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Why It Is They and Not We Who Sit on the Woolsack—A Motion to Dismiss in *EEOC v. United Parcel Service* in the Northern District of Illinois+

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I find it intriguing, as a U.S. Equal Employment Opportunity Commission (EEOC) regional attorney, that a significant number of defense counsel in various EEOC cases contemporaneously seize upon the same litigation strategy or tactic. One has the sense that they all attend the same seminars and fear failing to use the

+ This Article had its genesis in a paper I originally prepared with Nikki Flores (a law student intern in the EEOC Chicago District Office) for delivery at the November 8, 2010, meeting of the American Bar Association Section of Labor and Employment Law in Chicago. That paper, which is the source of much of what follows here, was entitled: *What Lies Ahead? Notice Pleading and* Iqbal *and* Twombly *in EEOC Employment Discrimination Litigation*. In the intervening years, I have repeatedly updated *What Lies Ahead?* to take into account more recent developments, and various versions of it have been published in continuing legal education publications of the Chicago Bar Association, the Practicing Law Institute, the American Bar Association, and Law Bulletin Seminars. With each of those updates, the motion to dismiss proceedings in *EEOC v. United Parcel Service, Inc*., No. 09-CV-5291, 2010 WL 3700704 (N.D. Ill. filed Aug. 27, 2009), emerged as the subject of more discussion, to the extent I concluded, at the risk of being accused of recycling of my own work too much, that a separate paper more narrowly focused on *United Parcel Service* was warranted. I was also fascinated by the court's consideration of the motion to dismiss. Accordingly, although it is true that this Article is derivative of and draws freely and at length from *What Lies Ahead?*, I make no apologies because the subject matter is fascinating.

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tactic du jour. A trend recently in vogue, and I believe happily now on the wane, involved moving to dismiss EEOC complaints on the basis of tortured readings of the Supreme Court's decisions regarding notice pleading in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009), coupled especially with an "outlier" decision of the Northern District of Iowa in *EEOC v. CRST Van Expedited, Inc.*, 614 F. Supp. 2d 968 (N.D. Iowa 2009), *rev'd* 679 F.3d 657 (8th Cir. 2012).

Based on these decisions and a few others, defense counsel have argued that the EEOC cannot seek monetary or other relief for victims of employment discrimination unless the victims have been individually identified in the administrative investigation that preceded the lawsuit, the Commission conciliated with the employer with respect to each victim separately, and each victim was individually identified in the complaint filed in federal district court.

In practice, however, the EEOC has a long history of litigating class actions, including to multi-million dollar consent decrees, in cases in which many relief recipients were identified only in the course of the litigation or during relief proceedings. Certainly this was true, for example, in *Chicago Miniature* (phase I liability verdict reversed on appeal), *Mitsubishi* ($34 million consent decree), *Dial Corporation* ($10 million consent decree), *Sears Roebuck* ($6.2 million consent decree), *Supervalu* ($3.2 million consent decree), and *International Profit Associates* ($8 million consent decree)—all cases litigated by my office in Chicago.[1] We in Chicago were therefore rocked by the initial success of *United Parcel Service* in one of our maximum leave/discharge cases brought under the Americans with Disabilities Act (ADA).[2]

In this short Article, I trace the extended proceedings on the defendant's motion to dismiss in *United Parcel Service* for three reasons. First, in my mind, *United Parcel Service* signals the demise of a defense strategy that never had any real merit. Second, *United Parcel Service* illuminates how procedures routinely taken for granted, such as pleading rules perhaps deemed inconsequential, can have an enormous impact on the ability of the EEOC to secure civil rights on the job. Third, *United Postal Service* is a teaching moment for civil rights litigators, showing that persistence in the pursuit of a better outcome can make a difference.

I. Proceedings on Defendant's Motion to Dismiss in *United Parcel Service*

A. Motion to Dismiss

Early on in *United Parcel Service*, Judge Robert M. Dow of the Northern District of Illinois appeared to introduce a new factor into the *Iqbal-Twombly* cal-

1. *See infra* Appendix.
2. *See* EEOC v. United Parcel Service, Inc., No. 09-CV-5291, 2010 WL 3700704 (N.D. Ill. filed Aug. 27, 2009).

culus in ADA cases.[3] He struck down the EEOC's allegations that United Parcel Service (UPS) failed to reasonably accommodate a disabled charging party on the grounds that "the complaint [did] not allege sufficient facts demonstrating that [the charging party] (*or the potential class members*) were qualified individuals."[4] It was not the first time an EEOC claim with respect to a charging party had been dismissed. Completely unexpected, however, was the clause pertaining to the dismissal *with respect to the class*—the members of which the EEOC had not identified in the complaint and that it expected to identify during the litigation. While the EEOC worked to overturn the unprecedented ruling, UPS aimed its efforts at upholding the dismissal. Over the following two-plus years, both parties continued to litigate the motion to dismiss before Judge Dow. Judge Dow first wrote:

> [A]s currently pled, the EEOC's complaint is so threadbare, conclusory, and formulaic that it does not even allow the Court to reasonably infer that [the charging party] or proposed class members have a plausible basis for claiming to be "otherwise qualified to perform the essential functions of the job with or without reasonable accommodation."[5]

Judge Dow's initial opinion does not indicate how high the court intended to set the bar for EEOC pleadings under the ADA. Nevertheless, there was a basis for concern in its statement that "the complaint does not allege sufficient facts *demonstrating* that [the charging party] (or the potential class members) were qualified individuals."[6] One perspective is that *demonstrating* sounds very much like *establishing* or *proving,* and that is exactly what the Federal Rules of Civil Procedure—even post-*Iqbal*—do not require.

Additionally troubling is the court's proposition that disability cases are different, as far as pleading is concerned, from Title VII race cases "[b]ecause disability, unlike race, in some circumstances can be a legitimate consideration in employment decisions. . . ."[7] Finally, it is unclear what the court intended with its references to "potential class members."[8] How is the EEOC, when it proceeds on behalf of a class whose members will be identified during the course of litigation, supposed to demonstrate in its complaint that the potential class members are qualified? May an employer successfully torpedo the pleading of an ADA class action by suppressing enough information during the EEOC's pre-suit administrative process

3. *Id*.
4. Memorandum Opinion and Order at 7, *United Parcel Serv., Inc*., No. 09-CV-5291, 2010 WL 3700704, at *3 (N.D. Ill. Sept. 10, 2010) (emphasis added).
5. *Id*. (citation omitted).
6. *Id*. (emphasis added).
7. *Id*. at 9.
8. *Id*. at 7.

to prevent the agency from making the kind of demonstration in the complaint that the court thinks necessary?

On September 30, 2010, twenty days after dismissal of its first complaint, the EEOC filed a first amended complaint.[9] In the first amended complaint, the EEOC alleged that:

> Since at least 2002, UPS has maintained an inflexible 12-month leave policy which does not provide for reasonable accommodation of qualified individuals with disabilities and which instead provides for termination of their employment, in violation of Sections 102(a) and 102(b)(3)(A) and (b)(5)(A) of Title I of the ADA, 42 U.S.C. §§ 12112(a) and 12112(b)(3)(A) and (b)(5)(A).[10]

The EEOC described in detail the effect of this policy on two victims, Trudi Momsen and Mavis Luvert.[11] The EEOC then described a class of additional victims affected by the same policy—a class of victims for whom the EEOC is seeking relief:[12]

> Similar to Momsen and Luvert, each class member is a qualified individual with a disability who could perform the essential functions of his or her job with or without a reasonable accommodation. Because disabilities, and the reasonable accommodations appropriate for particular individuals with disabilities, may vary significantly, the reasonable accommodations which UPS should have made available to class members to permit them to perform the essential functions of their jobs (with or without a reasonable accommodation), would not have all been the same. The reasonable accommodations would have varied from class member to class member on an individual basis, as determined through an interactive process between UPS and the individual class members. However, rather than engage in that interactive process and reasonably accommodate

9. First Amended Complaint at 2–3, *United Parcel Serv., Inc*., No. 09-CV-291 (N.D. Ill. Sept. 30, 2010).

10. *Id*. at 2–4.

11. *See id*. at 3–5.

12. *See id*. at 5. The adequacy of the EEOC's allegations as to Momsen and Luvert ceased to figure in the dispute. *See* Plaintiff EEOC's Motion for 1292(b) Certification at 3, *United Parcel Serv., Inc*., No. 09-CV-5291 (N.D. Ill. July 20, 2012) ("The adequacy of EEOC's pleading with regard to these claimants is not at issue."); Memorandum Opinion and Order at 3, *United Parcel Serv., Inc*., No. 09-CV-5291 (N.D. Ill. Jan. 11, 2013) (court noted "EEOC filed an amended complaint asserting more robustly pleaded claims on behalf of Momsen [and] Luvert" and otherwise addressed only unidentified victims).

> these class members, without undue hardship to itself, UPS terminated the class members' employment, pursuant to its policy described in paragraph 8.[13]

The court, at that time, refused to allow the EEOC to proceed with its claims for relief on behalf of these claimants, stating:

> [T]he EEOC has not alleged adequate factual information in its complaint with respect to the unidentified class members as it has not pleaded with adequate specificity facts establishing the plausibility of a claim that each class member is a qualified individual under the ADA who could have performed his or her job with or without a reasonable accommodation. Without additional detail, the EEOC's allegations do not "raise a right to relief above the speculative level." The Court therefore grants UPS's motion to dismiss the claims with respect to unidentified class members . . . .[14]

The EEOC then motioned for leave to file its second amended complaint, adding a claim under Section 102(b)(6) of the ADA, but not alleging any additional facts with regard to unidentified class members.[15] The court dismissed this motion for leave to file the second amended complaint, stating "[b]ecause Section 102(b)(6) only protects qualified individuals with disabilities, the EEOC needed to plead with adequate specificity facts supporting its contention that the unidentified class members meet this requirement."[16]

Subsequently, the EEOC sought certification for interlocutory review of this decision as to its claim on behalf of unidentified victims.[17] In determining to pursue an interlocutory appeal, we at the EEOC considered where the district court might have conceptually gone off the tracks. The court's own language from its dismissal of the EEOC's first amended complaint was revealing.[18] The court stated that the EEOC "has not pleaded with adequate specificity facts establishing the plausibility of *a claim that each class member is a qualified individual*. . . ."[19] That is to say, the court appeared to be holding that there are a multiplicity of claims in the case,

13. Plaintiff EEOC's Motion for 1292(b) Certification, *supra* note 12.
14. Memorandum Opinion and Order at 7, *United Parcel Serv., Inc*., No. 09-CV-5291(N.D. Ill. Sept. 28, 2012) (emphasis added) (quoting EEOC v. Concentra Health Servs., Inc., 496 F.3d 773, 777 (7th Cir. 2007)).
15. *See* Second Amended Complaint, *United Parcel Serv., Inc*., No. 09-CV-5291 (N.D. Ill. Oct. 20, 2011), 2011 WL 10830358.
16. Memorandum Opinion and Order, *United Parcel Serv., Inc*., No. 09-CV-5291 (N.D. Ill. July 3, 2012).
17. *See* Plaintiff EEOC's Motion for 1292(b) Certification, *supra* note 12.
18. Memorandum Opinion and Order, *supra* note 14.
19. *Id*. (emphasis added) (quoting *Concentra Health Servs., Inc*., at 777 (7th Cir. 2007)).

each one separately either belonging to or being made on behalf of each class member and each of which must appear in a complaint to be separately and individually plausible.[20] The problem is that in cases brought by the EEOC the only party plaintiff is the EEOC, and there is only one claim—the claim brought by the EEOC against the employer on the grounds of discrimination. That single claim, in and of itself, satisfies the *Iqbal* plausibility requirement.[21]

B. Reconsideration of Motion to Dismiss

Dedicated litigators are seldom willing to "cut some slack" for colleagues on the bench who, in the litigators' own esteemed judgment, "got it wrong." But at times, some of our brethren in black robes show us why it is they and not we who sit "on the woolsack."[22] That is precisely what happened in *United Parcel Service*.[23] In an extended memorandum opinion and order entered January 11, 2013, Judge Dow exhaustively reviewed the litigation of the motion to dismiss and the applicable law (including *Iqbal* and *Twombly*), and on his own motion reconsidered.[24] Judge Dow withdrew his earlier rulings, denied the UPS motion to dismiss, granted the EEOC leave to file its second amended complaint, and denied the EEOC's motion for a certificate of appealability as moot.[25] The court's language turned everything

20. *See generally United Parcel Serv., Inc*., 2010 WL 3700704.

21. *See* Ashcroft v. Iqbal, 556 U.S. 662, 663 (2009).

22. Students of Willis L.M. Reese, the great Columbia Law School professor and American Law Institute reporter, will recall the towering figure with the enormous wing-span he was in the classroom. They will recall him describing—with wings extended—how in the earliest days courts were sometimes convened in the shade of large trees, and the judges, perhaps "sitting in chancery," might be seated before the petitioners on sacks full of wool, which may have been awaiting delivery or sale, or even have been the subject of "the litigation." Hence, the earliest dispensers of the common law and their brethren to this day may be said, at least to the still admiring students of Professor Reese to "sit on the woolsack." It is an article of faith among those who practice the profession that "on the woolsack" is a noble place to sit.

23. *See generally* Memorandum Opinion and Order, *supra* note 12.

24. *Id*. at 1.

25. *Id*. at 1–2. As to whether a federal judge's doing a 180-degree turnaround without having been reversed is actually noteworthy, consider an October 16, 2013, story in *The New York Times* headlined *Judge in Landmark Case Disavows Support for Voter ID*. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. Times, Oct. 16, 2013, at A16. The reporter observed that "it is the kind of thought that rarely passes the lips of a member of the federal judiciary: I was wrong," and took note of a new book by Seventh Circuit U.S. Court of Appeals Judge Richard A. Posner, *Reflections on Judging*. *Id*. The article states that in the book Judge Posner wrote, "I plead guilty to having written the majority opinion" in *Crawford v. Marion County Election Board,* a decision upheld by the Supreme Court in 2008. *Id*. In *Crawford*, the Seventh Circuit upheld an Indiana voter identification law, which Judge Posner wrote is "'a type of law now widely regarded as a means of voter suppression rather than of fraud prevention.'" *Id*. *The New York Times* article further noted that when Judge Posner was asked

around and made it right:

> Upon revisiting EEOC's first amended complaint, and drawing all reasonable inferences in the EEOC's favor, the Court concludes that the first amended complaint satisfies these standards and should not have been dismissed. . . .
>
> But this broader case is brought by EEOC, which frequently and in this instance "does not stand in the employee's shoes." EEOC, charged with "advanc[ing] the public interest in preventing and remedying employment discrimination," is pursuing this action on behalf of a nationwide class of aggrieved individuals. And although EEOC is subject to the federal pleading rules when acting in this capacity, the unique role of the EEOC is such that courts generally have allowed complaints with "class" allegations comparable to those asserted here to move forward, both pre- and post-*Twombly* and *Iqbal* . . . .
>
> *Iqbal* and *Twombly* do not require plaintiffs, including EEOC, to plead detailed factual allegations supporting the individual claims of every possible member of a class. EEOC must merely "plead[] factual content that allows the court to draw the reasonable inference" that UPS violated provisions of the ADA as to the unidentified individuals. It has done that.[26]

Judge Dow declined to follow the once trendsetting decision in *EEOC v. CRST Van Expedited, Inc*.[27] *CRST* was a Title VII class action sex discrimination case. The EEOC contended that the national long haul trucking company maintained a system in which newly-hired female driver-trainees were sexually harassed by experienced male drivers assigned to accompany, train, and supervise them during their initial long haul runs.[28] The district court entered summary judgment in favor of defendant CRST and against the EEOC on the EEOC's pattern or practice claim. It then dismissed the remaining sixty-seven individual claims that survived summary judgment on the grounds that the EEOC did not, during the statutory pre-suit conciliation process, specifically identify and attempt to negotiate settlements

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in an October 11, 2013, *Huffington Post* video interview whether the court had gotten its ruling in *Crawford* wrong he responded, "'Yes. Absolutely.'" *Id*. While Judge Posner's about-face in *Crawford* comes too late to have avoided the Supreme Court's compounding of the error, it will hopefully check the impact of the decision.

26. Memorandum Opinion and Order, *supra* note 12, at 8–11 (alteration in original) (citations omitted).

27. 679 F.3d 657 (8th Cir. 2012).

28. *Id*. at 665–67.

with respect to each class member separately.[29] The EEOC's position was that the law did not require such separate individualized negotiations during conciliation.[30] In any event, the EEOC argued such negotiations would have been impossible because during the agency's administrative investigation that preceded conciliation CRST refused and failed to disclose numerous complaints of sexual harassment that would have made victim identification possible.[31]

In declining to follow *CRST*, Judge Dow wrote:

> [T]he Seventh Circuit has made clear that courts "have no business limiting [an EEOC] suit to claims that the court finds to be supported by the evidence obtained in the Commission's investigation," and EEOC has alleged . . . that "[a]ll conditions precedent to the institution of this lawsuit have been fulfilled."[32]

But the *United Parcel Service* motion to dismiss saga had not fully run its course.

29. *Id*. at 670–74.

30. *Id*. at 673.

31. See Circuit Judge Murphy's dissent in *CRST Van Expedited, Inc*., 679 F.3d at 695–97 (8th Cir. 2012) ("Although many women had reported harassment . . . CRST furnished to the Commission only two names. . . . Using [the majority's] standard employers can avoid disclosure to the EEOC of complaining workers [during] investigation and conciliation, then reveal the names during court order discovery, and seek dismissal of the entire case on the ground of inadequate pursuit efforts by the EEOC.").

32. Memorandum Opinion and Order, *supra* note 12, at 11–12 (second and third alterations in original) (citations omitted). Judge Dow is not alone in declining to follow *CRST* and allowing unidentified victims to be in a suit as a class, rather than as individuals. *See, e.g*., EEOC v. United States Steel Corp., No. 10-1284, 2012 WL 3017869, at *18 (W.D. Pa. July 23, 2012) (citations omitted) (finding after a survey of decisions including post-*Iqbal* and *Twombly* decisions that naming as of yet unidentified victims in the complaint by the EEOC was *not* required: "[t]his Court agrees with these decisions and likewise holds that *Iqbal* and *Twombly* do not require the EEOC to name all of the potential class members in its amended Complaint. The Court acknowledges U.S. Steel's emphasis in [*CRST*]. However, the Court notes that the Eighth Circuit's holdings in *CRST* are not binding on this Court."); EEOC v. Source One Staffing, Inc., No. 11-C-6754, 2013 WL 25033, at *5 (N.D. Ill. Jan. 2, 2013) (granting the EEOC motion for a protective order, notwithstanding defendant's invocation of *CRST*: "this Court already has held that the EEOC cannot reasonably be expected to identify the 'class members' who were denied job assignments because of their sex or estimate the damages resulting from an alleged pattern or practice of discrimination without expert analysis of . . . assignment and payroll data" produced in discovery); EEOC v. Cintas Corp., 699 F.3d 884, 904–05 (6th Cir. 2012) (disagreeing with a lower court's reliance on *CRST*, the court said that, "[W]e recognized that 'the nature and extent of an EEOC investigation. . . is a matter within the discretion of th[e] agency'. . . . Given that [the EEOC letter of determination and proposed conciliation agreement] were provided to Cintas . . . there is no basis for concluding that Cintas was unaware that the EEOC had investigated and was seeking to conciliate class-wide claims. . . . [I[t is clear that the EEOC satisfied its administrative prerequisites to suit.").

On February 1, 2013, UPS petitioned Judge Dow to certify a "question" supposedly related to his January 11, 2013, order: "Can EEOC satisfy the pleading requirements of [*Twombly*] . . . when each proposed individual for whom EEOC seeks relief was unable to work for 12 months at the time of separation?"[33] UPS apparently hoped to convince Judge Dow and the Seventh Circuit that it could never be a reasonable accommodation to allow a day more than twelve months leave, and therefore that any complaint suggesting anything to the contrary could never be "plausible," even if it was the employer itself who was responsible for the absence.[34] Under this theory, it would be permissible for UPS to keep disabled workers off the job for twelve months by denying an employee who was released to return to work the opportunity to do so, and then terminating him or her at the twelve-month mark. Suffice it to say that UPS's contentions had not figured in Judge Dow's January 11, 2013 Memorandum Opinion and Order[35] and they sounded more like arguments appropriate, if at all, for a motion for summary judgment.

Judge Dow remained convinced that, although the issue before him involved a controlling and contestable question of law, his decision denying the UPS motion to dismiss was correct and that permitting an interlocutory appeal would not materially advance the ultimate termination of the case[36]:

> [T]he Court remains confident of the correctness of its January 11 ruling—indeed, it would not have reconsidered on its own motion the prior ruling had that not been the case—the fact that the same judge has viewed the question to be close enough to warrant reconsideration is testimony to both the difficulty and the contestability of the issue . . . .
>
> After careful consideration of the alternative paths . . . the Court concludes that further litigation in the district court, augmented as appropriate with expedited briefing on potentially dispositive issues, would serve the interests of justice and efficiency better than certifying a question or an issue for interlocutory appeal. The Court therefore denies the motion for interlocutory appeal . . . .[37]

So that is how things stand in *EEOC v. United Parcel Service* as of summer

33. Plaintiff EEOC's Motion for 1292(b) Certification, *supra* note 12, at 2.

34. *See id*. at 2–3 ("Indeed, EEOC's unsupported conclusion that all class members fall within the protected class is highly doubtful because every class member was unable to work for 12 months at the time of separation and the Seventh Circuit has never found any employee who missed more than two months of work to be a qualified individual with a disability.").

35. *See* Memorandum Opinion and Order, *supra* note 12.

36. *See generally* Memorandum Opinion and Order, *United Parcel Serv., Inc*., No. 09-CV-5291 (N.D. Ill. June 11, 2013).

37. *Id*.

2013.[38] The case has now been referred to the assigned magistrate judge for supervision of discovery and exploration of settlement.[39] Either way, the court has taken an important step back from the brink and the notion that the EEOC cannot pursue relief with respect to victims who are not identified in the EEOC's complaint has proven to be a short-lived trend.

II. Looking Ahead

It is a good thing that the trend was short lived. If *United Parcel Service* had been decided differently, there would be two concerns as to how it would have combined with *Iqbal* and *Twombly* to affect EEOC employment discrimination litigation down the road, and how even as decided, it may still affect other districts and courts. The first concern is that if there was a genuine, long-term trend away from notice pleading, the EEOC might be expected to begin specifically demonstrating in its complaints, including in class actions, that its stated claim against an employer was an aggregation of individual claims of class members, each of which would be separately considered "plausible" on an individual basis. Such an outcome would likely spell the end of class litigation by the EEOC, except on behalf of the smallest classes of victims of discrimination. Can one imagine such a complaint if there were 100 class members? What if there were 400 or more?

The EEOC has, for a very long time as a litigating agency, pursued relief not only on behalf of victims of discrimination specifically identified in the course of its administrative investigations, but also on behalf of victims identified through discovery in the course of litigation—that is, after suit is filed. In many cases such as *Chicago Miniature*,[40] *Mitsubishi*,[41] *Dial*,[42] *Sears Roebuck*,[43] and *Roadway*,[44] enough victims of the particular kind of discrimination at issue were identified during the administrative investigation to lead to the inescapable conclusion that employers were acting illegally, not only with respect to those victims, but also with many

38. *United Parcel Serv., Inc.*, 2010 WL 3700704. Therein lies the downside to this tale of justice prevailing: *EEOC v. United Parcel Service* was filed in the Northern District of Illinois on August 27, 2009, and as the case approached its third anniversary, the motion to dismiss proceeding had just concluded and discovery was just set to begin. One could observe that the wheels of justice do grind slowly.

39. Order of the Executive Committee, *United Parcel Serv., Inc.*, No. 09-CV-5291 (N.D. Ill. June 11, 2013).

40. EEOC v. Chicago Miniature Lamp Works, 622 F. Supp. 1281 (N.D. Ill. 1985), *rev'd*, 947 F.2d 292 (7th Cir. 1991).

41. EEOC v. Mitsubishi Motor Mfg. of Am., Inc., 102 F.3d 869 (7th Cir. 1996).

42. EEOC v. Dial Corp., 156 F. Supp. 2d 926 (N.D. Ill. 2001).

43. EEOC v. Sears, Roebuck & Co., No. 04-C-7282, 2005 WL 2664367 (N.D. Ill. filed Nov. 10, 2004).

44. EEOC v. Roadway Express, Inc., No. 06-C-4805, 2007 WL 2198363 (N.D. Ill. Jul. 31, 2007).

others yet to be identified. Often they were unidentified because employers were unable or unwilling to provide, prior to litigation, information with regard to many employees and applicants. In those cases, discovery under the Federal Rules of Civil Procedure was the only process by which the EEOC could identify those victims and gather details about the specific discrimination they faced.

Plainly, it would be impossible for the EEOC to demonstrate plausibility within the four corners of a complaint with respect to specific members of a victim class that the EEOC has not yet identified without any discovery. However, if that is where the federal courts were to head—and I do not believe they have or will—it would severely prejudice the performance of the EEOC's legal mandate to combat and eradicate employment discrimination.

I do not believe federal courts will endorse onerous pleading requirements with respect to the EEOC class actions anytime soon. Nevertheless, there have been a few isolated district courts that have deemed it appropriate to enter substantive adverse judgments on the merits in the EEOC cases. This is not merely because the EEOC did not plead specifics with respect to individual victims, but also because the EEOC did not specifically and individually investigate and conciliate with respect to unidentified victims and their particular circumstances during the administrative process before agency litigation.[45] In my estimation, those decisions are

45. *See, e.g.*, *EEOC* v. *CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012); EEOC v. Bloomberg L.P., No. 07-CV-8383, 2013 WL 4799150, at *9 (S.D.N.Y. Sept. 9, 2013) (granting defendant's motion for summary judgment: "[T]he Court adopts the . . . reasoning from Chief Judge Linda P. Reade's analysis in [*CRST*], a case dismissed under similar circumstances."). The approach of these courts is contrary to the notion that the EEOC's administrative processes, including investigations and conciliations, are wholly within the discretion of the agency. For example, *EEOC v. Caterpillar*, 409 F.3d 832 (7th Cir. 2005), holds that the agency's investigations are not subject to judicial review. Title VII itself provides that the only test for a conciliation agreement is whether it is "acceptable" to the EEOC and that conciliation materials are confidential. 42 U.S.C. § 2000e-5 (2006). With respect to conciliation, District Judge Joe Billy McDade observed in *EEOC v. Sears, Roebuck & Co.*, "A review of the relevant statutory language on conciliation reveals that substantial discretion is vested in the Commission . . . . An effort by the Senate in 1972 to require judicial review of the Commission's determinations of 'acceptable' agreements was soundly rejected. 118 Cong. Rec. 3807 (Feb. 14, 1972). Such an examination of the conciliation process was deemed unworkable. *Id.* at 3807." 504 F. Supp. 241, 262 (N.D. Ill. 1980), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Further, under the Administrative Procedure Act (APA) and otherwise, conciliation agreements are not subject to judicial review because they do not constitute final agency decisions, and employers are always entitled to a trial de novo on the issue of whether or not they engaged in employment discrimination. *See, e.g.*, *Doe v. Dairy,* 456 F.3d 704, 710–11 (7th Cir. 2006) (employing APA analysis to find Title VII does not require charging party cooperation with EEOC conciliation prior to private suit); *Caterpillar*, 409 F.3d at 832 (court relies on cases decided under the APA to find the EEOC reasonable cause determination was not subject to review); *Stewart v. EEOC,* 611 F.2d 679, 681–83 (7th Cir. 1979) (relying on the APA in rejecting a challenge to EEOC process). As District Judge Milton Shadur observed years ago during an unreported colloquy at a hearing

outliers and will wither and die on the vine, and never again receive any significant following. Judge Dow's rulings in *United Parcel Service* and other cases referred to in this Article indicate that this process is already underway and I think irreversible.

The second concern relates to the conceptual basis some defense counsel propose as a justification for their demands wanting an extraordinary amount of detail in employment discrimination complaints. Based on their reading of *Iqbal* and *Twombly,* they argue that significant detail and specificity within complaints is necessary because otherwise employers do not know and cannot know the nature of the actionable conduct with which they are charged. That situation may arise in select cases with highly complex claims, but seldom in employment discrimination cases. Overwhelmingly, standard notice pleading requirements have been more than sufficient for both plaintiffs and defendants. Further, because of the administrative process that precedes and undergirds the EEOC litigation—*a process in which the employer-defendant is a party*—protests of "don't know" and "can't know" do not ring true.[46]

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attended by the author in the *Chicago Miniature* case, when sued for employment discrimination employers are not entitled to two bites of the apple, with the first being litigation of the EEOC administrative process and the second being the question of whether or not there was discrimination. *See* EEOC v. Chicago Miniature Lamp Works, 526 F. Supp. 974, 975–76 (N.D. Ill. 1981) (discussing the "undesirability of turning every properly-filed EEOC action into a two-fold action"). As this Article was going to press, it became clear that, at least in the Seventh Circuit, the EEOC has it right with respect to judicial review of conciliation. On June 28, 2013, in an unusual move, the U.S. Court of Appeals for the Seventh Circuit granted the EEOC's petition for an interlocutory appeal in *EEOC v. Mach Mining, LLC*, No. 11-CV-879, 2012 WL 3800787 (S.D. Ill. May 30, 2013), in order to consider "the question whether an alleged failure to conciliate is subject to judicial review in the form of an implied affirmative defense to the EEOC's suit." *EEOC v. Mach Mining, LLC*, No. 13-2456, slip op. at 2 (7th Cir. Dec. 20, 2013). On December 20, 2013, the Seventh Circuit announced a decision which unequivocally supported the EEOC position, writing,

> The language of [Title VII], the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit. . . . We therefore disagree with our colleagues in other circuits and hold that the statutory directive to the EEOC to negotiate first and sue later does not implicitly create a defense for employers who have allegedly violated Title VII.

Id. How squarely the entire Seventh Circuit stands behind this important decision is telegraphed by the following extraordinary footnote: "We have circulated this opinion among all judges of this court in regular active service pursuant to Circuit Rule 40(e). No judge favored a rehearing en banc on the question of rejecting the implied affirmative defense for failure to conciliate." *Id*. at 23 n.3.

46. By the time an EEOC case gets to court, the employer has typically: (1) dealt directly with the charging party and class members, perhaps as long-term employees; (2) received a charge of discrimination stating the charging party's claim; (3) had an opportunity to mediate the charge; (4) received requests for information and documents telegraphing the issues and circumstances the EEOC is investigating; (5) prepared, usually with the assistance of counsel,

No one possesses more knowledge about an employer's policies, practices, and experiences with victims of employment discrimination than the employer.[47] Even if an employer is unaware of the facts and circumstances surrounding alleged discrimination before a charge is filed, by the time the EEOC files a complaint in federal district court, the nature of the process has "educated" the employer and claims to the contrary are almost always gamesmanship. The Federal Rules of Civil Procedure were designed precisely to supplant such antiquated schemes. Judge Dow's consideration of the defendant's motion to dismiss in the *EEOC v. United Parcel Service* gives me confidence that the modern principles memorialized in the federal rules will survive the of recent squall surrounding *Iqbal* and *Twombly*.

a position statement detailing the charging party's history and responding to the claim(s) of discrimination; (6) exchanged telephone calls and/or other correspondence with the EEOC staff; (7) had the opportunity—because it supplied it—to itself examine virtually all or much of the evidence the EEOC is looking at; (8) conducted its own investigation; (9) received a letter of determination stating the nature of the cause finding; and (10) had the opportunity to engage in conciliation during which the nature, scope, and remedy for the found discrimination may be discussed. *See generally The Charge Handling Process*, EEOC, http://www.eeoc.gov/employers/process.cfm (Dec. 13, 2013).

47. Often in harassment cases, defendant-employers in conciliation and litigation take the position that the victim(s) did not complain and that the employer never knew about the harassment. Just as often discovery surfaces evidence that the victims did in fact complain, and that the employer had been dealing *ineffectively* with the harasser's conduct for a long time—sometimes for years—by employing a multitude of bad management techniques (for example, repeated verbal warnings, moving the harasser from one position or facility to another, telling victims to stay away from the harasser, etc.). When such employers protest they never knew, one can be forgiven for raising an eyebrow. As for no one ever complaining, here is a revealing vignette: The author recently sat through a conciliation meeting at which the employer was represented by three attorneys, with two from one of the nation's most highly regarded New York "white shoe" law firms. A third attorney pushed the argument that no complaints had been made. We later learned that, by that time, a charge of discrimination relating to the exact issue presented had been filed prior to the conciliation meeting. When lead counsel was thereafter confronted with this fact, the response was *not* that lead counsel didn't know, but rather that it was another attorney at the table who had made the misrepresentation. Lesson learned.

Appendix

EEOC v. Chicago Miniature Lamp Works

For more information on the *Chicago Miniature* case, see *EEOC v. Chicago Miniature Lamp Works*, 526 F. Supp. 974 (N.D. Ill. 1981) (in this Title VII class action recruitment and hiring case alleging racial discrimination, the court denied the company's motion for summary judgment, holding in November 1981 that the EEOC's determination that on its face states that widespread discrimination found in investigation, followed by pleading, satisfied the jurisdictional requirement of Title VII). This was followed by *EEOC v. Chicago Miniature Lamp Works*, 622 F. Supp. 1281 (N.D. Ill. 1985), *rev'd*, 947 F.2d 292 (7th Cir. 1991) (EEOC class-wide recruitment and hiring claims were found to be appropriate because they developed in course of a reasonable investigation of the plaintiff's charge; while the court found that there was a pattern and practice of class discrimination against black workers, the court did not find that the individual plaintiff was discriminated against). For the decision on remedies that followed, see *EEOC v. Chicago Miniature Lamp Works*, 640 F. Supp 1291 (N.D. Ill. Aug. 13, 1986) (holding that consistent discriminatory underrepresentation of blacks in the employer's recruitment and hiring for entry level factory jobs constituted a violation, such that every victim of the employer's discrimination during set time period could become a class member entitled to relief). This was followed by *EEOC v. Chicago Miniature Lamp Works*, 668 F. Supp. 1150 (N.D. Ill. 1987) (holding that in context of shortfall/pro rata procedure for class-wide distribution of back pay, district court would implement back pay procedure to comply with statutory mandate). *Chicago Miniature Lamp Works*, 526 F. Supp. 974, was reversed by 947 F.2d at 305–06 (holding that disparate treatment and disparate impact findings were erroneous because they credited statistics that did not take into account applicant preference and because anecdotal evidence presented at trial was not significantly probative).

For more information, see also *EEOC v. Chicago Miniature Lamp Works,* 110 F.R.D. 120 (N.D. Ill. 1986) (after district court found employment discrimination on part of defendant-employer in class action, but ruled individual plaintiff had not himself been victim of racial discrimination, individual plaintiff filed motion to effect immediate appeal; the district court held that individual plaintiff entitled to appeal disposition of claim immediately).

For more information, see also *Randolph v. Chicago Miniature Lamp Works,* No. 79-C-2362, 1986 WL 9535 (N.D. Ill., Aug. 22, 1986) (granting a former Chicago Miniature employee leave to proceed 'forma pauperis').

EEOC v. Mitsubishi Motor Manufacturing of America, Inc.

For more information, see *EEOC v. Mitsubishi Motor Manufacturing of*

America, Inc.,102 F.3d 869 (7th Cir. 1996) (Title VII, class action sexual harassment case in which the court upheld trial court order, which required the EEOC to send employees a letter detailing complaint process as related to defendant employer's sexual harassment policy; motion for stay denied and appeal dismissed).

For more information, see also *EEOC v. Mitsubishi Motor Manufacturing of America, Inc*., 990 F. Supp. 1059 (C.D. Ill. 1998) (holding that the EEOC complied with its statutory conciliation obligations before filing suit).

For more information, see also *EEOC v. Mitsubishi Motor Manufacturing of America, Inc*., 960 F. Supp. 164 (C.D. Ill. 1997) (holding that the employer could not interview employees concerning past incidents of harassment or retaliation other than by noticed deposition, but could have ex parte contact with employees who initiated discussions about claims of new harassment).

EEOC v. Dial Corp.

For more information, see Memorandum and Order on Defendant's Motion in Limine to Exclude Testimony of Jane Doe and Related Evidence, *EEOC v. Dial Corp*., 16 F. Supp. 2d 926 (N.D. Ill. 2001), 2000 WL 33912745 (Title VII, class action sexual harassment case, order granting defendant's motion in limine to exclude 'irrelevant' testimony of a female executive, Jane Doe). *See also* Memorandum and Order on Plaintiff's Motion to Unseal Briefs, Hearing Transcript, Court Order and Deposition of Jane Doe, *Dial Corp*., 156 F. Supp. 2d 926 (No. 99-C-3356), 2000 WL 33912746 (denying the EEOC's motion to unseal briefs of Jane Doe); Memorandum and Order on Plaintiff EEOC's Motion for Reconsideration, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356 2000 WL 684195 (granting the EEOC's protective order to protect identities of members of class action suit).

This was followed by *EEOC v. Dial Corp*., 156 F. Supp. 2d 926 (N.D. Ill. 2001) (holding that the EEOC satisfied statutory obligation to conciliate and that administrative charge process was not circumvented), and then by Memorandum and Order on Defendant's Motion for Contempt Order, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2001 WL 1945089 (holding the EEOC in contempt for violating parties' stipulated protective order); Memorandum and Order on Defendant's Motion for Certification of Issues for Appeal, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2001 WL 1945088 (granting defendant's motion for interlocutory review to determine, amongst other issues, whether Dial was given sufficient notice of the EEOC's pattern and practice claim at the administrative stage where the underlying charge contained no allegations of a class-wide Title VII violation and the bulk of evidence relied upon by the EEOC was revealed after it filed suit); Memorandum and Order on Defendant's Petition for Attorneys' Fees and Costs Incurred to Prepare and Prosecute its Motion for an Order Holding EEOC in Contempt, *Dial Corp*, 156 F. Supp. 2d (No. 99-C-3356), 2002 WL 1974084 (granting defendant's petition for attorneys'

fees and costs incurred to prepare and prosecute its motion for an order holding the EEOC in contempt); Second Memorandum and Order on Defendant's Motion for Contempt Order, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2002 WL 1974085. (finding that the EEOC complied with defendant's petition for attorney's fees and costs, and the subject of that order was concluded). Those orders were followed by: Memorandum and Order on Defendant's Motion for Reconsideration of the Court's Notice and Timeliness Rulings, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2002 WL 1974072 (defendant's motion denied); Memorandum and Order on Defendant's Motion in Limine to Exclude Plaintiff's Expert Testimony, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2002 WL 31061088 (granting defendant's motion, to an extent, by excluding relevant portions of plaintiff's expert report).

The motions were followed by the Memorandum and Order on Motion for Reconsideration of September 18, 2002, Ruling on Dial's Motion for Attorney's Fees, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2002 WL 32077351 (granting the EEOC's Motion for Reconsideration on the following three issues: first, that the EEOC's interrogatory responses were substantially correct; second, even in cases where later deposition testimony did not conform with earlier interrogatory responses, the EEOC had a legitimate basis for including that information in its responses based on the EEOC's reasonable inquiry and belief that answers were correct; third, the court's reliance upon the EEOC's legal assertion that each class member was subjected to sexual and sex-based harassment as grounds for sanctions was improper).

For more information, see also Memorandum and Order on Defendant's Motion for Reconsideration of the Court's Denial of its Motion in Limine to Exclude Evidence of Alleged Harassment Before 1991 and, Alternatively, to Exclude Evidence That is Not Relevant Background Evidence, *Dial Corp*., 156 F. Supp. 2d (No. 99-C-3356), 2003 WL 1809467 (granting, in part, defendant's motion; otherwise denying the motion); *Dial Corp*., 259 F. Supp. 2d 710 (N.D. Ill. 2003) (defendant's motion for reconsideration of phased bifurcated arrangement laid out by the court denied).

EEOC v. Sears, Roebuck & Co.

For more information, see *EEOC v. Sears, Roebuck & Co*., No. 04-C-7282, 2005 WL 2664367 (N.D. Ill. Jul. 22, 2005) (ADA class action case regarding medical leave and reasonable accommodation, finding that the EEOC met its notice-pleading requirements and denying the defendant's motion to dismiss case on grounds that the EEOC did not qualify class members under the ADA).

EEOC v. Supervalu, Inc.

For more information, see *EEOC v. Supervalu, Inc*., No. 09-CV-5637, 2010 WL 5071196 (N.D. Ill. Dec. 7, 2010) (ADA class action case regarding medical leave and reasonable accommodation, denying the defendant's request that the EEOC

provide proper verification signed by each applicable claimant, instead requiring that the EEOC need only meet with each claimant regarding three of the interrogatories, and to report inaccuracies from each claimant interrogatories to the defendant).

This was followed by Memorandum Opinion and Order, *Supervalu, Inc*., No. 09-CV-5637 (N.D. Ill. Aug. 8, 2012), 2010 WL 5071196 (granting and denying in part, the defendant's motion to compel properly verified responses to their first set of interrogatories; denying the plaintiff's motion to compel a portion of the defendant's human resources database; granting and denying in part, the plaintiff's motion to compel regarding its Rule 34 request for entry upon land and inspection); Memorandum Opinion and Order, *Supervalu, Inc*., No. 09-CV-5637 (N.D. Ill. Mar. 19, 2013), 2013 WL 1154217 (granting and denying in part the plaintiff's motion for civil contempt sanctions and to conduct limited discovery).

EEOC v. International Profit Associates, Inc.

For more information, see *EEOC v. International Profit Associates, Inc*., 206 F.R.D. 215 (N.D. Ill. 2002) (Title VII class action sexual harassment case, denying defendant's motion to compel plaintiff's production of interview notes because notes are protected by attorney-client privilege and the work product doctrine). *See also Porter v. Int'l Profit Assocs., Inc*., Nos. 01-C-4427, 02-C-2790, 2003 WL 22956004 (Dec. 11, 2003) (defendant's motion to dismiss is denied).

This was followed by *EEOC v. International Profit Associates, Inc*., No. 01-C-4427, 2007 WL 844555 (N.D. Ill., Mar. 16, 2007) (denying defendant's motion for summary judgment and holding that the EEOC met notice-pleading standards for class suit, when defendant was engaged in pattern or practice of sexual discrimination towards all claimants generally); and by Order, *Int'l Profit Assoc. Inc*., No. 01-C-4427 (N.D. Ill., Feb 22, 2008), 2008 WL 485130 (denying defendant's motion to reconsider order prohibiting settlement communications with claimants).

This was followed by *EEOC v. International Profit Associates, Inc*., 654 F.Supp. 2d 767 (N.D. Ill. 2009) and Memorandum and Order, *International Profit Associates, Inc*., No. 01-C-4427 (N.D. Ill., Feb 22, 2008), 2008 WL 4876860 (defendant's motion for summary judgment with respect to three claimants granted; defendant's motion for summary judgment with respect to three other claimants denied).

This was followed by *EEOC v. International Profit Associates, Inc*., 647 F.Supp. 2d 951 (N.D. Ill. 2009) (defendant's motion for summary judgment with respect to eight claimants granted; defendant's motion for summary judgment with respect to twenty-four other claimants denied), and *EEOC v. International Profit Associates, Inc*., No. 01-C-4427, 2010 WL 1416153 (N.D. Ill., Mar. 31, 2010) (denying defendant's motion for summary judgment).