Case No. 19-20541

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellant

v.

VANTAGE ENERGY SERVICES, INCORPORATED; VANTAGE DRILLING INTERNATIONAL, formerly known as Offshore Group Investment Limited; VANTAGE INTERNATIONAL MANAGEMENT COMPANY PTE. LIMITED,
Defendants-Appellees

On Appeal from the United States District Court
for the Southern District of Texas, Hon. Lynn N. Hughes

OPENING BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLANT

SHARON FAST GUSTAFSON
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Assistant General Counsel

ANNE NOEL OCCHIALINO
Senior Appellate Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724
Annenoel.Occhialino@eeoc.gov

STATEMENT REGARDING ORAL ARGUMENT

The Equal Employment Opportunity Commission ("EEOC") requests oral argument. The Commission brought this enforcement action under the Americans with Disabilities Act. The issue on appeal is whether the charging party satisfied the statutory prerequisites to suit by timely filing an unverified intake questionnaire and later submitting a verified charge. Resolution of this issue requires consideration of two Supreme Court cases as well as detailed examination of the charging party's filing documents. Oral argument will assist this Court in resolving the legal and factual issues raised by this appeal, which were not fully elucidated by the district court's one-line order disposing of this case.

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STATEMENT OF JURISDICTION

The EEOC brought this enforcement action under the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 *et seq.* The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 12117(a). On May 29, 2019, the district court entered final judgment against the EEOC. ROA.208. The EEOC filed a timely notice of appeal on July 26, 2019. ROA.213. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In light of the Supreme Court's holdings that an EEOC intake questionnaire may constitute a charge and a charge may be verified after the filing period, did the district court err in dismissing the EEOC's ADA suit on the grounds that its predicate charge was untimely?

STATEMENT OF THE CASE

A. Governing Standards for Filing a Charge of Discrimination.

Title I of the ADA, which governs employment, incorporates the "powers, remedies, and procedures" set forth in certain sections of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e *et seq*., including 42 U.S.C. § 2000e-5. 42 U.S.C. § 12117(a). Neither statute requires

a charge of discrimination to take any particular form or be on any particular document. The relevant provision of Title VII states only that "[c]harges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b).

Charges usually must be filed within 300 days of an allegedly unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1).[1] The timely filing of a charge of discrimination "is a precondition to filing suit in district court." *Cruce v. Brazosport Indep. Sch. Dist.*, 703 F.2d 862, 863-64 (5th Cir. 1983) (per curiam) (discussing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982)); *see also Fort Bend Cty. v. Davis*, 139 S. Ct. 1843 (2019) (Title VII's charge-filing requirement is a mandatory claim-processing rule, not a jurisdictional prerequisite).

In 42 U.S.C. § 2000e-12(a), Congress expressly authorized the EEOC to "issue … suitable procedural regulations to carry out the provisions of

[1] In some circumstances, not relevant here, the filing period is 180 days. 42 U.S.C. § 2000e-5(e)(1).

this subchapter." Accordingly, the EEOC promulgated regulations addressing, *inter alia*, the required form and content of a charge of discrimination. Echoing the statute, the EEOC's regulation governing the form of a charge requires that it be "in writing and signed and … verified." 29 C.F.R. § 1601.9. The term "verified" is defined as either "sworn to or affirmed before a notary public, designated representative of the Commission, or other person duly authorized by law to administer oaths and take acknowledgements," or "supported by an unsworn declaration in writing under penalty of perjury." 29 C.F.R. § 1601.3(a).

The EEOC's regulation governing the content and amendment of charges is 29 C.F.R. § 1601.12. Section 1601.12(a) sets out what information a charge "should contain." Immediately following that, 29 C.F.R. § 1601.12(b) states that "[n]otwithstanding the provisions of paragraph (a) of this section, a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." Section 1601.12(b) also provides that charges may be

amended to cure technical defects, "including failure to verify the charge," and that such amendments "relate back to the date the charge was first received."

The EEOC utilizes several different forms during the intake and processing of charges. A "Form 283 Intake Questionnaire" is a four-page form used to solicit information, determine jurisdiction, and provide charge-filing counseling. ROA.69. As stated on the final page of the form, "[c]onsistent with 29 C.F.R. § 1601.12(b) … th[e] questionnaire may serve as a charge if it meets the elements of a charge." ROA.72. The form requests information about the charging party, the employer, what happened, and the alleged basis of discrimination, while the final page contains two boxes an individual can check to tell the EEOC what the individual wants the EEOC to do with the information. "Box 1" states that the filer wants to talk with someone at the EEOC before deciding whether to file a charge. "Box 2" states, "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above." ROA.72. The

intake questionnaire includes a signature line, but it is not under penalty of perjury. ROA.72.

The EEOC's general practice is to "prepare a formal charge of discrimination for the complainant to review and to verify, once the allegations have been clarified." *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 115 n.9 (2002). That formal charge is an "EEOC Form 5 Charge of Discrimination," a two-page document summarizing the charging party's allegations that is signed under penalty of perjury. ROA.63-64. This document is typically sent to the employer. *See* ROA.80.

B. Course of Proceedings

EEOC filed this enforcement action against Vantage Energy Services, Inc., Vantage Drilling International f/k/a Offshore Group Investment Ltd., and Vantage International Management Co. PTE, Ltd. ("Vantage").[2] ROA.6. The EEOC alleged that Vantage's termination of David Poston following a heart attack violated the ADA. ROA.6-11.

[2] The EEOC also sued Vantage Drilling Co. ROA.6. The district court dismissed that defendant. ROA.4 (R.25 management order). The EEOC is not appealing that ruling.

Vantage moved to dismiss, arguing that Poston failed to file a timely charge of discrimination. ROA.18-24, ROA.122-25. The EEOC countered that Poston's timely-filed intake questionnaire, which he later verified, satisfied the ADA's charge-filing requirements. ROA.54-58, ROA.135. The district court ruled that Poston's intake questionnaire was not a verified charge and dismissed the case. ROA.208. This appeal followed. ROA.213.

C. Statement of the Facts

Poston worked for Vantage as the Chief Electronic Technician on the Titanium Explorer, a deepwater drillship. ROA.65. While working on the ship, he suffered a heart attack. ROA.65. Vantage placed him on short-term disability leave. ROA.65. On the day Poston was due to return, October 2, 2014, Vantage fired him. ROA.65. Vantage also terminated other employees. ROA.65, ROA.67. Although Vantage asserts it fired Poston for poor performance, Poston had an exemplary work record and had never had a poor evaluation or been disciplined. ROA.65.

On February 20, 2015, Poston's attorneys submitted a letter to the EEOC's New Orleans Field Office. ROA.67. They asked that the EEOC

"accept this letter as a complaint of employment discrimination brought against Vantage Drilling on behalf of" Poston and eight other terminated employees. ROA.67. The letter asserted that the terminations violated, *inter alia*, the ADA. ROA.67. It added that the employees, including Poston, had signed power-of-attorney agreements authorizing the attorneys to submit "these claims" and to sign their names to the claim forms. ROA.67-68. At the conclusion of the letter, the attorneys thanked the EEOC for "reviewing the immediate complaints of employment discrimination against Vantage … under the ADA[.]" ROA.68.

The attorneys submitted with the letter an EEOC Form 283 intake questionnaire for each claimant. The first page of Poston's intake questionnaire provides his name and Vantage's name and address, states approximately how many employees Vantage has ("More than 500"), and lists Poston's position, salary, and dates of hire and termination. ROA.69. The second page of the questionnaire checks the box for "Disability" discrimination, states Poston's date of termination ("10/2/14") and who fired him ("Kenneth Anderson, Rig Manager"), and provides the reason

Vantage gave for his termination ("poor performance," later changed to "previous management's decision").[3] ROA.70. The questionnaire also explains that Poston believed his termination was discriminatory because Vantage fired him immediately after his short-term disability leave for his heart attack and because Vantage fired others after their short-term disability leaves. ROA.70.

The final page of the questionnaire indicates that Poston had not previously filed a charge with the EEOC or another agency. ROA.72. In response to the query "what would you like us to do with the information you are providing," "Box 2" is checked, indicating Poston wanted "to file a charge of discrimination, and … authorize[d] the EEOC to look into the discrimination … described above." ROA.72. The unverified signature line is signed "s/David Poston." At the bottom of the page, the form states that it is used to solicit information about discrimination claims and "may serve as a charge if it meets the elements of a charge." ROA.72. The EEOC

[3] Poston also alleged age discrimination. ROA.70.

received the letter and intake questionnaire on February 20, 2015, which was 137 days after Poston's termination. ROA.67, ROA.61.

On February 25, 2015, the EEOC sent Poston a letter acknowledging receipt of his "charge." ROA.73. The letter used the charge number 461-2015-00786, which the EEOC had assigned to Poston's intake questionnaire and written in on the upper right-hand corner of the form. ROA.69, ROA.73. In a second letter sent to Poston the same day, the EEOC explained that when a charge on behalf of another person is received, the EEOC's procedures require it to obtain the charging party's name, address, and phone number. ROA.75. The EEOC therefore requested that Poston supply the information on the enclosed EEOC Form 151. ROA.75.

On the same day, the EEOC also sent Vantage a "Notice of Charge of Discrimination." ROA.76. Citing the charge number assigned to Poston's intake questionnaire, the notice stated that a "charge of employment discrimination" under the ADA had been filed. ROA.76. The notice listed Poston's attorney as having filed the ADA charge "on behalf of other(s)." ROA.76. It informed Vantage "no action" was currently required

and that "a perfected charge (EEOC Form 5) will be mailed to you once it has been received from the Charging Party." ROA.76.

On May 7, 2015, Poston's attorneys informed the EEOC that Vantage's executive offices are in Houston. ROA.78. Five days later, the EEOC transferred Poston's charge to the EEOC's Houston District Office. ROA.61-62. On May 21, 2015, the EEOC sent Poston's attorneys a letter stating that although it had notified Vantage of the initiation of "the charge filing process," the EEOC required an individual charge before beginning its investigation. ROA.195. The EEOC enclosed a draft Form 5 charge and requested that it be returned within thirty days. ROA.196.

Three months later, in a letter dated September 22, 2015, the EEOC notified Poston's attorneys that the EEOC had not received Poston's "charge." ROA.195. The letter, however, referenced Poston's charge number (assigned to his intake questionnaire), referred to him as a "Charging Part[y]," and explained that although the EEOC had notified Vantage that Poston "initiated the charge filing process," the EEOC required a signed Form 5 Charge of Discrimination before the agency could

begin an investigation. ROA.195-96. In accordance with the EEOC's regulation and Supreme Court precedent upholding it, the letter stated that for timeliness purposes "the date of your original signed document will be … the original filing date." ROA.195.

On October 13, 2015, the EEOC received Poston's Form 5 charge, which was dated September 7, 2015, and signed under penalty of perjury. ROA.63. The EEOC then sent notice of Poston's charge to Vantage and requested a position statement. ROA.80. Vantage submitted the position statement, asserting it fired Poston for poor performance. ROA.77. Vantage acknowledged having received notice of Poston's charge on February 25, 2015, but contended that he failed to timely file because his "perfected" charge was signed September 7, 2015. ROA.77.

After conducting an investigation, the EEOC issued a Letter of Determination finding reasonable cause to believe that Vantage violated the ADA. ROA.8. The EEOC's conciliation efforts were unsuccessful. ROA.8.

D. **District Court Proceedings**

The EEOC filed this enforcement action, alleging that Poston's termination violated the ADA. ROA.6. The complaint alleged that more than thirty days prior to suit, "Poston filed a charge of discrimination" and that the EEOC satisfied "all conditions precedent" to suit. ROA.8-9.

Vantage moved to dismiss for failure to state a claim, arguing, *inter alia*, that the EEOC failed to "exhaust administrative remedies." ROA.18-24, ROA.122-25. Vantage contended that the EEOC failed to plead that Poston timely filed his charge of discrimination. ROA.22, ROA.124. Moreover, Vantage argued, the EEOC could not plead this, as Poston submitted his Form 5 charge more than 300 days after his termination. ROA.22-23, ROA.124.

The EEOC responded that it had satisfied the pleading standards by averring in accordance with Federal Rule of Civil Procedure 9(c) that all conditions precedent to suit had been satisfied. ROA.57, ROA.120-21. Further, Poston satisfied the charge-filing requirement by filing his intake questionnaire within 300 days of his termination. ROA.49-58, ROA.134,

ROA.114-18. The EEOC argued that the intake questionnaire constituted a charge under *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008), which held that intake questionnaires constitute charges where they satisfy the EEOC's regulatory requirements for a charge and can reasonably be construed as a request for the EEOC to take remedial action. ROA.54-57; ROA.117-18. Relying on *Edelman*, 535 U.S. 112-18, the EEOC argued that unverified documents can be charges and that Poston's verified Form 5 charge related back to his timely-filed intake questionnaire, satisfying the verification requirement. ROA.55, ROA.114-17.

Faced with this Supreme Court precedent, Vantage asserted that *Holowecki* does not control because it concerned the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA"). In support, Vantage cited *Patton v. Jacobs Engineering Group, Inc.*, 874 F.3d 437, 443 (5th Cir. 2017), an ADA case in which this Court said—without acknowledging *Edelman*—that the plaintiff's intake questionnaire "alone cannot be deemed a charge" because it was unverified. ROA.86. Vantage also argued that the EEOC's September 22, 2015, letter to Poston's attorneys requesting that the

Form 5 "charge" be returned demonstrated that the EEOC did not consider the intake questionnaire a charge. ROA.286 (arguing at hearing that the EEOC "comes to this Court today and says no, no, no, his intake questionnaire is a charge of discrimination, but they don't believe that").

The district court held two hearings. The judge told the EEOC's trial attorney that she could not rely on *Holowecki* because it concerned age discrimination. ROA.233 ("you can't cite it"). When the EEOC's trial attorney attempted to explain that "Fifth Circuit case law" applies *Holowecki* to Title VII and the ADA, the judge replied, "there's no such thing as case law" and "courts are not obliged to apply outlier cases." ROA.234.

The district court was likewise unpersuaded that *Edelman* permits the verification of a charge to occur after the charge-filing period. The court first insisted that, despite *Edelman*, a charge must be verified within the 300-day filing period. ROA.221. The court seemed to believe it could disregard *Edelman* because it is a Supreme Court case rather than the statute itself. *See* ROA.221 (when the EEOC's attorney said that the

Supreme Court says a charge does not have to be verified within 300 days, the district court responded, "[w]here does it say that in the statute?"). The court also appeared to find *Edelman* inapposite because, in its view, this case involved "an abandonment" of the intake questionnaire for "210 days"—the period between the filing of Poston's intake questionnaire and the submission of his Form 5 charge. ROA.223. Another comment suggested that the district court understood *Edelman* to apply only when verification occurs shortly after the charge-filing period ends. ROA.223 (stating that if the intake questionnaire is filed on day 299 and the verified charge is filed on day 301 "you have something different than we have here").

E. District Court's Decision

The district court issued a one-line final judgment order. It states, "Because the intake questionnaire is not a verified charge, this case is dismissed with prejudice." ROA.208.

STANDARD OF REVIEW

This Court reviews de novo a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *See Dorsey v. Portfolio*

Equities, Inc., 540 F.3d 333, 338 (5th Cir. 2008). A district court's determination that a plaintiff did not exhaust administrative remedies is also reviewed de novo. *See also Davis v. Fort Bend Cty.*, 893 F.3d 300, 303 (5th Cir. 2018), *aff'd*, 139 S. Ct. 1843 (2019).

SUMMARY OF ARGUMENT

While working on Vantage's deepwater drillship, David Poston suffered a heart attack. On the day he was to return to work, Vantage fired him. The EEOC alleges that Vantage fired Poston because of his heart attack; Vantage asserts it fired him for poor performance. The district court never reached the merits of this dispute, however, because it concluded summarily that Poston's timely-filed but unverified intake questionnaire was not a charge of discrimination. In so ruling, the court committed reversible error.

Two Supreme Court cases speak to the charge-filing requirements at issue here. The district court disregarded both. First, in *Holowecki*, 552 U.S. 389, the Supreme Court held that an intake questionnaire or other document constitutes a charge of discrimination under the ADEA for

timely-filing purposes if it contains the information required by the EEOC's regulation for a charge and can reasonably be construed as a request for the EEOC to take remedial action. Second, in *Edelman*, 535 U.S. 106, the Supreme Court upheld the validity of the EEOC's regulation at 29 C.F.R. § 1601.12(b) permitting verification of a charge to occur after the filing period. In other words, *Edelman* held that a charge does not need to be verified within the filing period. The Court explained that the purpose of the verification requirement is to protect employers from the expense and disruption of responding to frivolous claims. That objective is fulfilled, *Edelman* stated, so long as the employer is not required to respond to the charge until it has been verified.

The district court appeared to find *Holowecki* inapplicable because the ADEA lacks a verification requirement, which Title VII (and the ADA) contains. The court erred, as *Edelman* held that unverified documents can be charges under Title VII (and the ADA), as this Court has recognized. Moreover, this Court has recognized that *Holowecki* applies to Title VII and

ADA cases. An unverified intake questionnaire can thus constitute a charge of discrimination under Title VII and the ADA.

Here, Poston's timely-filed intake questionnaire satisfied *Holowecki*'s two requirements to constitute a charge: (1) it contained all the information required by the EEOC's regulation governing charge content; and (2) it requested that the EEOC take remedial action to protect Poston's rights. Although the intake questionnaire was unverified, Poston later submitted his Form 5 charge under penalty of perjury. Under 29 C.F.R. § 1601.12(b), which *Edelman* upheld, the verification related back to his timely-filed intake questionnaire, and the EEOC waited until Poston verified his charge before requesting that Vantage respond to it. The ADA's charge-filing requirements were therefore satisfied.

ARGUMENT

Poston's timely-filed intake questionnaire constituted a charge of discrimination and he subsequently verified it, satisfying the ADA's charge-filing requirements.

The district court erred in dismissing this case on the ground that Poston did not timely file a charge of discrimination. Straightforward application of Supreme Court and Fifth Circuit precedent confirms that intake questionnaires can be charges and that verification can occur after the filing period. Viewed under the proper legal standards, Poston's timely-filed intake questionnaire constituted a charge, and he satisfied the verification requirement by later submitting his Form 5 charge, signed under penalty of perjury, before Vantage was required to respond to it. This case should therefore be remanded for a determination on the merits of whether Vantage fired Poston because of his heart attack or his work performance.

A. Supreme Court and Fifth Circuit precedent confirms that unverified intake questionnaires can be charges.

Although the district court did not explain its reasoning, it appeared to believe that neither intake questionnaires nor unverified documents can be charges. The court was wrong on both counts.

1. The Supreme Court held in *Holowecki* that intake questionnaires can be charges under the ADEA.

In *Holowecki*, the Supreme Court considered whether the plaintiff's intake questionnaire and attached affidavit constituted a charge of discrimination under the ADEA. *See* 29 U.S.C. § 626(d)(1) ("charge" must be timely filed). Federal Express argued that intake questionnaires only constitute charges if the EEOC treats them as charges. *Holowecki*, 552 U.S. at 396, 403. In contrast, the plaintiff argued that all completed intake questionnaires are charges. *Id.* at 396. The government offered a third, middle view: that only those intake questionnaires that meet the EEOC's regulatory requirements for a charge and express an intent that the EEOC take action qualify as a charge. *Id.* at 396-98.

The Supreme Court agreed with the government, holding that an intake questionnaire (or other document) constitutes a charge under the ADEA if it satisfies the EEOC's charge-filing requirements at 29 C.F.R. § 1626.6 and can "be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and employee." 552 U.S. at 402. Satisfaction of the "request-to-act" requirement, the Court clarified, is "examined from the standpoint of an objective observer." *Id*.

Applying its ruling, the Supreme Court held that the plaintiff's intake questionnaire and affidavit constituted a charge. *Id*. at 404-05. The Court first observed that the intake questionnaire "contained all of the information outlined in 29 C.F.R. § 1626.8," the EEOC's regulation governing the content of age discrimination charges. *Holowecki*, 552 U.S. at 404. It then found the "request-to-act" requirement satisfied by the plaintiff's affidavit requesting that the EEOC "'force Federal Express to end [its] age discrimination plan so we can finish out our careers absent the

unfairness and hostile work environment'" created by its new workplace policy. *Id*. at 405.

The Supreme Court rejected Federal Express's argument that the plaintiff's subsequent filing of a Form 5 charge of discrimination showed she did not intend her earlier intake questionnaire and affidavit to be a charge. *Id*. at 406. That argument failed, the Court said, because what matters is whether the earlier filing "should be interpreted as a request for the agency to act. Postfiling conduct does not nullify an earlier, proper charge." *Id*. Finally, the Court noted that documents submitted to the EEOC should be construed, "to the extent consistent with permissible rules of interpretation, to protect the employee's rights and statutory remedies." *Id*.

2. The Supreme Court held in *Edelman* that an unverified document can be a charge under Title VII (and the ADA).

The Supreme Court has squarely held that verification within the charge-filing period is not a prerequisite for a charge. In *Edelman*, 535 U.S. 106, the plaintiff was denied tenure and timely submitted to the EEOC a letter complaining of discrimination under Title VII. She also submitted a

verified Form 5 charge 313 days after the denial of tenure. *Id*. at 110. The court of appeals held that in order to be a charge, a document must be verified within the filing period. *Id*. at 112. The Supreme Court disagreed. It upheld the validity of the EEOC's regulation at 29 C.F.R. § 1601.12(b), which permits "an otherwise timely filer to verify a charge *after* the time for filing has expired." 535 U.S. at 109 (emphasis added); *see id*. at 118 (calling the EEOC's regulation an "unassailable interpretation" of Title VII).

In so ruling, the Court observed that Title VII's verification requirement is at § 2000e-5(b), while the filing period is set out at § 2000e-5(e)(1); neither provision, the Court noted, incorporates the other. 535 U.S. at 112. Further, the two provisions serve different purposes. "The point of the time limitation is to encourage a potential charging party to raise a discrimination claim before it gets stale." *Id*. at 112-13. The verification requirement, on the other hand, protects "employers from the disruption and expense of responding to a claim unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury." *Id*. at 113. This latter objective is served by requiring an "oath

only by the time the employer is obliged to respond to the charge, not at the time an employee files it with the EEOC." *Id*.

3. This Court has recognized that *Holowecki* applies to Title VII and the ADA and that *Edelman* permits charges to be verified outside the charge-filing period.

The district court found *Holowecki* inapposite because it concerned the ADEA. ROA.223 (telling the EEOC's trial attorney "you can't cite it" because it is not a Title VII or ADA case). The court erred, as this Court—and every circuit court to address the issue of which we are aware—has applied *Holowecki* to Title VII and the ADA.

To be sure, the Supreme Court warned in *Holowecki* against applying its holding to other statutes "without careful and critical examination." 552 U.S. at 393. Critical examination of Title VII's statutory and regulatory scheme, however, supports this Court's application of *Holowecki* to Title VII and the ADA. Title VII and the ADEA have similar pre-suit requirements, although only Title VII requires that charges be "under oath or affirmation" and that a notice of right to sue issue before suit is filed. *See* 42 U.S.C. § 2000e-5(b), (f)(1); 29 U.S.C. § 626(d)(1). Both statutes require that a charge

be filed within either 180 or 300 days, that the EEOC notify the employer of the charge, and, if cause is found, that the EEOC attempt conciliation. *Compare* 29 U.S.C. § 626(d)(1)-(2) (ADEA), *with* 42 U.S.C. §§ 2000e-5(b), (e)(1) (Title VII); *see EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123-24 (1988) (observing that the ADEA's filing provisions were patterned after Title VII's and are "virtually *in haec verba*").

Apart from the verification and notice-of-right-to-sue requirements, the EEOC's regulations governing charges are also essentially identical under the ADEA and Title VII. Under both statutes, charges must be in writing or reduced to writing, name the respondent, and describe generally the alleged discrimination. *Compare* 29 C.F.R. §§ 1626.6, 1626.8(b) (ADEA), *with* 29 C.F.R. §§ 1601.9, 1601.12(b) (Title VII). And under either statute, charges may be amended, in which case the amendment relates back to the date the charge was first received. *Compare* 29 C.F.R. § 1626.8(c) (ADEA), *with* 29 C.F.R. § 1601.12(b) (Title VII).

Applying *Holowecki*'s holding to Title VII and the ADA thus makes logical sense in light of the governing regulatory scheme. It also makes

operational sense, because individuals often file charges with the EEOC alleging both ADEA and Title VII/ADA violations. It would be both confusing and highly inconsistent to construe the same document as constituting "a charge" under one statute but not the other(s).

Given the similarities between the ADEA and Title VII, this Court has recognized in unpublished cases that *Holowecki*'s holding applies to Title VII and the ADA. In *Kirkland v. Big Lots Store, Inc.*, 547 F. App'x 570 (5th Cir. 2013) (per curiam), a Title VII case, this Court acknowledged that an intake questionnaire "may constitute a filing for the purposes of Title VII." *Id*. at 572 n.3 (citing *Holowecki*); *see also Lavigne v. Cajun Deep Founds., LLC*, 654 F. App'x 640, 644 (5th Cir. 2016) (per curiam) (in Title VII case, stating that whether intake questionnaire constituted a charge requires "a fact-intensive inquiry" under *Holowecki*, but holding issue waived). More recently, this Court observed in a Title VII and ADA case that "[w]hether a particular questionnaire qualifies as a 'charge[]' … varies from case to case." *Sanders v. Univ. of Tex. Pan Am.*, -- F. App'x -- , No. 18-40371, 2019 WL 2486194, at *3 (5th Cir. June 13, 2019) (per curiam) (citing *Holowecki* and

assuming intake questionnaire constituted a charge, but finding it untimely).

To be sure, an intake questionnaire is not *always* a charge. *Id*. Rather, the essential inquiry is whether the document satisfies *Holowecki*'s two-factor test: (1) it contains the information required by the EEOC's regulation governing charge contents; and (2) it can reasonably be construed as a request that the EEOC take remedial action. *See Sanders*, 2019 WL 2486194, at * 3 (citing *Holowecki* and its two-part test for determining whether an intake questinnaire constitutes a charge). District courts within this circuit have also widely recognized that *Holowecki* applies to Title VII and ADA cases. *See, e.g.*, *Stone v. Academy, Ltd.*, 156 F. Supp. 3d 840, 845 n.2 (S.D. Tex. 2016) (*Holowecki* applies to Title VII); *Everson v. Sprint/United Mgmt. Co.*, No. 08-759, 2008 WL 4107524, at *6 (N.D. Tex. Aug. 21, 2008) (same); *see also Howard v. Vantage Int'l Mgmt., LLC*, No. 18-4182, 2019 WL 2492866, at *4-5 (S.D. Tex. May 21, 2019) (magistrate recommendation applying *Holowecki* and *Edelman* to hold that an unverified intake questionnaire may constitute a timely ADA charge and

that the plaintiff plausibly pled he timely filed a charge), *adopted*, 2019 WL 2491897 (S.D. Tex. June 13, 2019).

This Court's application of *Holowecki* to Title VII and ADA cases is consistent with the law of other circuits, which have uniformly applied *Holowecki* in Title VII and ADA cases. *See Carlson v. Christian Bros. Servs.*, 840 F.3d 466, 467-68 (7th Cir. 2016) (in ADA case, holding that plaintiff's "Complaint Information Sheet" did not satisfy *Holowecki* because it did not request remedial action); *Aly v. Mohegan Council, Boy Scouts of Am.*, 711 F.3d 34, 42 n.1 (1st Cir. 2013) (*Holowecki* applies under Title VII); *Williams v. CSX Transp. Co.*, 643 F.3d 502, 508 & n.2 (6th Cir. 2011) (*Holowecki* applies to Title VII); *see also Patillo v. Sysco Foods of Ark. LLC*, 704 F. App'x 612, 613 (8th Cir. 2017) (per curiam) (Title VII case remanding for determination of whether intake questionnaire constituted a charge under *Holowecki* and *Edelman*); *Woods v. FacilitySource, LLC*, 640 F. App'x 478, 482 (6th Cir. 2016) (confirming that *Holowecki* applies to Title VII); *Semsroth v. City of Wichita*, 304 F. App'x 707, 712-14 (10th Cir. 2008) (Title VII case holding that intake questionnaire and responses to letters from the EEOC satisfied *Holowecki*'s

charge requirements); *Cumbie v. General Shale Brick, Inc.*, 302 F. App'x 192, 194-95 (4th Cir. 2008) (per curiam) (vacating and remanding Title VII retaliation case in light of *Holowecki*).

Vantage argued below that *Holowecki* is inapposite because the ADEA lacks a verification requirement. Although the district court may have credited this argument, it is meritless. As discussed above, *Edelman*—decided six years before *Holowecki*—was explicit in its holding that, *under Title VII*, an unverified document can be a charge, and verification can occur later (before a response is required from the employer). *Holowecki* itself cited *Edelman*, confirming that unverified documents, including intake questionnaires, can be charges. *See Holoweck*, 552 U.S. at 404 (describing *Edelman* as "rejecting the argument that a charge is not a charge until the filer satisfies Title VII's oath or affirmation requirement"). Moreover, this Court has recognized that *Edelman* permits verification to occur after the charge-filing period. *See Conner v. La. Dep't of Health & Hosps.*, 247 F. App'x 480, 481 (5th Cir. 2007) (per curiam) (citing *Edelman* to hold that intake questionnaire, subsequently verified, constituted an ADA

charge). Accordingly, the fact that Title VII and the ADA require verification while the ADEA does not provides no basis for disregarding *Holowecki*.

Even assuming, *arguendo*, that *Holowecki* applies only to the ADEA, the district court's view of the law would be incorrect. That is because this Court's pre-*Holowecki* precedent recognized that unverified intake questionnaires can be charges under Title VII and the ADA. In *Price v. Southwestern Bell Telephone Co.*, 687 F.2d 74 (5th Cir. 1982), a Title VII case, this Court held that an unsigned intake questionnaire could be a charge where it identified the parties and described the discriminatory conduct, "thus setting the administrative machinery in motion." *Id*. at 78. And in *Conner*, this Court held that "[b]ecause the intake questionnaire was sufficient to constitute an EEOC charge and [was] filed within the 300-day filing period, the district court erred in dismissing Conner's complaint on that basis." 247 F. App'x at 481-82 (relying on *Edelman* and *Price*).

It is conceivable that the district court refused to follow *Holowecki* based on *Patton v. Jacobs Engineering Group, Inc.*, 874 F.3d 437, 443 (5th Cir.

2017), which Vantage cited below. If so, the district court misread the case. In *Patton*, the plaintiff filed his charge and the intake questionnaire on the same day, so the timeliness of the charge was not at issue. Rather, the issue was whether the plaintiff's failure-to-accommodate claim exceeded the scope of his formal charge where the intake questionnaire mentioned it but the formal charge did not. In this context, this Court stated that the intake questionnaire "alone cannot be deemed a charge" because it was unverified. *Id*. at 443. The Court nevertheless concluded that the failure-to-accommodate claim "should be construed as part of the EEOC charge" and therefore could be included in the lawsuit. *Id*.

Patton is therefore best read as holding that when determining whether a private lawsuit's claims exceed the scope of a formal charge, a court may appropriately consider allegations in an intake questionnaire. It should not be read to hold that an unverified intake questionnaire is not a charge. To the extent *Patton* held that only a verified document is a charge, that holding cannot be reconciled with *Edelman* or with *Price* and *Conner*.

Vantage's reading of *Patton* is also at odds with this Court's recent per curiam decision in *Melgar v. T.B. Butler Publishing Co.*, 931 F.3d 375 (5th Cir. 2019) (per curiam). In *Melgar*, the pro se plaintiff initially filed an unsigned and undated intake questionnaire with the Texas Workforce Commission (TWC). *Id*. at 380 n.4, 376. On the form, he checked the boxes for retaliation and discrimination based on national origin. *Id*. at 376. After several unsuccessful attempts to contact the plaintiff, the TWC told him it was unable to draft a charge on his behalf and eventually transferred his complaint to the EEOC. *Id*. at 376-77, 380. The EEOC sent the plaintiff a letter informing him "a charge had not been filed" and scheduling a phone interview. *Id*. at 377. Eight months later, the EEOC notified the plaintiff's employer that a charge had been filed. *Id*. The EEOC then sent the plaintiff a Form 5 charge for his signature, which he waited five months to return. *Id*. at 377. Upon receiving the Form 5 charge, the EEOC dismissed it and issued a right-to-sue notice, and the plaintiff filed suit alleging discrimination based on age, disability, and national origin. *Id*. at 376-78.

This Court held that "under these circumstances the intake questionnaire does not suffice as a charge of discrimination." *Id*. at 380. Although this Court did not cite *Edelman*, this Court recognized, correctly, that the plaintiff's failure to sign his intake questionnaire was not fatal because 29 C.F.R. § 1601.12(b) permits amendment of charges to cure technical defects. *Id*. at 380 n.4 (adding that an amended charge "would relate back" to the original filing date). Nevertheless, this Court held that the plaintiff's intake questionnaire was insufficiently specific under the ADEA and Title VII because it did not satisfy the EEOC's regulation requiring "a clear and concise statement of facts alleging unlawful employment practices," it was not treated as a charge, and the TWC expressly informed the plaintiff that it "had been 'unable to draft a charge on [his] behalf.'" *Id.* at 380 (citing 29 C.F.R. § 1601.12(a)(3)). Thus, this Court observed, "in the instant case, it would have been unreasonable for [the plaintiff] to believe the intake questionnaire sufficed as a charge." *Id.*

While this Court did not cite *Holowecki* in *Melgar*, its ruling is generally consistent with *Holowecki*'s dual requirements that in order for an

intake questionnaire to be a charge, it must satisfy the EEOC's regulations and be reasonably construed as a request for the EEOC to take remedial action. Based on this Court's description of the plaintiff's intake questionnaire in *Melgar*, the questionnaire failed to meet that standard. Poston's intake questionnaire, however, satisfies it in every respect, as discussed further below.

B. Poston satisfied the ADA's charge-filing requirements by timely submitting his intake questionnaire and later verifying it.

Holowecki and *Edelman*, along with this Court's precedent, compel the conclusion that Poston's timely-filed intake questionnaire constituted a charge and that his verified Form 5 charge related back to it.[4] Because

[4] Because the timely filing of a discrimination charge is a precondition to suit, not a jurisdictional requirement, the EEOC's general averment that "all conditions precedent" were met satisfied the pleading requirements. ROA.9; *see* Fed. R. Civ. P. 9(c) (stating that satisfaction of conditions precedent may be "allege[d] generally"). Thus, contrary to Vantage's argument below, the EEOC was not required to plead specifically that Poston "timely" filed his discrimination charge. *See EEOC v. Klingler Elec. Corp.*, 636 F.2d 104, 106-07 (5th Cir. Unit A Feb. 1981) (per curiam) (EEOC satisfied Rule 9(c) by pleading that "all conditions precedent" were fulfilled; EEOC did not have to plead specifically that conciliation had failed).

Poston satisfied the ADA's charge-filing requirements, this Court should reverse the district court's dismissal of this action.

1. Poston's intake questionnaire constituted a charge under *Holowecki*.

Poston's intake questionnaire fulfills *Holowecki*'s first requirement for a charge, as it contains the information required by the EEOC's regulations. Pursuant to 29 C.F.R. § 1601.12(b), a charge must be precise enough to identify the parties and to describe generally the action or practice complained of. Poston's intake questionnaire easily satisfies this standard. The questionnaire provides Poston's name as well as Vantage's name and address. ROA.69. Poston checked the box for "disability," provided the date of his discharge ("10/2/14"), named the person responsible ("Kenneth Anderson, RIG manager"), and described what happened and why he thought it was discriminatory ("I was discharged immediately after I finished short term disability (STD) resulting from a heart attack"). ROA.69-70. This information indisputably satisfied 29 C.F.R. § 1601.12(b), and Vantage has never argued otherwise. *Cf. Melgar*, 931 F.3d at 380 (insufficiently specific intake questionnaire was not a charge).

Poston's intake questionnaire submission also satisfied 29 C.F.R. § 1601.12(a), which sets out what a charge "should," but is not required to, contain. That includes: (1) the name, address, and phone number of the person making the charge; (2) the name and address of the respondent; (3) the facts, including pertinent dates; (4) the number of employees working for respondent; and (5) a statement disclosing whether the charging party commenced any proceedings before a State or local agency charged with enforcing fair employment practices. Here, the cover letter accompanying the intake questionnaire provides the attorneys' names, address, and phone number. ROA.67-68. As discussed, the intake questionnaire describes what happened and provides pertinent dates. ROA.69-70. Further, the intake questionnaire provides Vantage's name and address, states the number of employees ("More than 500"), and discloses that Poston had not previously filed a charge with the EEOC or another agency. ROA.69-70; ROA.72.

The intake questionnaire additionally satisfies *Holowecki*'s "request-to-act" requirement. 552 U.S. at 402. By checking "Box 2" on the

questionnaire, Poston expressed his intent "to file a charge" and "authorize the EEOC to look into the discrimination" described. ROA.72. Poston's intent could not have been clearer, as he elected *not* to check "Box 1," which states "I want to talk to an EEOC employee before deciding whether to file a charge. I understand that by checking this box, I have *not* filed a charge." ROA.72 (emphasis added). The intake questionnaire even states that it may be used as a charge. At the bottom of the last page at note 3 for "Principal Purpose," the form provides, "Consistent with 29 C.F.R. § 1601.12(b) and 29 C.F.R. § 1626.8(c), this questionnaire may serve as a charge if it meets the elements of a charge." ROA.72; *cf. Holowecki*, 552 U.S. at 405 ("The design of the form in use in 2001 does not give rise to the inference that the employee requests action against the employer.").[5]

[5] After *Holowecki*, the EEOC modified the Form 283 intake questionnaire to add the boxes permitting individuals to clearly indicate their intent to file charges. *See generally Holowecki*, 552 U.S. at 407 (suggesting that EEOC revise its "forms and processes" to "reduce the risk of further misunderstanding by those who seek its assistance"); *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 113 (3d Cir. 2014) ("Following *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action…. Under the revised form,

Poston's intake questionnaire can thus "be reasonably construed as a request for the agency to take remedial action to protect [Poston]'s rights." *Holowecki*, 552 U.S. at 402. It could not reasonably be construed any other way.

The letter accompanying Poston's intake questionnaire confirms the request for the EEOC to take action. Poston's attorneys wrote, "[p]lease accept this letter as a *complaint of employment discrimination* brought against Vantage Drilling." ROA.67 (emphasis added). Page two reiterates, "thank you for reviewing the immediate *complaints of employment discrimination* against Vantage." ROA.68 (emphasis added). Accordingly, the intake questionnaire submission, viewed as a whole, manifested an intent for the EEOC to take action to protect Poston's rights, satisfying *Holowecki*'s "request-to-act" requirement.

Because the district court's order was so cursory, the basis of its ruling is unclear. To the extent the district court believed that intake

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an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination.").

questionnaires and unverified documents cannot be charges, it misapprehended the law, as discussed, *supra* at 19-34. Insofar as the court might have believed that the intake questionnaire did not comply with 29 C.F.R. § 1601.12(b) or *Holowecki*'s "request-to-act" requirement, it also erred, as the intake questionnaire plainly satisfied *Holowecki*.

Perhaps the district court credited Vantage's argument, advanced at the second hearing, that the intake questionnaire was not a charge because the EEOC did not believe it to be one. *See* ROA.286 (arguing that the EEOC "comes to this Court today and says no, no, no, his intake questionnaire is a charge of discrimination, but they don't believe that"). Vantage based this argument on the EEOC's September 22, 2015, letter to Poston's attorneys, which reminded them that the EEOC had not yet "received charges of discrimination for any of the Charging Parties listed above," including Poston. ROA.286, ROA.195.

Whether or not the district court found this argument persuasive, it lacks legal and factual merit. Legally, *Holowecki* expressly rejected the notion that whether a filing constitutes a charge depends upon how the

EEOC treated it. *See Holowecki*, 552 U.S. at 404 (It "would be illogical and impractical to make the definition of a charge dependent upon a condition subsequent over which the parties have no control."). As a factual matter, the EEOC treated Poston's intake questionnaire as a charge upon receipt and consistently thereafter. As described *supra* at 9-10, when it received the intake questionnaire, the EEOC assigned it a charge number and consistently used that same number on all correspondence and throughout its processing of Poston's filing, which it referred to as a "charge." ROA.69; ROA.73; ROA.76.

Likewise, the September 22, 2015, letter used the same charge number and referred to Poston as one of the "Charging Parties [who] have initiated the charge filing process." ROA.195. It then clarified that "[b]efore we initiate an investigation, we must receive the signed Charges of Discrimination (EEOC Form 5)," and reiterated—in conformance with 29 C.F.R. § 1601.12(b)'s relation-back provision, which *Edelman* upheld—that "[f]or purposes of meeting the deadline for filing a charge, the date of your original signed document will be retained as the original filing date."

ROA.195-96. *Cf. Melgar*, 931 F.3d at 379-80 (intake questionnaire not a charge where it failed to satisfy EEOC's regulations and could not reasonably be construed as a charge because, *inter alia*, the TWC expressly informed the charging party it was not doing so).

2. Under *Edelman*, the verification requirement was satisfied.

As the district court noted, Poston's intake questionnaire was unverified. However, *Edelman* upheld the EEOC's relation-back regulation at 29 C.F.R. § 1601.12(b) as an "unassailable interpretation" of Title VII. 535 U.S. at 118. Here, Poston satisfied the verification requirement by submitting his Form 5 charge signed under penalty of perjury. 29 C.F.R. § 1601.3(a); *see supra* at 11. While outside of the charge-filing period, under 29 C.F.R. § 1601.12(b) and *Edelman*, that verification "relate[d] back to the date the charge was first received." Additionally, the purpose underlying the verification requirement—to provide employers "some degree of insurance against catchpenny claims of disgruntled . . . employees"—was satisfied because the EEOC waited until Poston verified his charge before asking Vantage to respond to it. *Edelman*, 535 U.S. at 115.

Because the district court's order lacks any analysis, the EEOC can only speculate as to its reason for failing to apply *Edelman*. At the first hearing, the district court repeatedly stated its view that Title VII requires a charge to be verified within the 300-day filing period. ROA.221; ROA.223; ROA.225. But that view is incompatible with *Edelman*'s unequivocal holding that the verification requirement can be satisfied *after* the charge-filing period, so long as verification occurs "by the time the employer is obliged to respond to the charge." *Edelman*, 535 U.S. at 113.

Other exchanges from the hearing suggest that the district court may have found *Edelman* inapposite on factual grounds. At one point, the district court noted that 210 days had passed between Poston's intake questionnaire and his verified Form 5 charge and asked whether this occurred in *Edelman*.[6] ROA.228-29. Elsewhere, the court suggested it was not required to apply *Edelman* because in that case verification occurred on day 313 while it occurred here on day 376. ROA.223 ("If the intake was

[6] In *Edelman*, 152 days elapsed between the plaintiff's original submission to the EEOC and his verified Form 5 charge. 535 U.S. at 109-10.

filed on the 299th day and then the charge was filed on the 301st day, you have something different than we have here.”).

But none of these factual distinctions between *Edelman* and this case alters the applicability of *Edelman*’s legal holding. The *Edelman* Court upheld the validity of the relation-back provision at § 1601.12(b) without regard to how much time elapsed between the filing of a charge and its subsequent verification, or how soon after the end of the charge-filing period verification occurred. Rather, *Edelman*’s reasoning focused on the different purposes underlying the timely filing and verification requirements. *Edelman*, 535 U.S. at 112-13.

As the *Edelman* Court explained, the key purpose of the verification requirement is to protect employers from having to respond to a complaint “unless a complainant is serious enough and sure enough to support it by oath subject to liability for perjury.” *Id*. at 113; *see also Price*, 687 F.2d at 77 (“The verification requirement is designed to protect an employer from the filing of frivolous claims.”). “This object … demands an oath only by the time the employer is obliged to respond to the charge, not at the time an

employee files it with the EEOC." *Edelman*, 535 U.S. at 113. *Edelman* also recognized that the EEOC's general practice is to "prepare a formal charge of discrimination for the complainant to review and to verify, once the allegations have been clarified," and only then request a response from the respondent. *Id*. at 115 n.9. By doing this, "the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied." *Id*. at 115.

Such was the case here. Within days of receiving Poston's unverified intake questionnaire, the EEOC notified Vantage it had received a charge of discrimination under the ADA. ROA.76. In accordance with the procedures described above, however, the EEOC informed Vantage that "[n]o action is required by you at this time," and that a "perfected charge (EEOC Form 5) will be mailed to you once it has been received from the Charging Party." ROA.76. Only after Poston submitted his verified Form 5 charge, signed under penalty of perjury, did the EEOC issue a notice to Vantage calling on it to respond to Poston's allegation of disability discrimination.

Finally, we note that it would be especially senseless to dismiss the EEOC's lawsuit now because Vantage *did* respond to the charge, mooting the underlying purpose of the verification requirement. Consistent with *Edelman*, other courts have observed that "the verification requirement is concerned only with protecting an employer from *responding* to an unverified charge. When an employer files a response on the merits, he foregoes the protection that the requirement affords." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 263 (3d Cir. 2006) (plaintiff waived its right to dismiss private complaint for lack of verification where it failed to raise the verification issue during the administrative process and instead responded to the plaintiff's unverified charge). Here, Vantage received Poston's verified Form 5 charge and then submitted a position statement responding to the merits of his claim. ROA.77 (asserting it fired Poston for "poor performance," not due to his disability). This mooted the verification issue in any event.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

SHARON FAST GUSTAFSON
General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ELIZABETH E. THERAN
Assistant General Counsel

s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Senior Appellate Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724
Annenoel.Occhialino@eeoc.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,152 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I certify that 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 2016 in Palatino Linotype 14 point.

s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Senior Appellate Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724
Annenoel.Occhialino@eeoc.gov

September 13, 2019

CERTIFICATE OF SERVICE

I, Anne Noel Occhialino, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system this 13th day of September, 2019, and will file 7 hard copies of the foregoing brief with the Court by next business day delivery, postage pre-paid, when the clerk's office reviews the electronic brief and deems it sufficient. I also certify that the counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system.

s/Anne Noel Occhialino
ANNE NOEL OCCHIALINO
Senior Appellate Attorney
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., 5th Fl.
Washington, D.C. 20507
(202) 663-4724 (phone)
Annenoel.Occhialino@eeoc.gov