

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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No. 12-2226

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ANTONIO VELAZQUEZ PEREZ,

Plaintiff-Appellant,

v.

DEVELOPERS DIVERSIFIED REALTY  
CORP.; DDR PR VENTURES II LLC,

Defendants-Appellees.

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On Appeal from a Judgment of the United States District Court  
for the District of Puerto Rico  
Civil Action No. 10-cv-1002 (GAG)

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BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
*AS AMICUS CURIAE* ON BEHALF OF  
APPELLANT VELAZQUEZ AND IN SUPPORT OF REVERSAL

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## STATEMENT OF INTEREST OF AMICUS CURIAE

The Equal Employment Opportunity Commission (EEOC or Commission) is the federal agency established by Congress to interpret, administer and enforce the employment nondiscrimination and anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* and other federal anti-discrimination statutes. EEOC's effective enforcement of Title VII depends, in significant part, on ensuring aggrieved individuals are able to file administrative charges of discrimination, because the EEOC's receipt and investigation of charges is the Commission's primary means of accomplishing Congress's mandate to enforce Title VII. *See* 42 U.S.C. § 2000e-5. Filing a timely charge with the EEOC is also a statutory prerequisite for an employee to file a Title VII lawsuit. *Id.*

Title VII provides that a charge must be filed within 180 days after the alleged unlawful conduct, but if the charging party has "initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice," the time limit is extended to 300 days. *See* 42 U.S.C. § 2000e-5(e)(1). The EEOC has a strong interest in ensuring that Title VII lawsuits are not improperly dismissed under the erroneous belief that the underlying charge was untimely under this provision. The district court in this case incorrectly applied the 180-day time limit to plaintiff's claim that his former employer retaliated against him for having complained about workplace sexual harassment and then dismissed

the claim for failure to file a timely charge. In fact, for almost two decades, federal district courts in Puerto Rico have mistakenly applied the 180-day time limit to retaliation claims arising out of employee complaints of workplace sexual harassment. Understanding why these decisions are incorrect requires an explanation of the interplay between the provisions of Title VII, the EEOC's procedural regulations interpreting Title VII, and the terms of the "worksharing agreement" between the EEOC and Puerto Rico's fair employment practices agency, the Anti-Discrimination Unit of the Puerto Rico Department of Labor and Human Resources. Because of the importance of this issue to Title VII's proper implementation, and pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the Commission offers its views to this Court.

### **STATEMENT OF THE ISSUE<sup>1</sup>**

Plaintiff Antonio Velazquez Perez alleges his former employer retaliated against him because he complained about being sexually harassed in the workplace. He filed a Title VII retaliation charge with the EEOC more than 180 days, but less than 300 days, after he alleges the retaliation occurred. Did the district court err in ruling Velazquez's retaliation charge untimely because he did not file it within 180 days?

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<sup>1</sup> The Commission takes no position on any other issue in this case.

## STATEMENT OF THE CASE

### Statement of Facts

Defendant Developers Diversified Realty Corporation (DDR) owns and manages shopping centers around the world, including fifteen shopping centers in Puerto Rico. Appellant's Appendix (Appx.) 650. DDR hired plaintiff Antonio Velazquez Perez (Velazquez) in June 2007 as an operations manager for three of DDR's Puerto Rico shopping centers. *Id.* After five months, DDR promoted Velazquez to the position of Regional General Manager, overseeing four shopping centers in the eastern region of Puerto Rico. *Id.* at 650-51.

DDR discharged Velazquez on August 25, 2008. Appx.653-54. DDR alleges that after Velazquez's manager, Rolando Albino, became concerned that Velazquez was not performing his job to DDR's expectations, DDR managers investigated and concluded that Velazquez, among other things, was not working the hours DDR expected of him, failed to manage an incident involving a 30-hour loss of electricity at one shopping center, and misrepresented information when Albino asked him about these matters during the company's investigation. *Id.* at 652-54.

Velazquez offers a different story. Velazquez alleges he was sexually harassed by Rosa Martinez, a DDR regional property accountant and the company's human resources liaison for DDR's operations in Puerto Rico.



Appx.649. Velazquez states that Martinez made unwanted sexual advances toward him over a period of several months, including sending him emails with sexual overtones and attempting to pressure him to have sex with her during business travel. Velazquez further asserts that he was concerned about rebuffing Martinez's advances because he believed that Martinez, as an HR liaison, had the ability to affect his salary and his terms of employment. Velazquez alleges he complained about Martinez to DDR managers in April and August 2008. Velazquez further alleges that the DDR managers, rather than addressing the situation, retaliated against him by fabricating reports that he was not performing his job properly and by ultimately discharging him on August 25, 2008. *See generally* District Court Record Number (R.) 132 at pp.2-5 (Appx.192-95).

On February 26, 2009—185 days after DDR discharged him—Velazquez filed a discrimination charge with the EEOC's office in San Juan, Puerto Rico. *See* Appx.654. Pursuant to the worksharing agreement between the EEOC's Miami District Office and the local fair employment practices (FEP) agency—the Anti-Discrimination Unit (ADU) of the Puerto Rico Department of Labor and Human Resources—the EEOC accepted Velazquez's charge on the ADU's behalf and, thereby, automatically “filed” the charge with the ADU. *See* R.104-2 (Appx.177-

82) - Fiscal Year 2009 Worksharing Agreement, § II.A.<sup>2</sup> Pursuant to the same worksharing agreement, the ADU immediately and automatically waived its statutory right under Title VII to investigate the charge for sixty days before the EEOC institutes administrative proceedings. *See id.* (FY 2009 Worksharing Agreement) § III.A.1.<sup>3</sup> *See* Addendum to EEOC’s Brief.

Velazquez thereafter requested a right-to-sue notice from the EEOC and filed this lawsuit, claiming DDR violated Title VII by failing to prevent and remedy sexual harassment and by retaliating against him for complaining about the harassment. R.1 (Appx.1). After discovery, DDR moved for summary judgment. DDR argued that Velazquez’s claim of retaliation culminating in his August 25, 2008, discharge is time-barred, asserting that in Puerto Rico, Title VII claims of retaliation must be filed within 180 days. DDR argued, first, that EEOC had not

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<sup>2</sup> The FY 2009 Worksharing Agreement provides, in section II.A: “[T]he EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges” and “EEOC’s receipt of charges on the FEPA’s behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII.” Appx.178.

<sup>3</sup> The Worksharing Agreement provides, in section III.A.: “The EEOC and the FEPA will process all Title VII, ADA, and ADEA charges that they originally receive.” Appx.179. Section III.A.1. further provides: “For charges originally received by the EEOC and/or to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.” *Id.*

“conferred” the ADU with “jurisdiction to hear claims for retaliation under Title VII.” *See* R.59 at p.34. In its reply brief, DDR argued, in addition, that Velazquez was not entitled to the 300-day charge-filing period because he did not first institute proceedings with a state or local agency, noting that Velazquez’s EEOC charge (the only charge he filed) does not indicate that he asked the EEOC to cross-file the charge with the ADU. *See* R.90 at pp.8-11.

### **District Court Decision**

The district court granted DDR summary judgment on Velazquez’s Title VII claims. R.152 (slip op. 9/4/2012) (Appx.647-63). The court held that Velazquez’s retaliation claim was time-barred because Velazquez did not file it within 180 days of his discharge. Slip op. at 15 (Appx.661). The court reasoned that “the EEOC has not conferred the Antidiscrimination Unit in Puerto Rico with jurisdiction to hear claims for retaliation under Title VII.” *Id.* (citations omitted). The court did not address DDR’s alternative argument: that Velazquez had only 180 days to file his charge because, having filed his charge with the EEOC, he failed to offer proof that the EEOC cross-filed it with the ADU.

## ARGUMENT

### **THE DISTRICT COURT ERRED IN DISMISSING VELAZQUEZ'S TITLE VII RETALIATION CLAIM FOR FAILURE TO FILE A TIMELY CHARGE.**

#### **A. A Charging Party in Puerto Rico, Filing a Claim of Retaliation under Title VII for having Complained about Sexual Harassment in the Workplace, has 300 Days to File His Charge.**

Before pursuing a Title VII claim in court, a plaintiff must file a timely charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1). “As a general rule, a complainant must file a discrimination charge with the EEOC within 180 days of the occurrence of the alleged unlawful employment practice.” *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 110 (1988) (citing 42 U.S.C. § 2000e-5(e)). But if the alleged unlawful employment practice occurred in a state or political subdivision that has both a state or local law that prohibits the conduct alleged in the charge *and* an agency with authority to grant or seek relief for such violations, and if the individual institutes his or her claim initially with the state or local agency, subsection 706(e) of Title VII extends the charge-filing period to 300 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1); *Commercial Office Prods.*, 486 U.S. at 110. Thus, three elements are required to trigger the 300-day charge-filing period: (1) there must be “a State or local law prohibiting the unlawful employment practice alleged” in the charge;

(2) there must be “a State or local agency with authority to grant or seek relief from such practice”; and (3) the charging party must have “initially instituted proceedings with [that] State or local agency.” *See* 42 U.S.C. § 2000e-5(e)(1).

All three elements are satisfied here. First, Puerto Rico has a local law that prohibits retaliation for complaining about workplace sexual harassment. “Law 17” of the Commonwealth of Puerto Rico, 29 L.P.R.A. §§ 155 *et seq.* (enacted April 22, 1988), prohibits sexual harassment in employment and, further, expressly prohibits employers from retaliating against any employee who, like Velazquez, opposed any practice that Law 17 makes unlawful. *See* 29 L.P.R.A. §§ 155, 155h. Second, the ADU and the Puerto Rico Secretary of Labor and Human Resources have authority to seek relief for workplace sexual harassment and retaliation claims arising out of complaints about such harassment. *See* General By-Laws of the Anti-Discrimination Unit of the Puerto Rico, Department of Labor and Human Resources (Nov. 16, 2000) (describing ADU’s authority under various Puerto Rico statutes to enforce Law 17 by receiving and investigating complaints and conducting mediations and conciliation conferences, and the Secretary’s authority under the same Puerto Rico statutes to enforce Law 17 by filing or intervening in civil actions).

Third, when Velazquez filed his charge with the EEOC, he “initially instituted proceedings with” the ADU, because the worksharing agreement

between the EEOC and the ADU authorized the EEOC to accept Velazquez's charge on the ADU's behalf. *See* Appx.177-82 (discussed *supra* at pp. 4-5). As noted above (p.5 n.2), under the worksharing agreement's express terms, the ADU designated the EEOC as its agent for purposes of receiving charges. The ADU and the EEOC further agreed, in the worksharing agreement, that the "EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII." FY 2009 Worksharing Agreement § II.A (Appx.178) (*see* Addendum).

The EEOC's acceptance of Velazquez's charge thus satisfied the final statutory prerequisite in 42 U.S.C. § 2000e-5(e)(1) for receiving the benefit of the 300-day charge-filing period—that Velazquez "initially instituted proceedings with a State or local agency." *See Griffin v. City of Dallas*, 26 F.3d 610, 612-13 (5th Cir. 1994) (under worksharing agreement between EEOC and Texas FEP agency, EEOC's acceptance of charge satisfied Title VII requirement that plaintiff initially institute proceedings with state agency and entitled plaintiff to 300-day charge-filing period); *see also Tewksbury v. Ottaway Newspapers*, 192 F.3d 322, 325-28 (2d Cir. 1999) (applying Title VII's charge-filing provisions to plaintiff's ADA claim and concluding that, under worksharing agreement between EEOC and state agency, plaintiff's ADA charge "must be deemed to have been filed 'initially' with" deferral-state agency when plaintiff submitted it to EEOC).

The district court acknowledged that “Puerto Rico is a deferral jurisdiction” and that a plaintiff can, therefore, “file a charge of discrimination with the EEOC within 300 days after the alleged unlawful employment practice occurred.” R.152 (9/4/2012 Order) at 15 (Appx.661). *See Marrero v. Goya of Puerto Rico, Inc.*, 304 F.3d 7, 16-17 (1st Cir. 2002) (recognizing Puerto Rico as a “deferral jurisdiction” where charge-filing period is extended to 300 days). The district court incorrectly stated, however, that “the EEOC has not conferred the Antidiscrimination Unit in Puerto Rico with jurisdiction to hear claims for retaliation under Title VII.” Appx.661 (citing *Alvarez v. Delta Airlines*, 319 F. Supp. 2d 240, 249 (D.P.R. 2004), and *Rivera Abella v. Puerto Rico Tel. Co.*, 470 F. Supp. 2d 86, 103 (D.P.R. 2007)).<sup>4</sup> The district court erred both in suggesting the EEOC has authority to “confer” on an FEP agency “jurisdiction to hear” certain claims *and* in concluding that the ADU lacks jurisdiction to address claims of retaliation arising out of sexual harassment complaints.

The cases on which the district court relied cited 29 C.F.R. § 1601.74, the

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<sup>4</sup> The court also cited *Rodriguez Velazquez v. Autoridad Metropolitana de Autobuses*, 502 F. Supp. 2d 200 (D.P.R. 2007), but that case is entirely inapposite. The plaintiff’s retaliation claim in *Rodriguez* was apparently based on complaints about disability discrimination, not sexual harassment, and the district court dismissed the retaliation claim because the plaintiff never mentioned retaliation in his EEOC charge, not because the charge was untimely. *Id.* at 207-09. In the opinion, the district court nevertheless repeated the statement that in Puerto Rico, Title VII claims of retaliation have a 180-day charge-filing time limit. *Id.* at 208.

EEOC regulation that lists designated “FEP agencies” and designated “Notice Agencies.” *Rivera*, 470 F. Supp. 2d at 102-03 & n.10; *Alvarez*, 319 F. Supp. 2d at 249. The court’s opinion in both cases noted that section 1601.74(a) designates the ADU as only a Notice Agency rather than an FEP agency for Title VII claims of retaliation. *See Rivera*, 470 F. Supp. 2d at 102-03 & n.10; *Alvarez*, 319 F. Supp. 2d at 249. The EEOC’s regulation is inaccurate on this point, however, and the court’s reliance on it in *Rivera* and *Alvarez* and, by extension, in this case was improper.

Section 1601.74(a) lists the state and local agencies the EEOC has designated as “FEP agencies,” and section 1601.74(b) lists the state and local agencies the EEOC has designated as “Notice Agencies.” *See* 29 C.F.R. §§ 1601.74(a), (b). When a state or local agency’s enforcement jurisdiction covers some, but not all, of the claims covered by Title VII, the agency is a Notice Agency for the Title VII claims not covered by the state/local law. *See* 29 C.F.R. §§ 1601.70(a), 1601.71 (explaining “FEP agency” and “Notice Agency” designations). *See generally* footnotes to 29 C.F.R. § 1601.74(a) (identifying the state and local agencies that serve as an “FEP” agency for most claims or bases under Title VII but as only a “Notice Agency” for Title VII claims not covered by the state or local law). Where the state or local agency lacks jurisdiction over specified claims and, therefore, serves as only a Notice Agency for charges that



allege such a violation, the 180-day charge-filing time limit applies to those particular claims, even if there are other claims in the same charge that would be entitled to a charge-filing time limit of 300 days. 29 C.F.R. § 1601.13(a)(2); 14A C.J.S. Civil Rights § 537 (2012).

The EEOC's designation of a state or local agency as an FEP agency does not "confer" on that agency jurisdiction over any particular types of charges or claims. Likewise, the EEOC's designation of a state or local agency as only a Notice Agency does not deprive any such state/local agency of jurisdiction over a particular claim or set of claims. Rather, the enforcement authority of any given state or local agency derives wholly from its state and local laws.<sup>5</sup>

To the extent the district court relied on prior district court decisions that mistakenly relied on the failure of the Commission's regulation to point out the exception for retaliation claims that fall within Law 17, the district court erred. Determining whether a particular state or local agency has authority to investigate

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<sup>5</sup> The EEOC's designation reflects the Commission's understanding of the scope of the state or local enforcement authority conferred by the relevant state/local law. The EEOC's identification of the Commonwealth of Puerto Rico as an FEP agency for most Title VII claims but only as a Notice Agency for several categories including "all charges alleging a violation of section 704(a) [of] title VII" (*i.e.*, Title VII retaliation claims), *see* 29 C.F.R. § 1601.74(a) n.5, was correct when originally promulgated. Following Puerto Rico's enactment of Law 17 in 1988, the regulation should have been clarified to reflect that claims of retaliation arising out of complaints of workplace sexual harassment now fall within the enforcement authority of the ADU.

a particular discrimination claim depends entirely on the current scope of the state or local law, not on what the EEOC lists in its regulations. *Cf. MacDonald v. Grace Church Seattle*, 457 F.3d 1079, 1083-85 (9th Cir. 2006) (rejecting plaintiff's argument that, because EEOC regulations listed the Washington State administrative agency as an FEP agency without qualification and failed to indicate that Washington State's antidiscrimination law did not extend to plaintiff's claim, plaintiff was entitled to 300 days to file her charge).

In sum, it is the state and local laws themselves—not the EEOC's list of designated FEP agencies in the Commission's regulations—that govern whether a charging party is entitled to 180 or 300 days to file a particular charge. The failure of the EEOC's regulations to note that claims of retaliation arising out of complaints of sexual harassment are covered under Puerto Rico's anti-discrimination laws and fall within the ADU's enforcement jurisdiction cannot alter the fact that this claim *is* covered under Puerto Rico law, *see* 29 L.P.R.A. § 155h, and that the ADU had authority to seek relief for violations of the anti-retaliation provision of Law 17 when Velazquez filed his charge with the EEOC.

Because Velazquez satisfied all of Title VII's conditions for the 300-day charge-filing period when he filed his retaliation charge with the EEOC, the district court erred in ruling Velazquez's retaliation claim untimely on the ground that he did not file it within 180 days.

**B. Velazquez’s Charge was Automatically Filed with the ADU Pursuant to the Worksharing Agreement Between the EEOC and the ADU.**

In its reply brief, DDR argued that Velazquez was not entitled to the 300-day charge-filing time period in any event because he “failed to file a discrimination charge before the ADU or to request dual filing of the charge before both [the EEOC and the ADU].” R.90 (DDR Reply Brief) at 8. DDR relied on the fact that the copy of Velazquez’s charge in the summary judgment record did not indicate, on its face, that Velazquez had asked the EEOC to dual-file the charge with the ADU. *Id.* at 9. The district court did not address this alternate argument, but it also lacks merit. Filing with the ADU occurred automatically by virtue of the provisions in the worksharing agreement.

Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c), requires the EEOC to defer to an FEP agency for a brief period of time before accepting a charge for EEOC administrative processing. Section 706(c) provides that in a state or local jurisdiction that has both an anti-discrimination law and state/local enforcement authority, no charge may be filed with the EEOC “before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated.” *Id.* When a charging party submits a charge to the EEOC first, the EEOC dual-files it automatically with the appropriate FEP agency. *See* 29 C.F.R. § 1601.13(a)(3) & (4). The EEOC

undertakes this step in order “to give full weight to the policy of section 706(c) of title VII.” 29 C.F.R. § 1601.13(a)(3)(i).

The means by which the EEOC accomplishes this automatic dual-filing varies depending on whether the FEP agency has waived its right to an initial period of exclusive processing. Subsection 1601.13(a)(4)(i)(B) provides that if an FEP agency has *not* waived its right to a period of exclusive processing for the specific allegation in the charge, the EEOC will transmit a copy of the charge to the FEP agency, and “State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered” to the FEP agency. 29 C.F.R. § 1601.13(a)(4)(i)(B). Subsection 1601.13(a)(3)(iii) provides that if the allegation in the charge is one over which the FEP agency *has* waived its right to exclusive processing, “[c]opies of all such charges will be forwarded to the appropriate FEP agency.” 29 C.F.R. § 1601.13(a)(3)(iii).<sup>6</sup>

Velazquez’s charge fell into this latter category, and the EEOC transmitted a copy of the charge to the ADU pursuant to section 1601.13(a)(3)(iii). There is no need to document this transmission to prove dual-filing, however, because under the EEOC/ADU worksharing agreement, the actual filing of Velazquez’s charge

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<sup>6</sup> Thus, with or without a worksharing agreement, and regardless of whether a charging party requests dual-filing, the EEOC dual-files charges automatically with the appropriate FEP agency.

with the ADU occurred when Velazquez submitted the charge to the EEOC.

As noted above, the EEOC's worksharing agreement with the ADU provides that each agency authorizes the other to accept charges on its behalf. *See* discussion at pp. 4-5, *supra*. As is typical of EEOC worksharing agreements, the EEOC/ADU agreement further provides, in section II.A: "EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706(c) and (e)(1) of Title VII." This provision is self-executing. As the Fifth Circuit explained in *Griffin*, "upon the EEOC's receipt of the complaint, [the FEP agency], for all legal and practical purposes, received the complaint." 26 F.3d at 612-13.

This result in no way depends on a charging party's request that a charge be dual-filed. Rather, where the EEOC has entered into a worksharing agreement with an FEP agency, charges are automatically dual-filed *when received by the EEOC*, merely by operation of the worksharing agreement. *See Tewksbury*, 192 F.3d at 327 (holding that, pursuant to worksharing agreement, plaintiff's charge was initially filed with state FEP agency when EEOC received it, even though plaintiff never asked EEOC to dual-file his charge with state agency). *See also, e.g., Puryear v. County of Roanoke*, 214 F.3d 514, 519 (4th Cir. 2000) (by virtue of worksharing agreement's "automatic initiation" and "waiver" provisions, plaintiff properly commenced state proceedings when she filed her charge with

EEOC only); *Hong v. Children's Mem'l Hosp.*, 936 F.2d 967 (7th Cir. 1991) (pursuant to worksharing agreement between Illinois state agency and EEOC, plaintiff automatically initially instituted proceedings with state agency when she filed her charge with EEOC). *Cf. Laquaglia v. Rio Hotel & Casino, Inc.*, 186 F.3d 1172, 1174-76 (9th Cir. 1999) (upholding provision in worksharing agreements that EEOC and state/local agencies accept charges on each other's behalf, and holding that waiver provision in such agreements is "self-executing").

Worksharing agreements like the one between the EEOC and the ADU enable the EEOC and FEP agencies to satisfy Title VII's mandatory deferral requirement in section 706(c) in a more streamlined and cooperative fashion by authorizing the EEOC to accept a charge on the FEP agency's behalf. Congress authorized this type of written agreement by which the EEOC cooperates with state and local agencies. *See* 42 U.S.C. §§ 2000e-4(g)(1), 2000e-8(b). Such worksharing agreements have also been endorsed by the Supreme Court and this Court. *See, e.g., Commercial Office Prods.*, 486 U.S. 107; *Isaac v. Harvard Univ.*, 769 F.2d 817, 824-26 (1st Cir. 1985) (refusing to invalidate worksharing agreement between EEOC and Massachusetts state agency and acknowledging that such worksharing agreements further congressional goals).

Thus, pursuant to the terms of the worksharing agreement between the EEOC and the ADU, when Velazquez submitted his discrimination charge to the

EEOC, the Commission accepted it on behalf of the ADU, and at that point it was automatically deemed to be filed with the ADU. Pursuant to the same worksharing agreement, the ADU immediately terminated its administrative proceedings by virtue of the provision in which the ADU waived its right to process the charge initially. At that point, Velazquez's charge was filed with the EEOC.

This Court has not yet decided whether, when there is a worksharing agreement between the EEOC and a state or local agency by which the EEOC accepts charges on the state/local agency's behalf, a charging party has "initially instituted proceedings" with that state or local agency under 42 U.S.C. § 2000e-5(e)(1) by submitting the charge to the EEOC only. The issue was presented in *EEOC v. Green*, 76 F.3d 19 (1st Cir. 1996), but this Court decided that case on other grounds.

In *Green*, the EEOC argued that pursuant to the worksharing agreement between the EEOC and the Massachusetts Commission Against Discrimination (MCAD), the EEOC's receipt of a charge automatically initiated MCAD's administrative proceedings for purposes of qualifying the charging party for the extended 300-day charge-filing period. 76 F.3d at 23. This Court acknowledged that the language of Title VII supported the EEOC's argument and that a number of other circuits agreed with the EEOC, including the Fifth Circuit in *Griffin*. *Id.* at 23 & nn.4 & 5. This Court found it unnecessary to reach the question, however,

because the Court ruled in the EEOC's favor on an alternate ground. *Id.* at 23.<sup>7</sup>

This case offers this Court the opportunity to clarify this important element of Title VII procedure. That the question needs clarification is demonstrated by the recent district court decision in *De Jesus-Gamboa v. Rio Mar Assocs. LPSE*, Civ. No. 10-cv-2013, 2012 WL 397612 (D.P.R. Feb. 7, 2012). The provisions in the EEOC/ADU worksharing agreement when De Jesus-Gamboa filed his charge with the EEOC, *id.* at \*5, were the same as the provisions at issue here. *Compare* 2010 EEOC/ADU Worksharing Agreement (R.75-31) *with* 2009 EEOC/ADU Worksharing Agreement (Appx.177-82) (*see* Addendum). The district court ruled nevertheless that DeJesus-Gamboa had only 180 days to file his charge, reasoning that by filing his charge with the EEOC, DeJesus-Gamboa had failed to institute proceedings initially with the ADU. *See* 2012 WL 397612, at \*5 & nn. 6 & 7.

Clarifying the proper interpretation of the EEOC/ADU worksharing agreement—as the EEOC has outlined it here—would not only correct the legal

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<sup>7</sup> This Court, in *Green*, urged the EEOC and the MCAD to consider revising the language of the worksharing agreement to clarify that the parties intended that filing a charge with the EEOC would automatically initiate proceedings with the MCAD. *Id.* at 23 & n.6. Several years later, the district court in *Seery v. Biogen, Inc.*, 203 F. Supp. 2d 35 (D. Mass. 2002), observed that the EEOC/MCAD worksharing agreement had been revised and that the new language appeared to address this Court's concern in *Green*. *Id.* at 42-43 & n.13. The provisions in the Puerto Rico worksharing agreement at issue in this case, *see* p.5 n.2, *supra*, likewise appear to avoid the ambiguity that concerned this Court in *Green*.



error in cases like *De Jesus-Gamboa*, but would also serve to answer a related question to which this Court alluded in *Marrero v. Goya of Puerto Rico*. In *Marrero*, this Court questioned whether—given Title VII’s mandatory sixty-day deferral period between filing a charge with a state or local agency and the EEOC, *see* 42 U.S.C. §2000e-5(c)—a complainant in a deferral state might need to file a charge within 240 days of the alleged discriminatory practices to ensure timely filing with the EEOC by day 300. *See Marrero*, 304 F.3d at 17 n.2. As explained, under typical worksharing agreements such as the agreement between the EEOC and the ADU, the EEOC’s receipt of a charge serves to institute proceedings on the FEP agency’s behalf and, pursuant to the waiver provision, immediately terminates the FEP agency’s administrative proceedings, enabling the charge to be filed with the EEOC the same day. *See, e.g., Griffin*, 26 F.3d at 612-13. Thus, a sexual harassment/retaliation charge submitted to the EEOC’s San Juan, Puerto Rico office on day 300 is timely because when it is received by the EEOC, it is immediately filed with *both* the ADU (first) *and* the EEOC (second) on the same day it is received by the EEOC. *See* 29 C.F.R. § 1601.13(a)(4)(ii)(A).<sup>8</sup>

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<sup>8</sup> The EEOC’s interpretation of Title VII’s charge-filing provisions in Section 706, as implemented through the EEOC’s regulations and work-sharing agreements, should be given considerable weight. *See Commercial Office Prods.*, 486 U.S. at 115 (“EEOC’s interpretation of ambiguous language need only be reasonable to be

## CONCLUSION

For the foregoing reasons, the EEOC respectfully asks this Court to reverse the district court's ruling that Velazquez had only 180, rather than 300, days to file his charge alleging DDR retaliated against him for complaining about workplace sexual harassment. We further ask this Court to clarify that, by operation of the EEOC's worksharing agreement with the ADU, a charge filed with the EEOC is automatically dual-filed with the ADU.

Respectfully submitted,

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Dated: February 4, 2013

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entitled to deference"); *id.* at 125 (O'Connor, J., concurring) ("deference [to EEOC] is particularly appropriate on this type of technical issue of agency procedure"); *Isaac v. Harvard Univ.*, 769 F.2d at 826-27 (adopting EEOC's interpretation that waiver provision in the worksharing agreement "terminated" state agency's proceedings, stating "EEOC's interpretation of § 706(c) . . . is 'entitled to great deference'") (internal quotation marks and citations omitted).

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**CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,965 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 in 14-point Times New Roman for both text and footnotes.

/s/ Susan R. Oxford

Dated: February 4, 2013

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Susan R. Oxford

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**42 U.S.C. § 2000e-4(g)(1)**

(g) Powers of Commission

The Commission shall have power—

- (1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals

**42 U.S.C. § 2000e-5(c)**

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

**42 U.S.C. § 2000e-5(e)(1)**

(e) Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency; seniority system

- (1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged

unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

#### **42 U.S.C. § 2000e-8(b)**

Cooperation with State and local agencies administering State fair employment practices laws; participation in and contribution to research and other projects; utilization of services; payment in advance or reimbursement; agreements and rescission of agreements

The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this subchapter and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the services of such agencies and their employees, and, notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this subchapter. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this subchapter.

## **29 C.F.R. § 1601.13(a)**

(a) Initial presentation of a charge to the Commission.

(1) Charges arising in jurisdictions having no FEP agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a FEP agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no FEP agency. Charges over which a FEP agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(3) Charges arising in jurisdictions having a FEP agency with subject matter jurisdiction over the charges are to be processed in accordance with the Commission's deferral policy set forth below and the procedures in paragraph (a)(4) of this section.

(i) In order to give full weight to the policy of section 706(c) of title VII, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by title VII, the ADA, or GINA and State or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as is practicable.

(ii) Section 706(c) of title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in § 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A FEP agency may waive its right to the period of exclusive processing of charges provided under section 706(c) of title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate FEP agency.

(4) The following procedures shall be followed with respect to charges which arise in jurisdictions having a FEP agency with subject matter jurisdiction over the charges:

(i) Where any document, whether or not verified, is received by the Commission as provided in § 1601.8 which may constitute a charge cognizable under title VII, the ADA, or GINA, and where the FEP agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate FEP agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the original document, shall be transmitted by registered mail, return receipt requested, to the appropriate FEP agency, or, where the FEP agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the FEP agency pursuant to the provisions of section 706(c) of title VII.

(ii) Such charges are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the FEP agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.



(B) Where the document on its face constitutes a charge which is not within a category of charges over which the FEP agency has waived its right to the period of exclusive processing referred to in paragraph (a)(3)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(4)(i) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of FEP agency proceedings, or upon waiver of the FEP agency's right to exclusively process the charge, whichever is earliest. Where the FEP agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the FEP agency terminated its proceedings or the FEP agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

#### **29 C.F.R. § 1601.70(a)**

(a) State and local fair employment practice agencies or authorities which qualify under section 706(c) of title VII and this section shall be designated as “FEP agencies.” The qualifications for designation under section 706(c) are as follows:

(1) That the State or political subdivision has a fair employment practice law which makes unlawful employment practices based upon race, color, religion, sex, national origin or disability; and

(2) That the State or political subdivision has either established a State or local authority or authorized an existing State or local authority that is empowered with respect to employment practices found to be unlawful, to do one of three things: To grant relief from the practice; to seek relief from the practice; or to institute criminal proceedings with respect to the practice.

## **29 C.F.R. § 1601.71**

(a) When the Commission determines that an agency or authority meets the criteria outlined in section 706(c) of title VII and § 1601.70, the Commission shall so notify the agency by letter and shall notify the public by publication in the Federal Register of an amendment to § 1601.74.

(b) Where the Commission determines that an agency or authority does not come within the definition of a FEP agency for purposes of a particular basis of discrimination or where the agency or authority applies for designation as a Notice Agency, the Commission shall notify that agency or authority of the filing of charges for which the agency or authority is not a FEP agency. For such purposes that State or local agency will be deemed a Notice Agency.

(c) Where the Chairman becomes aware of events which lead him or her to believe that a deferral Agency no longer meets the requirements of a FEP agency and should no longer be considered a FEP agency, the Chairman will so notify the affected agency and give it 15 days in which to respond to the preliminary findings. If the Chairman deems necessary, he or she may convene a hearing for the purpose of clarifying the matter. The Commission shall render a final determination regarding continuation of the agency as a FEP agency.

## **29 C.F.R. § 1601.74**

(a) The designated FEP agencies are:

Alaska Commission for Human Rights  
Alexandria (VA) Human Rights Office  
Allentown (PA) Human Relations Commission  
Anchorage (AK) Equal Rights Commission  
Anderson (IN) Human Relations Commission  
Arizona Civil Rights Division  
Arlington County (VA) Human Rights Commission<sup>2</sup>

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<sup>2</sup> The Arlington Human Rights Commission has been designated as a FEP agency for all charges except charges alleging a violation of title VII by a government, government agency, or political subdivision of the State of Virginia. For these

Austin (TX) Human Relations Commission<sup>3</sup>  
Baltimore (MD) Community Relations Commission  
Bloomington (IL) Human Relations Commission  
Bloomington (IN) Human Rights Commission  
Broward County (FL) Human Relations Commission  
California Department of Fair Employment and Housing  
Charleston (WV) Human Rights Commission  
City of Salina (KS) Human Relations Commission and Department  
City of Springfield (IL) Department of Community Relations  
Clearwater (FL) Office of Community Relations  
Colorado Civil Rights Commission  
Colorado State Personnel Board<sup>4</sup>  
Commonwealth of Puerto Rico Department of Labor<sup>5</sup>  
Connecticut Commission on Human Rights and Opportunity  
Corpus Christi (TX) Human Relations Commission  
Dade County (FL) Fair Housing and Employment Commission  
Delaware Department of Labor  
District of Columbia Office of Human Rights

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types of charges it shall be deemed a “Notice agency” pursuant to 29 CFR 1601.71(b).

<sup>3</sup> The Austin (TX) Human Relations Commission has been designated as a FEP agency for all charges except charges alleging a violation of title VII by a government, government agency, or political subdivision of the State of Texas. For these types of charges it shall be deemed a “Notice Agency,” pursuant to 29 CFR 1601.71(b).

<sup>4</sup> The Colorado State Personnel Board has been designated as a FEP agency for only those charges which relate to appointments, promotions, and other personnel actions that take place in the State personnel system. In addition, it has been designated as a FEP agency for all of the above mentioned charges except charges which allege a violation of section 704(a) of title VII. For this type of charge it shall be deemed a “Notice Agency” pursuant to 29 CFR 1601.71(b).

<sup>5</sup> The Commonwealth of Puerto Rico Department of Labor has been designated as a FEP agency for all charges except (1) charges alleging a “labor union” has violated title VII; (2) charges alleging an “Employment Agency” has violated title VII; (3) charges alleging violations of title VII by agencies or instrumentalities of the Government of Puerto Rico when they are not operating as private businesses or enterprises; and (4) all charges alleging violations of sec. 704(a) or title VII. For these types of charges it shall be deemed a “Notice Agency,” pursuant to 29 CFR 1601.71(b).

Durham (NC) Human Relations Commission  
East Chicago (IN) Human Rights Commission  
Evansville (IN) Human Relations Commission  
Fairfax County (VA) Human Rights Commission  
Florida Commission on Human Relations  
Fort Dodge–Webster County (IA) Human Rights Commission  
Fort Wayne (IN) Metropolitan Human Relations Commission  
Fort Worth (TX) Human Relations Commission  
Gary (IN) Human Relations Commission  
Georgia Office of Fair Employment Practices<sup>6</sup>  
Hawaii Department of Labor and Industrial Relations<sup>7</sup>  
Hillsborough County (FL) Equal Opportunity and Human Relations Department  
Howard County (MD) Human Rights Commission<sup>8</sup>  
Huntington (WV) Human Relations Commission  
Idaho Human Rights Commission  
Illinois Department of Human Rights  
Indiana Civil Rights Commission  
Iowa Civil Rights Commission  
Jacksonville (FL) Equal Employment Opportunity Commission  
Kansas City (KS) Human Relations Department  
Kansas City (MO) Human Relations Department  
Kansas Human Rights Commission  
Kentucky Commission on Human Rights  
Lee County (FL) Department of Equal Opportunity  
Lexington–Fayette (KY) Urban County Human Rights Commission  
Lincoln (NE) Commission on Human Rights<sup>9</sup>

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<sup>6</sup> The Georgia Office of Fair Employment Practices has been designated as a FEP agency for all charges covering the employment practices of the departments of the State of Georgia only.

<sup>7</sup> The Hawaii Department of Labor and Industrial Relations has been granted FEP agency designation of all charges except those filed against units of the State and local government, in which case it shall be deemed a “Notice Agency.”

<sup>8</sup> The Howard County (MD) Human Rights Commission has been granted designation of all charges except those filed against agencies of Howard County in which case it shall be deemed a “Notice Agency.”

<sup>9</sup> The Lincoln (NE) Commission on Human Rights has been designated as a FEP agency for all charges except (1) a charge by an “applicant for membership” alleging a violation of section 703(c)(2) of title VII(2) a charge by an individual alleging that a “joint labor-management committee” has violated section 704(a) of

Louisiana (LA) Commission on Human Rights  
Louisville and Jefferson County (KY) Human Relations Commission  
Madison (WI) Equal Opportunities Commission  
Maine Human Rights Commission  
Maryland Commission on Human Relations  
Mason City (IA) Human Rights Commission  
Massachusetts Commission Against Discrimination  
Michigan City (IN) Human Rights Commission  
Michigan Department of Civil Rights  
Minneapolis (MN) Department of Civil Rights  
Minnesota Department of Human Rights  
Missouri Commission on Human Rights  
Montana Human Rights Division  
Montgomery County (MD) Human Relations Commission  
Nebraska Equal Opportunity Commission  
Nevada Commission on Equal Rights of Citizens  
New Hampshire Commission for Human Rights  
New Hanover (NC) Human Relations Commission<sup>10</sup>  
New Haven (CT) Commission on Equal Opportunities  
New Jersey Division of Civil Rights, Department of Law and Public Safety  
New Mexico Human Rights Commission  
New York City (NY) Commission on Human Rights  
New York State Division on Human Rights  
North Carolina State Office of Administrative Hearings  
North Dakota Department of Labor

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title VII; and (3) a charge by an individual alleging that a “joint labor-management committee” has violated section 704(b) of title VII. For those types of charges, it shall be deemed a “Notice Agency,” pursuant to 29 CFR 1601.71(b).

<sup>10</sup> The New Hanover Human Relations Commission is being designated as a FEP agency for charges covering employment practices under section 706(c) of title VII and CFR 1601.70 et seq. (1980) within New Hanover County and “such cities within the county as may by resolution of their governing boards, permit the Ordinance of the Board of Commissioners of New Hanover County entitled ‘Prohibition of Discrimination in Employment’ to be applicable within such cities.” This covers Wilmington City and the unincorporated area of New Hanover County. At this time Wrightsville Beach, Carolina Beach and Kure Beach are not included in this designation. For charges from these latter locales the New Hanover Human Relations Commission shall be deemed a “Notice Agency,” pursuant to 29 CFR 1601.71(b).

Ohio Civil Rights Commission  
Oklahoma Human Rights Commission  
Omaha (NE) Human Relations Department  
Orange County (NC) Human Relations Commission  
Oregon Bureau of Labor  
Orlando (FL) Human Relations Department  
Paducah (KY) Human Rights Commission  
Palm Beach County (FL) Office of Equal Opportunity  
Pennsylvania Human Relations Commission  
Philadelphia (PA) Commission on Human Relations  
Pinellas County (FL) Affirmative Action Office  
Pittsburgh (PA) Commission on Human Rights  
Prince George's County (MD) Human Relations Commission  
Prince William County (VA) Human Rights Commission  
Reading (PA) Human Relations Commission  
Rhode Island Commission for Human Rights  
Richmond County (GA) Human Rights Commission  
Rockville (MD) Human Rights Commission  
St. Louis (MO) Civil Rights Enforcement Agency  
St. Paul (MN) Department of Human Rights  
St. Petersburg (FL) Human Relations Division<sup>11</sup>  
Seattle (WA) Human Rights Commission  
Sioux Falls (SD) Human Relations Commission  
South Bend (IN) Human Rights Commission  
South Carolina Human Affairs Commission  
South Dakota Division of Human Rights  
Springfield (OH) Human Relations Department  
Tacoma (WA) Human Relations Commission  
Tampa (FL) Office of Community Relations  
Tennessee Commission for Human Development  
Texas Commission on Human Rights  
Topeka (KS) Human Relations Commission

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<sup>11</sup> On June 1, 1979, the St. Petersburg Office of Human Relations was designated a FEP agency for all charges except those charges alleging retaliation under section 704(a) of title VII. Accordingly, “for retaliation charges” it was deemed a “Notice Agency,” pursuant to 29 CFR 1601.71(c). See 44 FR 31638. On May 23, 1979, an ordinance amended the St. Petersburg, FL Human Relations law to include charges of retaliation. Therefore, retaliation charges will be deferred to that agency effective immediately.

Utah Industrial Commission, Anti-Discrimination Division  
Vermont Attorney General's Office, Civil Rights Division  
Vermont Human Rights Commission  
Virgin Islands Department of Labor  
Virginia Council on Human Rights  
Washington Human Rights Commission  
West Virginia Human Rights Commission  
Wheeling (WV) Human Rights Commission  
Wichita Falls (TX) Human Relations Commission  
Wisconsin Equal Rights Division, Department of Industry, Labor and Human Relations  
Wisconsin State Personnel Commission<sup>12</sup>  
Wyoming Fair Employment Practices Commission  
York (PA) Human Relations Commission  
Youngstown (OH) Human Relations Commission

(b) The designated Notice Agencies are:

Arkansas Governor's Committee on Human Resources  
Ohio Director of Industrial Relations  
Raleigh (NC) Human Resources Department, Civil Rights Unit

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<sup>12</sup> The Wisconsin State Personnel Commission is being designated as a FEP agency for all charges covering the employment practices of the agencies of the State of Wisconsin except those charges alleging retaliation under 704(a) of title VII. Accordingly, for retaliation charges, it shall be deemed a Notice Agency pursuant to 29 CFR 1601.71(b).

**FY 2009 EEOC/FEPA MODEL WORKSHARING AGREEMENT**

**WORKSHARING AGREEMENT**

**BETWEEN**

**Puerto Rico Department of Labor & Human Resources  
Anti-Discrimination Unit**

**and**

**The U.S. Equal Employment Opportunity Commission  
Miami District Office**

**FOR FISCAL YEAR 2009**

**I. INTRODUCTION**

1. The Anti-Discrimination Unit, hereinafter referred to as the FEPA, has jurisdiction over allegations of employment discrimination filed against employers of 1 or more employees occurring within Puerto Rico based on (list all bases including those for disability, as appropriate,) age, sex, race, color, marital status, national origin, political and religious believe, social status, domestic violence, sexual assault and stalking, and against employers with 15 or more employees based on physical or mental disability; pursuant to Act 100 of June 30, 1959, as amended; Act 3, of March 1942, as amended; Act 69 of July 6, 1985; Act 17 of April 22, 1988, as amended; Act 44 of July 2, 1985, as amended and Act 427 of December 16, 2000, as amended.

*CAI*  
The U.S. Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, has jurisdiction over allegations of employment discrimination occurring throughout the United States where such charges are based on race, color, religion, sex, or national origin, all pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)) (hereinafter referred to as Title VII). The EEOC has jurisdiction to investigate and determine charges of discrimination based on age (40 or older) under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621 et seq.) (ADEA), for unequal wages based on sex under the Equal Pay Act of 1963, as amended (29 U.S.C. § 206) (EPA), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. § 12101) (ADA).

- B. In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement, which is designed to provide individuals with an efficient



procedure for obtaining redress for their grievances under appropriate Commonwealth of Puerto Rico and Federal laws.

## II. FILING OF CHARGES OF DISCRIMINATION

- A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706 (c) and (e) (1) of Title VII. This delegation of authority to receive charges does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge. Charges can be transferred from one agency to another in accordance with the terms of this agreement or by other mutual agreement.
- B. The FEPA shall take all charges alleging a violation of Title VII, the ADEA, the EPA, or the ADA where both the FEPA and the EEOC have mutual jurisdiction, or where the EEOC only has jurisdiction, so long as the allegations meet the minimum requirements of those Acts, and for charges specified in Section III. A. 1. below, refer them to the EEOC for initial processing.
- C. Each Agency will inform individuals of their rights to file charges directly with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of both agencies to the extent of their common jurisdiction.

Normally, once an agency begins an investigation, it resolves the charge. Charges may be transferred between the EEOC and the FEPA within the framework of a mutually agreeable system. Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III (DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES).

- epw*
- D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, an employment discrimination charge form which within statutory limitations, is acceptable in form and content to the EEOC and the FEPA) to draft charges. When a charge is taken based on disability, the nature of the disability shall not be disclosed on the face of the charge. (If applicable state statute or local ordinance requires such disclosures, this sentence may be deleted.)

(More specific instructions depending on District Office/FEPA procedures should also be included here.)

- E. Within ten calendar days of receipt, each Agency agrees that it will notify both the Charging Party and the Respondent of the dual-filed nature of each such charge it receives for initial processing and explain the rights and responsibilities of the parties under the applicable Federal, State, or Local statutes.

III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

In recognition of the statutory authority granted to the FEPA by Section 706(c) and 706(d) of Title VII as amended; and by Title I of the Americans with Disabilities Act, and the transmittal of charges of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving charges between the FEPA and the EEOC will be divided as follows:

- A. The EEOC and the FEPA will process all Title VII, ADA, and ADEA charges that they originally receive.
1. For charges originally received by the EEOC and/or to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

In addition, the EEOC will initially process the following charges:

- All Title VII, ADA, and concurrent Title VII/ADA charges jurisdictional with the FEPA and received by the FEPA 240 days or more after the date of violation;
- All disability-based charges that may not be resolved by the FEPA in a manner consistent with the ADA.
- All concurrent Title VII/EPA charges;
- All charges against the FEPA or its parent organization where such parent organization exercises direct or indirect control over the charge decision-making process;
- All charges filed by EEOC Commissioners;
- Charges also covered by the Immigration Reform and Control Act;
- Complaints referred to the EEOC by the U.S. Department of Justice, Office of Federal Contract Compliance Programs, or Federal fund-granting agencies under 29 CFR § 1640, 1641, and 1691.
- Any charge where the EEOC is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;
- Any charge alleging retaliation for filing a charge with the EEOC or for cooperating with the EEOC; and

*epa.*

-- All charges against Respondents that are designated for initial processing by the EEOC in a supplementary memorandum to this Agreement.

-- (Add additional provisions specific to District Office here)

2. The FEPA will initially process the following types of charges:

-- Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

-- Any charge where the FEPA is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an on-going list of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

-- All charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered by the FEPA Ordinance, or where the EEOC is mandated by federal court decision or by internal administrative EEOC policy to dismiss the charge, but the FEPA can process that charge.

-- All charges against Respondents that are designated for initial processing by the FEPA in a supplementary memorandum to this Agreement; and

-- All disability-based charges against Respondents over which the EEOC does not have jurisdiction.

(Add additional provisions specific to the FEPA here.)

- CM*
- B. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge subject to agreement of the other agency. Such variations shall not be inconsistent with the objectives of this Worksharing Agreement or the Contracting Principles.
- C. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list a copy of the new charge will be sent to the other Agency's litigation unit within working days.

#### IV. EXCHANGE OF INFORMATION

- A. Both the FEPA and the EEOC shall make available for inspection and copying to appropriate officials from the other Agency any information that may assist each Agency in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, investigative files, conciliation agreements, staffing information, case management printouts,

charge processing documentation, and any other material and data as may be related to the processing of dual-filed charges or administration of the contract. The Agency accepting information agrees to comply with any confidentiality requirements imposed on the agency providing the information. With respect to all information obtained from the EEOC, the FEPA agrees to observe the confidentiality provisions of Title VII, the ADEA, and the ADA.

- B. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

V. RESOLUTION OF CHARGES

- A. Both agencies will adhere to the procedures set out in the EEOC's State and Local Handbook, including current revisions thereto.
- B. For the purpose of according substantial weight to the FEPA final finding and order, the FEPA must submit to the EEOC copies of all documents pertinent to conducting a substantial weight review; the evaluation will be designed to determine whether the following items have been addressed in a manner sufficient to satisfy EEOC requirements; including, but not limited to:
  - 1. jurisdictional requirements,
  - 2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,
  - 3. relief, if appropriate,
  - 4. mechanisms for monitoring and enforcing compliance with all terms of conciliation agreements, orders after public hearing or consent orders to which the FEPA is a party.
- C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive and administrative requirements as stipulated in the Contracting Principles.
- D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable State and Local statutes.

*EM*

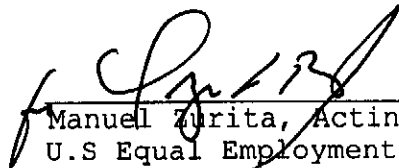
VI. IMPLEMENTATION OF THE WORKSHARING AGREEMENT

- A. Each agency will designate a person as liaison official for the other agency to contact concerning the day-to-day implementation for the Agreement. The liaison for the FEPA will be Carmen A. Lugo Fournier. The liaison official for the EEOC will be (name of person).

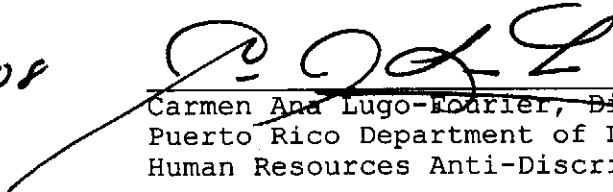
- B. The agencies will monitor the allocation of charge-processing responsibilities as set forth in the Agreement. Where it appears that the overall projection appears inappropriate, the appropriate portions of this Agreement will be modified to ensure full utilization of the investigation and resolution capacities of the FEPA and rapid redress for allegations of unlawful employment discrimination.
  
- C. The EEOC will provide original forms to be copied by the FEPA, in accordance with the Regulations and the Compliance Manual to be used by the FEPAs in correspondence with Charging Parties and Respondents.
  
- D. If a dispute regarding the implementation or application of this agreement cannot be resolved by the FEPA and District Office Director, the issues will be reduced to writing by both parties and forwarded to the Director of the Office of Field Programs for resolution.
  
- E. This Agreement shall operate from the first day of October 2008 to the thirtieth day of September 2009 and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

10/29/08  
Date

  
\_\_\_\_\_  
Manuel Zurita, Acting District Director  
U.S Equal Employment Opportunity Commission  
Miami District Office

October 21, 2008  
Date

  
\_\_\_\_\_  
Carmen Ana Lugo-Rodriguez, Director  
Puerto Rico Department of Labor &  
Human Resources Anti-Discrimination Unit

FY 2010 EEOC/FEPA MODEL WORKSHARING AGREEMENT

WORKSHARING AGREEMENT

BETWEEN

Puerto Rico Department of Labor & Human Resources  
Anti-Discrimination Unit

and

The U.S. Equal Employment Opportunity Commission  
Miami District Office

FOR FISCAL YEAR 2010

I. INTRODUCTION

1. The Anti-Discrimination Unit, hereinafter referred to as the FEPA, has jurisdiction over allegations of employment discrimination filed against employers of 1 or more employees occurring within Puerto Rico based on (list all bases including those for disability, as appropriate,) pursuant to age, sex, race, color, marital status, national origin, political and religious believe, social status, domestic violence, sexual assault and stalking, , and against employers with 15 or more employees based on physical or mental disability pursuant to Act 100 of June 30, 1959, as amended; Act 3, of March 1942, as amended; Act 69 of July 6, 1985; Act 17 of April 22, 1988, as amended; Act 44 of July 2, 1985, as amended and Act 427 of December 16, 2000, as amended.

*De la Cruz*

The U.S. Equal Employment Opportunity Commission, hereinafter referred to as the EEOC, has jurisdiction over allegations of employment discrimination occurring throughout the United States where such charges are based on race, color, religion, sex, or national origin, all pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000(e)) (hereinafter referred to as Title VII). The EEOC has jurisdiction to investigate and determine charges of discrimination based on age (40 or older) under the Age Discrimination in Employment Act of 1967, as amended (29 U.S.C. § 621 et seq.) (ADEA), for unequal wages based on sex under the Equal Pay Act of 1963, as amended (29 U.S.C. § 206) (EPA), and over allegations of employment discrimination based on disability pursuant to Title I of the Americans with Disabilities Act of 1990, as amended (42 U.S.C. § 12101) (ADA).

- B. In recognition of, and to the extent of the common jurisdiction and goals of the two (2) Agencies, and in consideration of the mutual promises and covenants contained herein, the FEPA and the EEOC hereby agree to the terms of this Worksharing Agreement,

which is designed to provide individuals with an efficient procedure for obtaining redress for their grievances under appropriate Commonwealth of Puerto Rico and Federal laws.

## II. FILING OF CHARGES OF DISCRIMINATION

- drawn*
- A. In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving and drafting charges, including those that are not jurisdictional with the agency that initially receives the charges. The EEOC's receipt of charges on the FEPA's behalf will automatically initiate the proceedings of both the EEOC and the FEPA for the purposes of Section 706 (c) and (e) (1) of Title VII. This delegation of authority to receive charges does not include the right of one Agency to determine the jurisdiction of the other Agency over a charge. Charges can be transferred from one agency to another in accordance with the terms of this agreement or by other mutual agreement.
  - B. The FEPA shall take all charges alleging a violation of Title VII, the ADEA, the EPA, or the ADA where both the FEPA and the EEOC have mutual jurisdiction, or where the EEOC only has jurisdiction, so long as the allegations meet the minimum requirements of those Acts, and for charges specified in Section III. A. 1. below, refer them to the EEOC for initial processing.
  - C. Each Agency will inform individuals of their rights to file charges directly with the other Agency and or assist any person alleging employment discrimination to draft a charge in a manner that will satisfy the requirements of both agencies to the extent of their common jurisdiction.

Normally, once an agency begins an investigation, it resolves the charge. Charges may be transferred between the EEOC and the FEPA within the framework of a mutually agreeable system. Each agency will advise Charging Parties that charges will be resolved by the agency taking the charge except when the agency taking the charge lacks jurisdiction or when the charge is to be transferred in accordance with Section III (DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES).

- D. For charges that are to be dual-filed, each Agency will use EEOC Charge Form 5 (or alternatively, an employment discrimination charge form which within statutory limitations, is acceptable in form and content to the EEOC and the FEPA) to draft charges. When a charge is taken based on disability, the nature of the disability shall not be disclosed on the face of the charge. (If applicable state statute or local ordinance requires such disclosures, this sentence may be deleted.)

(More specific instructions depending on District Office/FEPA procedures should also be included here.)

- E. Within ten calendar days of receipt, each Agency agrees that it will notify both the Charging Party and the Respondent of the dual-filed nature of each such charge it receives for initial

processing and explain the rights and responsibilities of the parties under the applicable Federal, State, or Local statutes.

### III. DIVISION OF INITIAL CHARGE-PROCESSING RESPONSIBILITIES

In recognition of the statutory authority granted to the FEPA by Section 706(c) and 706(d) of Title VII as amended; and by Title I of the Americans with Disabilities Act, and the transmittal of charges of age discrimination pursuant to the Age Discrimination in Employment Act of 1967, the primary responsibility for resolving charges between the FEPA and the EEOC will be divided as follows:

- A. The EEOC and the FEPA will process all Title VII, ADA, and ADEA charges that they originally receive.
1. For charges originally received by the EEOC and/or to be initially processed by the EEOC, the FEPA waives its right of exclusive jurisdiction to initially process such charges for a period of 60 days for the purpose of allowing the EEOC to proceed immediately with the processing of such charges before the 61st day.

In addition, the EEOC will initially process the following charges:

- All Title VII, ADA, and concurrent Title VII/ADA charges jurisdictional with the FEPA and received by the FEPA 240 days or more after the date of violation;
- All disability-based charges that may not be resolved by the FEPA in a manner consistent with the ADA.
- All concurrent Title VII/EPA charges;
- All charges against the FEPA or its parent organization where such parent organization exercises direct or indirect control over the charge decision-making process;
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- Complaints referred to the EEOC by the U.S. Department of Justice, Office of Federal Contract Compliance Programs, or Federal fund-granting agencies under 29 CFR § 1640, 1641, and 1691.
- Any charge where the EEOC is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The EEOC will notify the FEPA of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

*revised*



-- Any charge alleging retaliation for filing a charge with the EEOC or for cooperating with the EEOC; and

-- All charges against Respondents that are designated for initial processing by the EEOC in a supplementary memorandum to this Agreement.

-- (Add additional provisions specific to District Office here)

2. The FEPA will initially process the following types of charges:

-- Any charge alleging retaliation for filing a charge with the FEPA or cooperating with the FEPA;

-- Any charge where the FEPA is a party to a Conciliation Agreement or a Consent Decree that, upon mutual consultation and agreement, is relevant to the disposition of the charge. The FEPA will provide the EEOC with an on-going list of all Conciliation Agreements and Consent Decrees that have features relevant to the disposition of subsequent charges;

-- All charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered by the FEPA Ordinance, or where the EEOC is mandated by federal court decision or by internal administrative EEOC policy to dismiss the charge, but the FEPA can process that charge.

-- All charges against Respondents that are designated for initial processing by the FEPA in a supplementary memorandum to this Agreement; and

-- All disability-based charges against Respondents over which the EEOC does not have jurisdiction.

(Add additional provisions specific to the FEPA here.)

- B. Notwithstanding any other provision of the Agreement, the FEPA or the EEOC may request to be granted the right to initially process any charge subject to agreement of the other agency. Such variations shall not be inconsistent with the objectives of this Worksharing Agreement or the Contracting Principles.
- C. Each Agency will on a quarterly basis notify the other of all cases in litigation and will notify each other when a new suit is filed. As charges are received by one Agency against a Respondent on the other Agency's litigation list a copy of the new charge will be sent to the other Agency's litigation unit within working days.

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- B. In order to expedite the resolution of charges or facilitate the working of this Agreement, either Agency may request or permit personnel of the other Agency to accompany or to observe its personnel when processing a charge.

#### V. RESOLUTION OF CHARGES

- A. Both agencies will adhere to the procedures set out in the EEOC's State and Local Handbook, including current revisions thereto.
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  - 1. jurisdictional requirements,
  - 2. investigation and resolution of all relevant issues alleging personal harm with appropriate documentation and using proper theory,
  - 3. relief, if appropriate,
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- C. In order to be eligible for contract credit and/or payment, submissions must meet all the substantive and administrative requirements as stipulated in the Contracting Principles.
- D. For the purposes of determining eligibility for contract payment, a final action is defined as the point after which the charging party has no administrative recourse, appeal, or other avenue of redress available under applicable State and Local statutes.

#### VI. IMPLEMENTATION OF THE WORKSHARING AGREEMENT

- A. Each agency will designate a person as liaison official for the other agency to contact concerning the day-to-day implementation

for the Agreement. The liaison for the FEPA will be Domingo E. Chicón de Peña, Esq. The liaison official for the EEOC will be (name of person).

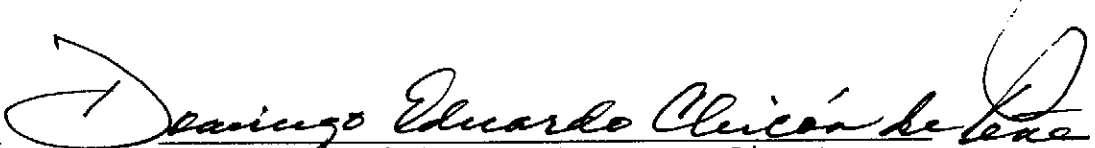
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- E. This Agreement shall operate from the first day of October 2009 to the thirtieth day of September 2010 and may be renewed or modified by mutual consent of the parties.

I have read the foregoing Worksharing Agreement and I accept and agree to the provisions contained therein.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Delner Franklin-Thomas, Acting District Director  
U.S Equal Employment Opportunity Commission  
Miami District Office

\_\_\_\_\_  
August 9, 2010  
Date

  
Domingo E. Chicón de Peña, Esq., Director  
Puerto Rico Department of Labor &  
Human Resources Anti-Discrimination Unit

## CERTIFICATE OF SERVICE

I hereby certify that on February 4, 2013, I filed the within amicus curiae brief with the Clerk of the Court, U.S. Court of Appeals for the First Circuit, using the court's electronic case filing (ECF) system and, on this same date, served the counsel noted below by email and using the Court's ECF system:

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Counsel for Defendants-Appellees Developers  
Diversified Realty Corp. & DDR PR Ventures II LLC

/s/ Susan R. Oxford

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Susan R. Oxford  
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