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 MOTION FOR PARTIAL SUMMARY JUDGMENT

The issue presented by Defendant Freeman's Motion for Partial Summary Judgment is the identification of Title VII's 300-day charge filing period for claims of discrimination that were never asserted in an EEOC charge. Freeman has shown that the period is determined by reference to the date on which EEOC gives notice that it is investigating beyond the scope of the charge.

In opposing Freeman's Motion for Partial Summary Judgment, EEOC does not deny that it failed to notify Freeman of its expansion of the investigation of Katrina Vaughn's charge to encompass Freeman's policy of using criminal history information until September 25, 2008, more than eight months after Vaughn filed her charge. EEOC also fails to offer any excuse for its delay in advising Freeman of the expanded investigation.

Under these circumstances, as Freeman demonstrated in its initial Memorandum, EEOC cannot seek relief for would-be "class members" who were rejected for employment based on Freeman's use of criminal history information more than 300 days before September 25, 2008. EEOC attempts to avoid this result through five main arguments. Each lacks merit.

First, EEOC asserts that the plain language of Title VII requires that the 300-day period be measured from the date of Vaughn's charge. But the statutory language does not expressly provide for the expansion by EEOC of its investigation of her charge. That right was carved out by the case law. The same case law establishes that when a charge is expanded, the 300-day period should be measured from the date when EEOC notifies the defendant of the expansion.

EEOC argues second that claims based on decisions made more than 300 days before the employer received notice of the expanded investigation are precluded only where the employer can demonstrate prejudice from the delay in notification. It bases this argument on language in the cases stating that "in the absence of countervailing equities," *EEOC* is limited in its ability to seek back pay to the period of two years before notice of the claim in question was given to the employer. This "countervailing equities" language requires *EEOC* to present equities to overcome the presumption that delay is prejudicial and that employers are harmed when EEOC fails to provide them with notice required by law. The burden is not on the employer to demonstrate additional prejudice.

EEOC attempts to demonstrate a countervailing equity when it argues, third, that Freeman had notice that its use of criminal history background checks was under challenge by virtue of Katrina Vaughn's charge itself. This is untrue. Vaughn, who passed her criminal background check, did not (and could not) allege that she was discriminated against by virtue of that inquiry. Vaughn also did not allege that anyone else was suffered discrimination due to the criminal history check. Insofar as the charge mentions other African-Americans, it states only that they were discriminated against in "this manner" – *i.e.*, the same manner she was.

Moreover, Vaughn did not allege, as EEOC does here, that Freeman's use of criminal history information discriminated against Hispanics and white males. Her charge is expressly

limited to alleging discrimination against "racial minorities." Thus, the charge gave Freeman no reason to expect a lawsuit alleging that it discriminates against members of these groups.

EEOC also argues that Freeman had notice that its use of criminal history information might be challenged because it knew about, but "disregarded," EEOC's published "guidance" regarding the use of such information. But EEOC's argument that its "guidance" represents a substitute for the statutorily required notice is at odds with its conduct in this case. It is undisputed that EEOC eventually saw the need to provide such notice to Freeman.

EEOC's argument also proves too much. It can always be said that employers have knowledge of EEOC's wide-ranging interpretive documents. This knowledge hardly dispenses with the conditions precedent for an EEOC action, including proper notice to the employer. Moreover, there is very little case law regarding the use of criminal history information in employment decisions, and EEOC guidance documents lack the force of law. Thus, EEOC's reliance on its own published view of the law as an "equity" that excuses its failure to provide timely notice to Freeman is particularly misplaced.

EEOC argues fourth that its delay justifies at most a two-year limit on back pay from September 25, 2007, not the cutting off of claims based on decisions made 300 days before that date. But this Court has already decided, in this case, that the timely charge-filing requirement is not just about limiting back pay, but rather also serves as a limitations period governing which claims can be brought. When EEOC makes a unilateral decision to expand a charge, the date on which the employer is notified of the expansion serves the function of the charge-filing date. It follows that this date serves as a limitations period on claims, not just on back pay; EEOC's argument to the contrary is based on a serious misreading of the case law.

The date when EEOC notified Freeman of the expansion of its investigation was not apparent from its initial pleading, so the issue could not be raised in Freeman's motion to dismiss. Now that it has been properly identified, the Court should grant Freeman's motion.

A. The Language of Title VII Does Not Support EEOC's Position.

EEOC asserts, without analysis, that Freeman's position calls on the Court to "reject the plain language of [Title VII]." (Document 31 at 2). It cites, but does not quote, Section 706(e)(1), which provides: "A charge under this section shall be filed within one hundred and eighty days after *the alleged unlawful employment practice occurred* and notice of the charge . . . shall be served upon the person against whom such charge is made within ten days thereafter . . . ." (Emphasis added) However, where state law proscribes the alleged employment practice and the charge has initially been filed with a state deferral agency, "such charge shall be filed by or on behalf of the person aggrieved within three hundred days *after the alleged unlawful practice occurred.*" (Emphasis added)

In this case, neither Katrina Vaughn nor anyone else ever alleged in a charge that Freeman unlawfully discriminates against Blacks, Hispanics, or white males through its use of criminal history information in the hiring process.[1] Instead, the "alleged unlawful practice" was the use of credit information. Thus, under a strict reading of the statutory language, the charge-filing requirement has not been met with respect to using criminal history information.

EEOC nonetheless has the right to challenge this practice because courts have concluded that the purposes of Title VII are not served by requiring the filing of a new charge in cases where EEOC uncovers non-alleged forms of discrimination during a reasonable investigation of the discrimination alleged in the charge. As the Fourth Circuit explained in *EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 365 (4th Cir. 1976), "To require a new charge . . . and to begin again the

[1] To the extent EEOC argues to the contrary, its argument is addressed in Section C below.

administrative process thereon, would result in an inexcusable waste of valuable administrative resources and an intolerable delay in the enforcement of rights which require a 'timely and effective remedy.'" (internal citation omitted) Such an approach, said the Court, "would be simply a useless exercise in technical nicety." *Id.* at 366.

The Court also recognized, though, that the same pragmatic considerations that counsel in favor of permitting an expanded investigation without a new charge also dictate that, absent "countervailing equities," employers must not be saddled with larger back pay awards than would result if a new charge were required. It thus insisted that back pay is ordinarily limited in these situations to the period of two years before the employer receives notice of the expansion of the investigation or its results. *Id.* at 371-72. Similarly, employers should not be saddled with exposure to more claims than would result if a new charge were required, and courts have so held. *See EEOC v. Optical Cable Corp.*, 169 F. Supp. 2d 539, 547 (W.D.Va. 2001).

In sum, Freeman's position is not at odds with the statutory language, and it follows from the very gloss on that language that permits EEOC to challenge Freeman's use of criminal history information in this case.

B. Freeman Need Not Make A Special Showing Of Prejudice.

There is obvious prejudice to an employer when its total liability increases due to the expansion of an investigation of which the employer was not made aware. To limit that prejudice, the Fourth Circuit ruled in *EEOC v. General Electric* that, absent "countervailing equities" justifying a different result, it would be "an abuse of discretion" not to limit the right to back pay in that case to the period of two years before the employer was notified of claims resulting from an expanded investigation. 532 F.2d at 372.

This holding is grounded in the importance the statute places on prompt notice to employers of the specific allegations of discrimination against them. EEOC's own regulations stress the need for such notice. They require that charges include a "clear and concise statement of facts. . .constituting the alleged unlawful employment practices." 29 C.F.R.§ 1601.12(a)(3). *See also Chacko v. Patuxent Inst.*, 429 F.3d 505, 508 (4th Cir. 2005) (quoting this regulation). As the Supreme Court has said, the "evident purpose of the regulation [is] to encourage complainants to identify with as much precision as they can muster the conduct complained of." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 (1984).

When EEOC expands the scope of a charge during its investigation, the notice it provides the employer of that expansion serves the same function as the charge normally does. It follows that, in this situation, EEOC should promptly identify for the employer, with as much precision as it can muster, the practices it considers problematic. By limiting the relief available in cases where EEOC fails to do so, cases like *General Electric* and *Optical Cable* encourage EEOC not to keep employers in the dark.

An employee whose charge kept the employer in the dark would be barred from raising the unasserted claims in a lawsuit; the employer would not be required to present specific evidence of prejudice. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002) (a plaintiff's right to file a Title VII suit is determined by the contents of the charge). Since notice by EEOC of an expanded investigation serves the same purpose as the charge, it makes no sense to have the original, incomplete charge define the 300-day limitations period, and no sense to require specific evidence of prejudice before using the date of notification to define that period.

Accordingly, *General Electric* and *EEOC v. Optical Cable* place the burden on EEOC to demonstrate countervailing equities that might overcome the presumptive prejudice to employers

caused by a delay of required notice.[2] Here, as in these cases, EEOC seeks to impose liability on the employer for conduct not originally alleged to be unlawful, for a period much longer than 300 days prior to the provision of notice. Indeed, EEOC seeks to nearly double the potential liability period. Nor is this unusual for EEOC. *See, e.g.*, *Optical Cable*, 169 F. Supp. 2d 539 (eight months from charge to notice of first expansion; 21 months from charge to notice of second expansion); *EEOC v. Sunoco, Inc.*, No. 08-MC-145, 2009 WL 197555 (E.D. Pa. Jan. 26, 2009) (14 months from charge to notice of expansion); *EEOC v. Carrols Corp.*, 215 F.R.D. 46, 48 (N.D.N.Y. 2003) (19 months from charge to EEOC determination letter, which the company argued was its first notification of expansion); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, No. 00-2153, 2000 WL 1610617 (E.D. La. Oct. 26, 2000) (at least 18 months from charge to notification of expansion of investigation). These sorts of delays should not be tolerated.

In this case, using the March 23, 2007 cut-off date EEOC advocates, rather than the November 30, 2007 the cut-off date advanced by Freeman in this motion, would add at least ten claims to this proceeding. (Declaration of Jackie Evans at ¶ 3, Exhibit 1 hereto). The addition of ten claims plainly would prejudice Freeman. Barring a demonstration by EEOC of countervailing equities, these claims are precluded.

C. EEOC Fails to Assert Cognizable Countervailing Equities.

To the extent EEOC presents countervailing equities in this case, it does so based on the following considerations: (1) General Electric was not notified of the addition of claims for more than two years; here the delay was not as long, (2) Freeman did not alter its use of criminal history information after EEOC finally informed it of the expanded investigation, (3) Katrina

[2] EEOC's reliance on *EEOC v. Burlington Northern Inc.*, 644 F.2d 717 (8th Cir. 1981) is misplaced. There, the employer sought dismissal of EEOC's lawsuit because notice of the charge was issued a few weeks late. The court ruled that, where EEOC provides an explanation of the delay such that the court is satisfied that it was not the result of bad faith, EEOC may proceed with the lawsuit absent a showing of substantial prejudice. Here, EEOC has not attempted to explain its delay in notifying Freeman of the expansion of Katrina Vaughn's charge. In any event, Freeman does not seek dismissal of EEOC's challenge to its use of criminal history information.

Vaughn's charge raised issues of race discrimination against a class and she mentioned that her offer of employment was contingent on passing a criminal background check that included criminal history, (4) Freeman allegedly showed during the investigation that it understood its use of criminal history information was at issue, and (5) Freeman had "independent notice," via EEOC's published guidance documents, that the use of criminal history information in the hiring process may result in Title VII liability.

None of these considerations constitutes a countervailing equity that justifies computing liability based on the charge-filing date, rather than the date on which EEOC notified Freeman that it had expanded its investigation. Because it is therefore clear that such countervailing equities do not exist, it is not "premature" to grant Freeman's Motion now.

1. EEOC's delay was substantial.

It is true that the delay of notification in *General Electric* was longer than the delay here. However, it is also true that EEOC waited for eight months to tell Freeman that it was investigating the company's use of criminal history information – a practice EEOC now claims was red-flagged, from its perspective, by the charge.

This delay is substantial. Indeed, it is approximately the same length as the delay of notification of the first expansion of the charge in *Optical Cable*, 169 F. Supp. 2d at 542, 545, where the court deemed the date of notification to the employer, not the date of the charge, to be the measuring point for the limitations period on claims, absent a continuing violation.[3] And, as in *General Electric* and *Optical Cable*, EEOC offers no explanation for its lengthy delay. Thus, just as the two-year delay in *General Electric* resulted in two-years of relief back pay liability, the eight-month delay in this case should result in relief from exposure to Freeman during these eight months.

[3] *EEOC v. Optical Cable* is discussed more fully in Section D below.

2. Freeman's post-notice conduct does not excuse EEOC's delay.

It does not matter that Freeman continued to use criminal history information after EEOC finally informed it that this policy was under investigation. EEOC's argument here amounts to the contention that it is excused from its obligation to provide employers with prompt notification of expanded investigations unless the employer admits to the EEOC's allegations of discrimination. This position is oppressive and untenable.

In *General Electric*, the employer similarly declined to change the practice that was being challenged. Instead, the employer continued to rely on the allegedly discriminatory testing of female applicants even after EEOC made it clear that it considered such testing to be sex discrimination. 532 F.2d at 371. Yet, the Court found that the company had a potential defense to increased back pay liability as a result of EEOC's delayed notification.

3. Vaughn's charge did not challenge EEOC's use of criminal history information.

Katrina Vaughn, who passed her criminal history background check, alleged that she was discriminated against "because of my race" by virtue of her "rejection due to information received about my credit background." (EEOC charge of Katrina Vaughn, Document 7-2). She also alleged that Freeman discriminates "in this manner" against "racial minorities as a class." *Id.* Plainly, she did not allege that Freeman's use of criminal history information discriminates against racial minorities, much less against members of other groups.

EEOC understood that Vaughn's charge contained no such allegation. This is clear from EEOC's admission that it cannot say when it decided to expand its investigation of that charge. If Vaughn had challenged Freeman's use of criminal history information, there would have been nothing to "decide" – EEOC would have been obligated to investigate this allegation. But EEOC correctly did not consider itself so obligated. Instead, it made a decision, at some point between

March 25 and September 25, to expand its investigation to the issue of Freeman's use of criminal history information.

EEOC also notified Freeman of this decision. Such notice would not have been necessary if Vaughn had accused Freeman of discriminating through its criminal history background checks.

EEOC relies on the introductory paragraph of Vaughn's charge. There, she stated that after her interview with Freeman, she was told she "would be hired, contingent on my passing a drug, criminal, and credit background check." (Document 7-2). This was relevant background information because the alleged statement by Freeman directly supports her claim (amplified in the next paragraph) that she would have been hired but for the discovery of adverse credit information. But the recitation of this background information does not mean, as EEOC asserts, that Vaughn "alleged that the background check policy was discriminatory to a class of 'racial minorities'" (Document 31 at 11). Vaughn made no such allegation.

Vaughn also made no claim that Freeman discriminates in any respect against Hispanics and white males. Yet, EEOC sues Freeman for such alleged discrimination. Plainly, the charge did not alert Freeman to the prospect of a lawsuit on behalf of Hispanics and white males.

In this respect, the present case is quite similar to *EEOC v. General Electric*, which EEOC labors so hard to distinguish. In that case, the EEOC charge alleged racial discrimination based in part on the use of certain tests required of job applicants. 532 F.2d at 368. When EEOC investigated these tests, it concluded that they were a source of gender discrimination, as well. *Id.* It thus brought a suit claiming both race and sex discrimination. The Fourth Circuit permitted that suit to proceed, but held that, absent countervailing equities, it would be an abuse

of discretion not to limit back pay relief to a period two years before the defendant received notice of the new claim.

Here too, the charge alleged only racial discrimination. Moreover, unlike in *General Electric*, the practice challenged in the charge – use of credit information – is not the practice challenged by virtue of the expanded investigation. If anything, Freeman had less reason to expect the expansion of Vaughn's charge to encompass the use of criminal history than General Electric had to expect the expansion that occurred in its case.

4. Freeman did not believe its use of criminal history information was being challenged.

EEOC claims that Freeman understood during the investigation that its use of criminal information was at issue. This is not true. To be sure, Freeman provided EEOC with information about its entire background policy. But such information was relevant to Vaughn's complaint that she and other African-American applicants were victims *of the use of credit information*. The relevance was this: to the extent that Vaughn and other African-American applicants with poor credit histories also ran afoul of other aspects of the background check process that Vaughn did not challenge, these individuals are not be entitled to any relief. This, in fact, is Vaughn's situation – as EEOC notes, she failed the drug test and thus is not a victim of discrimination even assuming, arguendo, that the use of credit history does discriminate against some African-Americans.

Accordingly, it cannot be inferred from Freeman's provision to EEOC of information about all aspects of its background check policy that Freeman understood that its use of criminal history information and drug screening were under challenge or under investigation. Freeman had no such understanding. (*See* Declaration of Suzanne Bragg, Document 27-2).

Once again, the *General Electric* case is instructive. There, as the Fourth Circuit noted, the employer had produced during the investigation the tests that led EEOC to conclude that the case involved not just racial discrimination, as the charge alleged, but also sex discrimination. The Court stated: "Had the defendant not agreed that such tests were relevant to the investigation of the charges filed, it is safe to assume it would have objected to their production." 532 F.2d at 368.

The defendant's willingness to produce the tests was one reason why the Fourth Circuit concluded that EEOC's claims of gender discrimination were the product of a reasonable investigation of the charge of race discrimination, and thus could be maintained in a suit based on that charge. However, the Court did not go further and hold that the production of the tests excused EEOC's failure to inform the defendant of the expanded scope of the proceeding for purposes of defining the back-pay period.

Similarly, the fact that Freeman checked other background information along with credit history, and produced information to the EEOC about these other checks, justifies the EEOC's expansion of the investigation to Freeman's use of criminal history information. But it does not excuse EEOC's failure to inform Freeman of the expanded investigation.[4]

5. EEOC's policy guidance documents are no substitute for notice.

Finally, EEOC contends that its policy pronouncements regarding the use of criminal history information in employment decisions "put Defendant on notice of its potential liability, certainly more so than any individual charge raising the convictions issue or the EEOC's

[4] The requirement that EEOC's expansion of a charge must be based on information stemming from a reasonable investigation is not just a formality. *See EEOC v. Kronos Inc.*, No. 09-3219 (3d Cir. Sept. 7, 2010) (Attached as Appendix) (inquiry into potential race discrimination is not a reasonable expansion of charge alleging disability discrimination despite claims by EEOC that its research regarding defendant led to information suggesting that its test had a disparate impact on minorities); *EEOC v. S. Farm Bureau Cas. Ins. Co.*, 271 F.3d 209 (5th Cir. 2001) (no reasonable basis to expand race discrimination charge to sex discrimination based on a roster provided by employer to EEOC that lists employees by name, position, and race).

September 2008 letter." (Document 31 at 13). But EEOC's general statements of its view of the law – which do not have the status of law[5] – cannot substitute for notice to an employer that it is charged with, or is being investigated for, a violation. The statute requires such notice. There is no exemption, equitable or otherwise, for situations in which EEOC pronouncements, or even the language of cases or of Title VII itself, may be at odds with an employer's practice.[6]

In *General Electric,* for example, EEOC expanded its investigation of a charge of racial discrimination to encompass the issue of whether the employer's test disproportionately excluded female job applicants. No less of an authority than the Supreme Court had held that tests with such an impact are unlawful. In finding the expansion of the investigation reasonable, the Fourth Circuit specifically noted the Supreme Court case in question – *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). 532 F.2d at 368. However, it did not find that the existence of this authority excused EEOC from notifying the employer of the expansion of the investigation, or barred the employer from seeking relief from the consequences of EEOC's failure to provide such notice.

Similarly, in *EEOC v. Optical Cable*, EEOC's investigation of the charging party's claim of race discrimination led it to discover that the company disproportionately placed females in lower-paying positions with no legitimate justification for this pattern. The law is quite clear that, absent justification, it is unlawful for employers systematically to place females in low-paying jobs. However, the court concluded that the "filing date" for the gender discrimination claim was the date on which EEOC notified the employer that it was expanding its investigation to

[5] *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70, n.6 (1986), *citing Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976).

[6] In this case, moreover, the evidence will show that Freeman's actual practice was much narrower than the one described in the document that EEOC relies on in claiming that Freeman's policy runs afoul of EEOC guidance. Indeed, EEOC has taken a number of liberties with the facts surrounding Freeman's adoption and application of its criminal history background check policy. However, EEOC's misstatements go to the merits of the case, not this motion.

encompass this matter, not the date on which the original charge was filed. 169 F. Supp. 2d at 547. The corresponding result should apply in this case.

D. The September 25, 2008 Notice Date Defines The 300-day Limitations Period.

EEOC argues that if the notice date, rather than the charge-filing date, has effect in this case, it defines only the date from which the two-year limitation on back pay runs, not the 300-day statute of limitations period. EEOC claims, erroneously, that this is what the courts held in *General Electric*, *Patterson v. Am. Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976), and *Optical Cable*.

EEOC's argument is, in part, a rehash of the position it took when Freeman filed its Partial Motion to Dismiss. There, EEOC argued that the applicable charge-filing period "does not define the period within which harm must have occurred for purposes of liability" in a pattern-or-practice suit, but instead defines only the two-year back pay period. (*See* Document 12 at 11). But this Court rejected that argument, holding that EEOC can seek relief only for claims that arose within 300 days of the charge-filing period.

The issue on this Motion, then, is identifying the "charge filing period" for claims of discrimination that were never asserted in a charge. Once that date is fixed, there can be no dispute that claims arising more than 300 days earlier are barred as outside the limitations period.

As the court observed in *Optical Cable*, the Fourth Circuit uses the date when EEOC notifies the defendant of the expansion of an investigation to determine the date of the "filing of a charge" for back pay purposes, and there is no reason why the date on which "a charge is filed under Section 2000e-5(e)" should be any different. The provision of notice presents the opportunity for the employer to evaluate, and possibly alter, the challenged practice, and/or to collect and preserve relevant evidence. These opportunities are lacking where, as here, EEOC withholds notification.

EEOC's reliance on *General Electric*, *Patterson*, and *Optical Cable* is badly misplaced. In *General Electric* and *Patterson*, the only issue regarding the employer's exposure was the length of the back pay period; the employer did not raise a statute of limitations type defense. Thus, in neither case did the Fourth Circuit reach that issue.

In *Optical Cable*, the employer raised the same basic statute of limitations defense Freeman presents here, and the court found merit in the employer's position. Based on the principles articulated by the Fourth Circuit in *General Electric*, the court agreed that, for statute of limitations purposes, "the 'filing' dates for the race and gender pattern or practice charges were the dates on which the EEOC notified Defendant that it was expanding its investigation to encompass these charges." 169 F. Supp. 2d at 547.

This finding did not result in granting Optical Cable's motion, *but only because EEOC asserted the continuing violation theory*. Under this doctrine, incidents outside of the limitations period are not time-barred if they are bear the required relationship to a timely-challenged incident or act. The court said it could not yet decide how the continuing violation doctrine applied to the case. Thus, despite its agreement with defendant's analysis of how the limitations period should be measured, it denied defendant's motion pending discovery that would elucidate the continuing violation issue.

Accordingly, EEOC is correct but extremely misleading when it states that "the *Optical Cable* court specifically held that EEOC may recover back pay for any injury within the two-year back pay period even where the discriminatory act occasioning the harm antedates the two-year period." (Document 31 at 18) The court made this statement in the context of a potentially viable continuing violation claim. Indeed, the court's full quotation is: "Nevertheless, an employer's back-pay liability may be based upon wrongful acts that antedate the two-year period

(*and which form part of a continuing violation*)." (emphasis added) EEOC conveniently ignores the parenthetical.

Here, unlike in *Optical Cable*, this Court has already rejected EEOC's continuing violation argument. Thus, there is no basis for permitting the bringing of claims that arose more than 300 days before the constructive "filing" date of September 25, 2008 – *i.e.*, the date on which EEOC notified Freeman of the expansion of its investigation of Katrina Vaughn's charge.

E. Conclusion

For all of these reasons, and those set forth in Freeman's Initial Memorandum, the Court should grant Defendant's Motion for Partial Summary Judgment.

Dated: October 22, 2010

Respectfully submitted,

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