



# Fifth Circuit Expands EEOC's Ability to Bring Pattern or Practice Discrimination Claims

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In a decision that grants the Equal Employment Opportunity Corporation ("EEOC") broader discretion to bring a pattern or practice discrimination claims against employers, the Fifth Circuit recently held that, at least in that circuit, the EEOC may bring such a claim under Section 706 of Title VII of the 1964 Civil Rights Act. The case, *EEOC v. Bass Pro Outdoor World, LLC*, applied and expanded upon the framework set out in the Supreme Court's opinion in *International Brotherhood of Teamsters v. United States*, which addressed Section 707 of Title VII.

The case arose out of a dispute against Bass Pro Outdoor World by its employees and job applicants, who claim that black and Hispanic applicants and employees were discriminated against in stores nationwide. After both identifying approximately 100 individuals who were allegedly subject to such discrimination and a failed conciliation process, the EEOC brought this lawsuit against the company under both Sections 706 and 707 of Title VII.

Traditionally, when employees allege that an employer has maintained a pattern or practice of discrimination in the workplace, they bring such claims under Section 707 of Title VII. If the employer is found liable under this section, declaratory or injunctive relief may be granted. Conversely, under Section 706 of Title VII, which has traditionally been used to target an employer's discriminatory actions against a specified individual, an aggrieved plaintiff may receive compensatory or punitive damages. Section 706 does not reference a "pattern or practice" cause of action in its text.

When bringing a claim under Section 707, the case may proceed according to the foundation set forth in *Teamsters*. This framework allows pattern or practice claims at a bifurcated proceeding. In the first phase, the plaintiffs must establish that unlawful discrimination was part of the employer's "standard operating procedure." Second, after such a finding, the court will determine the scope of individual relief. Such a holding was meant to allow for pattern and practice suits without having to meet the stringent class action requirements under Federal Rules of Civil Procedure Rule 23. The *Teamsters* framework also allows the use of statistical evidence to show a pattern or practice of discrimination.

In its recent decision, the Fifth Circuit remarked that even though Section 706 does not "explicitly authorize" a pattern or practice theory, Congress also did not explicitly prohibit such a claim under this section of the law. Because there was no indication to the contrary, and because Congress furnished the EEOC with "broad enforcement power" to combat employment discrimination, the Fifth Circuit determined that a pattern or practice claim may proceed under Section 706, subjecting Bass Pro to compensatory and punitive damages if

found liable. Moreover, such a claim may be litigated under the bifurcated framework first applied in *Teamsters*.

Commentators have suggested that such a holding could pressure employers into settling pattern or practice cases due to the threat of monetary damages. This, in turn, could result in the EEOC being incentivized to bring more claims under Section 706. The Fifth Circuit, however, responded to such concerns by stating that the Federal Rules of Civil Procedure provide sufficient protections for employers. For example, the Fifth Circuit pointed to Rule 49, which allows for a special verdict or a verdict with written questions, as a means to “structure the jury’s findings of fact” so that the Seventh Amendment is not violated. A court could require that the jury first find that the EEOC has met its preponderance of the evidence burden for proving that there is a pattern or practice. Then, if the jury answers yes, the jury may then answer whether the company “engaged in the practice with the requisite ‘malice or reckless indifference.’” As the Fifth Circuit noted, “[t]his system avoids the risk that a second jury would reconsider the first finding of fact or award damages for aberrational conduct of a single actor or other conduct sporadically occurring outside the found pattern.”

*If you have any questions or concerns regarding employment related issues, please contact James G. Ryan at [jryan@cullenanddykman.com](mailto:jryan@cullenanddykman.com) or at 516-357-3750.*

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