14-1782-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v.

STERLING JEWELERS, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of New York (Buffalo)

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c), *Amici Curiae* Equal Employment Advisory Council, NFIB Small Business Legal Center, and Retail Litigation Center, Inc. disclose the following:

1) The Equal Employment Advisory Council, NFIB Small Business Legal Center and Retail Litigation Center, Inc. have no parent corporations.

2) No publicly held company owns 10% or more stock in the Equal Employment Advisory Council, NFIB Small Business Legal Center or Retail Litigation Center, Inc.

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The Equal Employment Advisory Council, National Federation of Independent Business Small Business Legal Center and Retail Litigation Center, Inc. respectfully submit this brief *amici curiae* contingent upon granting of the accompanying motion for leave to file.[1] Counsel for Plaintiff-Appellant does not oppose, but has not consented to, the filing of this *amici curiae* brief. Accordingly, *amici* are moving for permission for leave to file pursuant to Fed. R. App. P. 29(b). The brief supports affirmance of the decision below and thus supports the position of Defendant-Appellee Sterling Jewelers Inc. (Sterling).

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 250 of the nation's largest private sector companies. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and

[1] No counsel for a party authored this brief in whole or in part. No party or counsel for a party contributed money that was intended to fund preparing or submitting this brief. No person or entity – other than *amici curiae*, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is the nation's leading small business association, with offices in Washington, D.C. and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

The Retail Litigation Center, Inc. (RLC) is a public policy organization that identifies and engages in legal proceedings that affect the retail industry. The RLC's members include many of the country's largest and most innovative retailers. The member entities whose interests the RLC represents employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC

seeks to provide courts with retail-industry perspectives on important legal issues, and to highlight the potential industry-wide consequences of significant pending cases.

Many of *amici's* members are employers, or representatives of employers, subject to Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, and other federal employment-related laws and regulations. As representatives of potential defendants to Title VII discrimination charges and lawsuits, *amici* have a substantial interest in the questions presented in this case. Because the U.S. Equal Employment Opportunity Commission (EEOC) is authorized to sue only after it has fulfilled its statutory, pre-suit duties, including to investigate the contested claims, the district court below properly held that the agency was precluded from bringing a nationwide Title VII pattern-or-practice suit where that claim was not subject to a pre-suit, nationwide pattern-or-practice investigation.

As national representatives of many professionals whose primary responsibility is compliance with equal employment opportunity laws and regulations, *amici* have perspectives and experience that can help the Court assess issues of law and public policy raised in this case beyond the immediate concerns of the parties. Since 1976, EEAC, NFIB and the RLC collectively have participated as *amicus curiae* in hundreds of cases before the U.S. Supreme Court,

this Court, and other federal courts of appeals, many of which have involved important questions of Title VII's proper interpretation and application. Because of their practical experience in these matters, *amici* are well-situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

STATEMENT OF THE CASE

This litigation stems from 19 individual charges of sex discrimination filed against Sterling retail stores in eight states — New York, Florida, California, Massachusetts, Missouri, Nevada, Indiana and Texas — between May 2005 and November 2006. *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 60 (W.D.N.Y. 2014). The charges accused the company of discriminating against the charging parties and other similarly situated female employees in pay and promotions. *Id.*

After private settlement negotiations between Sterling and private counsel representing the charging parties in a separate, threatened class action lawsuit broke down—negotiations that the EEOC was allowed to attend—David Ging, the EEOC Lead Investigator assigned to this matter, invited Sterling and the charging parties to submit any information they wished to be considered as part of his file. *Id.* at 60-61. Sterling did not provide any additional information beyond what already had been submitted earlier in the process. *Id.* at 61.

Counsel for the charging parties did submit additional information, however, asserting in a November 30, 2007 letter that the charging parties "and other women similarly situated to them" were subjected to a pattern or practice of unlawful sex discrimination in pay and promotions at Sterling stores, and that charging parties' submission and exhibits "set forth the factual, legal and statistical support" for their claims. *Id.*

Shortly thereafter, on January 3, 2008, the EEOC issued a Letter of Determination finding that Sterling subjected the charging parties and "a class of female employees with retail responsibilities *nationwide*" to unlawful pattern-or-practice sex discrimination. *Id.* (emphasis added). The EEOC brought suit on September 23, 2008, accusing Sterling of nationwide pattern-or-practice sex discrimination in pay and promotions in violation of Title VII. *Id.* at 62.

During discovery, Sterling sought to determine the basis for the EEOC's nationwide claim. Despite the EEOC's efforts to avoid depositions, Sterling eventually succeeded in deposing Ging. Notwithstanding the EEOC's 125 deliberative process objections, at deposition Ging ultimately testified that he could not recall what, if anything, he did to investigate the 19 charges or whether there was any evidence of a nationwide pattern or practice of sex discrimination in pay and promotions. *Id.*

Sterling moved for partial summary judgment on the ground that the EEOC did not investigate the claim that the company was engaged in a nationwide pattern or practice of unlawful sex discrimination, and thus failed to satisfy a mandatory precondition to suit under Title VII. *Id.* at 62. In opposing the motion, the EEOC conceded that "there is little investigative material in the files beyond the charges, Sterling's responses, and other correspondence." *Id.* at 64. Nevertheless, the EEOC contended that Ging's testimony that he investigated the charges collectively as "class-based" claims, coupled with the language of the charges asserting claims on behalf of all women "similarly situated," was sufficient to show that the agency satisfied its pre-suit investigation obligation. *Id.* at 64. In any event, the EEOC argued, federal courts are not authorized to review the sufficiency of its pre-suit investigative efforts. *Id.* at 62.

The magistrate judge rejected the EEOC's arguments and recommended that the district court dismiss the EEOC's nationwide pattern-or-practice lawsuit with prejudice. *Id.* at 60. Pointing out that the EEOC's obligation to investigate prior to suit "is both mandatory and unqualified," *id.* at 68 (citation omitted), the magistrate judge concluded that the agency conducted no independent investigation at all. *Id.* at 69.

Among other things, the magistrate judge found that the only evidence offered by the EEOC of a nationwide pattern or practice investigation was a

statistical analysis prepared by an expert retained by the charging parties' lawyers (in connection with the earlier, unsuccessful settlement negotiations) purporting to measure and support charging parties' settlement demands, which the EEOC contended was evidence of company-wide disparities in pay and promotions on the basis of sex. *Id.* at 68. Noting that the EEOC repeatedly refused to identify the basis for its Letter of Determination in response to Sterling's numerous discovery requests, the magistrate judge concluded that "having invoked privilege in response to Sterling's inquiries in discovery, the EEOC cannot now be allowed to argue that this was the analysis referred to in its Letter of Determination, or that it took any steps to verify the reliability of that analysis. Absent such proof, there is no evidence that its investigation was nationwide." *Id.* (footnote omitted).

The district court adopted the magistrate judge's Report and Recommendation, and by Order dated March 10, 2014, dismissed the EEOC's action with prejudice. *Id.* at 60. This appeal ensued.

SUMMARY OF ARGUMENT

The U.S. Equal Employment Opportunity Commission (EEOC) was created by Congress to enforce Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, which prohibits discrimination in the terms, conditions or privileges of employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a)(1). Title VII authorizes the EEOC to

bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest, but only after it has fulfilled its pre-suit administrative responsibilities, including its obligation to investigate the contested claims. 42 U.S.C. § 2000e-5(b). Because the EEOC sued Defendant-Appellee Sterling Jewelers Inc. (Sterling) under Title VII for nationwide pattern-or-practice sex discrimination in pay and promotions, without actually investigating the allegation as part of its pre-suit administrative activities, the district court properly dismissed the agency's action with prejudice.

Title VII establishes "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)). The filing of a discrimination charge triggers the agency's statutory obligation to serve the named respondent with notice and a copy of the charge; to investigate; to render a factual determination as to whether reasonable cause exists to believe a violation occurred; and to attempt to resolve the matter informally through "methods of conference, conciliation and persuasion." 42 U.S.C. § 2000e-5(b). Only after discharging those administrative duties may the EEOC commence a Title VII action in federal court.

Accordingly, the EEOC may not sue an employer in federal court on claims that go beyond the scope of those uncovered and actually investigated by the agency at the administrative stage. Said differently, if an EEOC lawsuit contains allegations that have no relevance to the underlying administrative charge investigation, then the EEOC has not fulfilled its pre-suit administrative obligations, and the action must be dismissed.

Although the EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge, the agency must actually investigate prior to suit in order to invoke that rule. *See EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th Cir. 1992); *see also EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc.*, 279 F. Supp. 2d 974, 979-81 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc.*, 445 F. Supp. 985, 987-89 (W.D. Pa. 1978); *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 567 (N.D. Ga. 1975); *EEOC v. Target Corp.*, 2007 WL 1461298, at *3 (E.D. Wis. May 16, 2007) (unpublished). Indeed, pre-suit investigation is vital to ensuring compliance with the policies underlying Title VII. Among other things, it promotes sound employment relations policies and compliance programs by encouraging early detection and correction of potential violations, without resort to protracted federal court litigation.

In particular, a proper EEOC charge investigation sets the stage for meaningful conciliation, which benefits respondents seeking to avoid the cost and reputational damage associated with employment discrimination litigation. It also benefits charging parties seeking speedy resolution to their workplace disputes. Ignoring those principles in the instant case, the EEOC sued Sterling, accusing it of engaging in a nationwide pattern or practice of unlawful discrimination in pay and promotions against women in retail sales positions—despite having failed to conduct any administrative investigation of an alleged nationwide pattern or practice of sex discrimination.

The EEOC's actions in pursuing litigation on claims that were *never* examined at the charge investigation stage are especially troubling to employers represented by *amici*, because those actions strongly suggest that the agency's enforcement priorities have shifted away from informal resolution of discrimination charges, as contemplated by Title VII, in favor of broad-based, systemic litigation. The EEOC's current Strategic Enforcement Plan (SEP), for instance, requires field offices to progressively increase the percentage of systemic cases on their active litigation dockets, but says nothing to suggest that meaningful investigation and pre-suit charge resolution are agency priorities. Such policies serve not to encourage careful administrative charge investigations, but to

incentivize staff to bypass investigation and pre-suit conciliation in favor of high-profile, class-based lawsuits.

The EEOC's failure to investigate prior to suit deprives charging parties and respondents of a meaningful opportunity to resolve meritorious claims informally, and represents an inexcusable dereliction of the EEOC's statutory responsibilities under Title VII. Accordingly, when, as here, the EEOC expends taxpayer dollars to pursue litigation of Title VII claims that were not subjected to pre-suit investigation, the appropriate remedy is dismissal with prejudice.

ARGUMENT

I. AN EEOC LAWSUIT ASSERTING NATIONWIDE PATTERN-OR-PRACTICE DISCRIMINATION MUST BE PRECEDED BY AN ADMINISTRATIVE INVESTIGATION OF ALLEGED NATIONWIDE PATTERN-OR-PRACTICE DISCRIMINATION

The U.S. Equal Employment Opportunity Commission (EEOC) is not authorized to sue under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, as amended, unless and until it first has satisfied all mandatory prerequisites to suit, including the obligation to conduct an administrative investigation of the claims being asserted in court. Inasmuch as the EEOC can produce no actual evidence demonstrating that it conducted any investigation regarding whether Sterling was engaged in a nationwide pattern or practice of unlawful sex discrimination *prior to* filing suit on that basis, the agency's action was properly dismissed.

A. Under Title VII, The EEOC's Authority To Sue Is Conditioned Upon Fulfillment Of All Pre-Suit Administrative Requirements, Including A Pre-Suit Investigation Of The Claims Upon Which It Brings Suit

The EEOC is authorized by Congress to enforce Title VII, which prohibits discrimination against a covered individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). Title VII sets forth "'an integrated, multistep enforcement procedure' that … begins with the filing of a charge with the EEOC alleging that a given employer has engaged in an unlawful employment practice." *EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) (quoting *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 359 (1977) (footnote omitted)).

Once a charge has been filed, Title VII provides that the EEOC "shall serve a notice of the charge ... within ten days, and shall make an investigation thereof." 42 U.S.C. § 2000e-5(b). When first enacted, the statute gave the EEOC limited authority to prevent and correct discrimination through this administrative framework of charge investigations and, where appropriate, informal conciliation. Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b). In 1972, Congress amended Title VII to authorize the EEOC to bring a civil lawsuit against private employers in its own name, both on behalf of alleged victims and in the public interest. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

"Although the 1972 amendments provided the EEOC with the additional enforcement power of instituting civil actions in federal courts, Congress preserved the EEOC's administrative functions" in the amended Act. *Occidental Life*, 432 U.S. at 368.

The EEOC's procedural regulations also reflect this Congressional mandate, providing that "[t]he investigation of a charge *shall* be made by the Commission …." 29 C.F.R. § 1601.15(a) (emphasis added). Whenever the agency "completes its investigation" . . . and finds "no[] reasonable cause to believe that an unlawful employment practice has occurred . . . the Commission shall issue a letter of determination" to that effect. 29 C.F.R. § 1601.19(a). Where the EEOC does find reason to believe discrimination occurred, the EEOC may issue a determination *only* "based on, and limited to, evidence obtained by the Commission" during the investigation. 29 C.F.R. § 1601.21(a). Only when the EEOC is "unable to obtain voluntary compliance," 29 C.F.R. § 1601.25, through "informal methods of conference, conciliation and persuasion" may it initiate a public enforcement action. 29 C.F.R. § 1601.24(a); *see also* 42 U.S.C. § 2000e-5(b).

Accordingly, the EEOC's pre-suit administrative process involves several distinct stages: 1) providing notice of the charge; 2) undertaking an investigation; 3) conducting a post-investigation determination of the merits of the charge; and 4) if reasonable cause is found, attempting to eliminate unlawful practices through

conciliation. *Id.* "Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others." *EEOC v. Allegheny Airlines*, 436 F. Supp. 1300, 1306 (W.D. Pa. 1977); *see also EEOC v. Bloomberg LP*, 967 F. Supp. 2d 802, 810 (S.D.N.Y. 2013); *EEOC v. Jillian's of Indianapolis, IN, Inc*., 279 F. Supp. 2d 974, 979 (S.D. Ind. 2003). Indeed, the "completion of the *full* administrative process is a prerequisite to the EEOC's power to bring suit in its own name." *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176, 1186 (4th Cir. 1981) (emphasis added); *see also EEOC v. E.I. DuPont de Nemours & Co*., 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975).

B. The Scope Of An EEOC Lawsuit Cannot Exceed That Of The Underlying Administrative Investigation

Here, the EEOC brought an action against Sterling accusing it of engaging in a pattern or practice of unlawful discrimination in pay and promotions against women in retail sales positions nationwide. Despite the sweeping and very serious nature of that accusation, there is nothing in the investigative record to suggest that the claim was subject to any pre-suit investigation by the EEOC.

The EEOC "'can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process.'" *EEOC v. Bass Pro Outdoor World, LLC*, 1 F. Supp. 3d 647, 671 (S.D. Tex. 2014) (quoting *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171,

1179 (D. Colo. 2013)). To permit otherwise "would do violence to the Supreme Court's, and Congress's, insistence that Title VII's overall enforcement structure should be a sequential series of steps beginning with the filing of a charge with the EEOC." *Id.* at 672 (citing *Occidental Life*, 432 U.S. at 372) (internal quotations omitted).

Judge Preska observed recently that the EEOC cannot conciliate "one set of issues and having failed, litigate a different set." *EEOC v. Bloomberg LP*, 751 F. Supp. 2d 628, 634 (S.D.N.Y. 2010) (quoting *EEOC v. Sears, Roebuck & Co.*, 650 F.2d 14, 19 (2d Cir. 1981)). The same reasoning applies to the EEOC's pre-suit investigative responsibilities: the agency is not permitted to investigate one set of allegations, then attempt to sue in federal court on an entirely different set of claims. Rather, "Congress requires that the EEOC engage in specific pre-litigation activities, including investigating the claim and attempting to 'eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.'" *EEOC v. Bloomberg, L.P.*, 967 F. Supp. 2d 802, 810 (S.D.N.Y. 2013) (quoting *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534–35 (2d Cir.1996)). Only thereafter may it "bring any claims reasonably related to the charge it investigated." *Id.* (citation omitted).

If the claims asserted in an EEOC lawsuit were not subject to investigation during the administrative charge stage, then the EEOC has not fulfilled its pre-suit

administrative obligations. 42 U.S.C. § 2000e-5(b). Indeed, the EEOC has applied parallel principles in instructing its staff on proper charge investigation techniques, counseling specifically against collecting irrelevant information and data that does not resolve allegations raised in the charge.[2] Thus, as the magistrate judge below observed, whether and to what extent the EEOC may pursue a particular claim in court largely will depend on "'the relationship between the complaint and the scope of the investigation'" underlying it. *EEOC v. Sterling Jewelers, Inc.*, 3 F. Supp. 3d 57, 63 (W.D. N.Y. 2014) (quoting *Jillian's*, 279 F. Supp. 2d at 980); *see also EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 675 (8th Cir. 2012) ("The relatedness of the initial charge, the EEOC's investigation and conciliation efforts, and the allegations in the complaint is necessary to provide the defendant-employer adequate notice of the charges against it and a genuine opportunity to resolve all charges through conciliation") (citations omitted).

The EEOC generally is permitted to pursue in litigation any statutory violation growing out of facts uncovered during a "reasonable investigation" of an underlying charge. *EEOC v. Delight Wholesale Co.*, 973 F.2d 664, 668-69 (8th

[2] The EEOC advises investigators, for example, to collect evidence that is "material to the charge" and "relevant to the issue(s) raised in the charge," EEOC Compl. Man. § 602.4, explaining that evidence is *material* "when it relates to one or more of the issues raised by a charge . . . or by a respondent's answer to it." *Id*. at § 602.4(a). Similarly, evidence is *relevant* "if it tends to prove or disprove [a material] issue raised by a charge." *Id.* at § 602.4(b).

Cir. 1992). The "reasonable investigation" rule does not allow the agency to altogether circumvent Title VII's "integrated, multi-step enforcement procedure," *Shell Oil*, 466 U.S. at 62, however, by including in a lawsuit matters that have never before been the subject of an investigation, reasonable cause determination, and conciliation. *EEOC v. Nat'l Cash Register Co.*, 405 F. Supp. 562, 567 (N.D. Ga. 1975). *See also EEOC v. Outback Steak House of Fla., Inc.*, 520 F. Supp. 2d 1250, 1264 (D. Colo. 2007); *EEOC v. Jillian's of Indianapolis, IN, Inc*., 279 F. Supp. 2d 974, 979-81 (S.D. Ind. 2003); *EEOC v. E. Hills Ford Sales, Inc*., 445 F. Supp. 985, 987-89 (W.D. Pa. 1978); *EEOC v. Target Corp*., 2007 WL 1461298, at *3 (E.D. Wis. May 16, 2007) (unpublished).

Indeed, courts have made abundantly clear that an EEOC lawsuit must be "the product of the investigation that reasonably grew out of underlying charges," as distinguished from facts gathered for the first time in litigation. *Jillian's*, 279 F. Supp. 2d at 980; *see also Target Corp*., 2007 WL 1461298, at *3. In short, the EEOC may not use discovery "as a fishing expedition" to uncover violations. *EEOC v. Harvey L. Walner Assocs.*, 91 F.3d 963, 971-72 (7th Cir. 1996).

Approximately 30% of all charges received by the EEOC each year contain an allegation of unlawful sex discrimination. Of those, only about 4.5% result in a

finding of reasonable cause.[3] Thus, the mere fact that 19 women filed sex discrimination charges against Sterling in the 2005–2006 timeframe is not particularly remarkable in and of itself, given the size of Sterling's workforce. The number of charges claiming discrimination by Sterling might well be relevant to potential class-based claims if an investigation revealed that the women were treated less favorably, in similar ways and under like circumstances, than similarly situated men.

But those factual questions were not evaluated during the EEOC's purported charge investigation.[4] Thus, even assuming that any aspect of the EEOC's investigative activities did reveal disparate treatment discrimination against one or more of the charging parties because of sex, the question of whether that treatment was part of a nationwide pattern or practice of discrimination – the basis for the EEOC's lawsuit – was never raised or examined, much less resolved, by the EEOC at the pre-suit investigation stage.

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[3] *See* EEOC Enforcement and Litigation Statistics, Charge Statistics (FY 1997–2013), *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Dec. 9, 2014).

[4] Indeed, the little that is known about the EEOC's handling of the case is that at least two of the charges – one filed prior to and the other after the matters were "consolidated" for handling by Ging – initially were dismissed on the merits for lack of reasonable cause. In both instances, it was not until outside counsel for the charging parties intervened that the EEOC reversed course and reinstated the charges. The fact that the EEOC's initial investigation of the would-be lead plaintiff's charge ended in a determination that further investigation was not likely to uncover a violation reinforces the lack of evidence of a local, regional, or national pattern or practice of sex discrimination by Sterling.

Furthermore, evidence of disparate treatment discrimination (even of some kind of systemic disparate treatment discrimination) largely is irrelevant in and of itself in determining whether or not the accused employer has engaged in a *nationwide* pattern or practice of unlawful discrimination. "A pattern or practice claim is a particular vehicle to bring a Title VII case [which focuses on] allegations of widespread acts of intentional discrimination against individuals." *EEOC v. Bloomberg LP*, 778 F. Supp. 2d 458, 468 (S.D.N.Y. 2011) (citations omitted).

Proper pre-suit charge investigation is especially important in light of the EEOC's current, aggressive enforcement strategy that places particular emphasis on EEOC-initiated, class-based systemic and pattern-or-practice discrimination litigation.[5] To make out a threshold pattern-or-practice claim, the EEOC must show that alleged discrimination was the defendant's *modus operandi – e.g.*, a "standard operating procedure" followed by the employer, as opposed to isolated violations. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977) (footnote omitted). This may be done, in part, through the use of statistics showing a statistically significant workforce gender imbalance.

[5] The EEOC's Strategic Enforcement Plan (SEP) for Fiscal Years 2013 – 2016 identifies six national enforcement priorities, including "enforcing equal pay laws" by "target[ing] compensation systems and practices that discriminate based on gender." Of particular interest to the EEOC are "issues that will have broad impact because of the number of individuals, employers or employment practices affected." EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

In the discrimination charge context, for instance, a charging party might claim that the employer has engaged in a pattern or practice of unlawful discrimination through the application of hiring practices that discriminate on the basis of race. In support, he or she might offer statistics showing that since the particular policy has been in place, the employer has hired only one African-American to fill 1,000 available positions companywide. The employer might respond with a direct attack on the charging party's statistics, arguing for example that they are rife with mathematical errors or other significant mistakes.

During its investigation of the charge, the EEOC would be expected to, at a minimum, conduct an analysis of the data and the parties' respective views on it, and perform its own statistical analyses to identify strengths and weaknesses in each side's position. The agency did nothing of the sort here. It did not seek out evidence of statistical disparities, let alone statistically significant disparities, or even follow up on its request for limited personnel storage information from Sterling.

When presented with an analysis performed by an expert retained by the charging parties for settlement negotiations, the EEOC did not analyze the report or test its validity by performing any independent analysis of the data. This is significant, because such an independent review could have determined whether the charging parties' analysis: (1) was based upon inadequate, incomplete, or

otherwise flawed data; (2) failed to consider the appropriate variables; or (3) utilized inappropriate statistical techniques. The question of statistical evidence of discrimination apparently did not resurface again until the EEOC issued its Letter of Determination, which inaccurately claimed that the "statistical evidence" was gathered by the EEOC as a result of an analysis of data submitted to it by Sterling.

The lack of effort or interest on the EEOC's part in actually investigating a suspected pattern or practice of discrimination could not be further from Title VII's mandate that the agency must conduct an investigation, make findings, and attempt meaningful conciliation prior to suing in federal court. As Sterling points out, "If dismissal is not affirmed on this extraordinarily egregious record, the EEOC will have no incentive ever to perform its statutory duties in good faith, thus undermining the carefully calibrated statutory scheme Congress created when it enacted Title VII." Brief of Defendant-Appellee at 63.

II. PERMITTING THE EEOC TO BRING CLAIMS IN COURT THAT WERE NOT SUBJECT TO AN ADMINISTRATIVE CHARGE INVESTIGATION WOULD UNDERMINE THE PURPOSES AND GOALS UNDERLYING TITLE VII, INCLUDING THE EFFICIENT AND EXPEDITIOUS RESOLUTION OF DISCRIMINATION CLAIMS, ULTIMATELY HARMING ALL EMPLOYERS

Indeed, allowing the EEOC to sue for, and potentially recover, substantial damages for claims not subject to an administrative charge investigation would seriously undermine Title VII's strong federal policy favoring informal and voluntary resolution of discrimination claims. It also would arm the agency with

yet another powerful weapon for forcing employers to settle even questionable claims so as to avoid the risk of having to defend a costly and lengthy lawsuit, and incur the attendant reputational damage, where the size of the purported class, and thus the cost of defense, is inflated artificially, unreasonably, and without basis.

A. Proper Charge Investigation Facilitates Meaningful Conciliation Efforts

In addition to requiring the prompt service and investigation of every charge filed with it, Title VII imposes an affirmative duty on the EEOC to attempt conciliation of every meritorious charge prior to filing suit in federal court. Specifically:

> If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge .... If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission *shall endeavor to eliminate such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion*.

42 U.S.C. § 2000e-5(b) (emphasis added). Conciliation thus plays a critical role in effectuating the policies underlying Title VII. Indeed, "Title VII places primary emphasis on conciliation to resolve disputes." *EEOC v. Zia Co.*, 582 F.2d 527, 529 (10th Cir. 1978).

Effective conciliation depends greatly on the competent investigation and resolution of all issues reasonably related to the underlying charge allegations. When the EEOC complies with its pre-suit investigation obligations, all parties

stand to benefit, as fulsome information regarding the basis for a reasonable cause determination is necessary for the parties to make an informed and intelligent decision about whether to settle a claim or proceed to litigation. Where, as here, the EEOC fails to investigate allegations that eventually become the basis for a reasonable cause determination, it is unable to engage in meaningful conciliation, as the law requires. *See EEOC v. CRST Van Expedited, Inc.*, 2009 WL 2524402, at *18 (N.D. Iowa Aug. 13, 2009), *aff'd*, 679 F.3d 657, 671-75 (8th Cir. 2012); *see also EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 802, 816 (S.D.N.Y. 2013) (dismissal of EEOC lawsuit necessary so as not to "sanction[] a course of action that promotes litigation in contravention of Title VII's emphasis on voluntary proceedings and informal conciliation"); *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256, 1261 (11th Cir. 2003) ("In its haste to file the instant lawsuit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort") (footnote omitted).

As evidenced by its conduct in this case, the EEOC "views [its] power of suit and its administrative process as unrelated activities, rather than as sequential steps in a unified scheme for securing compliance with Title VII." *EEOC v. E.I. DuPont de Nemours & Co.*, 373 F. Supp. 1321, 1333 (D. Del. 1974), *aff'd*, 516 F.2d 1297 (3d Cir. 1975). However, "if conciliation is to work properly, charges

of discrimination must be fully investigated ...." *EEOC v. Bailey Co.*, 563 F.2d 439, 449 (6th Cir. 1977). Indeed:

> "[T]he quality of the investigation has a bearing, not only on the scope of the determination, but also on the sufficiency of the Commission's attempt to conciliate specific issues. The investigation and determination are supposed to provide a framework for conciliation. Conciliation is the culmination of the mandatory administrative procedures, whose purpose is to achieve voluntary compliance with the law. *Each step in the process – investigation, determination, conciliation, and if necessary, suit – is intimately related to the others*."

EEOC v. Allegheny Airlines, 436 F. Supp. 1300, 1305-06 (W.D. Pa. 1977) (emphasis added). Permitting the EEOC to ignore this statutory framework in this case will only encourage similar conduct by the agency in other cases.

B. The EEOC's Failure To Discharge Its Pre-Suit Investigation Duties Is Especially Improper, Given The Vast Array Of Statutory Investigative Tools At Its Disposal

The EEOC's investigatory authority under Title VII is broad and includes the ability to access and copy evidence "relevant to the charge under investigation," 42 U.S.C. § 2000e-8(a), and to compel the production of such evidence, including witness testimony, through the issuance of administrative subpoenas. 42 U.S.C. § 2000e-9; *see also Shell Oil*, 466 U.S. at 63-64. In addition, it can (and frequently does) perform investigations "on-site" at the employer's facility and hold "fact-finding conferences" at its own offices to facilitate the gathering of testimony and other evidence. EEOC Compl. Man.

§ 25.1, *On Site Investigation: General*; 29 C.F.R. § 1601.15(c).

The EEOC has acknowledged that its investigative file in this matter contains little information at all, much less any concrete data evidencing a pattern-or-practice charge investigation. Although it claims to have asked Sterling early on to "identify any computerized or machine-readable files" where data on personnel activities was stored, (Corrected) Brief of the Equal Employment Opportunity Commission as Appellant at 10, the EEOC concedes that it did not subpoena any of that information – notwithstanding the wide range of tools at its disposal *specifically* for the purpose of properly investigating discrimination charges.

Unlike private litigants, the EEOC is statutorily required to carefully evaluate the merits of every case *before* undertaking costly and resource-intensive litigation. As the Supreme Court explained in *Occidental Life Insurance Co. v. EEOC*:

> [T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal, noncoercive fashion. *Unlike the typical litigant[,] . . . the EEOC is required by law to refrain from commencing a civil action until it has discharged its administrative duties*.

432 U.S. at 368 (emphasis added).

The EEOC's rush to litigate claims that it *never* examined at the charge investigation stage confirms *amici's* growing concern that the agency effectively

has abandoned its commitment to pursue meaningful administrative charge resolution, choosing instead the more expedient, high-profile litigation route. Indeed, *amici* are extremely troubled by the EEOC's recent efforts to expand its own authority under Title VII, while at the same time working to sharply curtail the role of the courts in policing its enforcement activities. *See, e.g.*, *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013) (where the EEOC argued, and the court held, that its pre-suit conciliation efforts are immune to judicial review), *cert granted*, 134 S. Ct. 2872 (U.S. June 30, 2014) (No. 13-1019); *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 150 (4th Cir. 2014) (where the EEOC argued, unsuccessfully, that the doctrine of laches can never be applied when the government is the plaintiff).

C. EEOC Litigation Abuses Confirm The Need For Careful Review Of Its Compliance With All Pre-Suit Administrative Requirements

As noted, the EEOC has been engaged in an increasingly aggressive, systemic enforcement strategy, which actively promotes the use of federal court litigation as a purported "deterrent" to discriminatory employment practices. In its Strategic Enforcement Plan (SEP) for Fiscal Years 2013-2016, for instance, the EEOC has committed to progressively increasing the percentage of systemic cases

on its active litigation docket each fiscal year.[6] In furtherance of that objective, the agency has established a specific, numerical target that it expects its enforcement staff to meet, largely ignoring objections from the business community that such an approach would encourage hasty, insufficient systemic charge investigations and detract from meaningful, pre-suit settlement efforts.[7]

Although one might reasonably expect the EEOC, as part of its systemic litigation initiative, to develop strategic objectives aimed at ensuring that every investigation of an administrative charge in which systemic or pattern-or-practice discrimination is alleged is carefully investigated, the SEP does not identify "proper systemic charge investigation" as a short – or long – term goal. While the SEP does speak of developing a "Quality Control Plan" to improve charge investigations and conciliations generally, the Commissioners have yet to approve such a plan, much less implement any meaningful investigative quality assurance mechanisms, systemic or otherwise.

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[6] EEOC, Strategic Enforcement Plan FY 2013-2016, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Dec. 9, 2014).

[7] The agency has exceeded the SEP active systemic litigation targets in the last two fiscal years. *See* EEOC, Fiscal Year 2013 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm (last visited Dec. 9, 2014) and EEOC, Fiscal Year 2014 Performance and Accountability Report (Systemic Cases – Performance Measure 4), *available at* http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf (last visited Dec. 9, 2014).

The lack of commitment on the part of EEOC officials to publish concrete quality assurance guidelines, juxtaposed with the agency's highly-publicized systemic litigation enforcement priorities, leaves employers increasingly skeptical of the agency's insistence that it did not shirk its presuit administrative obligations in this matter, and that it does not do so as a matter of course. Indeed, the agency's contentions are belied by a growing body of rulings in which the courts have taken it to task specifically for its failure to, among other things, investigate properly prior to suit. *See, e.g., CRST Van Expedited, Inc.*, 2009 WL 2524402, at *18, *aff'd*, 679 F.3d 657, 671-75 (8th Cir. 2012); *Bloomberg*, 967 F. Supp. 2d at 810.[8]

Even Congress has taken note of the EEOC's recent, misguided enforcement tactics. Just a few weeks ago, the incoming leadership of the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee issued a Report accusing the agency of pursuing cases under untenable legal theories, refusing to conciliate, and otherwise "demonstrating poor judgment and using questionable tactics in pursuit of cases that are not fulfilling the EEOC's objective of protecting employees from workplace discrimination."[9]

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[8] Federal courts also have been very critical of the EEOC's increasing failure to properly conciliate discrimination charges prior to suit, yet those cases have only served to encourage the EEOC to argue that its pre-suit administrative activities are beyond judicial review. *See EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, 134 S. Ct. 2872 (U.S. June 30, 2014) (No. 13-1019).

[9] U.S. S. Comm. on Health, Educ., Lab. & Pensions, Minority Staff Rpt., *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and*

Permitting the EEOC to bypass its obligation to investigate the claims upon which it brings suit would further encourage it to employ questionable tactics seemingly designed primarily to force employers into untenable settlement positions under constant threat of agency litigation. The EEOC's failure to comply in every instance with its statutory duty to investigate prior to suit is particularly problematic where, as here, a handful of individual charges are transformed by the EEOC into a nationwide pattern-or-practice lawsuit without any nationwide discrimination investigation.

The EEOC's failure to investigate, or as in this case conduct any pre-suit, national investigation, deprives charging parties and respondents of a meaningful opportunity to resolve meritorious claims informally, without resort to litigation. It also represents an inexcusable dereliction of the EEOC's statutory responsibilities under Title VII. To the extent that the agency seeks to bring an action in federal court based on claims that were not subjected to pre-suit investigation, the appropriate remedy therefore is dismissal with prejudice.

Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency (Nov. 24, 2014), *available at* http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf (last visited Dec. 9, 2014).

CONCLUSION

For the reasons set forth above, the *amici curiae* Equal Employment Advisory Council, NFIB Small Business Legal Center, and Retail Litigation Center, Inc. respectfully submit that the decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,772 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND RETAIL LITIGATION CENTER, INC. IN SUPPORT OF DEFENDANT-APPELLEE AND IN SUPPORT OF AFFIRMANCE with the Clerk of the Court this 10th day of December, 2014, by uploading an electronic version of the brief via this Court's Next Generation Case Management/ Electronic Filing System (NextGen CM/ECF). I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Court's NextGen CM/ECF system.

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