

# PUBLICATION

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## Fifth Circuit Court of Appeals Decision Worsens Headaches for Employers Negotiating Pattern or Practice EEOC Claims

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In *Equal Employment Opportunity Commission v. Bass Pro Outdoor World, L.L.C.*, a three-judge panel of the Fifth Circuit Court of Appeals held that the EEOC can seek punitive and compensatory damages for a pattern or practice claim under Section 706 of the Civil Rights Act and the EEOC can apply the *Teamsters* framework, as opposed to the frequently used *McDonnell Douglas* framework, to meet its burden of proof in a Section 706 pattern-or-practice claim. This outcome means that the only two Circuits that have addressed this issue have reached unfavorable rulings for employers. As such, the decision may further embolden the EEOC to take a hardline approach to negotiations when pursuing pattern or practice discrimination claims. This case is worth monitoring, because Bass Pro has recently filed a petition for the entire Fifth Circuit to review the decision, and the EEOC's compensatory damages claims may still prove to be unmanageable at a later stage in the litigation.

### Background on Title VII and the *Teamsters* Framework

Section 707 of Title VII of the Civil Rights Act allows the EEOC to file suit against an employer for a "pattern or practice" of discrimination. In the 1970s, the Supreme Court held that the government could meet its burden of proof for a pattern-or-practice claim by applying what became known as the *Teamsters* framework. The *Teamsters* framework differed from the *McDonnell Douglas* framework, which courts commonly use to assess whether the plaintiff has proved intentional discrimination through circumstantial evidence.

Under the "liability" stage of the *Teamsters* framework, the government's initial burden in a pattern or practice lawsuit is to demonstrate that unlawful discrimination has been a regular procedure or policy that an employer or group of employees followed. If the government meets its initial burden, the court will assume that a particular employment decision was made in pursuit of an unlawful policy during the period in which the unlawful policy was enforced. By contrast, the *McDonnell Douglas* framework initially requires the plaintiff to show membership in a protected class, objective qualifications for the job and an adverse employment decision from which others similarly situated but not part of the protected class were spared.

Under the *Teamsters* framework, bifurcation of proceedings, i.e., separating the litigation into two phases, may be proper when the Government seeks individual relief for the victims of a discriminatory practice. The court must usually conduct additional proceedings after the liability phase to determine the scope of individual relief. The *McDonnell Douglas* framework does not contemplate a bifurcation of proceedings.

When the Supreme Court endorsed the *Teamsters* framework for pattern-or-practice claims in the 1970s, Title VII offered only equitable relief. In 1991, Congress amended Title VII to allow compensatory and punitive damages under Section 706, but did not add these remedies to Section 707. Unlike Section 707, Section 706 does not expressly authorize pattern or practice suits. Therefore, there were two unresolved issues following the 1991 amendment. First, could the EEOC seek compensatory and punitive damages in a pattern-or-practice claim under Section 706. Second, if the EEOC could seek compensatory and punitive damages for a pattern-or-practice claim under Section 706, could the EEOC meet its burden of proof by applying the *Teamsters* framework.

## The Court of Appeals Weigh-in with Troubling Implications for Employers

In *Serrano v. Cintas Corp.*, the Sixth Circuit Court of Appeals vacated the district court's judgment in favor of the employer and held that the EEOC could pursue a discriminatory hiring claim under Section 706 using the *Teamsters* pattern-or-practice framework. The Sixth Circuit acknowledged that there is an argument that allowing pattern practice claims to proceed under Section 706 would make Section 707 superfluous, especially when buttressed with the fact that Congress's 1991 amendments added compensatory and punitive damages only to Section 706. However, the Sixth Circuit dismissed this argument noting "an important distinction prevents § 707 from becoming superfluous":

§ 707 permits the EEOC to initiate suit without first receiving a charge filed by an aggrieved individual, as it must when initiating suit under § 706. It is reasonable to conclude that the presence of a previously filed charge by an aggrieved person was the distinction upon which Congress wished the availability of particular remedies to rise and fall. In fact, this is arguably the most logical interpretation of congressional intent given that the need for compensatory and punitive damages diminishes when the EEOC is not seeking compensation for a specific victim of discrimination.

In mid-June, the Fifth Circuit Court of Appeals became the second Circuit to deal a blow to employers negotiating pattern-or-practice claims with the EEOC when it decided *Bass Pro*. The EEOC filed a lawsuit against *Bass Pro* under Section 706 and Section 707, alleging a pattern or practice of discriminatory hiring against African American and Hispanic applicants. On interlocutory appeal, the Fifth Circuit held that the EEOC could bring pattern-or-practice suits under Section 706 and could carry pattern-or-practice suits to trial with sequential determinations of liability and damages in a bifurcated framework. Unlike the Sixth Circuit, the Fifth Circuit did not indicate the remedies available to the EEOC was affected by whether an aggrieved individual previously filed a charge of discrimination.

### What Should Employers Take Away from *Bass Pro*:

First, employers should continue to monitor this case, especially if they have an ongoing pattern-or-practice case with the EEOC. *Bass Pro* has stated that they believe the Fifth Circuit panel's holding is wrong and that they will continue to fight the decision. Immediately following the decision, *Bass Pro* issued a public statement, stating:

The Fifth Circuit's procedural ruling is perplexing as it provides no guidance for the district court on how to try the EEOC's claims without violating *Bass Pro's* rights under the Seventh Amendment and Due Process Clause. In response to this 'figure it out as we go along' approach, the company is considering a number of potential actions.

On July 28, *Bass Pro* asked the Fifth Circuit rehear the three-judge panel's decision, arguing that the panel's decision conflicted with prior Fifth Circuit precedent and could lead to "tens of thousands of people" seeking compensatory damages, punitive damages and a jury trial. While circuit courts rarely grant entire circuit rehearings, the entire Fifth Circuit will rehear the case if a majority of the circuit judges conclude that a rehearing is necessary to secure or maintain uniformity of the court's decisions or believe that the rehearing would involve a question of exceptional importance. A reversal would help employers in pattern-or-practice claims in the Fifth Circuit and create a split among circuits.

If *Bass Pro* is unsuccessful in challenging the Fifth Circuit's decision, it will be interesting to see how the district court addresses the manageability issues that are inherent in proving compensatory damages under the *Teamsters* approach. The Fifth Circuit provided some insight into how the court might address the manageability concerns for punitive damages, but expressed skepticism about whether the EEOC's

compensatory damages would be manageable. In *Cintas*, the EEOC argued on remand that it did not need to provide the names of all plaintiffs until after Phase I of the bifurcated trial. The district court disagreed and made the EEOC disclose all individual plaintiffs for whom it intended to seek monetary damages prior to Phase I of the bifurcated trial. The court also reopened discovery for a year following production of the list. The parties settled before the litigation progressed to trial.

Second, employers should keep in mind that the EEOC may now be further emboldened to pursue pattern or practice claims knowing that there is favorable precedent in multiple circuits. *Bass Pro* and *Cintas* demonstrate that the EEOC may attempt to push pattern-or-practice cases forward while only identifying a fraction of the putative victims.

Third, the decision may increase the burdens on companies negotiating with the EEOC regarding pattern-or-practice claims. If the EEOC is able to show a pattern-or-practice of discrimination, the EEOC can apply the bifurcated proof scheme to shift the burden to employers to disprove bias at the remedial stage while also seeking compensatory and punitive damages.

Finally, employers need to be aware of this recent precedent when assessing pattern-or-practice claims. Both *Bass Pro* and *Cintas* indicated that the EEOC's initial burden to make out a prima facie case under the *Teamsters* approach is heightened. "This is no simple task, as the plaintiff must prove that discrimination was the company's standard operating procedure – the regular rather than the unusual practice." Furthermore, the EEOC's pursuit of damages still must be presented in a manageable fashion that does not deprive the employer of due process and its Seventh Amendment rights.