No. 13-3159

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,
Plaintiff/Appellant,

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

REPLY BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

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INTRODUCTION

In its opening brief (EEOC-Brf), EEOC argued that the district court committed legal error and abused its discretion by imposing fees and costs on EEOC under *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), because CRST did not establish *both* that it "prevailed" below *and* that EEOC's lawsuit was frivolous or unfounded.

EEOC argued that CRST is not a prevailing party, as EEOC obtained relief in this suit through a settlement agreement incorporated into the district court's dismissal order. EEOC-Brf at 34-58. EEOC further argued that the district court's dismissal of EEOC's lawsuit for failure to satisfy Title VII's pre-suit requirements was not a ruling on the merits and, therefore, CRST is not a prevailing defendant for purposes of Title VII's fee-shifting provision. *Id.* at 49-58 (relying on *Marquart v. Lodge 837, Int'l Ass'n of Machinests & Aerospace Workers*, 26 F.3d 842, 851-52 (8th Cir. 1994)).

EEOC also argued that the district court's ruling that EEOC's lawsuit was "frivolous, unreasonable, or without foundation" was an abuse of the court's discretion because the district court had identified 67 EEOC

claimants who alleged actionable sexual harassment; this Court identified two more; and EEOC presented reasonable arguments with respect to the rest. EEOC-Brf at 59-107. EEOC further argued that it reasonably believed it had satisfied Title VII's pre-suit requirements for bringing an action seeking relief for multiple victims of the same form of discrimination, and one member of this Court, in the first appeal, agreed with EEOC on this point. *Id.* at 62-77.

CRST argues in its response brief (CRST-Brf) that EEOC's lawsuit consisted of a pattern-or-practice *claim* that the district court dismissed as lacking supporting evidence and 154 individual, unrelated claims, on only one of which EEOC prevailed (Monika Starke). CRST-Brf at 27-40. CRST further argues that Title VII's pre-suit requirements are elements of EEOC's claim and, therefore, the district court's dismissal based on pre-suit considerations is a ruling on the merits. *Id.* at 41-47. On these bases, CRST argues it is a "prevailing defendant."

CRST also argues that EEOC lacked reasonable grounds to believe it had satisfied Title VII's pre-suit requirements and reasonable grounds for

seeking relief for the claimants addressed in the court's summary judgment rulings. CRST-Brf at 48-76. Finally, CRST argues that the district court properly awarded CRST appellate fees—despite the dissenting opinion of one member of this Court agreeing with EEOC on two critical legal questions, as well as the majority's unanimous reversal of the district court on the issue of judicial estoppel. *Id.* at 77-81. CRST's arguments on all these points lack merit; the imposition of fees and costs should be reversed.

ARGUMENT

I. The District Court Committed Legal Error in Awarding CRST Fees and Costs because CRST Is Not a Prevailing Defendant.

CRST's brief fails to address this Court's ruling in the first appeal and controlling Supreme Court precedent. This Court vacated the district court's initial fee award, stating: "In light of our reversals of a couple of the district court's summary judgment orders, CRST is no longer a 'prevailing' defendant because the EEOC still asserts live claims against it." A-290. CRST fails to explain how, after this Court vacated the first fee award on the ground that CRST was no longer a prevailing defendant, CRST became

a prevailing defendant by entering into a settlement agreement with EEOC providing $50,000 monetary relief for Starke.

CRST—like the district court—also fails to address or even mention *Farrar v. Hobby*, 506 U.S. 103 (1992), which establishes the standard for a "prevailing" civil rights plaintiff. The Commission argued it is the prevailing party under this Supreme Court standard. EEOC-Brf at 34-49. CRST offers no explanation for ignoring this controlling precedent.

Instead, CRST argues it is the prevailing defendant based on the mistaken contention that once the district court ruled EEOC could not use the pattern-or-practice method to try this case—a ruling that CRST repeatedly notes EEOC did not appeal—EEOC's lawsuit devolved into 154 "separate and distinct" claims, of which EEOC ultimately prevailed on only one. *See, e.g.*, CRST-Brf at 28-31. The first point is irrelevant; the second is incorrect.

EEOC's decision not to challenge the lower court's pattern-or-practice ruling in the first appeal has no significance for the legal issues in this fee appeal, as CRST incorrectly suggests. *E.g.* CRST-Brf at 23-24, 29, 68.

The primary benefit of the pattern-or-practice method of proof derives from the burden-shifting, bifurcated trial framework outlined in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *See Craik v. Minn. State Univ. Bd.*, 731 F.2d 465, 470 & n.7 (8th Cir. 1984). Before the district court issued its pattern-or-practice ruling in April 2009, however, it had already denied EEOC's motion to use the *Teamsters* framework on the ground that EEOC waited too long to file its motion. *See* III-Apx.770-775 (R.156). Thus, EEOC did not appeal the pattern-or-practice ruling because without bifurcation, there was no point, and EEOC believed this Court would be unlikely to reverse the court's discretionary trial-management ruling denying bifurcation.

At any rate, appeal was unnecessary because Title VII authorizes EEOC to seek the same injunctive and monetary relief for multiple victims of discrimination under EEOC's general litigation authority, regardless of whether the case is styled "pattern or practice." *See General Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 324 (1980) ("EEOC need look no further than § 706 [of Title VII, 42 U.S.C. § 2000e-5] for its authority to bring suit in its own

name for the purpose, among others, of securing relief for a group of aggrieved individuals"). EEOC concluded it could achieve the same relief for its claimants by presenting each of their individual allegations to a jury. Thus, that EEOC initially sought to litigate this case as a pattern or practice (*see* CRST-Brf at 34-35) and chose not appeal the district court's pattern-or-practice ruling offers CRST no support on the specific issues before this Court: whether the district court erred in ruling CRST a prevailing Title VII defendant for fee-shifting purposes; whether EEOC had non-frivolous bases for filing this lawsuit seeking relief for women who were sexually harassed on the job; and whether EEOC had a non-frivolous basis for its initial appeal.

If EEOC's case had gone to trial on the 69 women found to have trial-worthy allegations,[1] each claimant would have testified concerning the

[1] All of the 67 women recognized by the district court as having potentially meritorious sex harassment allegations either survived CRST's earlier motions for summary judgment or were not the subject of a CRST motion for summary judgment. *Compare, e.g.*, orders declining to bar EEOC from seeking relief for allegedly aggrieved individuals, R.256 (A-175), and R.258 (A-184), *with* the list of the final 67 women, A-223. This Court added two more (Starke and Jones). A-281, 285.

sexual harassment she experienced and CRST's response to her complaints. But that fact does not convert EEOC's lawsuit into a collection of 69 distinct and separate claims. In a typical Title VII harassment trial with multiple victims, each claimant testifies in EEOC's case-in-chief. In a pattern-or-practice trial under the *Teamsters* burden-shifting, bifurcated trial format, a jury would decide liability based on the testimony of a sampling of EEOC's claimants and the remaining claimants would testify later, in the "damages" phase. *See, e.g.*, *EEOC v. Mitsubishi Motor Mfg. of Am.*, 990 F. Supp. 1059, 1070-81 (C.D. Ill. 1998) (outlining trial process for establishing, first, pattern of employer neglect to sex harassment complaints, followed by individual testimony by each claimant demonstrating she subjectively perceived the harassing conduct as "hostile"); *see also EEOC v. Dial Corp.*, 156 F. Supp. 2d 926, 947 (N.D. Ill. 2001) (adopting *Mitsubishi* model).

In either circumstance, each EEOC claimant would have to present her testimony at some point. *See EEOC v. Dial Corp.*, 259 F. Supp. 2d 710, 712-13 (N.D. Ill. 2003); *Mitsubishi*, 990 F. Supp. at 1070-81. And under either

format, EEOC, to demonstrate the insufficiency of CRST's preventive and remedial steps, would have presented the same testimony of CRST officials describing the company's anti-harassment policies and procedures and the steps CRST took generally and specifically to respond to complaints.[2] The district court's rejection of EEOC's legal theory that CRST's conduct reflected a pattern of neglect toward sexual harassment complaints did not convert EEOC's class lawsuit seeking relief for multiple victims of the same form of discrimination into separate and distinct "individual" claims. There remained only one claim—that CRST's negligence subjected female trainees and employees to sexual harassment. *See* EEOC-Brf at 39-41.

CRST unsuccessfully tries to distinguish *EEOC v. Global Horizons*, 2013 WL 3940674 (E.D. Wash. July 31, 2013), and *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 743 (1976). *See* CRST-Brf at 31-32 & n.6. EEOC cited both as examples of judicial recognition that a lawsuit advancing a

[2] *See, e.g.*, testimony of CRST officials: James Barnes (XVII-Apx.4545); Michael Bivens (XVII-Apx.4601); George Brandmayr (XVII-Apx.4605); Michael Gannon (XVII-Apx.4638); Lisa Oetken (XVII-Apx.4657); Lance Votroubek (XVII-Apx.4711); Michael Wuestenberg (XVII-Apx.4724).

single legal theory encompasses a single claim even when it seeks relief for multiple claimants. EEOC-Brf at 39-41.

CRST argues that the court in *Global Horizons* did not need to rule on the "multiple/single claims" question, because EEOC had previously conceded it did not seek relief for claimants whose employment fell outside the 300-day charge-filing time limit. CRST-Brf at 31-32 But the *Global Horizons* court *did* rule for the defendants on this issue, and then denied defendants' application for fees—not on the ground that EEOC had already conceded the point, but on the ground that defendants had not prevailed on any EEOC "claim" because the judicial ruling did not eliminate any "claims" but simply limited the number of claimants for whom EEOC could seek relief. *Global Horizons*, 2013 WL 3940674, at *9.

Liberty Mutual, a class action challenging an employer's maternity leave policies under Title VII, is not irrelevant, as CRST contends. CRST-Brf at 31 n.6. As here, multiple claimants had claimed injury from Liberty Mutual's discriminatory policies and, as here, each class member's individual claim for relief depended on her individual circumstances.

After initially granting certiorari, the Supreme Court dismissed the case because the court of appeals had no jurisdiction.[3] In so ruling, and despite the existence of multiple claimants, the Supreme Court characterized the case as "a single claim action." *Liberty Mut.*, 424 U.S. at 742-43.

Likewise here, EEOC's lawsuit challenged CRST's anti-harassment practices and sought to obtain injunctive and compensatory relief for the victims of CRST's inattention to sexual harassment complaints. That each claimant's entitlement to relief as well as amount of her damages would have depended on her individual circumstances did not alter the fact that, as in *Liberty Mutual*, EEOC's lawsuit was "a single claim action."

Of course, the reason CRST asserts that EEOC's lawsuit consisted of a dismissed "pattern-or-practice claim" transformed into 154 individual claims is so CRST can argue that it "prevailed" on either all, or all but one, of those claims and is, therefore, entitled to fees. *See* CRST-Brf at 32-37. Indeed, CRST argues, unconvincingly, that it was the prevailing party even

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[3] The court of appeals had no jurisdiction because Liberty Mutual appealed from the district court's finding for plaintiffs on liability, before the court acted on the plaintiffs' requests for relief and, therefore, judgment was not final. *Liberty Mut.*, 424 U.S. at 739-40.

with respect to the settlement providing relief for Starke. *Id.* at 32-33. The Starke settlement, however, is not the type of "mere private settlement" entailing no judicial oversight that this Court has indicated might not establish a plaintiff as a prevailing party. *See Coates v. Powell*, 639 F.3d 471, 474 (8th Cir. 2011). Although CRST paid $50,000 to Starke without judicial oversight, the court's explicit incorporation of the terms into the dismissal order provided federal jurisdiction to enforce the settlement, had CRST failed to make this payment. *See Myers v. Richland County*, 429 F.3d 740, 745-47 (8th Cir. 2005) (jurisdiction exists to enforce settlement agreement where court incorporated agreement into its final order). Thus, EEOC's settlement with CRST is distinguishable from *Bill M. v. Neb. Dep't of Health & Human Servs.*, 570 F.3d 1001, 1002-04 (8th Cir. 2009), *see* CRST-Brf at 33, where the court expressly declined to incorporate a private settlement into a dismissal order and, instead, expressly disavowed any on-going jurisdiction to enforce the settlement terms.

Nor is there any merit to CRST's argument that it is entitled to fees for all its work unrelated to the Starke settlement, under the theory that the

other 153 "claims" are unrelated and turn on unique facts. *See* CRST-Brf at 35-41. CRST overstates the differences in each claimant's allegations and ignores the common threads arising from CRST's responses to harassment complaints.

As EEOC explained in its opening brief, the women identified in EEOC's lawsuit alleged similar, recurring forms of sexual harassment. EEOC-Brf at 15-17. When women complained to CRST, they often received similar, inadequate, responses from their dispatchers and CRST officials. EEOC-Brf at 17-27. Their allegations are linked, in particular, by CRST's unified method of selecting, training, and monitoring lead drivers, *see, e.g.*, XVII-Apx.4605-4625, and CRST's anti-harassment policy and procedures, under which all harassment complaints were reported to only two individuals who provided virtually the same response in each case, EEOC-Brf at 20-21, the adequacy of which presented a jury question in at least 69 instances.

Thus, although the district court stated that "CRST does not operate a unified workplace," *see* CRST-Brf at 38 (citing CRST's Separate Appendix at

17), CRST *did* operate a unified Human Resources and personnel department which provided unified oversight of lead drivers and a unified procedure for receiving and addressing sexual harassment complaints. If EEOC's lawsuit did not allege a single claim, as EEOC contends, then the "claims" were, at the very least, inter-related. Therefore, under *Fox v. Vice*, 131 S. Ct. 2211, 2215 (2011), CRST is entitled to none of its fees, as it would have had to perform the same work to defend against EEOC's inter-related, non-frivolous allegations. *See* EEOC-Brf at 86.

CRST argues that EEOC cannot rely on CRST's unified anti-harassment policy and procedures because this argument is based on deficiencies in CRST's anti-harassment policies that EEOC asserted in response to CRST's pattern-or-practice motion, which the district court rejected. CRST-Brf at 39-41. CRST argues that EEOC did not appeal the district court's finding that the policies were facially valid, and this Court also examined those polices in the first appeal and found them sufficient. *Id.* at 39-41. But, as the district court expressly stated, the facial validity of CRST's policies did not foreclose EEOC from pursuing its claim that CRST

violated Title VII by failing to take effective preventive and remedial steps in response to specific complaints. A-48-51, A-67. Indeed, the district court and this Court ruled a jury could find that CRST's response to the harassment complaints of 69 EEOC claimants violated Title VII. A-222-224, A-281, 286.

CRST gains no traction by arguing that even if EEOC is correct that it brought only *one* claim, CRST "prevailed on virtually 99.9% of that claim." CRST-Brf at 32. As EEOC explained in its opening brief, the extent to which a plaintiff prevails on its single or inter-related claims is relevant only to the amount of fees a court might award a *plaintiff*, which is immaterial here because EEOC is not entitled to recover fees, even when it prevails. That a plaintiff may have prevailed on only a small portion of its inter-related claims does not, however, alter the plaintiff's status as having prevailed. *See* EEOC-Brf at 44-45 (discussing *Farrar*, 506 U.S. at 113-16).

Finally, EEOC's satisfaction of Title VII's pre-suit requirements is not a merits-related element of an EEOC sex harassment claim, as CRST contends (CRST-Brf at 41-48). Therefore, dismissal on this basis does not

entitle CRST to fees, because it is not a judicial determination on the merits as *Marquart* requires. *See* EEOC-Brf at 49-59. Indeed, CRST seemed to recognize this point when it sought dismissal of EEOC's lawsuit, not for failure to state a *claim* under Federal Rule of Civil Procedure 12(b)(6), but for failure to exhaust administrative remedies. *See* R.222 (CRST Motion for Order to Show Cause); A-207.

CRST incorrectly reasons that satisfaction of Title VII's pre-suit requirements must be merits-related because courts have ruled it is not jurisdictional and EEOC has argued in other cases that pre-suit requirements are "elements" of a Title VII claim. *See* CRST-Brf at 42-44. In *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503 (2006), the Supreme Court rejected the defendant's argument that Title VII's employee-numerosity requirement is a jurisdictional limitation and ruled, instead, that it is an element of a Title VII claim. But CRST reads too much into *Arbaugh* in arguing that if a statutory prerequisite to suit is non-jurisdictional, it necessarily must be an element of a Title VII claim. CRST-Brf at 42-43.

Since *Arbaugh* was decided, the Supreme Court has acknowledged implicitly that non-jurisdictional statutory requirements may fall into other categories besides a "substantive ingredient of a claim for relief." In *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160-61 (2010), the Court applied the reasoning of *Arbaugh* to conclude that the Copyright Act's registration requirement is not jurisdictional. The Court did not, however, hold that registration is an element of a copyright claim. Instead, after noting that *Arbaugh*'s numerosity requirement "could be considered an element of a Title VII claim," the Court characterized the Copyright Act's registration requirement as a "prerequisite to initiating a lawsuit," and found both statutory requirements to be non-jurisdictional. *Id.* at 165-66.

Like the Copyright Act's registration requirement, Title VII's pre-suit requirements are a "prerequisite to initiating a[n EEOC] lawsuit," 559 U.S. at 165-66, rather than a standard that establishes whether Title VII's prohibitions are violated, as is *Arbaugh*'s numerosity requirement. And just as a plaintiff's satisfaction of the registration requirement of the Copyright Act is only a prerequisite to bringing suit, and neither

establishes nor undermines the merits of the plaintiff's copyright claim, so, too, the pre-suit requirements of Title VII are merely litigation pre-conditions that neither establish nor undermine the merits of a Title VII violation. As the district court itself acknowledged, "dozens of potentially meritorious sexual harassment claims" would not be adjudicated because of the district court's view that EEOC had failed to conciliate. A-222. Thus, as EEOC argued in its opening brief (EEOC-Brf at 49-59), under *Marquart*, the district court's ruling based on Title VII's pre-suit requirements is not a judicial adjudication on the merits for fee-shifting purposes under Title VII.

The positions EEOC took in two district court cases in the Ninth Circuit do not undermine EEOC's argument here, as CRST contends. CRST-Brf at 43. The issue before the district courts in those cases was—as in *Arbaugh*—whether a statutory requirement in Title VII was jurisdictional or non-jurisdictional, and EEOC correctly argued in both cases that pre-suit requirements are not jurisdictional in nature. *See id.* That EEOC characterized Title VII's pre-suit requirements as an element of EEOC's claim for relief in those cases, where that was not the issue, is of no

consequence to EEOC's argument here concerning the correct characterization of Title VII's statutory pre-suit requirements. *See, e.g.*, *Reed Elsevier*, 559 U.S. at 165-66. And to the extent EEOC's characterization of pre-suit requirements may have altered since briefs were filed in the two cases CRST identified, that shift is supported by recent precedent squarely holding that a failure to conciliate or investigate is not an affirmative defense to liability. *See EEOC v. Mach Mining*, 738 F.3d 171, 174-84 (7th Cir. 2013). If such administrative deficiencies are not defenses to liability, *id.*, then proof of the fulfillment of pre-suit requirements is necessarily not an element of a claim.

EEOC has not waived this argument or its argument premised on Rule 9(c) of the Federal Rules of Civil Procedure, as CRST asserts (CRST-Brf at 44, 46). EEOC opposed CRST's fee application below on the ground that CRST was not a "prevailing defendant" under *Marquart*. R.391 at 7-8. EEOC argued, specifically, that the district court's dismissal of EEOC's lawsuit based on Title VII's pre-suit requirements, after acknowledging that EEOC presented trial-worthy sexual harassment allegations for 67

claimants, was not a ruling on the merits. *See* R.391 at 7-8 ("there has been no judicial ruling" that EEOC's "claim against CRST lacks any merit"); R.397 at 3 (CRST was not a prevailing defendant "where a large portion of [EEOC's] claim was not determined on the merits"). The district court relied largely on *Arbaugh* in rejecting this argument. A-312-14. On appeal, EEOC is entitled to explain why the district court's reliance on *Arbaugh* is unsound, and to support its argument with reference to analogous legal principles found in court rules and judicial decisions.

II. EEOC's Lawsuit Was Not Frivolous, Unreasonable, or Without Foundation

Like its argument that it is the prevailing party, much of CRST's argument that the *Christiansburg* standard is satisfied depends on its mistaken view that once the pattern-or-practice proof framework was rejected, EEOC's suit constituted 154 claims. CRST-Brf at 49, 54.[4] That

[4] Although CRST's brief refers here to EEOC's 154 claimants, in other places CRST variously refers to the number of women on whose behalf EEOC sought relief as "268" or "270." *See, e.g.*, CRST-Brf at 31, 66, 75. Beginning May 12, 2009, however, EEOC's list of individuals on whose behalf EEOC sought relief included 255 women. A-313 n.8. The court noted that "there was no judicial determination on the merits" for 101 of

view of the case is equally unavailing as support for a determination that EEOC's lawsuit was frivolous.

The decisions CRST cites that upheld fee awards against EEOC (*see* CRST-Brf at 50-54) arose in vastly different circumstances and, in one case, was decided under a different legal standard. These cases offer no support for CRST's argument that the district court properly imposed fees here.[5]

- In *EEOC v. Asplundh Tree Expert Co.*, 340 F.3d 1256 (11th Cir. 2003), and *EEOC v. Hendrix College*, 53 F.3d 209 (8th Cir. 1995), the district courts awarded fees on the ground that EEOC had acted in bad faith. In *Asplundh*, the court found EEOC abruptly ended conciliation after Asplundh requested additional time and information. *Asplundh*,

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these women—98 women who did not appear for deposition and three women for whom EEOC notified the court it was no longer seeking relief. The court thus excluded these 101 women, along with Starke, from its calculation of fees, *see* A-314, leaving 154 claimants.

[5] CRST argues that *EEOC v. Kenneth Balk & Associates*, 813 F.2d 197, 198 (8th Cir. 1987), and *EEOC v. Bruno's Restaurant*, 13 F.3d 285, 288-89 (9th Cir. 1992), on which EEOC relied (EEOC-Brf at 62), are factually distinct from this case. CRST-Brf at 49. EEOC cited those cases, however, for the legal standard a court applies in determining whether a party's position is unreasonable, not because the facts are analogous. *See* EEOC-Brf at 62.

340 F.3d at 1260-61. In *Hendrix College*, this Court upheld fees imposed under the Equal Access to Justice Act, concluding that EEOC litigated in bad faith when it sued to correct a record-keeping practice it knew the college had already corrected. *Hendrix College*, 53 F.3d at 211-12. Here, the court explicitly—and properly—made no finding that EEOC acted in bad faith. A-222 n.25.

- In *EEOC v. Agro Distribution*, 555 F.3d 462, 472-73 (5th Cir. 2009) (discussion of pre-suit conduct *dicta*, *id.* at 467-69), *EEOC v. TriCore Reference Laboratories*, 493 Fed.Appx. 955, 960-62 (10th Cir. 2012), and *EEOC v. Peoplemark, Inc.*, 732 F.3d 584, 591-92 (6th Cir. 2013), fees were imposed and upheld solely because EEOC continued to litigate after learning that evidence did not support EEOC's original discrimination claims. Here, the district court expressly found that EEOC's evidence showed 67 claimants had trial-worthy allegations.
- The Ninth Circuit upheld fees in *EEOC v. Pierce Packing Co.*, 669 F.2d 605, 609 (9th Cir. 1982), because, unlike here, EEOC did not engage in *any* Title VII pre-suit steps before filing suit. The facts in *Pierce*

Packing are *sui generis*: EEOC sued Pierce Packing after it violated a pre-determination settlement agreement, and EEOC improperly brought an enforcement action based on the original charge, even though no cause finding or conciliation efforts had ever occurred. *Id.* at 606-09. Here, in contrast, it is undisputed that EEOC investigated the alleged unlawful practice, issued a reasonable cause finding, and invited CRST to conciliate. The only dispute was over the previously-undecided legal question of whether EEOC is required to complete those administrative steps for each claimant, individually.

- In *EEOC v. Propak Logistics, Inc.*, --- F.3d ---, 2014 WL 1199493 (4th Cir. 2014), the Fourth Circuit upheld fees on the ground that EEOC's lawsuit was moot when filed: Propak had closed the facility in question and the court found that EEOC had not identified any claimants before filing suit. Here, in contrast, EEOC had identified claimants before filing suit against CRST and had invited CRST to engage in an effort to identify others in conciliation, and the

unresolved question was whether Title VII required EEOC to identify *all* of its claimants during the administrative process.

A. EEOC reasonably believed it satisfied Title VII's pre-suit requirements before filing suit.

Before filing suit seeking relief for Starke and other women, EEOC investigated whether CRST's conduct subjected Starke and other women to a violation of Title VII, found reasonable cause to believe it did, and offered CRST an opportunity to conciliate this class claim. In its opening brief, EEOC argued that it reasonably believed this conduct satisfied Title VII's statutory prerequisites for a lawsuit seeking relief for multiple victims of the same type of Title VII violation.[6] EEOC-Brf at 62-78.

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[6] Had CRST provided EEOC with the information EEOC requested at the outset of the Starke investigation or had CRST joined EEOC in trying to conciliate the charge in this case, claimants would have been identified during investigation or conciliation and CRST might have made changes to its practices that could have prevented future harassment. *See* EEOC-Brf at 11-14. But because CRST withheld requested information and then rejected the opportunity to identify claimants before suit was filed—declining to conciliate for reasons unrelated to the conciliation process EEOC outlined—identification of claimants came during discovery, as is usually the case when respondents refuse to discuss relief for anyone other than the initial charging party. *See, e.g., EEOC v. Bruno's Rest.*, 13 F.3d at 289 (EEOC reasonably believed its pattern or practice conciliation efforts

Thus, EEOC has not "conceded that it did not satisfy Title VII's pre-suit requirements for any of the 'claims' dismissed on summary judgment other than those on behalf of" Starke and Peeples, nor has EEOC "admitted that it did *nothing* before filing this lawsuit to investigate, find reasonable cause, and conciliate" with respect to 152 of the 154 women identified in EEOC's lawsuit, as CRST wrongly asserts. *E.g.* CRST-Brf at 58, 59, 63-64 (internal quotation marks added). CRST bases these supposed concessions on EEOC's alleged failure to address in its opening brief one portion of the district court's fee decision. *See* CRST-Brf at 58-59 (quoting district court's fee award, R.400, at A-319 n.9). The district court reasoned that nothing short of EEOC's individual identification of each alleged victim and EEOC's separate investigation, issuance of reasonable cause determination, and conciliation would have satisfied Title VII's pre-suit requirements in a case like this. *See* CRST-Brf at 58-59. This was the same rationale on which the district court based its August 2009 dismissal order, A-185-224.

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sufficient where defendant was unwilling to engage in discussion of individual charge).

The court's factual statement that EEOC did not conduct separate, individual investigations nor separately conciliate the individual allegations of each alleged victim is correct, but EEOC does not concede that this amounts to a failure to satisfy Title VII's pre-suit requirements. Rather, as EEOC argued below and in its opening brief, based on existing judicial precedent, when EEOC filed this lawsuit, it reasonably believed it had undertaken all of the steps that Title VII requires and was not required to identify every potential victim before filing suit. *See* EEOC-Brf at 62-78.

CRST concedes that "EEOC may properly sue on behalf of the entire class affected by company-wide or workplace discrimination or harassment uncovered in EEOC's investigation without having investigated each individual's claim." *Id.* at 62. CRST states that such lawsuits could properly include a claim that multiple female workers were sexually harassed, where the harassment was either by the same alleged harassers or in a common workplace. CRST-Brf at 61-62 & cases cited in nn.15&16. CRST further concedes that EEOC is not required to identify all of the victims (*i.e.*, claimants) during the administrative process. *Id.* at 62.

CRST nevertheless argues that EEOC had no reasonable grounds to be surprised by the outcome of the first appeal. CRST asserts that this Court did not create a "new legal rule" but simply applied the holding in *EEOC v. Delight Wholesale Co.*, 973 F.2d 664 (8th Cir. 1992), that "an EEOC lawsuit is not confined to the specific allegations in the charge" so long as "the additional allegations of discrimination are included in the reasonable cause determination and subject to a conciliation proceeding." *See* CRST-Brf at 60 (citing A-275, which quotes *Delight Wholesale*, 973 F.3d at 668).

What CRST fails to explain is how the line of cases CRST noted in its brief (at 61 & nn.15&16), or the facts of this case, should have alerted EEOC that the standard rule—that EEOC is permitted to seek relief for a class without first investigating each individual's separate allegations, CRST-Brf at 62—would not apply here. CRST notes the district court's observation that CRST's workplaces "are largely the cabs of hundreds of semi-truck tractors." CRST-Brf at 62 (citing A-66). But until this Court issued its divided ruling in the first appeal, there was no authority suggesting that

the isolated location of harassment incidents compels different EEOC administrative requirements.

CRST argues that its non-unified workplace—the separate cabs of individual trucks—means that the harassment allegation of one female driver "provides no basis for concluding that CRST violated Title VII with respect to other female drivers allegedly harassed by other male drivers on other trucks at different times and places." CRST-Brf at 62-63. But a claim that *CRST* violated Title VII is not based on what a male harasser did. Liability for workplace harassment is based on an *employer's* failure to take the steps required by Title VII to prevent and remedy harassment. *Cf. EEOC v. Dial Corp.*, 156 F. Supp. 2d at 946-47 (company practice of tolerating sexual harassment forms basis for pattern or practice liability).

EEOC's lawsuit addressed whether CRST's preventive and remedial responses to the complaints of female drivers were adequate, and EEOC reasonably believed the existing rule concerning lawsuits seeking class relief, *see* CRST-Brf at 61 & nn.15&16, applied to its pre-suit efforts. CRST offers no explanation of why this belief was unreasonable.

Tellingly, CRST asserts that this Court, in EEOC's first appeal, cited with approval the line of cases that CRST argues should have told EEOC it can identify claimants after filing suit only in certain situations. *See* CRST-Brf at 62 (referring to cases cited at CRST-Brf at 61 & nn.15 & 16). CRST's citation to the opinion is erroneous, and its inference about this Court's rationale is therefore misleading. CRST does not cite to the majority's opinion, but to Judge Murphy's *dissent*. Judge Murphy cited this line of cases to support her view that even in the unique circumstances of CRST's long-haul trucking operation, Title VII did not require EEOC to identify individual victims and separately investigate and conciliate their individual allegations before seeking relief for them in this litigation. *See* CRST-Brf at 62 (citing to A-291, Judge Murphy's dissent in the first appeal).

CRST argues that Title VII imposes pre-suit obligations on EEOC that do not apply to other Title VII plaintiffs, to protect employers from having to defend costly litigation unless EEOC has reasonable grounds to bring suit. CRST-Brf at 63. But Congress mandated conciliation under Title VII to encourage voluntary compliance by employers, not to give them a tactic

for avoiding liability after refusing to negotiate pre-suit. *See EEOC v. Mach Mining*, 738 F.3d at 178-80.

In any event, EEOC undertook reasonable efforts before filing this lawsuit to ascertain whether there was a Title VII violation that warranted EEOC enforcement. *See* EEOC-Brf at 9-12 (citing, *inter alia*, V-Apx.1259; VI-Apx.1636, 1638). EEOC filed this lawsuit only after analyzing all the evidence it had received and concluding that CRST had subjected not just Starke, but other women as well, to harassment in violation of Title VII. EEOC-Brf at 12; VI-Apx.1629-30. EEOC reasonably believed that this administrative process satisfied Title VII's pre-suit requirements and demonstrated there was a basis for an EEOC enforcement action. EEOC-Brf at 61-74.

CRST attempts, unsuccessfully, to distinguish the two recent decisions EEOC cited that reiterate EEOC's broad discretion under Title VII to pursue enforcement litigation without close judicial scrutiny of how EEOC performed its administrative functions. *See* EEOC-Brf at 67-73 (citing *Serrano v. Cintas*, 699 F.3d 884 (6th Cir. 2012), *cert. denied sub nom.*

Cintas Corp. v. EEOC, 134 S. Ct. 92 (2013), and *EEOC v. Mach Mining*, 738 F.3d 171). CRST argues that the defendants in those two cases did not specifically contend "that EEOC had 'wholly failed' to satisfy" Title VII's statutory requirements, but had argued, instead, that EEOC had not done enough. CRST-Brf at 64. But the defendants in both cases argued variations on CRST's argument here—that EEOC did not fulfill its Title VII pre-suit requirements—and both courts rejected those challenges unequivocally. As the Sixth Circuit explained: "[T]he nature and extent of an EEOC investigation into a discrimination claim is a matter within the discretion of th[e] agency" and it is "inappropriate for a 'district court to inquire into the sufficiency of the Commission's investigation.'" *See Serrano*, 699 F.3d at 904 (quoting *EEOC v. Keco Indus.*, 748 F.2d 1097, 1100 (6th Cir. 1984)); *see also EEOC v. Mach Mining*, 738 F.3d 171 (declining even to recognize an affirmative defense of "inadequate conciliation").

In sum, EEOC recognizes that this Court has now held that in contexts like this one, where EEOC alleges multiple women were sexually harassed by different harassers in diverse and separate locations, the

otherwise-widely-accepted administrative process that EEOC followed here does not satisfy Title VII. A-274-277. But despite the majority's ruling in the first appeal on this pivotal legal question, fees are improper here because nothing in this Court's prior jurisprudence or decisions from other circuits would have led EEOC to foresee that this Court would reach this result (and, indeed, one member of this Court would have ruled otherwise). EEOC reasonably believed it had satisfied Title VII's pre-suit requirements when it filed this lawsuit seeking relief for multiple women who alleged the same type of Title VII violation that Starke alleged.

B. EEOC had a non-frivolous basis for seeking to litigate this case using the pattern-or-practice method of proof and, thereafter, for continuing to seek relief for individual claimants.

CRST argues that EEOC acted unreasonably when it sought to employ the pattern-or-practice method of proof and then continued to seek relief for individual victims of harassment after the district court ruled "pattern-or-practice" unavailable. CRST's arguments are based on faulty logic or misinformation.

For example, CRST argues that EEOC's reliance on the sexual harassment complaints of CRST female drivers and EEOC's failure to interview or depose alleged harassers demonstrates the unreasonableness of EEOC's lawsuit. CRST-Brf at 66-67. CRST further suggests that EEOC's decision to proceed without interviewing alleged harassers undermines EEOC's criticism of CRST's policy of declining to determine whether a harassment complaint was valid. CRST-Brf at 66-67. Neither contention has merit. EEOC's practice was not unreasonable, nor did it affect the basis for the district court's fee award.

There is nothing unusual or inappropriate about EEOC, as an enforcement agency, interviewing claimants, assessing their credibility, and then relying on those credibility assessments as the basis for asserting, in court, the existence of the underlying factual predicates of a sexual harassment claim (*i.e.*, that the harassment was "because of sex" and "severe or pervasive"). *Cf. Borgman v. Kedley*, 646 F.3d 518, 523 (8th Cir. 2011) ("Officers may 'rely on the veracity of information supplied by the victim of a crime. '") (citation omitted); *Torchinsky v. Siwinski*, 942 F.2d 257,

262 (4th Cir. 1991) (arresting officer acted with objective reasonableness when he based probable cause finding on victim's reliable identification of his attackers).

CRST's argument on this point is a red herring, in any event, because none of the district court's rulings turned on evidence that a harasser did not actually engage in the conduct a claimant alleged. Where the district court barred EEOC from seeking relief for a claimant, the court concluded—based on a claimant's own testimony and not on contradictory testimony from the alleged harasser—that her harassment allegations were not sufficiently severe or pervasive, that she had not complained to CRST sufficiently soon enough, or that CRST's response was adequate.[7]

[7] As EEOC argued in its opening brief, EEOC-Brf at 88-99, the court's rulings that EEOC could not seek relief for various claimants because the harassment they alleged was not sufficiently severe or pervasive do not establish that EEOC's lawsuit was frivolous or groundless. EEOC supported inclusion of each claimant with record facts and legal precedent from this Court or other circuits finding this threshold issue was met under analogous circumstances. That the district court disagreed does not, by itself, satisfy the *Christiansburg* standard for fees. *See* EEOC-Brf at 98-99. Nevertheless, the court's rulings on this point demonstrate that the testimony of alleged harassers was not pivotal to any issue in this case.

Another illogical argument CRST advances is that the district court's ruling that CRST's written anti-harassment policy and its anti-harassment procedures were "facially valid," *see* A-57-58, means that EEOC had no reasonable ground for challenging CRST's implementation of the policy. This Court did not—as CRST wrongly asserts—so hold in the first appeal. *See* CRST-Brf at 66 (citing A-289). Indeed, the district court acknowledged that CRST sometimes did not follow its own preventive or remedial policies. *See, e.g.*, A-49-51, 61, *see also* A-52 ("CRST does not dispute" that EEOC's evidence may have "uncovered some of the failings of its policies and procedures."). Significantly, although for pattern-or-practice purposes, the district court found EEOC's evidence insufficient to establish that tolerating sexual harassment was CRST's standard operating procedure, the court expressly stated that the same evidence might suffice "to prove CRST is liable for sexual harassment as to individuals and obtain the equitable and other relief [EEOC] seeks on their behalf." A-67. The 69 women who remained as claimants following the district court's various summary judgment rulings and this Court's reversal on two issues

demonstrate the district court was correct that CRST, at times, failed to implement its policy in ways that a jury could find violated Title VII. A-222 (describing the allegations of the 67 remaining women as "potentially meritorious").

CRST argues, contrary to the record, that "EEOC did not present even a *prima facie* case of actionable sexual harassment in 75% of its original 270 individual claims." CRST-Brf at 66. This statement is factually incorrect. The number of women on whose behalf EEOC ultimately sought relief is 154, not 270. *See supra* at 20 n.4. Of those 154, the district court found 67 women had alleged actionable harassment, and this Court added two more. Thus, almost half of the women for whom EEOC sought relief were judicially determined to have alleged actionable harassment.

The calculation of the percent of "claims" in which EEOC presented a *prima facie* case is, in any event, not directly pertinent to the question on appeal, which is simply whether EEOC's lawsuit was frivolous. That a claim was dismissed on summary judgment does not automatically mean it meets *Christiansburg*'s standard for imposing fees. *See, e.g.*, *Mitchell v. City*

of Moore, 218 F.3d 1190, 1203 (10th Cir. 2000). Although the district court ruled, on summary judgment, that EEOC was barred from seeking relief for 87 women, the court found (or CRST did not dispute) that many of those women had alleged harassment that was severe or pervasive, and relief was barred based only on the court's view that these women waited too long to complain to CRST, *e.g.*, A-154-156, or because CRST responded adequately to the complaint, *e.g.*, A-156, conclusions that EEOC contested in opposition to summary judgment with references to the factual record and citations to supporting legal precedent. Indeed, EEOC argued below and in the first appeal that trainers were properly considered supervisors, an argument that Judge Murphy found persuasive in her dissent and a position that would have altered the analysis on a substantial number of the women for whom the court ruled EEOC could not seek relief because they had not complained to CRST soon enough. Thus, CRST's assertion is not only inaccurate, it also ignores that EEOC presented detailed evidence, supported by judicial precedent, concerning each of the 154 women on whose behalf EEOC ultimately sought relief.

CRST also criticizes EEOC for not offering statistics to support EEOC's effort to use the "pattern-or-practice" method of proof and for not appealing the district court's pattern-or-practice ruling. CRST-Brf at 66, 68-70. But EEOC relied on the expert testimony of Dr. Michael Campion, EEOC-Brf at 82-83, and in any event, as the district court acknowledged, a pattern or practice of discrimination may be proven without statistics. A-60 (citation omitted). And, as EEOC explained above (at pp.5-6), EEOC chose not to appeal that ruling because, absent bifurcation, the pattern-or-practice method of proof has little benefit.

CRST turns Supreme Court precedent on its head in arguing that it is entitled to fees because "[v]irtually all the fees" it incurred prior to the first appeal were related to CRST's pattern-or-practice motion. CRST-Brf at 70. In *Fox v. Vice*, 131 S. Ct. 2205 (2011), the Supreme Court stated that a defendant may recover only those attorneys' fees "incurred because of, *but only because of*, a frivolous claim." *Id.* at 2215. The fees CRST incurred for its pattern-or-practice motion were not incurred *only because of* that motion.

Rather, EEOC relied on the same evidence to support its contention that individual women were entitled to relief. *See* EEOC-Brf at 86.

Indeed, although the district court issued seven separate summary judgment decisions over a period of two and a half months, *see* A-1-184, CRST filed all seven of these summary judgment motions on the same day, *see* R.144-150; I-Apx.16-17, and EEOC opposed all seven—including CRST's pattern-or-practice motion (R.150)—based on unified statements of facts that it filed with all of its responses. *E.g.*,II-Apx.289; III-Apx.580; III-Apx.776; III-Apx.848. Thus, as EEOC explained in its opening brief, even if EEOC had not sought to use the pattern-or-practice method of proof, EEOC's claim that individual women were entitled to relief would have necessitated CRST's engaging in the same discovery efforts. EEOC-Brf at 87.

None of CRST's other arguments relating to the court's *Christiansburg* ruling have any merit. EEOC has not waived the argument that the district court was required, but failed, to make specific findings concerning the reasonableness of EEOC's inclusion of specific women as claimants. CRST-

Brf at 70-71. In opposing CRST's fee application, EEOC argued that CRST was not entitled to fees for defending against any non-frivolous claims. R.391 at 13-23. EEOC noted that the district court had expressly stated, in its first fee decision, that it did *not* dismiss EEOC's lawsuit "because the remaining 67 allegedly aggrieved persons' claims were without foundation." *See* R.391 at 22 (quoting district court at A-241).[8] EEOC further argued below that to the extent this Court found that any of EEOC's positions were either meritorious or non-frivolous, R.391 at 19, CRST's request for fees should be denied because CRST failed to separate out fees incurred in addressing different claimants, including the 69 claimants ruled to have alleged actionable harassment. R.391 at 22-23. Subsumed in that argument is the notion that, assuming arguendo that EEOC's lawsuit consisted of multiple claims, the court, before awarding

[8] Indeed, the district court's partial denials of CRST's motions for summary judgment, *see, e.g.*, A-92-93 (EEOC may seek relief at trial for Kelli Carney); A-147 (Cindy Moffett's claims survive to trial); A-157-160 (EEOC may seek relief at trial for sixteen women); A-169-170, 175 (EEOC may seek relief at trial for eight women); A-184 (EEOC may seek relief at trial for seven women), demonstrates that EEOC's positions with respect to those claimants were not frivolous, as the district court acknowledged in its first fee decision. A-241.

fees, would need to determine which specific individuals reflected a "frivolous" EEOC claim and which did not and separate CRST's fees accordingly.

The Supreme Court's statement in *Fox* that "the determination of fees 'should not result in a second major litigation,'" 131 S. Ct. at 2216, does not mean that a district court can omit the individualized determination of whether EEOC had, or lacked, a legal and factual foundation for each EEOC claimant, as CRST incorrectly asserts. CRST-Brf at 71. That statement in *Fox* refers to a court's *calculation* of the amount of fees attributable to a frivolous claim, not whether the award was justified in the first instance under the Court's stringent standards. *See Fox*, 131 S. Ct. at 2216 ("trial courts need not . . . become green-eyeshade accountants"; "[t]he essential goal in shifting fees . . . is . . . not to achieve auditing perfection"). *Fox* thus provides no support for affirming a fee award that is counter to the standards for shifting fees established in *Christiansburg*. *See, e.g.*, *Bill M.*, 570 F.3d at 1003 (in fee-shifting context, this Court reviews *de novo* legal question of whether a party "prevailed").

CRST, having failed to distinguish fees for work that does not meet *Christiansburg*'s standard, improperly attempts to shift the burden onto EEOC to demonstrate that each of EEOC's 154 claimants was supported by non-frivolous grounds. CRST-Brf at 72-73. But EEOC met its burden when it argued below and in its opening brief that this lawsuit presented a single Title VII claim against CRST with multiple victims/claimants or, at the very least, that it presented inter-related claims that CRST's anti-harassment policies and procedures failed to prevent and remedy sexual harassment as required by Title VII. *See* R.391 at 22-23; EEOC-Brf at 39-49.

Even if this Court finds that EEOC's lawsuit consisted of separate claims on behalf of 154 individual women, CRST still bore a dual burden it has not met here. CRST was obligated, first, to identify any individual claimants for which EEOC's legal and factual position was frivolous in the *Christiansburg* sense *and* wholly distinct and unrelated to EEOC's unsuccessful, but non-frivolous, claims. CRST was obligated, second, to document the amount of fees CRST incurred that are attributable solely to any such "frivolous" EEOC claims. As EEOC argued below, CRST's fee

application failed to make any such distinctions as required by *Christiansburg* and *Fox*. The district court likewise failed to distinguish between frivolous and non-frivolous "claims" in awarding CRST virtually all of its fees. In failing to make this necessary distinction, the district court committed legal error and abused its discretion, and EEOC has not waived this argument, because it made it below.

CRST incorrectly argues that Judge Murphy's dissent, agreeing with EEOC in the first appeal on two pivotal issues—whether EEOC's pre-suit conduct satisfied Title VII's pre-suit obligations, and whether trainers were trainees' supervisors—does not demonstrate that EEOC's positions were non-frivolous. CRST-Brf at 74-77. CRST cites no Title VII cases in which a court awarded fees to a prevailing defendant under *Christiansburg* despite a dissent agreeing with the plaintiff's position; the cases CRST cites are inapposite.

In *EEOC v. Clay Printing Co.*, 13 F.3d 813 (4th Cir. 1994), an age discrimination case, the Fourth Circuit affirmed fees under the very different Equal Access to Justice Act (EAJA) standard, 28 U.S.C.

§ 2412(d)(1)(A). Under *Christiansburg*, a court *may* award fees to a prevailing defendant, but only if the *defendant* demonstrates the plaintiff's lawsuit lacked any foundation. *See Marquart*, 26 F.3d at 851-52. Under EAJA, in contrast, a court *must* award fees to a private party that prevails against the federal government unless *the government* establishes that its position was "substantially justified." *Clay*, 13 F.3d at 814-15. In *Clay*, one panel member agreed with EEOC on the underlying merits, and the Fourth Circuit acknowledged that this dissent was relevant to the "substantially justified" question. The court simply held that the dissenting view, *standing alone*, was insufficient to establish that the government's position was substantially justified. *Id.* at 815-16.

Here, Judge Murphy's agreement with EEOC does not stand alone—it exists alongside numerous circuit court and district court decisions supporting EEOC's position. Thus, Judge Murphy's dissent is substantial evidence that EEOC's position on appeal, although not ultimately prevailing, was solidly grounded in legal precedent.

The other cases CRST cites, CRST-Brf at 75 & n.21, likewise did not apply *Christiansburg* and are all, likewise, inapposite. In *Hoover v. Armco*, 915 F.2d 355 (8th Cir. 1990), the plaintiff never appealed the merits, so there was no dissent on the underlying merits, only on whether fees were warranted under the bad faith exception to the American Rule. *See also U.S. v. Estridge*, 797 F.2d 1454, 1458 (8th Cir. 1986) (no dissent on underlying merits; dissent only on question of whether EAJA standard was met); *Friends of Boundary Waters Wilderness v. Thomas*, 53 F.3d 881, 885-86 (8th Cir. 1995) (applying EAJA and reversing denial of fees to prevailing plaintiffs where defendant government's position was "plainly contrary to existing law"); *Snider v. U.S.*, 468 F.3d 500, 511 (8th Cir. 2006) (awarding fees to prevailing plaintiffs under a fee-shifting provision similar to EAJA).

C. **EEOC's Appeal Was not Frivolous.**

EEOC's opening brief argued that the district court abused its discretion in awarding CRST appellate fees for the first appeal because EEOC reasonably thought it could succeed on appeal, the standard articulated in *Wrenn v. Gould*, 808 F.2d 493, 505 (6th Cir. 1987). EEOC-Brf at

108-114. CRST, like the district court, wrongly ignores that the first appeal decided an important issue (judicial estoppel) in EEOC's favor. CRST also improperly minimizes the significance of Judge Murphy's dissent on the pre-suit and supervisor issues. The outcomes on these issues were not clearly controlled by this Court's precedent, as CRST contends. CRST-Brf at 79-80. And CRST is wrong in arguing that the supervisor issue would not have altered the final outcome. CRST-Brf at 80-81. Among other things, had Judge Murphy's view prevailed, EEOC might have been able to pursue its claim for women who reasonably delayed reporting trainer harassment until they reached safety. *See* EEOC-Brf at 104-105.

CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's imposition of attorneys' fees and costs on EEOC.

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CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,485 words, as permitted by this Court's order, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief 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 Palatino Linotype 14 point.

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CERTIFICATE OF SERVICE

I, Susan R. Oxford, hereby certify that on May 2, 2014, I filed the foregoing reply brief electronically with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the Court's CM/ECF system. I further certify that the brief has been scanned for viruses and is virus-free. I certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system:

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