-Ludlum*) has no relation to procedures "at the administrative level," the requirement of a timely charge lies at the heart of the administrative process. Indeed, as explained above, it is a timely charge that triggers this process. Thus, *Allegheny-Ludlum* does not support EEOC's position.

3. Public policy does not support exempting "pattern or practice" suits from statutes of limitations.

EEOC argues that a statute of limitations is inconsistent with the broad remedial purpose of "pattern or practice" litigation. However, the same argument could be made about any restriction on EEOC's power. EEOC arguably would be more effective at combating discrimination if it had "cease and desist" power, as some federal agencies do. The same would be true if could obtain treble damages or, for that matter, if no limitations period applied to its suits under Section 706. Yet, Congress rejected each of these options, just as it rejected the option of imposing no limitations period in Section 707 suits.

EEOC presents no evidence or analysis to support the claim that its inability to pursue ancient claims deals a meaningful setback to public policy. Instead, it invokes various truisms about EEOC's role in the Title VII enforcement scheme. It notes that when EEOC sues, it does so "in its own name for the public interest" not as a "proxy" for individuals who file charges. (EEOC's Opposition at 3). In

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[2] *Allegheny-Ludlum* proceeds on the assumption that a charge is not "mandatory" in order for EEOC to proceed under Section 707. 517 F.2d at 843. However, in *Shell Oil*, the Supreme Court subsequently made it clear that a charge is, in fact, required. 446 U.S. at 62, 65. Thus, *Allegheny-Ludlum* appears to rest in part on a discredited view of Section 707 procedure.

addition, EEOC observes that Congress has made it "the master of its own case" and that victim-specific remedies such as back pay serve a public, as well as a private, interest. (*Id.*).

However, each of these statements is true of EEOC actions under both § 706 and § 707.[3] Thus, EEOC's status as vindicator of the public interest and master of its own case provides no basis for its position that a limitations period applies in cases under § 706, but not § 707.

EEOC argues, in the same vein, that if it could pursue only injunctive remedies, its ability to protect the public interest would be impeded. (*Id.*). But the application of the limitations period does not confine EEOC to pursuing injunctive remedies. EEOC remains free to pursue back pay relief; it is barred only from seeking it for stale claims. This is the norm when the government litigates in pursuit of the public interest. *See, e.g.*, 15 U.S.C. § 15(b) (establishing a four-year limitations for antitrust claims under the Clayton Act); 15 U.S.C. § 57b(d) (establishing a three-year limitations period for actions by the Federal Trade Commission for unfair or deceptive trade practice cases).

The charge filing period established by Title VII serves important public policies, a fact EEOC downplays in its analysis of the public interest. It promotes prompt notification to the employer of the asserted violations and brings the employer before EEOC, thereby permitting effectuation of "the Act's primary goal, the securing of voluntary compliance with the law." *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). The sooner a valid claim is presented to EEOC, the sooner it can be addressed, either voluntarily by the employer or through a court order.

EEOC responds that individuals have an incentive to bring charges promptly, even apart from limitations on EEOC actions, since they cannot litigate stale claims in a private action. However, when

[3] In fact, even when back pay is sought by individual plaintiffs in private litigation under Title VII, the award of this remedy serves a significant deterrent purpose. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975).

Congress gave EEOC authority to sue, it contemplated that EEOC "[would] bear the primary burden on litigation." *General Telephone of the Northwest v. EEOC*, 446 U.S. 318, 326 (1980). Permitting EEOC to revive stale claims by litigating them as "pattern or practice" cases weakens the incentive for individuals to bring timely charges. Indeed, the Supreme Court has specifically recognized Congress's "concern for the need of time limitations in the fair operation of the Act," as reflected in the "short time periods within which charges were to be filed with the EEOC and notice given to the employer." *Occidental Life*, 432 U.S. at 371.

The Supreme Court has also emphasized another important interest served by the limitations on recovery that flow from the charge-filing period – it "protects employers from the burden of defending claims arising from employment decisions that are long past." *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 630 (2007) (quoting *Delaware State College v. Ricks*, 449 U.S. 250, 256-57 (1980)). This interest applies with equal force whether the claims in question are brought by EEOC or by private litigants.

EEOC responds that employers are protected by § 706(g), which states that back pay liability shall not accrue from a date more than two years prior to the filing of the charge. As noted, EEOC does not explain why it believes this limit is incorporated into § 707, while the limitation stemming from the requirement of a timely administrative charge is not.

In any event, § 706(g) does not prevent the litigation of stale claims. In this case, for example, EEOC seeks to litigate employment decisions made during the very early 2000s. The fact that it will not seek back pay all the way back to that time for these claims would not relieve Freeman from having to defend them. Thus, the limit on back pay does not serve the public policy identified by the Supreme

Court in *Ledbetter* and *Ricks*.[4] Employers cannot be protected from "the burden of defending claims arising from employment decisions that are long past" if EEOC is allowed to run roughshod over the limitations period by bringing discrimination claims under Section 707.

This case illustrates the problem. Brought under both § 706 and § 707, it is a garden variety "disparate impact" case – *i.e.*, an action in which EEOC alleges that rules that apply equally to all employees are actually discriminatory because they exclude a disproportionately large share of African-Americans and, in the case of one rule, Hispanics and men as well. EEOC does not even contend that Freeman has engaged in intentional discrimination.

Public policy does not support the proposition that by calling a challenge to a "neutral rule with a disparate impact" a "pattern or practice" suit, EEOC can void the statute of limitations. Moreover, the fact that EEOC can label virtually any lawsuit challenging multiple decisions a "pattern or practice" case further undercuts EEOC's position. It is not just disparate impact cases that EEOC can brand "pattern or practice" challenges. It can also do so in cases where a supervisor is alleged to have harassed more than one individual and in cases where more than one minority employee failed to receive a job offer or promotion (or received discipline) from an employer. If the employer uses objective criteria to make its hiring, promotion, or discipline decisions, the use of these criteria will be said to represent the "pattern or practice." If it does not, the absence of such criteria will become the "pattern or practice." In sum,

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[4] EEOC argues that there is a tension between the 300-day charge filing period applicable to Section 706 actions and the two-year back pay period for these cases. (EEOC's Opposition at 11-12). It seeks to reconcile the tension by having the 300-day period apply only to § 706 actions and the two-year back period only to § 707 actions. However, the Supreme Court has already reconciled this tension. Under *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), the 300-day charge filing period limits liability in all 706 actions except for hostile work environment cases. This rule is extended to § 707 actions by § 707(e).

EEOC's position would give it the power to void the limitations period almost at will. This is contrary to sound public policy.

4. The court should not follow the ruling in *EEOC v. LA Weight Loss.*

In *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 534-36 (D. Md. 2007), Judge Quarles held that in "pattern or practice" cases, EEOC can seek relief without respect to any limitations period flowing from the date on which the charge that gave rise to the investigation was filed. A decision of a federal district court judge "is not binding precedent in. . .the same judicial district." Moore's Federal Practice § 134.02[1][d]; *see also National Union Fire Insurance Co. v. Allfirst Bank*, 282 F. Supp. 2d 339, 351 (D. Md. 2003).[5] Thus, this Court should follow *LA Weight Loss* only if its reasoning is persuasive.

The reasoning of *LA Weight Loss* is not persuasive. The decision is based on the view that the statutory language "is not so plain as to warrant the application of [Section 706's] limitations period for individual charges to pattern-or-practice claims brought by the EEOC under [Section 707]." 509 F. Supp. 2d at 535. However, the court did not provide any analysis of the statutory language. Moreover, the court's statement appears to acknowledge that the most natural reading of the statute supports the application of the Section 706 limitations period.

The court relied on three arguments: (1) that applying the limitations period would be "inconsistent with the very nature of a pattern-or-practice violation;" (2) that unlike claims brought under Section 706, EEOC actions under Section 707 "are not brought on behalf of individual victims, but on the EEOC's own initiative for the purpose of rectifying a pattern or practice" of discrimination; and (3) that it is "crucial that the EEOC's ability to investigate charges of systemic discrimination not be impaired." *Id.*

[5] We apologize, however, for inadvertently failing to cite *LA Weight Loss*.

These arguments lack merit. First, the nature of "pattern or practice" claims does not justify refusing to apply the limitations period. A "pattern or practice" of discrimination is made up of discrete acts of discrimination, any one of which can provide the basis for filing a charge. The fact that, in the abstract, there is no certain date from which to run the limitations period is not a problem because Title VII provides a date certain – the filing date of the charge on which the litigation is based.

There is nothing anomalous or unjust about using this date. It is well established that in a private class action challenging a neutral rule with a disparate impact, the charge-filing period cuts off relief for decisions made before that period begins. *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 572, n.20 (4th Cir. 1985). Similarly, we do not understand EEOC to be contending that it can seek relief in disparate impact cases under Section 706 for decisions made more than 300 days before the filing of the charge on which it bases a Section 706 action. Yet, there is no "date certain," other than the date of the charge on which the litigation is based, from which to run the limitations period in these contexts. Accordingly, the nature of EEOC's "pattern or practice" action does not militate in favor of negating the limitations period established by Title VII.

Second, the *LA Weight Loss* court was incorrect in differentiating EEOC actions under § 707 from those under § 706 on the theory that the latter, but not the former, "are not brought on behalf of individual victims." In reality, § 706 EEOC actions are brought for precisely the purpose of advancing the public's interest in eradicating discrimination. *See Gen. Telephone*, 446 U.S. at 326. [6]

Third, applying the limitations period to "pattern or practice" actions will not impair EEOC's ability to investigate charges of systemic discrimination. In this case, for example, EEOC was able to

[6] To be sure, an EEOC action under Section 706 may also benefit victims of discrimination. But this is true in Section 707 cases, as well.

investigate the charge of Katrina Vaughn and, based on its investigation, to seek both injunctive and back pay relief. Application of the limitations period does not affect its ability to investigate and remedy alleged discrimination.

Moreover, EEOC is not confined to investigating charges filed by individual claimants. It also has the power to investigate charges filed, on their own initiative, by EEOC Commissioners. 42 U.S.C. § 2000-6(e). Thus, EEOC can fully investigate whenever it suspects systemic discrimination.

Finally, from all that appears, the court in *LA Weight Loss* did not consider the implications of treating § 707(e) as incorporating only the requirements that EEOC investigate and conciliate. As discussed above, such an interpretation would, among other consequences, leave EEOC without the authority to seek jury trials and compensatory and punitive damages under § 706, a result that cannot be reconciled with the court's pronouncements in *LA Weight Loss* about the importance of "pattern or practice" cases in the Title VII enforcement scheme.

B. The Continuing Violation Theory Does Not Provide A Basis For Challenging Decisions Made Outside The 300-Day Period.

EEOC argues that *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), "supports application of the continuing violation doctrine to this case." (EEOC's Opposition at 13). Accordingly, it contends that, assuming the limitations period applies to "pattern or practice" cases, it still can seek relief for individuals who were denied promotion outside of the 300-day charge filing period.

There is no merit to this position. *Morgan* makes clear, as EEOC acknowledges, that "Title VII precludes recovery for *discrete acts of discrimination* that occur outside the applicable statutory charge-filing period." (EEOC's Opposition at 13) (emphasis added). If EEOC is correct that using criminal history or credit history to screen applicants has a disparate impact and is not justified, then the refusal to hire an applicant with an unacceptable criminal history or credit history is a discrete act of

discrimination. It follows that Title VII precludes recovery for discrete acts of unlawfully denying a particular applicant a job based on criminal or credit history if the decision is made outside of the limitations period.

EEOC contends that because Freeman's decisions can be characterized as being made pursuant to a "pattern or practice," they are not discrete decisions. But this makes no sense and is inconsistent with the logic of *Morgan*. A decision is no more or less discrete if it falls into a pattern or results from a practice.

The case law is clear on this point. In *Williams v. Giant Food Inc.*, 370 F.3d 423 (4th Cir. 2004), the Fourth Circuit stated that the plaintiff's allegation that the denial of her promotion was part of "a 20-year 'pattern or practice' of discrimination" does not "extend the applicable limitations periods." 370 F.3d at 429. It explained that "even if [plaintiff] is correct that [defendant's] failures to promote her. . . were part of a broader pattern or practice of discrimination, those failures remain discrete acts of discrimination." *Id.* The same is true of any "failure" by Freeman to hire applicants with unacceptable criminal histories or credit histories.

EEOC tries to distinguish *Williams* by arguing that it was not a "pattern or practice" case because the Fourth Circuit had previously held in *Lowery v. Circuit City Stores, Inc.*, 158 F.3d 742 (4th Cir. 1998), that a class cannot maintain "pattern or practice" claims under Title VII. (EEOC's Opposition at 15). But although the plaintiff in *Williams* could not "pursue a cause of action based on a pattern or practice of discrimination," she was permitted to "use evidence of a pattern or practice of discrimination to help prove her individual claims." 370 F.3d at 430, n.3. The Fourth Circuit held that plaintiff's allegations that the discrimination she experienced fell within the alleged "pattern or practice" did not make that discrimination any less of a discrete act. *Id.*

The question of whether an act of discrimination that falls within a "pattern or practice" is a discrete act turns on the nature of the act – e.g., hiring decision, promotion decision – not on whether the plaintiff happens to be empowered to bring a Section 707 case. Thus, *Williams* stands for the common sense proposition that an employment decision is "discrete" whether or not it is part of a "pattern or practice."

In *Morgan,* the Supreme Court held that Title VII permits recovery for the entire scope of a hostile work environment, including behavior that occurred outside of the limitations period. It based this ruling on the distinctive nature of hostile work environment claims, which often require repeated conduct in order to be actionable. As the Court explained, "it is precisely because the entire hostile work environment encompasses a single unlawful employment practice" that plaintiffs can base a hostile work environment claim on acts that occurred outside the limitations period. 536 U.S. at 117-18. The Court noted that Title VII "does not separate individual acts that are part of the hostile environment claim from the whole for the purposes of timely filing and liability." *Id.* at 118.

EEOC argues that decisions not to hire applicants, if they are part of a "pattern or practice," are analogous to acts of sexual harassment that give rise to a hostile work environment claim. However, hostile work environment claims differ fundamentally from "pattern or practice" cases because in "pattern or practice" cases, *one act* – e.g., the refusal to hire an individual because of her race – will give rise to a discrimination claim for that individual, thus providing the basis for that individual to file a meritorious charge with EEOC.

This distinction is crucial for purposes of determining the consequences of failing to file a charge. An employee subjected to one offensive remark cannot be expected to file a charge because it is unlikely that the single remark gives rise to a Title VII claim. However, an applicant for a job or a

promotion who is turned down for reasons she considers discriminatory is required to file a charge within 180 (or 300) days. It is then up to EEOC to decide, based on its investigation, whether the employer's conduct is part of a "pattern or practice" of discrimination.

Accordingly, if a "pattern or practice" finding by EEOC provided a basis for enabling the late-filing charging party to recover through a "pattern or practice" case brought by EEOC, a major purpose of the charge-filing limitations period – requiring aggrieved individuals to complain promptly about discrimination – would be thwarted. By contrast, that purpose is not thwarted when a charging party declines to file a charge of harassment after a single, or even several, instances of offensive conduct because the charging party cannot be expected to know whether she has experienced cognizable discrimination. Thus, EEOC's reliance on *Morgan* is misplaced.

C. Vaughn Filed Her Charge On January 17, 2008.

EEOC argues that Katrina Vaughn filed her charge on December 19, 2007, not January 17, 2008, as Freeman has argued. (EEOC's Opposition at 22). It does not dispute that, on January 17, 2008, Vaughn filed a document called "Charge of Discrimination." It contends, however, that a different document submitted by Vaughn on December 19, 2007 – called "Intake Questionnaire" – constitutes her actual charge.[7]

EEOC relies on *Holowecki v. Federal Express Corp.*, 128 S.Ct. 1147 (2008). There, the Supreme Court held that an intake questionnaire constituted a "charge" because it expressly requested EEOC to take action on the allegations of discrimination contained therein. The charging party had, in an

[7] Freeman did not receive the intake questionnaire. It learned of its existence when EEOC filed its Opposition to this motion.

affidavit attached to the questionnaire, asked EEOC to "please force Federal Express to end their age discrimination. . . ." 128 S.Ct. at 1159.

In this case, as is clear from the face of the intake questionnaire attached to EEOC's Opposition, Vaughn did not request EEOC to take any action. Thus, *Holowecki* does not support EEOC's contention that the intake questionnaire is a "charge."

EEOC relies on several post-*Holowecki* cases in which district courts have found that intake questionnaires that did not expressly ask EEOC to act on allegations of discrimination constituted "charges" nonetheless. (EEOC's Opposition at 24). However, these were cases in which the charging party would not have been able to bring a timely action unless the intake questionnaire were deemed a charge. The courts were thus able to rely on language printed on the questionnaire that stated: "When this form constitutes the only timely written statement of allegations of employment discrimination, the Commission will. . .consider it to be a sufficient charge of discrimination under the relevant statute(s)." *See Hodge v. United Airlines*, Civ. Action No. 07-1527, 2009 WL 3416202, at *5 (D.D.C., Oct. 26, 2009); *Palmer v. Southwest Airlines, Co.*, No. 08 C 6158, 2009 WL 3462043, at *7 (N.D. Ill., Oct. 23, 2009); *Cargo v. Kansas City Southern*, Civ. Action No. 05-2010, 2009 WL 3010830, at *3 (W.D. La., Sept. 16, 2009).

Here, it is clear from the face of her "Charge of Discrimination" that Katrina Vaughn's charge was timely filed. According to Vaughn's "Charge of Discrimination," Freeman rejected her as a candidate for hire "on or about August 29, 2007." Therefore, her January 17, 2008 charge was filed well within the 300-day charge-filing period. This means that the intake questionnaire did not "constitute[] the only timely written statement of allegations of employment discrimination." As the printing on the intake questionnaire makes clear, under these circumstances the Commission will not consider the

document a sufficient charge of discrimination. Accordingly, Ms. Vaughn's charge is the document of that name filed on January 17, 2008, not the intake questionnaire filed a month earlier.

In any case, even if this Court concludes that the charge was filed on December 19, 2007, or that the precise filing date cannot be determined from the face of the Complaint and related materials, it should still grant Freeman's partial motion to dismiss. At a minimum, the Court should dismiss all claims relating to hiring decisions made more than 300 days before December 19, 2007. That date is February 22, 2007.

D. Conclusion

For all of these reasons, and those set forth in Freeman's initial Memorandum, the Court should grant Defendant's Partial Motion To Dismiss For Failure To State A Claim.

Respectfully submitted,

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