UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS
APPEAL NUMBER 12-1874

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PLAINTIFF-APPELLANTS' REPLY BRIEF

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III. STATEMENT OF SUPPLEMENTAL ISSUES PRESENTED FOR REVIEW NECESSITATED BY THE APPELLEE'S BRIEF

As a result of the Appellee's Brief, the Plaintiff-Appellants believe the following issues should now also be presented for review, and therefore respectfully request such review:

1) Generally, whether, in order to meet the administrative exhaustion requirements pursuant to Title VII, an Equal Employment Opportunity Commission (EEOC) claimant must, in his or her EEOC charge, make out a *prima facie* case consistent with the summary judgment standard applicable for the underlying legal claim;

2) In particular, whether in a Title VII disparate impact case, an EEOC claimant must make out in his or her EEOC charge, a *prima facie* case consistent with the summary judgment standard, and allege or identify a facially neutral employment practice; and

3) Whether, if an EEOC charge alleging disparate impact has identified a facially neural employment practice, but has not used language indicating that the employment practice is facially neutral, the claimant has nonetheless exhausted his or her administrative remedies with respect to the disparate impact claim.

IV. REPLY ARGUMENTS

A. The Appellees' Argument that the Appellants Needed to Demonstrate Excusable Neglect to File Their Second Amended Complaint is Contrary to Legal Authority and Logic

It is clear from the *Bausch v. Stryker Corp*., 630 F.3d 546 (7th Cir. 2010) and *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2011) decisions that the Appellants need not have demonstrated excusable neglect in order to amend their complaint after the District Court's ruling on the Defendants' Motion for Partial Judgment on the Pleadings. The details involving the attempt to amend the complaint in question were covered in the Appellants' Brief, and will not be repeated here.

In their arguments, the Appellees have conveniently inverted the Seventh Circuit pleading procedures following a trial court's dismissal of a complaint or a portion of a complaint pursuant to Federal Rule of Civil Procedure 12. *Bausch* and *Vance* make clear that a *rule nisi* approach is to be followed, allowing a Plaintiff at least one opportunity to correct a "defective" pleading *after* the trial court has declared the pleading in question to be deficient. This is indeed the rule, and not the exception. And surely analogous to a Rule 12(c) motion, *Bausch* states that "a formal motion for leave to amend was not necessary at the Rule 12(b)(6) stage, and the plaintiff was entitled to wait and see if any pleading problems the court might find could be corrected." *Id*. at 562.

It is clear that a plaintiff should automatically be afforded at least one opportunity to amend a "defective" pleading after it has been determined to be defective unless it is demonstrated (by the defendant or *sua sponte* if the trial court is so inclined) that

allowing the amendments will involve undue delay, bad faith, dilatory motive, or undue prejudice. See *Vance*, footnote 11.

The Appellants believe they have already adequately addressed why, even under the incorrect standards of excusable neglect and good cause, they meet even those standards, and will not therefore repeat those arguments here.

B. The Appellees' Argument that the Appellants Failed to Exhaust Their Administrative Remedies with Respect to Their Disparate Impact Claims is without any Applicable Legal Authority

This section addresses the issues raised in the Supplemental Issues Section (Part III). In essence, the Appellees argue that even if the Appellants can amend their complaint with respect to the disparate impact claims, such claims are barred by the exhaustion of administrative remedies doctrine, and that regardless of any subsequent pleading, the Appellants' "EEOC charges, [did] not identify a facially neutral employment policy."

Yet, in support of their conclusion, the Appellees cite no authority identifying those actual requirements. Instead, the Appellees cite cases from other jurisdictions where disparate impact claims have been dismissed utilizing the exhaustion of administrative remedy doctrine under non-analogous circumstances. The Appellants do not controvert that in order to prevail on an adverse impact claim, a plaintiff must show that "[a]n employer has adopted a particular employment practice that, although neutral on its face, disproportionately and negatively impacts members of one of Title VII's

protected classes." *Bennett v. Roberts*, 295 F.3d 687, 698 (7th Cir. 2002). That duty at trial and at summary judgment is not, however, a duty which must be met when writing and submitting an EEOC charge.

This is not the Appellants' wishful thinking, but the holdings in the very cases upon which the Appellees attempt to rely. The Appellees rely on *Pacheco v. Mineta*, 448 F.3d 783 (5th Cir. 2005) for the proposition that disparate impact claims are barred for lack of administrative exhaustion if they do not allege a facially neutral policy, and a disproportionately adverse effect on a protected class. That is only part of the picture. To be clear, the only language in the EEOC charge in the *Pacheco* case that was not time-barred was: "The [February 28, 2000] incident was non-selection for a supervisor's job opening at this facility. Once again, the 'good old boy' was selected even though I was more qualified having been in the agency since 1978. This being my seventh facility (my third level 4 facility)." The *Pacheco* court held that was simply insufficient to reasonably expect a disparate impact investigation to be triggered—which was the plaintiff's real shortcoming.

The *Pacheco* court explicitly rejected the Appellee's interpretation that a facially neutral employment practice must be identified in an EEOC charge in order for a subsequent disparate impact claim to proceed through litigation when it stated:

> To be clear, we do not require that a Title-VII plaintiff check a certain box[13] or recite a specific incantation to exhaust his or her administrative remedies before the proper agency. *See Sanchez,* 431 F.2d at 463-65. Nor do we require, for purposes of exhaustion, that a plaintiff allege a prima face case before the EEOC. *See Id.* Instead, the plaintiff's administrative

> charge will be read somewhat broadly, in a fact-specific inquiry into what EEOC investigations it can reasonably be expected to trigger. *Id*. at 792.

The EEOC charging party's duty is to place the EEOC sufficiently on notice reasonably expected to trigger a disparate impact investigation. The Appellee's reliance on *Pittman v. General Nutrition Corp.*, 515 F.2d 721 (S.D. Tex. 2007) is also misplaced, since that court, while dismissing a disparate impact claim based on the exhaustion doctrine, nonetheless clearly states the crux of the plaintiff's (in that case) deficiency stating: "Demeke has failed to identify any statements or allegations that he made to the EEOC that did or should have resulted in an administrative disparate impact investigation. Demeke's disparate impact claim must be dismissed for lack of exhaustion of administrative remedies." *Id*. at 733.

Thus, the EEOC charging party need not utter magic words in his or her charge, nor even make out a *prima facie* case for disparate impact claims. He or she must merely allege such facts that should reasonably trigger an adverse impact investigation. The Appellee's reliance on *Woodman v. WWOR-TV*, 293 F. Supp. 381 (S.D.N.Y. 2003) is also unavailing since the plaintiff in that case attempted to assert a disparate impact claim for the first time in response to a motion for summary judgment, and had unequivocally only pursued a disparate treatment claim in her underlying EEOC charge. That is simply not the present situation.

As an aside, the Appellants are not sure why the Appellees have cited *Byrnie v. Town of Cromwell, Bd. of Educ.*, 243 F.3d 93 (2d Cir. 2001) since that case involves a

review of a summary judgment and is unrelated to standards regarding the adequacy of underlying EEOC charges when disparate impact claims are prosecuted.

The next step in the analysis is to determine whether the Appellants' underlying EEOC charges contain information that could reasonably be expected to trigger a disparate impact investigation by the EEOC. It is telling, incidentally, that the Appellees have not alleged that they were never on notice that the Appellants were pursuing disparate impact claims at the EEOC stage, or that the EEOC never conducted a disparate impact investigation. The cases cited by the Appellees on this topic involve plaintiffs who have not alleged circumstances that would indicate the presence of disparate impact in their EEOC charges, and who later seek to add disparate impact claims during the ensuing litigation. This is simply not the present case.

In order not to inundate the Court with documentation in this Reply, the Appellants present excerpts from the EEOC charges of Plaintiff Ronnie Anderson, a firefighter, and Plaintiff Kendale Adams, a police officer. These EEOC charges are representative of the other EEOC charges, and are also conveniently shown in the Defendants' Exhibits 26 and 27 attached to their motion for summary judgment, and are also the subject of the Appellee's subsequent motion to seal. Anderson's EEOC charge includes, in addition to the totality of circumstances indicating a problem with disparate impact in the promotion processes, the following language: "Claimant was part of a group of African Americans who were deprived of promotional opportunities by being subjected to testing that does not have a reasonable nexus to job functions and

responsibilities and as a result was impermissibly impacted." Adams' charge includes the following language: "Claimant was part of a group of African Americans who were deprived of promotional opportunities by being subjected to testing which does not have a reasonable nexus to job functions and responsibilities and as a result was impermissibly impacted;" and "Claimant is part of a group (African Americans) that is adversely affected economically by the current promotional process procedures. African Americans are promoted at disproportionately lower rates than are Whites (White males in particular) creating a career long disparities in income potentials."

Surely, the Appellants alleged sufficient facts that could reasonably be expect to trigger a disparate impact investigation by the EEOC. To find otherwise, is a self-serving result for the Appellees that imputes either gross incompetence or callous disregard to the EEOC, reducing the purpose behind administrative exhaustion to mere wordplay; it would require all EEOC charging parties to make out airtight, summary judgment-style *prima facie* cases in their EEOC charges—an untenable and unjust approach.

C. The Appellees' Failure to Address Many of the Issues Raised in the Appellants' Brief is a Tacit Surrender to the Appellants' Arguments on Those Issues

The Appellants believe the present appeal raises issues regarding pleading practice and EEOC charge practice with ramifications beyond the current legal dispute. Beginning on page 30 of the Appellee's Brief, the Appellees identify but fail to provide any arguments to the following issues raised by the Appellants: "(1) the court "adopted

the Defendant-Appellees‟ use of summary judgment and trial cases to determine the adequacy of the Plaintiff-Appellants‟ complaint without critically questioning whether the analysis was an appropriate one"; (2) the court "required the Plaintiff-Appellants to plead a *prima facie* case in their complaint"; (3) the court should have considered the Government's level of "circumstances, experience, and sophistication" when it dismissed the Officers‟ disparate impact claims; (4) the court should have "estopped" the Government from raising a Rule 12(b)(6) defense to their disparate impact claims; and (5) the court should have converted the City's Motion for Partial Judgment on the Pleadings into a Motion for Summary Judgment."

The Appellees' response essentially relies on that fact that no case law provides an answer to the issues, while advancing no oppositional arguments. Litigation and the practice of law are not always amenable to cookie-cutter approaches. Important policy and doctrinal considerations are also part of the pursuit of procedural and substantive justice. With one exception, the Appellees have failed to put forth any opposing arguments regarding issues that have now largely been presented more than once in the current litigation. Their silence should be construed as an inability to produce reasoned opposing arguments.

The one exception, in superficially addressing issue (5), above, is the Appellee's citing of *Tierney v. Vahle*, 304 F.3d 734 (7th Cir. 2002), in which a trial court declined to convert a motion to dismiss to a motion for summary judgment on a civil rights claim (42 U.S.C. §1983), despite having considered, in addition to the pleadings, a letter written by

one of the defendants in that case. Even the *Tierney* court expressed doubt about whether conversion could be avoided when matters outside of written contracts and the like are presented and relied upon when it stated:

> In light of this discussion, the scope of the exception recognized in the cases we have cited is uncertain; perhaps it is or should be limited to cases in which the suit is on a contract or the plaintiff, if he has not attached, has at least quoted from, the document later submitted by the defendant. *Id*. at 739.

The *Tierney* court appears to have declined to convert the motion to dismiss to a motion for summary judgment in large part because the plaintiffs—and not the defendants—had attached the letter in question to their complaint, and because the letter was deemed to be potentially dispositive of the plaintiffs claim. *Id*. at 738-39. *Tierney* does not address what happens when defendants attach documents to their Answer, or whether the act of attaching EEOC charges as part of responsive pleadings in Title VII discrimination cases converts Rule 12(b)(6) or Rule 12(c) motions to motions for summary judgment as would seem to be required by Rule 12(d).

Lastly, the Appellees have not put forth arguments as to why the case of *United States, et. al. v. City of New York, et. al.*, 683 F.Supp.2d 225 (E.D.N.Y. 2010), should not have been persuasive authority utilized by the District Court during the summary judgment proceedings. That case was cited for the proposition that disparate treatment can be demonstrated by a showing of knowledge of disparate impact, coupled with a continuing use of a discriminatory process. The Appellants have pointed out that even if the District Court disregarded their Surreply, the *City of New York* case was pointed out

in their summary judgment oppositional brief. The District Court never addressed the issue in its Order Granting Defendant's Motion for Summary Judgment (District Court Document 190), but the Appellants believe it should have.

V. CONCLUSION

Both in their attempts to carve out self-serving pleading practice exceptions that do not serve justice, and in ignoring valid legal issues raised by the Appellants, the Appellees have not demonstrated that the District Court's rulings in question should be upheld by this Honorable Court. Sound legal reasoning and policy considerations dictate that the Appellants should be allowed to pursue their disparate impact claims, and that the District Court's grant of summary judgment on the Appellants' disparate treatment claims should respectfully be reversed. This is the Appellants' view and request, and nothing in the Appellee's Brief supports a contrary result.

Respectfully submitted,
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VI. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

1) This Reply brief complies with the page limitations of Fed. R. App. P. 32(a)(7)(A) because it contains 14 pages total, and it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains only 3,154 words total; and 2) This Reply brief complies with typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally space typeface using Microsoft Word, 13 point Times New Roman style.

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VII. CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2012, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the following:

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