U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

May 9, 2012

Michael E. Gans
Clerk of Court
United States Court of Appeals for the
Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Re: *EEOC v. CRST Van Expedited, Inc.*, Nos. 09-3765, 10-1682

Dear Mr. Gans:

The EEOC hereby notifies this Court and the parties—through this Court's electronic case filing system—that EEOC wishes to proceed with its application for rehearing en banc and will rely on the EEOC's petition for rehearing en banc filed with this Court on April 9, 2012.

CRST Van Expedited filed its response to EEOC's rehearing petition on April 26, 2012. On May 4, 2012, EEOC filed a motion for leave to file a reply and submitted, along with the motion, EEOC's proposed reply. Your May 8, 2012, letter to counsel indicates that if EEOC relies on its previously-filed rehearing petition, CRST need not file a new response. EEOC therefore hereby asks the Court to consider, along with EEOC's Petition and CRST's Response, the EEOC's motion for leave to file a reply.

When the panel reissued its opinion on May 8, 2012, the change it made on page 26 of the opinion in response to the rehearing petition filed by Plaintiff-Intervenor Monika Starke caused a slight shift in the slip opinion's page numbers for the remaining text. For the convenience of the Court, EEOC has corrected the citations to the panel's slip opinion in nine places in the rehearing petition and two places in the proposed reply to conform to the page numbers in the re-issued slip opinion. EEOC hereby re-files the April 9, 2012, petition with the nine changes to slip opinion page numbers and no other changes, and re-submits the proposed

Reply with two corrected citations to conform to the page numbers in the re-issued slip opinion and no other changes. The specific changes to the April 9, 2012, Rehearing Petition are:

1. Page 3, 2nd paragraph, line 9: change "54" to "54-55"
2. Page 4, line 6: change "57" to "57-58"
3. Page 4, line 9: change "57-58" to "58"
4. Page 8, line 5: change "56" to "56-57"
5. Page 8, line 9: change "56-57" to "57"
6. Page 8, line 18: change "57" to "57-58"
7. Page 15, line 8: change "54, 56" to "54, 56-57"
8. Page 17, line 1: change "58" to "58-59"
9. Page 17, lines 8-9: change "*See* slip op. at 57" to "Slip op. at 57-58"

The specific changes to the proposed Reply submitted with the motion for leave to file a reply are:

1. Page 2, line 1: change "670 F.3d 897, 912-913 (8th Cir. 2012)" to "slip op. at 17 (8th Cir. May 8, 2012)"
2. Page 2, line 5: change "*See id.* at 913" to "*See id.*"

Please let me know if the Court requires anything else concerning EEOC's petition for rehearing en banc. EEOC relies on this Court's ECF notification to serve this notice and the revised documents on all counsel of record.

Respectfully submitted,

/s/ Susan R. Oxford

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Nos. 09-3764, 09-3765, 10-1682

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff–Appellant,

JANET BOOT et al.,
Plaintiffs–Interveners, and

REMCEY JEUNENNE PEEPLES & MONIKA STARKE,
Plaintiffs–Interveners–Appellants,

v.

CRST VAN EXPEDITED, INC.,
Defendant–Appellee.

On Appeal from the United States District Court
for the Northern District of Iowa
Civil Action No. 07-cv-95-LRR
Hon. Linda R. Reade, U.S.D.J., presiding

PETITION OF APPELLANT EQUAL EMPLOYMENT OPPORTUNITY COMMISSION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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SUGGESTION FOR REHEARING *EN BANC*

This decision by a divided panel of this Court addresses two questions of exceptional importance—the presuit requirements for EEOC enforcement actions, and the determination of supervisor status. First, the panel misconstrued the steps that Title VII of the Civil Rights Act of 1964 requires EEOC to take before resorting to court to redress unlawful workplace discrimination. The panel's requirement that EEOC identify every potential victim before filing suit is unsupported by the language of Title VII and conflicts with the decisions of every other court of appeals that has addressed this question. *See, e.g., EEOC v. Keco Indus.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981); *see also EEOC v. Rhone-Poulenc, Inc.*, 876 F.2d 16 (3d Cir. 1989) (Age Discrimination in Employment Act (ADEA)). The panel's unprecedented imposition of this new requirement will impede EEOC's ability to enforce Title VII and other civil rights laws in workplaces with the most widespread discrimination.[1] The majority's affirmance of dismissal rather than requiring a stay of the action also means significant discrimination will go unremedied, despite EEOC's efforts to fulfill its statutory presuit obligations.

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[1] The Age Discrimination in Employment Act's presuit provisions are modeled after those in Title VII. *See* 29 U.S.C. § 626(b). The Americans with Disabilities Act expressly incorporates Title VII's procedural provisions, including the presuit requirements at issue in this appeal. *See* 42 U.S.C. § 12117(a).

Second, in rejecting EEOC's claim that CRST is liable for trainer harassment of female trainees during over-the-road training, the panel misapplied this Court's supervisor test to the unique circumstances of this case. *See Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). The panel's decision also conflicts with the Supreme Court's application of supervisor liability to the facts in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This error impacts EEOC's ability to seek relief for dozens of female trainees.

In EEOC's view, both issues present questions of exceptional importance. Accordingly, EEOC respectfully requests panel rehearing or rehearing *en banc*. *See generally* Fed. R. App. P. 35(a), (b) (standards for rehearing *en banc*).

STATEMENT OF THE ISSUES

1. Whether EEOC is barred from seeking judicial relief for individuals victimized by workplace discrimination solely because EEOC did not identify them during the investigative phase of its administrative process.

2. Whether the standard for employer liability for supervisor harassment applies to these facts, where CRST trainers not only have the unfettered ability to direct trainees' daily activities but also significantly influence whether trainees are hired as drivers by CRST.

INTRODUCTION

Congress authorized EEOC "to prevent any person from engaging in any unlawful employment practice" as defined by Title VII. 42 U.S.C. § 2000e-5(a). EEOC exercised that authority here by filing this lawsuit against CRST advancing a single claim—that CRST violated Title VII by failing to maintain a workplace free of sexual harassment.

In support of this single legal claim, EEOC offered evidence that dozens of CRST female long-haul truck drivers and trainees were sexually harassed—some repeatedly—by their male over-the-road trainers and co-drivers.[2] EEOC further claimed that CRST was liable under Title VII for this on-going harassment because it took only minimal, legally insufficient steps to remedy the harassment and to prevent future occurrences despite its awareness of the frequency (one harassment complaint a week over the course of several years) and disturbing nature of many of the incidents (including sexual propositioning, sexual assault, and rape). *See* slip op. at 54-55 (Murphy, J., dissenting). EEOC contended CRST was liable for the harassment of trainees under the "supervisor harassment" standard in

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[2] The panel mistakenly believed EEOC brought suit on behalf of only trainees. *See* slip op. at 3 (referencing only EEOC claim concerning "New-Driver Training Program"). EEOC investigated, issued a reasonable cause finding, and filed suit on behalf of trainees and co-drivers alike, to redress discrimination by both trainers and team drivers. *See, e.g.*, VIII-Apx.2107, VII-Apx.1905-06, I-Apx.34, 36.

Faragher, 524 U.S. at 807. As the dissent noted, during mandatory, month-long over-the-road training, "trainees were often confined in a truck for 28 consecutive days with their trainer" who "controlled almost all of a trainee's day to day activities, including when she was permitted to drive, when she could stop to use the bathroom, and when she could use the truck's satellite device to communicate with the outside world." Slip op. at 57-58. In addition, CRST invested trainers with "authority to evaluate their [trainees'] progress" and relied on the trainers' pass/fail evaluations of their trainees "almost exclusively in deciding whether to promote a particular trainee" to full driver status. *Id.* at 58 (Murphy, J., dissenting).

Before filing suit, EEOC undertook the presuit steps outlined in Title VII. Title VII directs EEOC to receive and investigate charges of unlawful conduct. 42 U.S.C. § 2000e-5(b). If EEOC "determines … there is reasonable cause to believe that the charge is true," Title VII requires EEOC to "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." *Id.* But if EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," Title VII authorizes EEOC to file an enforcement action in court. *Id.* at § 2000e-5(f)(1).

In this case, Monika Starke filed a charge in December 2005 alleging she was sexually harassed by two CRST male trainers. EEOC's investigator asked

CRST whether "any other individual has complained to any supervisor or manager" about sexual harassment and, if so, how CRST responded and for any documentation. *See* VII-Apx.1914 (EEOC Request for Information #3). At the time, CRST knew that at least *40* women had complained to its human resources department (HR) during the specified ten-month period, A-317 (Addendum); *see* XIX-Apx.5037-38, but CRST provided EEOC only *two* names. VII-Apx.1916 (CRST response). Later, EEOC asked CRST if any other women had filed sexual harassment charges against it, and CRST provided about a dozen charges. Ultimately, EEOC concluded that CRST had violated Title VII by subjecting Starke and "a class of employees and prospective employees to sexual harassment." VII-Apx.1905-06 (reasonable cause finding).

EEOC invited CRST to conciliate and outlined a process for identifying additional harassment victims so they could be given relief. CRST declined EEOC's invitation to conciliate, not because of the proposed method of identifying victims or because of EEOC's intent to seek relief for those victims, but because CRST could not reach a settlement agreement with Charging Party Monika Starke, who was privately represented. VII-Apx.1908 (e-mail from CRST counsel to EEOC investigator). CRST's decision left EEOC "unable to secure from" CRST "a conciliation agreement acceptable to the Commission," 42 U.S.C. § 2000e-5(f)(1), and provided the statutory predicate for this EEOC enforcement action.

During discovery, CRST provided the information EEOC had sought during the administrative investigation—the names of 182 women who had complained to it about sexual harassment. IV-Apx.1116, 1123. CRST then filed seven summary judgment motions arguing, *inter alia*, that CRST trainers are not "supervisors" and, for various women, challenging the severity of the harassment alleged and whether CRST had notice and responded effectively. In a series of decisions, the district court held that CRST's male trainers were not supervisors and that EEOC had not established actionable workplace harassment with respect to more than half of the 150 women EEOC had identified as claimants. At that point, EEOC's claim for relief for the remaining 67 victims presented issues for resolution by a jury.

None of CRST's motions had challenged EEOC's satisfaction of presuit requirements. *See* R.197, 4/30/09, at 5 n.2. The district court observed, in one of its decisions, that CRST had not complained "that the EEOC failed to conciliate the allegations of Ms. Starke or anyone else." *See id.* CRST thereafter promptly sought an order to show cause challenging the adequacy of EEOC's presuit efforts. *See* R.222 (motion filed 5/11/09). The district court granted CRST's application and dismissed EEOC's lawsuit on that basis. R.263. The court characterized its action as a "remedy" for EEOC's failure to satisfy its Title VII presuit obligations to investigate, issue a reasonable cause finding, and offer CRST a meaningful opportunity to conciliate before filing suit. *Id.* at 36-38.

Panel Decision

A divided panel of this Court affirmed, stating: "The present record confirms that the EEOC wholly failed to satisfy its statutory pre-suit obligations as to these 67 women, thus we cannot conclude that the district court abused its discretion in dismissing the EEOC's suit." Slip op. at 24. The majority relied on three district court decisions—*EEOC v. Dillard's, Inc.*, 2011 WL 2784516 (S.D. Cal. July 14, 2011), *EEOC v. Jillian's of Indianapolis*, 279 F. Supp. 2d 974 (S.D. Ind. 2003), and *EEOC v. Outback Steak House of Fla.*, 520 F. Supp. 2d 1250 (D. Colo. 2007)—in concluding that, because EEOC had not identified each victim or investigated her individual allegations, CRST had "no meaningful opportunity to conciliate." Slip op. at 18-23 (citation omitted).

In dissent, Judge Murphy noted that the majority's rule that "EEOC must complete its presuit duties for each individual alleged victim of discrimination when pursuing a class claim" imposes a "new requirement" that is not found in Title VII or this Court's prior cases and is inconsistent with decisions from other circuits, including the district court cases on which the majority relied. Slip op. at 54-56. Judge Murphy further noted that since EEOC asked CRST during the investigation whether other women had complained and CRST furnished only two names even though it knew "many women had reported harassment by trainers or codrivers during long haul trips," the rule announced by the majority "in effect

rewards CRST for withholding information from the Commission." *Id.* at 54. Judge Murphy also noted that the majority's rule "punishes the EEOC for employer recalcitrance and weakens [EEOC's] ability to enforce Title VII effectively," thereby frustrating the goal underlying the 1972 amendments to Title VII, *i.e.*, "to strengthen the EEOC's enforcement powers." *Id.* at 56-57. Judge Murphy observed that this case illustrates the "undesirable effects" of the majority's ruling, because "even though the EEOC made substantial efforts to investigate and conciliate prior to filing its lawsuit," the panel affirmed dismissal of "scores of women claimants with apparent trial worthy claims." *Id.* at 57.

The majority also affirmed the district court's ruling that CRST's trainers ("Lead Drivers") were not "supervisors." The panel reasoned that under this Court's precedent, trainers were more like "team leaders" than "supervisors" because they could only dictate "minor aspects of the trainees' work experience, such as scheduling rest stops during the team drive" and issue "non-binding" recommendations on whether trainees passed their 28-day over-the-road training. Slip op. at 35-37. Judge Murphy disagreed, noting that EEOC demonstrated trainers could exert a level of control over trainees similar to the supervisors' "unchecked authority" over their subordinates in *Faragher*. *Id.* at 57-58. Judge Murphy was also persuaded that CRST's reliance on trainers' pass/fail evaluations of trainees and the practical reality created by the confined space of a truck over

long periods on the road weighed in support of finding CRST's trainers to be supervisors. *Id.* at 58-59.

ARGUMENT

I. The Panel Majority's Decision Departs from Longstanding Legal Standards Governing EEOC Presuit Requirements and, if Left Standing, Will Impede EEOC's Ability to Enforce Title VII.

The panel's decision should be reconsidered for three reasons: (1) the panel's novel rule is unsupported by the text of the statute or judicial precedent; (2) the panel misunderstood a critical fact—that CRST misled EEOC's investigator about the extent of harassment in the company; and (3) the panel's decision, if allowed to stand, will undermine efforts to eradicate widespread discrimination.

First, the panel's decision finds no support in the language of Title VII. Title VII requires EEOC only to investigate a charge, issue a cause finding, and offer the respondent an opportunity to conciliate before filing suit. EEOC undertook all these administrative steps here before filing this "class" lawsuit alleging CRST was liable for sexual harassment of women trainees and co-drivers.

Courts, including this Court, have long held that EEOC can bring a civil suit on any discrimination "stated in the charge or developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding." *See, e.g.*, *EEOC v. Delight Wholesale*, 973 F.2d 664, 668-69 (8th

Cir. 1992); *see also EEOC v. Gen. Elec. Co.*, 532 F.2d 359, 364-70 (4th Cir. 1976). From the outset of EEOC's investigation here, EEOC considered whether other women had experienced the same form of discrimination as Starke, asking CRST whether anyone else had complained of sexual harassment, internally or externally. *See* slip op. at 54-55 (Murphy, J., dissenting).

Although CRST disclosed to EEOC only a fraction of the sexual harassment complaints its HR Department had documented, EEOC received enough information to conclude CRST had violated Title VII by subjecting Starke and "a class of employees (*i.e.*, female drivers) and prospective employees (*i.e.*, female trainees) to sexual harassment." *Id.* at 55. EEOC so notified CRST and invited CRST to conciliate that finding. EEOC specifically suggested a method for identifying additional victims so they could be provided monetary relief, and a successful conciliation would have led to agreement about such relief and changes in CRST's anti-harassment practices. But CRST's decision to discontinue those conciliation discussions left EEOC "unable to secure from [CRST] a conciliation agreement acceptable to the Commission." 42 U.S.C. § 2000e-5(f)(1). Thus, EEOC fully satisfied the statutory prerequisites Congress imposed on EEOC before filing suit against CRST on EEOC's single claim that CRST failed to prevent and remedy sexual harassment of Starke and other female drivers and trainees. CRST's refusal to conciliate cannot serve to impose an extra-statutory

duty on EEOC to persist in fruitless efforts to identify additional victims before resorting to the court to remedy the Title VII violation EEOC had found.

The majority's decision that EEOC could pursue judicial relief only on behalf of discrimination victims EEOC identified during the administrative investigation imposes just such an extra-statutory requirement, with no support in the language of Title VII. Further, it conflicts with the Supreme Court's decision in *General Telephone v. EEOC*, 446 U.S. 318, 324 (1980), that "EEOC need look no further than § 706 for its authority to bring suit in its own name for the purpose, among others, of securing relief for a group of aggrieved individuals."[3]

The majority's decision also conflicts with the decisions of other appeals courts to address this question. These courts have uniformly permitted EEOC to seek judicial relief for multiple victims without first having to identify each potential victim during the administrative process and investigate their individual allegations, so long as the lawsuit asserts the same type of discrimination specified in the reasonable cause finding. *See, e.g.*, *EEOC v. Am. Nat'l Bank*, 652 F.2d

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[3] In *General Telephone*, the Supreme Court held EEOC was not required to seek class certification under Rule 23 before pursuing class-wide judicial relief for the company's female employees in California, Idaho, Montana, and Oregon based on alleged discrimination in maternity leave, access to craft jobs, and promotion to managerial positions. 446 U.S. at 320-21. EEOC had filed suit after investigating several individual charges and concluding discrimination was widespread. *See id.* at 320. Nothing in the Court's opinion indicates EEOC identified all potential claimants before filing suit, nor did the Court suggest that was necessary.

1176, 1185-86 (4th Cir. 1981) (reversing district court decision, 1979 WL 25, *83 (E.D. Va. 1979), that barred EEOC from seeking relief for 51 claimants identified only in discovery); *EEOC v. UPS*, 860 F.2d 372, 374 (10th Cir. 1988) (permitting EEOC to challenge allegedly discriminatory policy that may affect unidentified members of a defined class); *EEOC v. Rhone-Poulenc*, 876 F.2d 16, 17 (3d Cir. 1989) (holding that under ADEA's comparable conciliation requirement, 29 U.S.C. § 626(b), EEOC need not conciliate individual class members before seeking judicial relief). *Accord EEOC v. UPS*, 94 F.3d 314, 318 (7th Cir. 1996) (recognizing EEOC's ability "to bring an action on behalf of a class of unidentified individuals") (dicta) (cited in slip op. at 19); *see also, e.g., Dillard's*, 2011 WL 2784516, at *6 (EEOC "not required to identify every potential class member") (cited in slip op. at 18-22), *denying reconsid.*, 2012 WL 440887, at *8-9 (S.D. Cal. Feb. 9, 2012); *Dinkins v. Charoen Pokphand USA*, 133 F. Supp. 2d 1237, 1245-46 (M.D. Ala. 2001) (applying this principle to a class sexual harassment claim).

EEOC v. Keco Industries, 748 F.2d 1097 (6th Cir. 1984), is particularly apposite. While investigating a single woman's charge, EEOC found Keco had discriminated against women as a class and sued seeking relief for the class. *Id.* at 1098. The Sixth Circuit reversed the district court's dismissal of the class claim, holding that EEOC had investigated, found cause, and conciliated the "class" allegations and that the district court had erred in examining the sufficiency of that

investigation and conciliation. *Id.* at 1100-02. The Sixth Circuit also held that EEOC's class-wide findings and conciliation had reasonably grown out of the initial individual charge, stating "the class-based claim is basically the same as Ms. Grimes' claim; only the number of [claimants] has changed." *Id.* at 1102. So too here.

The two district court decisions the panel majority cited extensively (slip op. at 18-22) do not support its ruling. As Judge Murphy correctly noted (*id.* at 56), neither decision barred EEOC from seeking judicial relief for individuals unknown to EEOC during its investigation. Rather, those district courts simply limited EEOC's lawsuit to the same *geographic scope* as EEOC's preceding investigation and conciliation efforts, a factor not at issue here. *See Dillard's*, 2011 WL 2784516, at *6-8 (permitting local class without having identified every class member); *Jillian's*, 279 F. Supp. 2d at 979-80, 982-83 (same); *see also Outback Steak House*, 520 F. Supp. 2d at 1255-69 (allowing suit for three-state region).

Thus, contrary to the majority's apparent belief, *see* slip op. at 18-22, the decisions the majority cited actually *permitted* EEOC to do what the majority now prohibits EEOC from doing here: identify additional victims of the same form of discrimination, within the same geographic scope of EEOC's investigation, after EEOC's lawsuit is filed. As the dissent correctly noted, in this critical sense, the majority's decision is unquestionably "unprecedented." Slip op. at 54.

Second, the panel's decision ignores the critical fact that EEOC asked CRST, at the very outset of the investigation, whether "any other individual has complained to any [CRST] supervisor or manager" about sexual harassment over a specified ten-month period, and CRST withheld the vast majority of the names it already knew. Despite the record evidence on this point, *see* pp.4-5, *supra*, the majority wrongly stated (slip op. at 6) that "EEOC's initial request for information … did not seek information relating to other potential victims" and "CRST … furnished the EEOC with all of the information that the EEOC demanded in the request for information." *See also id.* at 21 (again omitting mention of EEOC's early request for names of other women who complained to CRST of harassment). It is particularly inappropriate to fault EEOC for not identifying victims during the investigation when CRST knowingly withheld that information.

Third, the panel's decision will undermine EEOC's future enforcement efforts. In this case, EEOC completed its investigation, engaged in conciliation, and filed this lawsuit not knowing what CRST knew—that CRST had received and processed over a hundred complaints from female drivers of sexual harassment by their male trainers and co-drivers. Slip op. at 54 (Murphy, J., dissenting). As the dissent correctly noted, "[t]he majority's new requirement that the EEOC separately investigate and conciliate each alleged **victim** of discrimination" permits employers to "avoid disclosure to the EEOC of complaining workers while the

Commission is conducting its investigation and conciliation, then reveal the names during court ordered discovery, and seek dismissal of the entire case on the ground of inadequate presuit efforts by the EEOC." *Id.* at 56. Such a result, as the dissent observed, "rewards CRST for withholding information from the Commission" during EEOC's investigation and "punishes the EEOC for employer recalcitrance and weakens its ability to enforce Title VII effectively," thereby frustrating "the underlying goal of the 1972 amendments intended to strengthen the EEOC's enforcement powers." *Id.* at 54, 56-57 (citing *Gen. Tel.*, 446 U.S. at 325). The majority's rule all but encourages employers to lie to EEOC during investigations with the hope of benefiting later if EEOC attempts enforcement in court.

The Commission further urges reconsideration of the majority's decision to affirm dismissal rather than stay the action for further conciliation, as permitted by Title VII. 42 U.S.C. § 2000e-5(f)(1). The district court rejected that option because, in its view, EEOC had "wholly abdicated its role in the administrative process." R.263 n.24. EEOC's substantial efforts to conciliate the "class" claim in this case and CRST's refusal to join in that effort should not leave potential victims of discrimination without a remedy. As the dissent concluded, if EEOC's presuit efforts were somehow insufficient, dismissal was "far too harsh a sanction to impose on the EEOC." Slip op. at 57 (quoting *EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981)).

II. The Panel Decision Applies *Joens* Too Narrowly and Misconstrues Record Facts in Rejecting *Faragher*'s Liability Rule.

EEOC also requests reconsideration of the question whether CRST's long haul trainers were "supervisors" for purposes of CRST's liability for sexual harassment under *Faragher*. The majority's conclusion that trainers are not supervisors (slip op. at 35-37) fails to appreciate the unique circumstances of a trainee's over-the-road workplace and conflicts with Supreme Court and other circuits' application of "supervisor" liability to particular situations. *See Faragher*, 524 U.S. at 808; *e.g.*, *Whitten v. Fred's*, 601 F.3d 231, 244-47 (4th Cir. 2010).

The majority misread the record in concluding that "EEOC has adduced no evidence suggesting that a CRST Lead Driver possessed the power to do anything more than assign a trainee to specific tasks already within that trainee's normal, day-to-day duties." Slip op. at 36. To the contrary, even CRST's HR director characterized the lead driver/trainee relationship as "'really no different than … supervisors'" in other industries and organizations. *See* slip op. at 58 (Murphy, J., dissenting). Trainers could "reassign [trainees] to significantly different duties" by simply refusing to let them drive the hours or gain the types of driving experiences CRST mandated during these four weeks. *See, e.g.*, V-Apx.1191, 1194-95; V-Apx.1283 (trainers instructed to tell trainees they were the "captain of the ship"). CRST gave trainers instructions, *see id.*, but exercised no contemporaneous oversight to assure compliance with these instructions in the isolated long haul

"workplace." *See* slip op. at 58-59 (Murphy, J., dissenting). EEOC demonstrated that some trainers abused their power by depriving their trainees of specific training needed to be a successful long haul truck driver. *E.g.*, XV-Apx.4011.

As the dissent noted, CRST's trainers' extensive control over trainees' work experience is like that of the two employees in *Faragher*, 524 U.S. at 808, whom the Supreme Court assumed "were supervisors where they had been 'granted virtually unchecked authority over their subordinates, directly controlling and supervising all aspects of [the alleged victim's] day-to-day activities.'" Slip op. at 57-58. In applying *Joens*, the majority (*id.* at 35-37) failed to recognize that the "practical reality" of CRST's "workplace"—where two persons share the confined space of its long haul trucks, physically isolated from other CRST managers and employees, for up to 28 consecutive days at a time and where the trainer is able to exercise unchecked control over virtually every aspect of a trainee's daily life—is unlike any this Court has addressed in its prior decisions. *See id.* at 58 (Murphy, J., dissenting) (discussing *Cheshewalla v. Rand & Son Const.*, 415 F.3d 847, 851 (8th Cir. 2005); *Weyers v. Lear Operations*, 359 F.3d 1049, 1057 (8th Cir. 2004)).

Further, the majority erroneously stated EEOC offered no evidence that CRST simply "rubber stamped" its trainers' pass/fail recommendations. Slip op. at 36. To the contrary, EEOC offered the uncontested testimony of CRST Fleet Manager Michael Wuestenberg that if a trainer told CRST at the end of 28 days

that the trainee passed, CRST accepted that evaluation without any further review and the student became a co-driver, *see* XIX-Apx.5184 (cited in EEOC Opening Brief at 6), a circumstance some trainers used to coerce sexual favors from their trainees in exchange for a promise to "pass" them at the end of 28 days. *E.g.*, X-Apx.2598-600; XVII-Apx.4732-33. This Court should grant panel or *en banc* review because a proper application of the *Joens* test to the facts of the CRST "workplace," in contrast to the workplaces in this Court's prior decisions, mandates reversal of the district court's summary judgment decision on this point.

CONCLUSION

The panel's unprecedented decision that EEOC did not satisfy Title VII's presuit requirements is unsupported by the text of Title VII or judicial precedent and conflicts with the only other circuit decisions to have addressed the question. The decision that CRST's trainers are not "supervisors" is a misapplication of the *Joens* standard and inconsistent with *Faragher*. EEOC requests panel rehearing or rehearing *en banc* to correct these errors.

Respectfully submitted,

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/s/ Susan R. Oxford

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CERTIFICATE OF COMPLIANCE

This rehearing petition complies with the type-volume limitation of Fed. R. App. P. 40(b) because it contains 18 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the page limited permitted by this Court's order dated April 4, 2012. This rehearing petition 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

/s/ Susan R. Oxford

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Dated: April 9, 2012

CERTIFICATE OF SERVICE

I, Susan R. Oxford, hereby certify that on April 9, 2012, I filed electronically with the Clerk of the Court EEOC's Rehearing Petition and, on the same date, by the same means, served a copy of EEOC's Rehearing Petition on the counsel of record listed below, both of whom are registered ECF users. I further certify that, following the panel's issuance of a revised opinion on May 8, 2012, on May 9, 2012, I filed electronically with the Clerk of the Court the same EEOC Rehearing Petition with nine corrected page references to the dissent's opinion. Also on May 9, 2012, served a copy of EEOC's revised Rehearing Petition on the counsel listed below, via this Court's electronic case filing (ECF) system. I certify that there are no other changes to the rehearing petition other than the corrected pages noted in the EEOC cover letter, filed with the Court and served on the parties this same date.

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DATED: May 9, 2012

Nos. 09-3764, 09-3765, 10-1682

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff–Appellant,

JANET BOOT et al.,
Plaintiffs–Interveners, and

REMCEY JEUNENNE PEEPLES & MONIKA STARKE,
Plaintiffs–Interveners–Appellants,

v.

CRST VAN EXPEDITED, INC.,
Defendant–Appellee.

On Appeal from the United States District Court
for the Northern District of Iowa
Civil Action No. 07-cv-95-LRR
Hon. Linda R. Reade, U.S.D.J., presiding

EEOC'S MOTION FOR LEAVE TO FILE A REPLY TO CRST'S RESPONSE TO EEOC'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Plaintiff-Appellant EEOC hereby moves this Court for leave to file a Reply to the Response filed by CRST to EEOC's petition for rehearing. In support of this motion, EEOC states:

1. On February 22, 2012, a divided panel of this Court affirmed the district court's dismissal of EEOC's lawsuit against CRST. In its lawsuit, EEOC alleged that CRST violated Title VII of the Civil Rights Act of 1964 by failing to remedy and prevent sexual harassment of affected hundreds of women who drove long-haul trucks for CRST with male co-drivers or male trainers. The Hon. Diana Murphy dissented with respect to two of the panel's rulings: that CRST's trainers are not "supervisors" and that EEOC failed to satisfy Title VII's presuit requirements because EEOC's lawsuit sought relief for women EEOC had not identified during EEOC's administrative investigation.

2. On April 9, 2012, EEOC petitioned this Court for panel rehearing or rehearing en banc. This Court requested a response from defendant-appellee CRST, which CRST filed on April 26, 2012.

3. CRST makes a number of arguments in its Response that EEOC contends are incorrect, misleading, or otherwise warrant a reply by EEOC. EEOC respectfully submits that permitting EEOC to reply to CRST's arguments will assist this Court in deciding the important and previously undecided questions raised in EEOC's rehearing petition.

4. In particular, CRST misleadingly asserts, in its Response, that EEOC "*stipulated*" that it failed to satisfy any of Title VII's presuit requirements by not investigating, issuing a reasonable cause finding, or offering CRST an opportunity

to conciliate before seeking relief for women other than Charging Party Starke. *See, e.g.*, CRST Response at 1 (referring to "EEOC's stipulated failure to satisfy any of Title VII's three statutory pre-suit requirements"). EEOC made no such stipulation, and EEOC seeks to file this Reply in part to correct this misleading assertion.

5. CRST also misstates that EEOC "demanded" during conciliation that, to avoid being sued, CRST must agree to remedies for an unknown number of women to be identified by sending out letters to female employees and former employees. CRST Response at 10. EEOC made no such demand, and EEOC seeks to file this Reply in part to clarify this aspect of the factual record.

6. Further, CRST concedes, in its Response, that EEOC can litigate certain types of case without first identifying all of the potential claimants during the administrative process. CRST argues that those cases differ from the present case because they involve claims of "across-the-board employment discrimination" that "are inherently class claims," elements that CRST asserts are absent from this case. CRST Response at 7-9 & n.3. Underlying CRST's argument is its mistaken assumption that EEOC's lawsuit is comprised of "unconnected claims."

7. CRST's assumption is crucial to its rationale for defending the panel majority's decision. The assumption is incorrect, however, for at least three

reasons. EEOC seeks to file this Reply in part to address the reasons why CRST's linchpin assumption is, in fact, incorrect.

8. Finally, EEOC contended below and on appeal that CRST knowingly withheld critical information concerning other women who had complained to CRST of sexual harassment, information EEOC had requested at the outset of the administrative investigation. CRST, in its Response, argues this is a "baseless accusation" that the district court rejected. *See* CRST Response at 12-13.

9. This point is very important, in the EEOC's view. Indeed, Judge Murphy, in her dissent, agreed that the record shows CRST withheld the requested information and stated that the majority's decision, in effect, rewards CRST for having withheld this requested information from EEOC and is likely to encourage other employers to withhold information during future EEOC investigations. EEOC seeks to file this Reply in part to explain why Judge Murphy is correct on this critical factual point.

10. On May 4, 2012, I left a voice message and sent an email message to counsel for CRST, James T. Malysiak, Esq., advising him that EEOC was filing this motion. I attached the motion and proposed Reply to my email.

WHEREFORE EEOC respectfully asks this Court for leave to file a Reply to CRST's Response to EEOC's rehearing petition. Pursuant to the instructions of

the Office of the Clerk, the Reply is being submitted simultaneously with this motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan R. Oxford, hereby certify that on May 4, 2012, I filed electronically with the Clerk of the Court EEOC's Motion for Leave to File a Reply to CRST's Response to EEOC's Rehearing Petition. I further certify that on the same date, by the same means, I served a copy of EEOC's Motion to the following counsel of record, all of whom are ECF users:

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On Appeal from the United States District Court
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Civil Action No. 07-cv-95-LRR
Hon. Linda R. Reade, U.S.D.J., presiding

APPELLANT EEOC'S REPLY IN SUPPORT OF EEOC'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

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EEOC has petitioned this Court for rehearing of the panel majority's rulings that CRST's trainers are not "supervisors" and that EEOC failed to satisfy Title VII's presuit requirements. At this Court's request, CRST filed its response on April 26. With leave of the Court, EEOC offers this reply to CRST's response.

At the outset, CRST misleadingly asserts that EEOC stipulated that it did not investigate, issue a reasonable cause finding, or offer CRST an opportunity to conciliate before seeking relief for women other than Charging Party Starke. CRST Response at 1 ("EEOC's stipulated failure to satisfy any of Title VII's three statutory pre-suit requirements"). EEOC made no such stipulation. In response to a specific inquiry by the district court, the EEOC acknowledged that it did not investigate the individual allegations of the 67 women whom the district court found had actionable claims of sexual harassment. *Id.* at 11-12. EEOC has always maintained, however, that Title VII does not require this, and that the steps EEOC took during the administrative process satisfy Title VII's requirements for a lawsuit seeking relief for multiple women who experienced the same form of discrimination—CRST's failure to remedy and prevent sexual harassment as required by Title VII. Nothing in CRST's Response undermines this position.

Specifically, the district court and this Court both acknowledged that EEOC was entitled to expand its investigation of Starke's charge to consider whether CRST failed to remedy and prevent sexual harassment of female drivers. *See*

EEOC v. CRST Van Expedited, slip op. at 17 (8th Cir. May 8, 2012). The EEOC *did* expand the investigation in this manner, by asking CRST at the outset whether other women had complained to it about harassment, *see* discussion *infra*, and, later, by asking whether other women had filed sexual harassment charges against CRST. *See id.* The district court correctly acknowledged "that it could 'not second-guess the EEOC's finding in the Letter of Determination that,' *inter alia*, reasonable cause existed 'to believe that [CRST] ha[d] subjected a class of employees and prospective employees to sexual harassment, in violation of Title VII,'" and this Court did not disturb that ruling on appeal. *See id.* (quoting *EEOC v. CRST*, 2009 WL 2524402, at *15 (N.D. Iowa 2009)). EEOC then offered CRST an opportunity to conciliate this "class" finding.

EEOC did not "demand" that, to avoid being sued, CRST must agree to remedies for an unknown number of women who were to be identified by sending letters, as CRST wrongly asserts. CRST Response at 10. Rather, CRST's counsel asked EEOC's investigator for EEOC's conciliation proposal, and EEOC suggested, among other things, a procedure for identifying additional victims so they could be compensated, a process that would have involved negotiation and give-and-take between CRST and EEOC. CRST was free to accept EEOC's proposal, offer a counter-proposal, or decline to discuss conciliation any further. CRST declined the invitation to conciliate. As explained in EEOC's rehearing

petition, when an employer refuses to come to the bargaining table, nothing in Title VII or this Court's prior decisions requires EEOC to do more than it did here before bringing a suit, in the public interest, to redress a discriminatory practice, and numerous courts have ruled that such presuit efforts are sufficient. *See, e.g.*, *EEOC v. Keko Indus., Inc.*, 748 F.2d 1097 (6th Cir. 1984); *EEOC v. Am. Nat'l Bank*, 652 F.2d 1176 (4th Cir. 1981); *EEOC v. Rhone-Poulenc, Inc.*, 876 F.2d 16 (3d Cir. 1989), aff'g 677 F. Supp. 264 (D.N.J. 1988) (ADEA).

Indeed, CRST concedes that EEOC can litigate certain types of cases, including the cases cited above, without first identifying all of the potential claimants during the administrative process, but CRST argues that those cases differ from this one because they involve claims of "across-the-board employment discrimination" that "are inherently class claims." CRST Response at 7-9 & n.3. Underlying CRST's argument that the present case differs from cases CRST concedes do not require prior identification of victims is CRST's mistaken assumption that EEOC's suit against it is composed of "unconnected claims."

Specifically, CRST asserts that after the district court ruled EEOC lacked sufficient evidence to demonstrate a "pattern-or-practice" of discrimination, EEOC's lawsuit addressed only "individual claims" that are "unrelated" and "unconnected." *See, e.g.*, CRST Response p.1 (referring to EEOC's lawsuit as composed of "completely unrelated individual claims"), *see also id.* at 4

(characterizing EEOC's lawsuit as involving 268 "individual Title VII sexual harassment claims lacking any practical connection"), 8 (referencing "unrelated individual claims"). EEOC explained in its rehearing petition that its lawsuit involves a single claim that CRST violated Title VII by failing to prevent and remedy sexual harassment of female drivers and trainees. CRST's assumption that this lawsuit involves "unconnected claims," an assumption crucial to CRST's rationale in defending the panel's decision, is incorrect for at least three reasons.

First, CRST misapprehends the nature of EEOC's claim that CRST violated Title VII. To support its contention that EEOC's lawsuit is a collection of unrelated individual claims, CRST argues that it does not operate a "unified workplace" and that the alleged Title VII violations occurred in multiple locations (the individual cabs of long-haul trucks). CRST further suggests EEOC erred by not interviewing any of the accused harassers, as if the differing circumstances of each woman's allegations somehow demonstrate these are unconnected "claims." CRST Response at 9, 11. However, Title VII imposes a duty of care on *employers*, and EEOC's lawsuit properly challenges *CRST*'s conduct—specifically, the inadequacy of CRST's responses to numerous complaints of harassment based on the information CRST had before it. *See Isaacs v. Hill's Pet Nutrition, Inc.*, 485 F.3d 383, 386 (7th Cir. 2007) (employer liable even though harassment committed by different harassers at different times in different locations because "entity

responsible for complying with Title VII is the employer" and employer liable based on failure to respond properly); *see also Sandoval v. Am. Bldg. Maintenance Indus.*, 578 F.3d 787, 801-03 (8th Cir. 2009) (defendant's receipt of nearly 100 similar harassment complaints gave constructive notice even though harassment involved different victims and alleged harassers at hundreds of different locations).

Second, the summary judgment record shows the individual allegations of the women on whose behalf EEOC seeks relief are connected by CRST's consistent responses to reports of sexual harassment. CRST required all sexual harassment complaints to be reported to CRST's Human Resources Director, who maintained a chart of the complaints he received. V-Apx.1189, 1310; XIX-Apx.5121; A-317-19. CRST's written policy states that "depending on the investigation findings and severity of the behavior," harassment can result in "written warning; probation; suspension; termination." V-Apx.1310. But in response to hundreds of sexual harassment complaints, CRST identified not one instance where an accused harasser received a written warning, probation, or suspension, and only two instances of drivers terminated for harassment.

Instead, in virtually every case—even cases of sexual assault and rape—CRST separated the parties, gave the accused harasser a verbal warning, and sometimes restricted the accused harasser from driving with other women for a brief period of time. A-317-19; III-Apx.878-79; VI-Apx.1433-34; XIX-Apx.5016,

5121-23, 5135. The uniformity of CRST's responses to harassment complaints makes this case similar to those where CRST concedes EEOC can bring an enforcement action on behalf of multiple individuals regardless of whether they were identified during investigation. The distinction CRST draws is one without a difference. *See* CRST Response at 7-8 & n.3.

Third, CRST mistakenly suggests that the district court's ruling that EEOC's evidence was insufficient to establish a "pattern or practice" of discrimination has some bearing on EEOC's ability to proceed against CRST on behalf of multiple aggrieved individuals. The district court's rejection of EEOC's pattern-or-practice theory impacts the parties' respective burdens of proof and their presentation of those proofs at trial. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336-340 (1977). It in no way, however, precludes an EEOC claim that CRST failed to prevent and remedy sexual harassment of the 67 women who remained in the case after the district court's other summary judgment rulings.

Indeed, CRST has identified no statutory basis for its contention that EEOC has different administrative presuit requirements when it seeks relief for multiple victims of discrimination depending on whether EEOC plans to litigate the case under a *Teamsters* pattern-or-practice framework or under the "pretext" framework provided in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). No court has ever imposed such a rule, and it would make no sense to decide, years after

EEOC completed its administrative proceedings, that there was a deficiency in the administrative process based on subsequent evidentiary rulings in court.

This Court did not disturb the district court's ruling that 67 of the women for whom EEOC sought relief presented actionable claims of sexual harassment, including a basis, in each case, for finding that CRST failed to take effective steps to prevent or remedy severe or pervasive harassment of which CRST knew or should have known. A-256, 272 (describing the allegations of the 67 women as "dozens of potentially meritorious sexual harassment claims" that "may now never see the inside of a courtroom"). For the reasons noted above, CRST wrongly characterizes the allegations of these 67 women as "unconnected." Because CRST's argument hinges on this mistaken assumption, CRST's argument fails.

Finally, EEOC's contention that CRST withheld information that EEOC requested during this investigation is not a "baseless accusation," as CRST asserts, and to the extent the district court concluded that EEOC's first information request was "limited to the alleged harassment described in the Starke charge," the district court erred. *See* CRST Response at 12-13. EEOC's first information request asked CRST whether "any other individual has complained to any supervisor or manager concerning the conduct described in the charge" between January 2 and November 2, 2005, and, if so, how CRST responded. VII-Apx.1914. The "conduct described in the charge" was sexual harassment, and CRST understood

that EEOC was interested in knowing whether other women had complained to CRST of sexual harassment because CRST provided the names of two women—a female trainee who had complained of sexual harassment by her trainer and a female driver who had complained of sexual harassment by her co-driver. Both complaints are wholly unrelated to Starke's complaint and neither involved Starke's accused harassers, further demonstrating that CRST understood EEOC's request as EEOC intended it: a request for the names of other women who had complained to CRST about sexual harassment (of which there had actually been many more than the two CRST provided—over 40 women in ten months, in fact).

The EEOC's contention that CRST understood the question as EEOC intended it, and intentionally withheld the requested information, is further bolstered by the fact that another EEOC office, investigating a sexual harassment charge filed by another CRST female driver, Karen Shank, asked CRST around the same time "whether *any* complaints of sexual harassment … have *ever been made formally or informally*." XIX-Apx.5037-38. *The very same month* that Human Resources Director Jim Barnes provided only two names to EEOC in the Starke investigation, he provided the same two names—and only those two names—to the other EEOC office. In his deposition, Barnes admitted he knew, at the time of these inquiries, that he had received many more sexual harassment complaints

from CRST's female drivers, and he could not explain why he withheld this requested information from EEOC. *Id.* at 5037-38.

CRST contends that the district court and the panel majority considered this argument and rejected it. CRST Response at 12-13. However, this Court was obligated to consider the factual record *de novo* and make its own determination whether CRST withheld, during the investigation, information EEOC had requested that was critical to EEOC's understanding of the full scope of the harassment problem. The record demonstrates unmistakably that CRST withheld such information here. In so doing, CRST seriously misled EEOC as to the full extent of the sexual harassment problem at CRST.

EEOC relies on its rehearing petition for CRST's other arguments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply to CRST's response to EEOC's rehearing petition is hereby submitted in conjunction with EEOC's motion seeking leave of this Court to file the within Reply. The proposed reply 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14 point.

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Dated: May 9, 2012

CERTIFICATE OF SERVICE

I, Susan R. Oxford, hereby certify that on May 4, 2012, I filed electronically with the Clerk of the Court a motion seeking leave for EEOC to file a Reply to CRST's Response to EEOC's Rehearing Petition, and I submitted with the motion this proposed EEOC Reply. I further certify that on the same date, by the same means, I served a copy of EEOC's motion and proposed reply on the counsel of record listed below, all of whom are registered ECF users. I further certify that, following the panel's issuance of a revised opinion on May 8, 2012, on May 9, 2012, I filed electronically with the Clerk of the Court the same EEOC motion and proposed Reply with two corrected page references to the court's opinion as explained in the letter filed electronically with the Clerk of the Court on this date, and served a copy on the counsel listed below via the Court's ECF system.

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