UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MARYLAND

EEOC, Plaintiff	
vs	Civil Action: RWT-09-2573
FREEMAN, Defendant.	

Monday, March, 2010
Greenbelt, Maryland

The above-entitled action came on for a Motions Hearing Proceeding before the HONORABLE ROGER W. TITUS, United States District Judge, in courtroom 2C, commencing at 9:05 a.m.

APPEARANCES:

On behalf of the Plaintiff:

RONALD L. PHILLIPS, Esquire

On behalf of the Defendant:

DONALD R. LIVINGSTON, Esquire
PAUL E. MIRENGOFF, Esquire

I N D E X

THE CLERK: The matter now pending before this court is civil docket RWT-09-2573; EEOC versus Freeman. We're here for the purpose of a motions hearing.

Counsel, please identify yourselves for the record. Plaintiffs first.

MR. PHILLIPS: Your Honor, Ron Phillips for the EEOC.

MR. LIVINGSTON: Your Honor, I'm Don Livingston on behalf of Freeman.

MR. MIRENGOFF: And Paul Mirengoff on behalf of Freeman.

THE COURT: We're here on your motion. I will be glad to hear from you.

MR. LIVINGSTON: Good morning. Judge, the issue that's presented by our partial Motion to Dismiss is whether, when the EEOC sues under Section 707 of Title VII, the EEOC can seek remedies for hiring decisions that were made more than 300 days prior to the filing of the charge that underlies the lawsuit.

In this case, an individual named Katrina Vaughan filed a charge of discrimination with the EEOC in January of 2008. The charge alleged that the defendant refused to hire Ms. Vaughan because she's African-American. The EEOC investigated the charge and determined that there was cause to believe that discrimination had occurred in

hiring against three classes, all men, all African-Americans of either gender, and all Hispanics of either gender. The only favored group, I believe under EEOC's finding, would be non-minority females.

The EEOC attempted to settle the cause, finding with the defendant. And when the matter couldn't be settled, the EEOC filed this lawsuit in 2009.

The lawsuit alleges that the company has a policy that goes back to 2001 of making hiring decisions based on criminal histories and credit checks that resulted in unintentional discrimination against men and minorities.

The EEOC brings this lawsuit under two statutes, two statutory sections of Title VII. And these are Title VII, Section 706 and Title VII, Section 707.

Under Section 707, they challenge all hiring decisions since February 2001, which extends back seven years before the filing of the charge of Ms. Vaughan, that sets the prerequisite for this lawsuit.

Now, I have a briefing book for Your Honor that contains some cases that I'm going to refer to in my argument.

THE COURT: Yeah. Please pass it up.

MR. LIVINGSTON: I've already provided a copy to counsel for EEOC.

I think, in considering this issue, that it's

important to understand the historical context within which Congress gave EEOC litigation authority, both under 706 and 707. As Your Honor knows, the Civil Rights Act was passed in 1964. When Congress enacted Title VII, the Civil Rights Act, it did not entrust the EEOC to bring lawsuits. The EEOC was not given litigation authority. But one federal agency of the United States government was, and that was the Department of Justice.

The Department of Justice's litigation authority was given to it under Section 707 of Title VII, and I've included a copy of that provision under Tab 1 in the booklet.

707(a) of Title VII, enacted in 1964, gives the attorney general the authority to sue both public and private employers under Title VII when the attorney general believed that the employer was engaged in a pattern or practice of discrimination, in violation of the Act.

Now, there were no conditions precedent attached to the authority of the attorney general to sue private or public employers. That changed in 1972. In 1972, Congress amended a different Section of Title VII, and it amended Section 706. And it amended Section 706 to allow the EEOC to bring discrimination lawsuits against private employers.

I've got a chart of 706 under Tab 3. The EEOC could sue private employers. But based upon four conditions precedent under 706(e), a charge has to be filed against the employer within 180 or 300 days after the unlawful employment practice occurred. Under 706(b), the EEOC has to have investigated the charge, made a determination that it believed that there was -- that cause exists to believe that discrimination had occurred; and, three, the EEOC has to have attempted to settle the dispute with the employer. If those conditions precedent had been established, a charge, investigation, cause finding, conciliation, then the EEOC could sue an employer under 706 for employment discrimination under Title VII.

Now, Your Honor, having amended Title VII to give EEOC litigation authority, Congress now had under -- if 707 wasn't changed, they would have had two federal agencies empowered to sue employers under employment discrimination under Title 707. The way that was addressed in the 1972 amendments is that Congress amended Section 707, the portion of the statute that gave the Justice Department authorization to sue.

Going back to Tab 1, you will see the amendments that were created to 707 that did this. Section 707(c) says, in the middle of the chart, "The functions of the

attorney general under this section shall be transferred to the EEOC," but it doesn't stop there. It doesn't say that the functions of the attorney general are just transferred to the EEOC. It says the EEOC shall carry out such functions in accordance with Subsection (e) of this section.

Now, Congress could have just given the EEOC the same powers that the Department of Justice had, which was to sue EEOC without any of the condition precedents which were established under Section 706, but Congress didn't. It said that the functions of the attorney general must be carried out in accordance with Subsection (c) of -- Subsection (e) of 707.

And the next provision I have on this page is 707(e). And what 707(e) says is that pattern or practice actions have to be pursued pursuant to, or pardon me, in accordance with the procedures set forth in 706 of this Act. It's our view that nothing could be plainer; that in enacting 707(e), Congress created an integrated system for EEOC cases. It didn't establish a dual track system. It didn't say to the EEOC under 706, you have to go through a multi-step procedure before you can file suit, but under 707 you have the same powers as the attorney again.

This is very specific that the EEOC did not have

the powers of the attorney general but had to pursue its claims pursuant to Section 707(e). I hope I've made clear but, if not, I wish to remind Your Honor that 707(e) was a creation of the 1972 Act. It didn't apply with respect to the cases that could be brought by the attorney general prior to the 1972 amendments.

Now, why did Congress enact 707(e) instead of just continuing to allow pattern or practice cases to be brought without regard to the provisions of Section 706, the way that the Justice Department brought them? Well, that's because Congress believed that the procedures of 706 serve valuable purposes.

Foremost among these valuable purposes are the prompt notification of employers that they were accused of discrimination and the prompt efforts to resolve accusations of discrimination through conciliation. One of the Sections 706 procedures, which is incorporated into Section 707 by 707(e), is -- I know. Pardon me for throwing all of these numbers and letters out; I know it gets confusing.

THE COURT: That's fine.

MR. LIVINGSTON: But, 706(e) of Title VII requires a timely filed charge of discrimination before the EEOC can act. The charge is what triggers the process. We've included in the booklet, under Tab 7, the Occidental Life

Insurance case by the Supreme Court. In this case the Supreme Court held that the EEOC is not subject to a statute of limitations in the traditional sense, in that once a charge has been filed with EEOC there is no time within which EEOC has to process that charge and sue an employer.

But what the Court recognizes on Page 11 of the slip opinion that I've included in the book, it's the highlighted section at the bottom of that page, is that the Supreme Court recognized that when Congress enacted Title VII, it put the limitations period at the front end of the process. The limitations period is the period within which the charge has to be filed under 706(e), and the Supreme Court recognized that Congress viewed it as extremely important that the charge be filed promptly.

Remember, the whole overall purpose of Title VII was the voluntary resolution of the employment discrimination disputes expeditiously. Here is what the Court said in Occidental: "Congress did express concern for the need for time limitations in a fair operation of the Act, but that concern was directed entirely to the initial filing of the charge with the EEOC and prompt notification thereafter to the alleged violater."

The bills passed in both the House and the Senate contain short time periods within which charges were to

be filed with the EEOC and notice given to the employer. It is the protection afforded by this time period that the EEOC now wants to eliminate in cases that it characterizes as "pattern or practice cases."

Let me see if I can make an effort at cutting through the haze and narrowing the issue before the Court.

In this circuit, if the 300-day charge filing period in Section 706(e) applies to this case, then the EEOC cannot challenge hiring decisions that predate March 2007. That's the issue before the Court. Now, EEOC argues that even if the 300-day charged filing period does apply to it, that it can still go all the way back to 2001 under a doctrine of continuing violation. But that argument is foreclosed by the Fourth Circuit decision in Lewis versus Blumberg Mills, which is in the booklet under Tab 9.

In Lewis versus Blumberg Mills, the plaintiffs brought a class pattern and practice race discrimination case against the defendant. The case is very similar to the case here, in that the contention is that the defendant had a pattern or practice of engaging in hiring discrimination against African-Americans. And the allegation was not intentional discrimination but that the practice was neutral on its face and had a disparate

impact which disproportionally excluded minorities. The same claim that we have in this case.

The plaintiffs urged that they be permitted to seek to remedy hiring what they viewed as "hiring discrimination violations" which occurred earlier than the charge filing period, more than in this instance the charge filing instance was 180 days; more than 180 days prior to the filing of the charge. The Fourth Circuit said you can't do that.

On Page 15 of the slip opinion, we've highlighted the relevant passage from Footnote 20. The Court says this period meaning the, you know, claim period, is limited at its beginning by the date 180 days before September 18, 1969, the date on which plaintiff Lewis filed her EEOC charge.

In the next paragraph the Court explains why: "In fixing the beginning date, we reject appellant's contention that he thinks the two year back limitations period of 42 U.S.C. Section 200(e)(5)(G) dictates the beginning date two years before filing of Louis's charge. We do not agree that a discriminatory hiring pattern, as opposed to other possible discriminatory practices existing prior to the charged filing period, can be considered a continuing violation extending into the charged filing period to get this result." So, unless --

THE COURT: Is there a distinction to be made between pattern on the one hand and practice on the other?

MR. LIVINGSTON: No. No. The Supreme Court, in the United States versus Teamsters said that these terms are not terms of art, and they essentially -- they've been consistently referred to "as a pattern or practice without any legal recognition that there could be a difference between a pattern or a practice." Is that what you're asking me?

THE COURT: Well, without regard to what the Supreme Court said -- of course I have to give regard to what the Supreme Court said. But if there is a pattern that doesn't -- it's not the product of any specific decision-making by an employer but just happens to be this pattern that when you look at it a big picture emerges. Put that on one hand. And then a practice: We sat down at a board meeting today and said we're not going to hire people with criminal records in this company from January 1st forward.

Is there a difference between how one might treat that, as opposed -- one is a very clear, specific decision. You have a criminal record, you don't work for Freeman on one hand, and the other one simply being that over a long period of time collectively we sort of had a

bias that, well, if you have a criminal record we're not likely to hire you. But it wasn't a specific practice that was emboldened in board meeting minutes.

Is there any different --

MR. LIVINGSTON: For disparate impact claim, the type that EEOC is pursuing here, EEOC, under Title VII, has to identify a specific practice and show that practice resulted in an adverse and statistically significant differences when it played out in a selection process, promotion process, or compensation decision and so on.

So, I answer that by saying that the law has evolved to the point, Your Honor, where, in a disparate impact case, there would be no meaningful difference. In either case, the EEOC has to point to a particular specific practice that causes that result.

In the Louis case, that practice that was being pointed to was the practice of having the receptionist be the point person and designating who would and who would not be interviewed by the decision-makers. The plaintiffs allege that that practice had a disparate impact on minorities and resulted in fewer minorities being hired for positions even though the practice itself was facially neutral. The plaintiffs said they ought to be able to challenge that outside the charge filing

period. The Fourth Circuit said you can't do that.

The Fourth Circuit's decision is wholly consistent with the Supreme Court's later decision in National Railway Passengers Association versus Morgan, which might go more to Your Honor's question, where the Court said that when you're dealing with discreet decisions, a policy or a practice that results in discreet decision-making, like -- and the Court says, "like termination decisions, or decision of who to promote, or decision who to hire." If those are discreet acts, each one of them constitutes a potential violation. And those acts, even if part of a repeating nature, have to be challenged within the charge filing period under Title VII.

We have discussed in our brief that in Williams versus Giant, the Fourth Circuit said that that applies even in a situation of pattern or practice. And the point that I'm trying to make, Your Honor, is that even before Morgan; before Williams verse Giant, the Fourth Circuit had already said that in a case like this, in a case like the one before Your Honor, that the charge filing period determines how far back the plaintiff can go to seek to remedy claims, to assert claims.

Now, the EE- -- that doesn't end the matter, because EEOC says that the Louis case and the Morgan case

and the Giant case don't apply to it. And the reason the EEOC says that those cases don't apply to it is because it's suing under Section 707 of Title VII.

These other cases were brought under Title VII, Section 706. And what EEOC is arguing to the Court is that under -- that they say 707(a). Let's go back to -- if you would, go back to Tab 1. 707(a), which gave the attorney general the power to bring pattern or practice cases doesn't have a timely charge filing requirement with it. So, EEOC argues that it has no timely charge filing requirement when it sues under Section 707.

We say, then, what does 707(e) mean when Section 707(e) says that once this litigation authority was transferred from the attorney general to the EEOC, that EEOC would bring its actions in accordance with the procedures set forth in 706.

The procedures in 706 are the procedures I've already discussed. Timely filed charge, notice to the employer of the charge, investigation, conciliation, cause finding, and ultimately resulting in litigation. There is no basis -- you know, we talk -- I did a Google search. You know, I took this language "in accordance with." You know, you should do something "in accordance with" something else. And I did a Google search, and it just lit up the screen with regulations, statutes, and

with the local rules of this court. It's very common language of incorporation.

We say in the brief, I think, how many times that language is used in this court's local rules to mean to instruct lawyers to conduct their business in accordance with some other rule or regulation.

THE COURT: You're talking to the chairman of the local rules committee; we have used that word a lot.

MR. LIVINGSTON: Well I'm pleased to hear that I am, because Your Honor knows that that doesn't mean that lawyers should start to parse that language and figure out which ones can they avoid because the language may not mean -- "in accordance with" may not mean everything, and that's precisely to what is being urged to Your Honor by the EEOC today, that "in accordance with" doesn't mean what it says, and that it doesn't mean what it says (sic.). And to make the argument that it doesn't mean what it says, the EEOC reaches for statements of public policy.

THE COURT: There is a famous Maryland Court of Appeals case written by the late Judge McWilliams, and he was a big fan of British writings. And there was a case called Canada's Tavern versus Town of Glen Echo. And the -- in that case, the contention was being made by someone that the county council's legislation didn't mean what it

said. And he got off the book, a book that I actually have on my bookshelf because of this case called *A.P. Herbert's, The Uncommon Law*. And what he quoted was "The Deathless Dictum of Lord Mildew." You can even imagine it being with a British accent. "If the Council didn't mean what it said, it should have said so." So, that's essentially what your argument is is "The Deathless Dictum of Lord Mildew."

MR. LIVINGSTON: Had I known that, I would have certainly given it at least a footnote in the brief, because it encapsulates our argument that it is -- EEOC's position is that in 707(e) that Congress only intended that EEOC comply with the investigation, cause finding, and conciliation requirements of 706(e) and nothing else.

In fact, EEOC says that Congress in 707(e) never intended to limit EEOC's remedies, and they view a timely charge as limiting EEOC's remedies. I submit to Your Honor that this is awfully strained; it's an awfully strained interpretation of 707(e). If Congress had intended for the functions of the attorney general to be carried out in accordance with only the investigation-cause finding conciliation portions of Section 706, one would have expected Congress to say so and not to have said in all actions, all actions shall be conducted in accordance with procedures set forth in Section 706 of

this Act.

Now, if 707(e) doesn't say what we say it says, and that means that everything in 706 is incorporated into 707, then there must be some other fair reading of the provision.

The EEOC attempts to provide a cohesive rule for a narrower interpretation. The EEOC states that 707(e) is best read as making explicit only that EEOC must investigate and conciliate a charge before it's sued.

EEOC states that 707(e) does not make 706's litigation procedures applicable to 707 actions and, as I said, particularly to the extent those procedures limit remedies.

The EEOC asserts that the requirements that a charge be filed within a certain number of days is a litigation procedure that limits remedies and, therefore, is outside the scope of 707(e).

First, even if 707(e) could be read as excluding Section 706 litigation procedures from pattern or practice cases, it would still incorporate the requirement of a timely filed charge and the limitations period that flows from that requirement, because the requirement of a timely filed charge lies at the heart of the administrative process. In fact, it's what triggers it. The Supreme Court made this clear in the Shell Oil

decision which I have at Tab 8.

At Page 9 of the slip opinion, at Tab 8, the Court discusses the EEOC process. This case was a case brought by the EEOC under Section 707, the Section that is before the Court. And the Court says at the bottom of the page, "The process begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice."

The timely filed charge is the step that invokes the administrative process that EEOC concedes is incorporated into Section 707 by Section 707(e). So, even if the EEOC were correct, that 707(e) does not incorporate litigation procedures, a view which is at odds with the plain language of the statute, it would still incorporate the timely charge filing requirement and the consequences of not filing a timely charge.

The second point, and I -- the second point, Your Honor, is that EEOC's interpretation of Section 707 results in so many absurd consequences that you would have to reject it even if the statutory language were less clear. Let me give you a few examples. Perhaps we could look back to the chart under Tab 3. Again, the chart under Tab 3 are the Section 706 procedures. It's the position of the defendant that all of these procedures are incorporated in the 707 by virtue of

707(e). It's the EEOC's position, as I understand it, that only the procedures of Section 706(b) are incorporated into 707 actions. The requirement for a timely filed charge is in 706(e).

The point I'd like to make to Your Honor is that 706 contains a lot more provisions, too. And in crafting a rule of incorporation, the Court needs to keep in mind the consequences of that rule in future cases dealing with arguments with respect to incorporation of other Section 706 provisions.

First, under Section 706(f)(2) the EEOC can obtain emergency injunctions where they are important. But if Section 706 litigation procedures are not incorporated into Section 707, as EEOC argues, then the EEOC has no statutory authority to obtain such injunctions in pattern or practice cases.

Second, until 1991, when Congress enacted 42 U.S.C. Section 1981(a), EEOC for the very first time obtained the right to seek compensatory and punitive damages in employment discrimination cases; but that right to seek compensatory damages was specifically linked to a claim under Section 706. The statutory provision states that in 706 actions, the EEOC can seek compensatory punitive damages if EEOC is correct and 707(e) does not incorporate the litigation procedures of

Section 706. That means EEOC cannot seek compensatory and punitive damages in pattern or practice cases.

I think that means one of two things, that either Congress, when it enacted the punitive damage provisions, didn't agree with EEOC's assertions that these pattern or practice cases are of paramount importance to the country, or it didn't agree with the EEOC's view that these provisions would not be incorporated into Section 707 by 707(e).

Third, the right to a jury trial exists only for cases under Section 706(h). Now, in our view, this is not a problem, because 707(e) incorporates the right to a jury trial into a Section 707 action pattern or practice lawsuit. Under EEOC's interpretation that litigation procedures are not incorporated by Section 707(e), then there is no right to a jury trial in a pattern or practice case brought by the EEOC. These results make no sense.

The EEOC has emphasized to this court that pattern or practice cases are designed to attack the worst forms of employment discrimination. It would be absurd for the EEOC to be able to obtain emergency injunctions, trial by jury and compensatory and punitive damages in 706 cases, but not in pattern or practice cases. But these are the clear consequences of EEOC's argument that the litigation

procedures of 706 are not incorporated into Section 707.

The plain language of Section 707(e) answers all questions. It does not require thoughtful analysis of public policy considerations to go down the list of 706 procedure, litigation procedures, administrative procedures and find which ones are incorporated into Section 707 sections and which ones are not. I will tell Your Honor that in those cases where courts have attempted to do this gerrymandering, that the results are inconsistent and irreconcilable, and the reason is they're all using different rules.

For example, in the EEOC versus Mitsubishi, a district court decision that the EEOC cites as holding that there is no charge filing period under Section 707, the Court also said EEOC cannot bring a 707 pattern or practice case based upon a charge filed by an individual under 706 that the EEOC can only act on a commissioner charge. Well if that's the law, an EEOC 707 action should be dismissed because EEOC is proceeding on an individual charge and there is no EEOC commissioner charge filed in this case.

I'm not suggesting that that's the correct result. I am making the point that in erasing the line drawn by Congress of incorporation, there is no other line; and the courts are struggling to try to create one, and

they're coming up with different results except, of course, in those instances where they're agreeing with our position.

Another point that I think is quite important, and I know I've spent a lot of time up here Your Honor so I'd like -- I'll try to --

THE COURT: No, that's fine.

MR. LIVINGSTON: I'll try to wrap it up.

But, you know, the EEOC has argued that you shouldn't worry. You shouldn't -- the Court shouldn't be concerned about not imposing a limitations period on EEOC's actions because, after all, in Section 706(g) the EEOC cannot recover back pay going back more than two years prior to the filing of the charge. I have two points to make about that. Number one is, how is EEOC applying 706(g) to its pattern or practice case under 707? EEOC's arguing that 707(e) is not intended to limit EEOC's remedies, and it doesn't incorporate the litigation procedures of Section 706.

Section 706(g) is, number one, a litigation procedure and, number two, quite clearly limits EEOC's remedies. The only way that EEOC can argue as it does that 706(g) limits its pattern or practice cases is by conceding that it's incorporated into 707 by 707(e). But once it's made that -- once it's made that concession,

then where do you draw the line? It's not rational that 706(g) would be incorporated into the statute, but the charge filing in period 706(e) would not be.

The second point I want to make is going back to the case, Louis versus Blumberg Mills, which we've discussed with Your Honor for the point that the Fourth Circuit has said that in a case like this -- in a pattern or practice case like this, the plaintiffs can't go beyond the charge filing period to seek to establish claims.

In that case the plaintiffs argued that they should be able to go back at least two years prior to the filing of the charge under this provision that allows back pay up to two years prior to the filing of the charge. That argument in the passage that I read to the Court was specifically rejected. The Court said that a two-year back pay period did not provide a basis upon which litigants could go back beyond the charge filing period to bring cases.

I'd like to spend just a minute discussing the L.A. Weight Loss case, which is a case decided by one of Your Honor's colleagues on this court and ruled in EEOC's favor in that case. And he held that Section 707 does not incorporate the requirement for a timely filed charge under 706(e). In our brief, we've explained why we

believe that L.A. Weight Loss was decided incorrectly.

The point I'd like to stress today is that to our knowledge, the parties did not explain to the judge the consequences of the EEOC's interpretation of Section 707(e) for pattern and practice litigation. So, apparently, the Court was unaware, for example, that the EEOC thought that 706(g), which limits back pay to two years, applies in pattern or practice suits, but the limitations period that flows from the charge filing period does not.

The Court apparently was unaware that under EEOC's position, the EEOC would not be entitled to seek a jury trial or compensatory or punitive damages in pattern or practices cases. These results cannot be reconciled with the judge's statement in L.A. Weight Loss about the importance of pattern practice suits in a Title VII's enforcement scheme.

Also, the Court held that the nature of pattern or practice cases is not susceptible to placing a time period on it, that it constitutes a type of continuing violation that can be challenged all the way back to its inception. It doesn't appear from the case that the judge was familiar with the Louis versus Blumberg Mills decision; that case is not cited anywhere in the opinion.

If Your Honor has no additional question, then

I'll cede the podium.

THE COURT: Thank you very much.

Mr. Phillips.

MR. PHILLIPS: Good morning, Your Honor. Again, I'm Ron Phillips. I'm here for the EEOC in this matter. I want to address some of the points that counsel for Freeman referenced in his argument. But before I do, I just want to give a brief overview of the EEOC's position in this matter regarding the defendant's motion for partial dismissal.

First, it -- the EEOC does not contend that in order to institute a 707, or pattern or practice lawsuit, it does not need a timely charge. In that regard, we agree with the defendant that in order to trigger an investigation that would lead to a pattern or practice lawsuit, the EEOC requires a charge that is timely, that is what triggers the process that begins with a charge trial filing and investigation, a reasonable cause determination and a conciliation, all of which took place in this case. But that's not the issue.

The issue is not whether the EEOC had authority to investigate this matter. It did. There was a timely charge filed. The issue is whether the timing of that charge filing restricts the EEOC's remedies for a class involving a pattern or practice, a continuing violation

in subsequent litigation. That's a separate question.

And it's the position of the EEOC that although a timely charge is required to trigger an investigation, the charge filing period for an individual under Section 706(e)(1) does not limit the scope of relief that the EEOC may obtain in a pattern or practice lawsuit brought pursuant to its public interest exclusive authority under Section 707.

THE COURT: If I'm an employee of a company and I was the victim of five different discriminatory actions in the workplace, five specifically discreet things done to me: I wasn't promoted; on a different date I was suspended; on another date I was, and so forth. Five separate things, three of which occur prior to 300 days and two of which are after. Is there any question that the only ones that would properly be before the EEOC, as well as before this court, would be the two that are within the period of time?

MR. PHILLIPS: With respect to the individual who filed the charge, that is true, unless it were part of a pattern or practice and that individual had filed to represent a class with the EEOC and in this court. In that case, under the -- again, we're talking about setting aside Section 707. We're talking about a private litigant under Section 706.

In that situation, under the Fourth Circuit case law, that individual would not be able to raise prior acts of discrimination, acts that were time barred under the charge filing period, unless that person could prove under Teamsters a pattern or practice of discrimination, and unless that person were a class representative in a certified class action.

THE COURT: All right.

MR. PHILLIPS: But that is certainly the tradeoff. Under Williams, and under the prior decision that Williams cited, Lowery, the Fourth Circuit has made clear that an individual cannot evade the timely charge filing requirement and bring in otherwise time barred acts of discrimination by simply asserting a pattern or practice of discrimination. The pattern or practice claim has to be properly before the Court, and that can only happen under Lowery if there's a class action before the court.

With respect to -- which raises the additional issue here. Separate and apart from any construction of Section 707, under the Fourth Circuit case law the continuing violation doctrine would apply to this case and toll the limitations period to permit recovery for victims beyond the 300 day charge filing period even if this action were brought solely under EEOC's authority under Section 706(f). This is so because of the

application of the continuing violation doctrine.

Counsel cited a case of Louis versus Blumberg Mills. In the briefs, the EEOC cited a case which pre-dates Louis, another panel decision called Patterson versus American Tobacco Company. In that case the Fourth Circuit held that the pattern -- that a continuing violation in the situation of a pattern or practice would apply and would permit the class to be broader than a 300-day charge filing period. It would permit bringing in individuals and acts of discrimination prior to that period.

Another case that was not cited in the briefing but I can provide the court with a copy of, Chisum versus United States Postal Service, stands for the same proposition. And again, that is another Fourth Circuit decision that pre-dates Louis.

Going back for a moment to the issue of statutory construction under Section 707. Defendant contends that the language of Section 707(e) is plain and that it encompasses and limits the EEOC's remedies in a 707 action in accordance with when the charging party filed the charge. That EEOC's remedies would be restricted to the 300-day charge filing period. Respectfully, we regard that as a misreading of the statute.

The issue -- and in counsel's argument there was a

reference to the phrase in 707(e), "in accordance with." In accordance with the procedures set forth in Section 2000(e)(5) of this Title, otherwise Section 706. We take no issue with the defendant's interpretation of the phrase "in accordance with," but that's not the issue. The issue in this case is "in accordance with" what? In accordance with what? It says all actions shall be conducted in accordance with.

THE COURT: You asking me to pick and choose portions of Section 706?

MR. PHILLIPS: No, Your Honor. What I'm submitting to the Court is that the phrase "all such actions," that's the operative language that has to be construe here under 707(e), not "in accordance with." The prior sentence in Section 707(e) reads in relevant part: The commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination. "In investigate and act on." This statutory subsection does not reference reasonable cause findings. It does not reference conciliation. It references "investigate and act on."

Well, given the comprehensive administrative procedure set up under Section 706, the phrase "act on" has to be interpreted as including reasonable cause determinations and conciliation.

And in the next Section --

THE COURT: Isn't the whole purpose of conciliation in the mandatory aspect? And the mandatory aspect of it that hopefully most of those cases will not end up in federal court or, rather, they will be conciliated using the good and expert auspices of your agency and that both with regard to discreet cases and pattern and practice cases that in effect Congress is saying, let's nip these in the bud promptly. Let's identify the problems, address them and resolve them, hopefully administratively. Isn't that the purpose of what Congress was trying to accomplish?

MR. PHILLIPS: Yes it is, Your Honor. Indeed, it is, and that is precisely what occurred in this case. The EEOC --

THE COURT: Well, what happened in this case though did not relate to a period of time as vast as you're seeking.

MR. PHILLIPS: It actually did, Your Honor. The EEOC's reasonable cause determination in this case encompassed the full time period that is the subject of the litigation in this case and that reasonable cause determination. There was a conciliation attempt made as to the full scope of the case.

THE COURT: Perhaps it failed because you were

trying to go back too far.

MR. PHILLIPS: That is not correct, Your Honor. That is not why it failed.

THE COURT: Okay. All right.

MR. PHILLIPS: In any event, Your Honor, looking at this language of 707(e), all such actions in the last sentence has to refer to the phrase "act on" in the first sentence of 707(e). "Act on" is best understood given the language "investigate" that precedes it as a reference to the remaining portions of the administrative process, including -- that precede litigation, including invest- -- including a reasonable cause determination and conciliation.

This is the interpretation of this language that's been given to it by now a majority of district courts to consider this issue, including this court in L.A. Weight Loss. Most recently, Your Honor, a decision of the Western District of New York in EEOC versus Sterling Jewelers dealt with this issue, and I have a copy for the Court.

THE COURT: Hand it up to me.

MR. PHILLIPS: In EEOC versus Sterling Jewelers, Your Honor, the Western District of New York was very recently presented with this issue and sided with the EEOC, concluding that Section 707(e) -- I'm sorry, Your

Honor, that Section 706(e) charge filing period does not act as a restriction on EEOC's remedies in pattern or practice litigation.

In addition in Sterling Jewelers, the Western District of New York also concluded that the Supreme Court's decision in Morgan did not abrogate prior Second Circuit case law that provided for a continuing violation in situations where a pattern or practice of discrimination had been proven. And in that circumstance where there was a continuing violation involving a pattern or practice that the class remedies would not be restricted by the 300-day charge filing period under Section 706(e).

In addition, Your Honor, it's important to read the language of Section 707(e) in light of its subject matter. Section 707(e) and the entirety of 707 deal with pattern or practice violations. Pattern or practice violations by their very nature require proof of repeated regular discriminatory conduct over time. In this case a policy --

THE COURT: Is that really the case? As I said, if you take the example I was asking defense counsel about, a board meeting is held this morning and the board says, from now on we're not going to hire anybody with a criminal record henceforth and forever more.

That's our decision; that's our company policy. Does that require multiple instances to prove it? I mean, if you were to come out of discovery in this case and had a smoking gun right in your hand, here is our company policy; we will not hire somebody with a criminal record, period. Why do I need to have repeated instances?

MR. PHILLIPS: Your Honor, there would be no remedy in that situation, because there has yet to be an application of the policy. There is no class in that circumstance. It would require an actual application of that policy to individuals.

THE COURT: All right. Let's suppose we put the policy into effect October 1 of last year, and here it is January 1 and we've had 1,000 applicants and not one single African-American was hired because of this policy.

MR. PHILLIPS: A pattern of practice, Your Honor.

THE COURT: Is that enough?

MR. PHILLIPS: Yes, it is.

THE COURT: What you're addressing though is the effect of that practice -- of that policy, excuse me, as being -- having a discriminatory effect; correct?

MR. PHILLIPS: In this situation Your Honor we are not contending there was purposeful discrimination. It's a disparate impact claim.

THE COURT: Well, the purposeful act, assuming

that that's what ultimately is found in this case, is we don't hire people with criminal records. That's the purposeful act. That's not perfect -- on its face a purposefully discriminatory act. In order to prove it's ultimately a discriminatory act, you have to prove discriminatory effect; correct?

MR. PHILLIPS: In this case, to be clear, Your Honor, there was intentional discrimination in the sense that the company adopted a discriminatory policy intentionally. It did not adopt the policy -- we don't contend it adopted the policy for the purpose of screening out minorities or male candidates. But that was its effect which really goes to the heart of what the Supreme Court was talking about in Morgan, where it talked about a continuing violation.

In Morgan the Supreme Court dealt with a situation involving harassment where a repeated pattern of -- the nature of the discrimination would -- and the existence of discrimination, actionable discrimination, would not become evident until there were a pattern of acts over time. This is the nature of a hostile work environment as described by the Supreme Court in Morgan.

This case very closely resembles that fact pattern, Your Honor, in the sense that it would not become -- the discriminatory impact of the defendant's

policies in this case would not become evident until they were applied to a significant number of applicants over time and the pattern of disparate impact became clear both on minorities and on male job applicants.

This is really the -- an important point. In looking at the statutory language, we have to look at the nature of what it describes, and it describes pattern or practice discrimination. Pattern or practice discrimination involves a pattern or a policy of conduct over a period of time. In addition, looking at the language, even assuming -- even assuming that the language -- strike that, Your Honor.

Going beyond the plain language of the statute and looking at the legislative history, it's also quite clear that Section 707(e) was not intended to act to incorporate the charge filing period under 706(e) as a substantive limitation on the EEOC's remedies in litigation.

This was the conclusion of the Fifth Circuit in EEOC versus Allegheny Ludlum, a case in the 1970. The issue in Allegheny Ludlum was whether or not private individuals had an ability to intervene in EEOC 707 litigation. And what the Fifth Circuit concluded is that they did not. And the reason they did not, upon examination of the legislative history the EEO- -- the

Fifth Circuit concluded that Congress, when it enacted Section 707(e), never intended -- never intended 707(e) to act as a -- to set up a set of procedures for EEOC litigation. Rather, what 707(e) was intended to do was to provide for pattern or practice charge filing and EEOC administrative process to investigate, find reasonable cause and conciliate charges of pattern or practice of discrimination, whether brought by an individual or brought by a commissioner under a commissioner's charge.

In this regard it's important to keep in mind Congress' objectives. In granting EEOC authority to litigate pattern or practice cases under Section 707, congress had as one purpose to provide full remedies for patterns and practices of discrimination. This is a principle that's repeated in the case law. It most prominently it's noted in the briefs in the case Teamsters versus -- International Brotherhood of Teamsters versus United States. In that case there was a large class, and the Supreme Court directed the lower courts to formulate the fullest remedy possible for the entire class.

In addition, Congress had as a purpose, as described in the Supreme Court's decision in Waffle House, to give the EEOC broad independent authority to root out systemic discrimination. That's also noted by

Supreme Court in the Shell Oil decision, which is cited in the briefs, authority that is not contingent upon the substantive rights of particular individuals.

In their brief, the defendant, and in some of the cases that the defendant cites, there is this view that the EEOC acts as a proxy for individuals for whom it seeks relief. The Supreme Court has made clear repeatedly in the General Telephone decision and in Waffle House that that is not true. And in addition, Congress had as a key purpose to deter systemic violations of the law by providing the EEOC with a more forceful remedies possible.

This is why, as the Fourth Circuit described in the General Electric decision, the EEOC may seek remedies regarding any violations it uncovers in the scope of an investigation regardless of whether those violations were pleaded by the charging party in their charge, regardless of whether the charging party who filed the initial charge has standing to do so. And this is why, as the Fifth Circuit concluded in EEOC versus Allegheny Ludlum there is no intervention permitted in a Section 707 action. If the defendant's construction of Section 707(e) is correct, then private individuals would be permitted to intervene.

There are certain other portions of the statute

that also clearly indicate that Congress did not intend the 300-day charge filing period to restrict EEOC's remedies in pattern or practice litigation. For example, looking at Section 706(g), which limits back pay to a two year period preceding the charge filing, that provision would be completely unnecessary if Congress viewed the remedies of a litigant as being restricted to only those discriminatory acts that took place within 300 days of the charge.

The two year period obviously is a much broader period. So, obviously, what Congress had in mind was that in some situations -- in certain situations the plaintiff or the government would be permitted to recover back pay for a period exceeding the 300 day period of the charge. What are those situations? Well, it's clear from a reading of the majority of decisions that have reached this question of the EEOC's remedies under 707, and it is clear from a reading of the continuing violation case law, both pre-Morgan and post-Morgan involving these -- the kinds of claims that are at issue here that in a pattern or practice case, a plaintiff class or the EEOC was intended to be able to recover beyond the 300 day period. This is why the two year period becomes necessary, certainly involving a private class under Section 706.

The defendant, in its argument, raises several points that I'd like to address specifically. First, the defendant argues that if the Court were to construe Section 707(e) as not incorporating in its entirety all the provisions Of Section 706, that the EEOC would have no ability to obtain injunctive relief in a Section 707 action. In the defendant's view, injunctive relief is only provided for in Section 706 in the litigation authority provisions of Section 706. That is a misreading of the statute.

Looking at Section 707(a), there is specific language concerning the ability of the attorney general, whose authority has become the EEOC's, to file an application for a permanent or temporary injunction to seek a restraining order or other order against the person or persons responsible for such pattern or practice. Section 707(a) specifically addresses the statutory construction concern the defendant has.

The defendant also asserts that with respect to compensatory and punitive damages, and with respect to jury trial, that unless 707 incorporates in its entirety the procedures of Section 706, that the EEOC would have no ability in a pattern or practice case to seek compensatory or punitive damages or to obtain a jury trial.

Well, first of all, just to note for the Court, the EEOC is not seeking compensatory and punitive damages in this case. This case is purely a case involving disparate impact discrimination, and the statute provides only for equitable remedies in this situation including back pay, injunction, front pay. Furthermore, given that situation, the EEOC is not seeking a jury trial in this case. So, that -- those two issues are simply not at issue here.

THE COURT: Is the defendant entitled to a jury trial in this case?

MR. PHILLIPS: No, Your Honor, they are not. They are not. But with respect to their statutory construction argument, the short answer to the question is that the EEOC brings action -- pattern or practice actions under both Section 706 and 707 and so 706 does provide in those situations for both the jury trial and compensatory and punitive damages that the EEOC -- I'm sorry, that the defendant referenced.

With respect to the specific issue of 706(g) and the two year back pay period. The defendant argues that the EEOC's construction of Section 707(e) is incorrect because of statements in the EEOC's brief concerning the applicability of Section 706(g). Specifically, the two year limitation on back pay. To be clear Your Honor, the

EEOC's position in this case is that there is no limitations period applicable to the scope of EEOC's remedies under Section 707. That includes the two year back pay period under Section 706(g).

THE COURT: So you're not bound by that, is what you're saying?

MR. PHILLIPS: We are not bound by that, Your Honor. There were statements in the EEOC's brief to the effect that 706(g) would apply in this case. Those statements were error on my part. I misconstrued the statute. To the extent that we stated that Section 706(g)'s two year back pay period would apply in this case, that was -- the EEOC withdraws those statements. They were a misconstruction of the statute on my part and my part alone.

However, if the defendant is correct in the alternative, and Section 706(g) -- I'm sorry, Section 706 is incorporated in toto via Section 707(e), then it's very clear that Section 706(g) would apply. And in that circumstance, the restriction on EEOC's back pay remedies would be two years. There would be no purpose in having Section 706(g) exist in that circumstance unless Congress had in mind that the EEOC could recover beyond the 300 day period.

Defendant may argue that, well, Morgan answers

that question; that under Morgan the Supreme Court provided for a continuing violation in cases of hostile work environment; in cases where a plaintiff was pleading harassment. And the plaintiff in that situation, as long as it was part of a continuing violation, could continue to recover even for harassing acts that pre-dated the 300 day charge filing period.

The problem with that argument, Your Honor, is that, generally speaking, a plaintiff cannot recover back pay for harassment alone. Section 706(g) has to mean more than a hostile work environment. And we believe the answer to that question is Section 706(g) was intended to, at a minimum, restrict a private class's ability to recover involving a continuing violation and a pattern or practice involving employment actions other than harassment, such as hiring, promotion, and other acts of discrimination that were the subject of pre-Morgan Fourth Circuit case law and continuing violations.

The defendant, in its briefing and again here today, stresses the decision of the Fourth Circuit in Williams versus Giant, which was a single plaintiff discrimination action where the plaintiff asserted that multiple, otherwise time barred acts of discrimination were part of a pattern or practice for which she should be able to recover.

To be clear, the Williams decision did not find that a pattern or practice of discrimination could not be -- could not be considered a continuing violation. The Williams case doesn't address that issue at all. The central rule in Williams, which was dispositive in that case, was the Lowery holding in Fourth Circuit, that a private individual not asserting a class action claim could not assert a pattern or practice.

In addressing the defendant's concern about absurd results, the EEOC notes that the defendant's interpretation also creates a significant tension and absurd result in the statute. The EEOC investigates all pattern of practice charges that are filed against private employers, against government, including state and local government employers. The EEOC, however, does not have authority to file litigation against state or local governments involving violations of Title VII. In that circumstance the cases are referred to the U. S. Department of Justice for litigation.

If, as the defendant claims, the Section 706(e) charge filing period acts as restriction on the scope of EEOC's class remedies, then in cases involving state or local governments the EEOC would be restricted in its reasonable cause determination and would be restricted in its conciliation to seeking -- to making a finding and

seeking remedies for only victims of discrimination who had adverse action taken against them within the 300 day charge filing period. But that can't be right. And the reason is because Section 707(e) is inapplicable to the U. S. Department of Justice.

The U. S. Department of Justice, consistent in the case law, has the authority to obtain remedies for the entire class of pattern or practice violation, including any individuals beyond the 300 day charge filing period. This is a principle that was recognized in some of the cases that were cited in EEOC's brief, including the Ninth Circuit decision in United States versus Fresno Unified School District.

So if the defendant's interpretation is correct, the EEOC would be in the position of making findings only as to a limited class within the 300 day period and conciliating only those violations. But if conciliation is unsuccessful, the EEOC has to refer that case now to the U. S. Department of Justice which has authority to seek remedies for the entire class. This creates an enormous disjunction in the administrative process involving state and local government employers, and it creates the potential that the EEOC would be forced, because the EEOC has an affirmative statutory duty, to engage in conciliation effort. Once it finds a

violation, the EEOC would be forced to settle cases out from under DOJ on a much limited class scope. That cannot be a correct interpretation of the statute, but that is the interpretation of the statute that the defendant is inviting this court to adopt.

The defendant also argues that the 300 day period, applying that to restrict the EEOC's remedies in 707 litigation is necessary to give employers prompt notice of the violations that are at issue. The EEOC certainly does not quarrel with an interpretation of the charge filing period as it is existing to encourage prompt charge filing. However, as stated in the EEOC's brief, we do not believe that a restriction on the EEOC's remedies in a pattern or practice litigation is necessary or was intended to effectuate that outcome.

Individuals have very strong incentive to file timely charges of indiscrimination with the EEOC regardless of what EEOC's remedies are in pattern and practice litigation. That incentive is if the individual does not file a timely charge, the charges will be deemed untimely and it will be dismissed, and that individual will have lost their rights under Title VII.

In addition, as I've stated previously, we do not disagree with the defendant that in order to trigger an investigation of pattern or practice we require charge of

discrimination. Again, this is another incentive for individuals who file charges to file them within 300 days of the act of discrimination that they were subjected to. This applies to both individuals and EEOC commissioners.

Finally, Your Honor, I just wanted to go back to the issue of continuing violation under Section 706. As noted in the Western District of New York's opinion in Sterling, the Court found that in the alternative, even, even if it had not agreed with the EEOC's interpretation of Section 707 and the scope of EEOC's remedies under Section 707; even if the case had been brought solely under Section 706, that the continuing violation doctrine, as applied to patterns and practices of discrimination, survives Morgan, has continuing vitality, and would continue to apply in this situation.

And the EEOC believes that separate and apart from Section 707 that the continuing violation doctrine applies in this case. Morgan explicitly, in Footnote Nine of Morgan, did not address the question of whether a pattern or practice would permit tolling of the limitations period in a case involving a continuing violation.

And Your Honor, just for the Court's convenience, I cited in connection with the continuing violation portion of this argument decisions in Patterson, Fourth

Circuit decisions in Patterson versus American Tobacco Company; Chisum versus U. S. Postal Service. And I would like to provide copies of those to the Court.

THE COURT: Let me ask you this. The analysis that the Supreme Court engaged in in the Morgan case didn't make a distinction between discreet acts and a continuing wrong; it was a distinction between discreet acts and the cumulative effect of individual acts. That was the sort of the dividing line between where the Court came out. We're not dealing here with cumulative effect of individual acts, we're dealing here with the effect of the -- or the discriminatory effect of a discreet policy aren't we?

MR. PHILLIPS: No, Your Honor. What we're dealing with here is a pattern or practice violation. It is --

THE COURT: I understand. But we're not dealing with a question of the cumulative effect of that policy, we're dealing with a discriminatory defect. So, it's not a matter of having to accumulate a bunch of things like workplace insults and slights that individually would not be enough. But when you put the whole pattern together, then you've got a hostile work environment. That's the distinction that I believe Justice Thomas was making.

MR. PHILLIPS: Again Your Honor, in this circumstance where we have a case involving a disparate

impact of a policy, I think that's directly analogous to, certainly, the factual circumstances that the Supreme Court was dealing with in Morgan. The question is one of -- one has to ask, why is it -- why is the nature of the violation important? Why is the distinction between an accumulation of events and a discreet act an important distinction that the Supreme Court drew? And the answer to the question has to do with notice. It has to do with when would the charging party have noticed that it's time to file a charge. Certainly, in a hostile work environment not all harassing acts are actionable. And it all takes place in a context and not -- often it doesn't become clear that there is a hostile work environment and doesn't --

THE COURT: At some point the victim concludes that this has changed the terms and conditions of my employment.

MR. PHILLIPS: Correct.

THE COURT: Isn't that the tipping point?

MR. PHILLIPS: Correct. That is the Supreme Court's point. And at that point, that person is responsible for filing a timely charge, a charge within 300 days.

The situation you deal with with a pattern or practice is very similar in the sense that it does not

become clear oftentimes whether there is -- in some cases, as the Supreme Court noted with harassment, it would become clear immediately that there is an actionable claim. An example -- a terrible example to give would be a workplace rape, but that does happen. The Supreme Court drew no distinction between that circumstance and a circumstance involving comments aggregating over time.

Here, Your Honor, again we have a pattern or practice of discrimination where the nature of the pattern or the policy would not become apparent and the need for charge filing would not become apparent until some time period after the beginning of the implementation of the practice or of the policy. This is -- this is inherent in the nature of a pattern or practice.

As the Supreme Court noted in International Brotherhood of Teamsters versus United States, this is the burden that a plaintiff in these actions has to show that discrimination is the regular course of conduct, not isolated events of discrimination. And that can only happen when there is proof of repeated application of a discriminatory policy over time where there is proof of repeated implementation of a discriminatory practice over time. So, very much like Morgan in that regard -- like

the harassment claim at issue in Morgan.

The defendant raises a concern in its brief that any individual -- an individual or the EEOC could characterize discriminatory acts as a pattern or practice as a ruse perhaps to evade the applicability of the charge filing period. The problem with that argument, of course, is that one has to accept the bitter with the sweet. Well, actually there are two problems with that argument. The first threshold problem is Lowery, which is that a private individual, absent class and a class certification, cannot raise a pattern or practice claim. That is black letter Fourth Circuit case law. So, that risk falls away.

With respect to the EEOC, the problem with the defendant's argument is that the EEOC is not going to lightly raise a pattern or practice claim because we have to accept the bitter with the sweet. The bitter is that we have to meet our burden under Teamsters, which is a high burden to meet. So the policy concern that the defendant has with people couching their claims as pattern or practice to avoid the charge filing period is simply a false concern.

Finally, Your Honor, we would just note again that in construing Section 707(e), one should look to the totality of Title VII, including other provisions in

Section 706, the two year limitation period; including the language in Section 707(a) which deals -- unlike Section 707(e) which deals with the administrative process. Section 707(a) deals directly with litigation authority. And we would request that the Court deny the defendant's motion for partial dismissal.

THE COURT: All right.

MR. PHILLIPS: If you don't have any other questions.

THE COURT: Thank you very much.

Mr. Livingston.

MR. LIVINGSTON: Yes, sir. Let me hit this last point first before I forget it. The last point was, you know, don't worry -- trust the EEOC, I mean, we use 707 authority responsibly. We only use it in big cases. Well, that's not my experience. There's a case that I'm defending right now in the Central District of California. I'm not asking you to take my word for it, it's -- the pleadings are all available on PACER. It's EEOC versus Wal-Mart. EEOC brought the action under 706 and 707, and it's claiming that Wal-Mart -- a single Wal-Mart store in California created -- subjected six -- six Hispanic employees to a hostile work environment on basis of national origin. It's a 707 action brought to seek remedies for six individuals in a single workplace.

Now, the -- I'd like to repeat a point I made in my main argument, Your Honor, that we -- Congress has offered a very cohesive way to interpret the statute. 707(e) means what 707(e) says, and it incorporates all the procedures of 706 into 707 pattern or practice actions.

What I said to Your Honor is that EEOC's theory begins to break down when you have to start to look at the destruction that the theory would do to the statute if the Court were to follow it. And I believe that in EEOC's argument that EEOC made that point. The EEOC at first says that we're protected in pattern or practice cases by 706(g) which limits damages to two years, but then conceded in the argument that under its theory that 706(g) is not incorporated into 707 by 707(e).

So, when faced with our argument they've already, you know, withdrawn the two year back pay provision. Then in answer to our argument about could Congress have intended -- could Congress have seriously intended not to provide EEOC compensatory and punitive damages in jury trials in these paramount pattern or practice actions under 707? The EEOC answered, don't worry about that because that's not relevant to this case. But I submit that the Court's opinion that the logic, that the neutral principle that is established by the Court to decide this

case will be used in other cases. And in those other cases the EEOC may be seeking, or it certainly will have an entitlement to compensatory and punitive damages. And it makes no sense, Your Honor, for Congress to have intended that compensatory and punitive damages not be available in EEOC pattern or practice cases.

The EEOC says, don't worry about that result because we can get them in Section 706. Well, that begs the point. We're not arguing whether EEOC can or cannot get compensatory punitive damages under 706. We're asking the Court to consider the principle that will be applied to construe the statute. Does it make sense that Congress gave EEOC the right to seek compensatory and punitive damages when an individual is subject to discrimination but not when it brings a case alleging a pattern or practice of discrimination under Section 707? The answer is plain. It doesn't.

Now, I think it's important to recognize we are not arguing a pro-employer construction of the statute. Otherwise, we would be arguing that compensatory and punitive damages cannot be brought in the EEOC pattern or practice cases. In fact, a federal district court judge has ruled precisely that. And the problem with these rulings is that those rulings that are not following the plain language, as I said before, are applying all sorts

of public policy principles and are reaching different results.

Now, with respect to Your Honor's question hypothetical about the Court imposing a rule that it would not hire anyone with a criminal conviction. Number one, the company's policy is more nuanced than that. But to get to the heart of the Court's question, the EEOC's position on a practice such as that involved in this case is different from the theory that it's expressed to the Court. The EEOC's view is that pattern or practice case requires a cumulation of separate violations before the pattern or practice becomes apparent. Therefore, it's not appropriate to restrict --

THE COURT: -- for the discriminatory effect of the pattern or practice becomes apparent.

MR. LIVINGSTON: I stand corrected, Your Honor. Before the effect of the discriminatory pattern or practice becomes apparent, but I've included in the binder under Tab 6 a copy of the EEOC's policy on conviction records. Now, this is not a litigation policy. This is a policy that was established by the EEOC's commissioners. The leadership of the EEOC that is answerable to the president. And you see that the policy states at the commission meeting of November 25, 1985, "The commission approved a modification of its existing

policy with respect to the manner in which a business necessity is established for denying an individual employment because of a conviction record. The modification which is set forth below does not alter the commission's underlying position that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics, in light of statistics showing that they are convicted at a higher -- at a rate disproportionately greater than their representation in the population."

This expresses a per se rule that if an employer relies upon criminal conviction records, it's the EEOC's view that it's a -- it's disparate impact is established as a matter of law and that there is no need for there to be an accumulation of events before the effect can be determined. So, at least in a case like this one, the EEOC's rationale is not applicable.

The decision that EEOC gave Your Honor from New York. Now, We've cited in our briefs the cases that apply 707(e) to the charged filing period in litigation, so I'm not going to go through those. But, this Sterling Jewelers, Inc. case is an interesting case. In this case the Court held that EEOC is not subject to a time limit on its lawsuits. But if you read the case, you will see

that the Court's talking about Section 706 actions.

So, here the EEOC's argument has been extended into Section 706 actions so the EOC wouldn't be subject to a charge filing requirement as a period of limitation under either 706 or 707 actions. And I submit that that, again, makes the point that there is only one cohesive principle that can be applied here which will decide all of these issues, and that's that 707(e) means what it says.

The District Court in Iowa in, you know, surveying this, you know, an array of decisions, says, "The district court -- the district court's offer widely diverge an analysis that are impossible to reconcile or even to tidily summarize."

The Morgan point, I think, is important. Someone applies for a job and they're turned down. There's been an adverse employment action and it's complete. And under Title VII, the individual, if the individual wishes to challenge that decision, has 300 days in this state in which to do so. If an individual goes to work and is subject to a slur, that slur may not amount to an adverse action under Title VII; it may not give rise to a claim.

It's only when the slurs and the pejorative elements of the environment are aggregated is there a change in the terms and conditions of the individual

employment such to give rise to a claim. It's within that context that the Supreme Court said that the continuing violation theory is still viable, and the Court specifically referred to the discreet decisions that are involved in this case, hiring decisions, as decisions that need to be challenged within 300 days of which they were made.

One second, Your Honor.

It was suggested that the defendant's interpretation of Section 707 would lead to absurd results. As I said in my argument, the Justice Department had litigation authority first in 1964. The part of that authority which authorized the Justice Department to sue private entities was transferred to the EEOC in 1972. Now, Congress could have said this authority remains the same: EEOC, you do the same as the Justice Department, but it didn't do that. And it established Section 707(e); it said, EEOC you proceed under Section 706. But you know what it didn't say to the Justice Department? You proceed under Section 706.

It was Congress that made that -- drew the distinction between the way the Justice Department had proceeded and would continue to proceed and the way that EEOC would proceed under its actions under Section 706 and Section 707.

I believe that may be the last point I want to address, Your Honor, but give me one second --

THE COURT: All right.

MR. LIVINGSTON: -- to check my notes.

Well, I do want to talk about these, you know, broad statements of the EEOC's public interest which the EEOC argues justifies a very liberal interpretation of the statute such as to give it the ability to go back and require this defendant to justify hiring decisions that it made in 2004, 2003, 2002, 2001, and other potential defendants back maybe decades to have to defend individual decisions.

Those statements of policy that EEOC sues in its own name, that it sues in the public interest, that it is not restricted to the remedies that could be obtained by individuals, those things are all true. There is no contesting them, but they apply to all EEOC actions. They apply to individual cases that EEOC is bringing on behalf of the single person.

In fact, the Waffle House case that EEOC cites numerous times in its brief and mentioned here as stating these principles was a case that the EEOC brought under Section 706 on behalf of an individual named Eric Baker. Eric Baker was unable to bring his case in court because he was subject to mandatory arbitration agreement. EEOC

sued under 706 seeking back pay damages for Eric Baker, and it's in that context that the Court said that, you know, the EEOC is the master of its own case and the EEOC doesn't stand in as a surrogate for the individual.

If those principles were significant enough to free EEOC from a limitations period under 706, you would think that it would be sufficient to free EEOC from limitations. I mean under 707, you would think they would free EEOC from limitations under 706 as well, but they don't. And in this case, EEOC is not contesting that point.

THE COURT: All right. Thank you.

MR. LIVINGSTON: Thank you.

THE COURT: Counsel, I'm not going to make a decision today on this matter. I think I ought to -- since this is a matter that hasn't been finally decided by the Fourth Circuit, I'd rather do this in writing than mess it up orally, which is my preference. But I will try not to make terrible mistakes orally, and make my major mistakes in writing.

I have a question for you. The motion before me only goes to a discreet issue with regard to the complaint, which is otherwise answered. I'm not quite sure how long it's going to take me to crank out a decision. But if you assume a month to six weeks or

something, is there any reason why discovery shouldn't start? Because I could issue a scheduling order.

I don't know whether the matter that I would have under advisement would be so significant that it would dramatically alter the nature of the discovery or not. At least for purposes of assessing discriminatory effect, I'm not sure it would make any difference whether we're talking about X period of liability or Y period of liability. What are your thoughts on that?

MR. LIVINGSTON: I don't know that I can -- I mean, I can envision that it would not be and it should not influence discovery. On the other hand, not having seen the EEOC's discovery request, I don't know whether we might have some basis to object to some of them as being irrelevant and burdensome. I get Your Honor's point about the need to be able to demonstrate --

THE COURT: I can just hold off issuing a scheduling order and the whole question will be moot, but I was trying to make these cases be resolved sometime in our collective lifetime by not holding up on that if I can do it. It certainly would seem to me that if you can both behave yourselves with each other, those discovery issues that might require going back significantly farther, depending on what I do, could be kind of parked on the side for the moment so you will at least get

started on discovery.

MR. LIVINGSTON: It would be the defendant's position that the case would benefit by having discovery postponed until Your Honor rules, both from the perspective of minimizing potential discovery disputes between the parties, and also potentially facilitating settlement discussions between them.

THE COURT: Okay.

MR. PHILLIPS: Your Honor, it's EEOC's position that proceeding with discovery at this time is perfectly feasible. I don't see any potential for any significant disruption of discovery due to the fact that the Court --

THE COURT: I think what I'm going to do is I'm going to hold off. I'm just going to try to get this decision out promptly, and then I will be issuing a scheduling order, and then we'll do it. I'd rather not have the potential for a discovery dispute, so I'll get you something as quickly as I can.

I thank you very much for both good arguments.

MR. LIVINGSTON: Thank you, Your Honor.

MR. PHILLIPS: Thank you, Your Honor.

(Off the record at 10:47 a.m.)

CERTIFICATE

Tracy Rae Dunlap, RPR, CRR, an Official Court Reporter for the United States District Court of Maryland, do hereby certify that I reported, by machine shorthand, the proceedings had in the case of EEOC versus FREEMAN, Civil Action Number RWT-09-2573 on March 1, 2010.

In witness whereof, I have hereto subscribed my name, this 11th day of March 2010.

___/S/__Tracy Rae Dunlap__
TRACY RAE DUNLAP, RPR, CRR
OFFICIAL COURT REPORTER