UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
Plaintiff,	:	
	:	
v.	:	**C.A. 14-78S**
	:	
STATE OF RHODE ISLAND, RHODE ISLAND DEPARTMENT OF CORRECTIONS,	:	
Defendants.	:	

MOTION TO DISMISS

Now comes the State of Rhode Island and the Rhode Island Department of Corrections and hereby moves to dismiss the Complaint in the above entitled matter pursuant to Fed.R.Civ.P. 12(b)(6). A Memorandum of Law and Exhibits in Support accompany this Motion.

Respectfully submitted:

STATE OF RHODE ISLAND, and
RHODE ISLAND DEPARTMENT
OF CORRECTIONS

By Its Attorney,

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CERTIFICATION

I, the undersigned, hereby certify that I filed the within Memorandum via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the following attorneys of record on this 25th day of April 2014.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

The United States Department of Justice ("DOJ") brings this lawsuit against the State of Rhode Island Department of Corrections (the "State" or "DOC") alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6, for the time period of 2000 to 2011. (Complaint, Doc. 1, Feb. 10, 2014). The DOJ filed this action as a "pattern or practice" suit under 42 U.S.C. § 2000e-6, alleging unintentional disparate impact in the DOC's selection process for the correctional officer training academy. The Complaint followed the results of a DOJ investigation, which began in September of 2009 and culminated in a DOJ letter dated November 26, 2013 alleging unlawful employment practices. Through this action, the DOJ seeks prospective injunctive and retrospective individual relief reaching back 14 years to "'make whole' those African-American and Hispanic applicants…who have been harmed or will be harmed" because of the use of "written and video examinations" during the multistep selection process for the DOC's correctional officer training academy. (Complaint, Doc. 1, ¶¶ 9-33 and Prayer for Relief ¶¶ a – d).

A timely filing of a charge or notice of alleged discrimination is a prerequisite for any actions under Title VII. The DOJ's claims seeking "make whole" relief, which could include preferential hiring and monetary damages for individuals reaching back 14 years, must be dismissed. There is no discernible accrual date for the relief sought because the DOJ failed to follow the Title VII prerequisites. Title VII was designed to address allegations of discrimination through timely notice of a charge that states the time, place, and circumstances of the unlawful conduct with the Equal Employment Opportunity Commission ("EEOC") and conciliation efforts. Congress has provided no exemption for the DOJ when pursuing an action under Title VII. The DOJ must act in accordance with these procedures in a pattern or practice case under Section 707 of Title VII (42 U.S.C. § 2000e-6), as reinforced by the Reorganization Plan No. 1 of 1978 and an Executive Order. The DOJ has failed to comply with Title VII's temporal strictures to obtain such individual relief. There has been no charge filed and no timely notice to the DOC as required by Title VII to obtain the individual relief. *See* 42 U.S.C. § 2000e-5(g)(1). After more than four years of investigation, in a November 25, 2013 telephone conference and a letter dated November 26, 2013, the DOJ—for the first time—notified the DOC of alleged violations of Title VII. By circumventing the Title VII procedural requirements for obtaining individual relief, the DOJ has failed to provide the DOC the same due process protections afforded to any private employer or Federal Government defendant in an unintentional pattern or practice case. The DOJ's claims for such relief should be dismissed.

Although the DOJ may vindicate sovereign rights, when pursuing rights for individuals the DOJ steps outside of its sovereign capacity and must comply with the timeframes established by Title VII. The Supreme Court has recognized the importance of expeditious resolution accomplished through adherence to the specified timeframes of Title VII regarding prompt

notice of a charge and conciliation prior to litigation. Should these Title VII timeframes and procedures not apply in an action brought by the DOJ, an analogous state statute of limitations must apply.

The DOJ's Complaint also seeks to enjoin the DOC from using a written cognitive examination and a video examination in the selection of applicants for its training academy. (Complaint, Doc. 1, Prayer for Relief ¶¶ b-c). The Complaint brings untimely allegations related to multiple and distinct selection processes from 2000 through 2011. (Complaint, Doc. 1, ¶¶ 9-33). The DOC administered the written cognitive examination and video examination in October and November 2013, but after receiving DOJ's November 26, 2013 letter, the DOC immediately suspended its selection process.[1] The DOC notified the applicants that the process was on hold until further notice and no action has been taken with regard to the examinations or the results.[2] For these reasons, the Complaint must be dismissed.

II. STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of actions which fail to state a claim upon which relief can be granted. In considering a motion to dismiss, this Honorable Court "must take the allegations in the complaint as true and must make all reasonable inferences in favor of the [P]laintiff[]." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (*citing Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 988 (1st Cir. 1992)); *see also Ashcroft v. Iqbal*, 556 U.S. 662 (2009)(noting that the court must accept plaintiff's allegations as true and construe them in the light most favorable to plaintiff). While the District

[1] The Complaint contains no factual allegations pertaining to the 2013 administration of the written cognitive and video examination.

[2] The need to seat a training academy class grows more acute daily for the DOC because of fiscal and other concerns, not to mention the impact such a delay has upon the prospective correctional officer candidates.

Court must accept as true all of the allegations in the complaint; the court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (*quoting Papasan v. Allain,* 478 U.S. 265, 286 (1986)). Rule 8 of the Federal Rules of Civil Procedure requires that a pleading shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). A claim fails to state a claim for which relief may be granted if the factual allegations fail to "raise [plaintiff's] right to relief above the speculative level." *Twombly*, 550 U.S. at 555; *see* Fed.R.Civ.P. 8(a)(2). A complaint must contain sufficient facts to nudge a case "across the line from conceivable to plausible." *Id.* at 570; *see also Iqbal,* 556 U.S. at 680.

Under First Circuit precedent, generally "consideration of documents not attached to the complaint, or not expressly incorporated therein, is forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56." *Watterson*, 987 F.2d at 3 (*citing* Fed.R.Civ.P. 12(b)(6)). In the instant matter, the DOJ's complaint is entirely reliant and founded upon the documents and information provided by the DOC during the DOJ's more than four year investigation, which began in 2009. (*See* Complaint, Doc. 1, ¶ 35). This Court may therefore consider "documents the authenticity of which are not disputed by the parties;…official public records;…documents central to plaintiffs' claim; or…documents sufficiently referred to in the complaint." *Watterson*, 987 F.2d at 3 (citations omitted). Courts generally do not consider extraneous documents in a motion to dismiss due to the lack of notice to the plaintiff. *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991). But where the "plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated." *Id.* For these reasons, the factual background supporting this Motion to

Dismiss makes reference to documents produced to and relied upon by the DOJ in its Complaint, and this Honorable Court may properly consider such documents as part of the pleadings without converting the instant Motion to one for Summary Judgment. *See Watterson*, 987 F.2d at 4.

Though the Court may consider these documents, the Complaint, on its face, seeks to recover for alleged wrongs outside of any applicable limitations period.

III. STATEMENT OF FACTS

The DOJ began an investigation into the DOC's hiring and employment operations on September 1, 2009, lacking any complaint or charge of discrimination related to the entry-level selection process for correctional officer ("CO") candidates. (*See* Sept. 1, 2009 Letter (Exhibit A)). From 2000 to present, no one has ever filed any complaint or charge with the EEOC, the Rhode Island Human Rights Commission ("HRC"), or with the DOC. (*See* Feb. 25, 2010, Response to Question 18 (Exhibit B)). In a September 2009 letter, the DOJ asserted that it possessed information that indicated "that the percentages of black, Hispanic and female correctional officers at the Rhode Island Department of Corrections are significantly lower than would be expected for an agency of this type" and that the DOJ would conduct a "full investigation of the State of Rhode Island's employment practices at its Department of Corrections to determine whether it is engaged in a pattern or practice of discrimination against blacks, Hispanics and/or females with respect to employment opportunities… ." (Exhibit A). This letter did not contain specific facts of any allegations of unlawful employment practices under Title VII.[3] The first allegation of any type related to the issues in the instant Complaint came on November 25 and 26, 2013—over four years later.

[3] The subject line of the letter read "Investigation of the Employment Practices of the State of Rhode Island Regarding Employment Opportunities at the Rhode Island Department of

During the intervening four years, the DOC maintained open communication with the DOJ and responded to every request from the DOJ by scheduling meetings, exchanging emails, conducting conference calls, and providing extensive responses to detailed document requests into DOC operations.

On October 2, 2009, the DOJ sent a letter to the DOC, indicating that DOJ would be gathering information on "general topics" related to "the hiring practices for corrections officers." (Oct. 2, 2009 Email and Letter (Exhibit C)). These "general topics" included the organization and structure of the DOC, the entry-level hiring processes utilized, and hiring data for each selection process administered since 2000, and any equal employment or affirmative action plans/policies implemented by DOC. *Id.* No allegations against the DOC were made. *See id.* In advance of an October 23, 2009 meeting, the DOC produced a significant number of documents to the DOJ in a good faith effort to collaborate and cooperate with the DOJ's general inquiry into the DOC's employment practices and opportunities. (*See* Oct. 26, 2009 Letter (Exhibit D)).

By January 14, 2010, the DOJ had "reviewed the information provided to [it] and [wrote] to request additional information" regarding the DOC's operations and hiring processes. (Jan. 14, 2010 Letter (Exhibit E)). This letter, just as the previous two letters, did not identify any discriminatory practices; it simply contained the generalized language that the investigation was "pursuant to Section 707 of Title VII."[4] The DOC worked diligently to produce the requested information that it had within its possession, sought to obtain information as needed from third

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Corrections Pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, as Amended." (Exhibit A).

[4] The January 14, 2010 letter's subject line read the same as that in the September 1 and October 2, 2009 letters: "Investigation of the Employment Practices of the State of Rhode Island Regarding Employment Opportunities at the Rhode Island Department of Corrections Pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, as Amended." (Exhibit E).

parties, and indicated which documents/information had already been produced. The DOC provided responses to these requests in February 2010. (*See* Feb. 5, 2010 Letter and Emails (Exhibit F)). Significantly, the DOC informed the DOJ at that time that "there were no formal or informal charges or complaints (external or internal) of race, national origin and/or gender discrimination in hiring for the entry-level corrections officer position in the [DOC] for the years of 2000 to 2010."[5] (Exhibit B). The DOC also provided information on the status and expiration dates of eligibility lists. (*See* Feb. 2010 Response to Question 8 (Exhibit G)). In April 2010, the DOJ again requested information from the DOC. (*See* May 2010 Emails (Exhibit H)). By May 21, 2010, the DOC had provided responses to DOJ's April 2010 questions. *Id.*

On August 18, 2011, two months after DOC held a June 2011 recruitment period and administered examinations in July and August 2011, the DOJ requested additional materials, including updated information regarding the selection process for the June 2011 recruitment period. (*See* Aug. 18, 2011 Letter (Exhibit I)). The DOC provided the answers to this request on September 16, 2011. (*See* Sept. 16, 2011 Email and Letter (Exhibit J)). Of note, the DOC's answers informed the DOJ that the candidate list generated from the April 19, 2009 to May 10, 2009 recruitment period "was deactivated April 13, 2011. After two years, the list was stale; all applicants were notified by letter and encouraged to reapply" and as such, there was no further processing or hiring of those candidates. (Exhibit J, Response to Question 2). The DOC also informed the DOJ that the DOC was "currently in the process of recruiting and selecting an academy class scheduled to begin in February 2012." (Exhibit J, Response to Question 4). From February through June 2012, the DOJ sent emails to the DOC containing Third, Fourth, Fifth,

[5] Nor have any such complaints or charges been filed as of the date of this instant Motion.

and Sixth Requests for Information and Documents, as well as other follow up questions. (*See e.g.* Feb. to June 2012 Emails (Exhibit K)). The DOC provided answers to these requests.

The DOC had provided the majority of the information requested to the DOJ by April 2010 in response to the DOJ's multiple requests—particularly the information regarding the examinations and applicant data, which DOJ now alleges as a basis for their Complaint. Over the 4 years, the DOC provided detailed information responsive to every DOJ request (in some instances on multiple occasions). The DOC administered a written cognitive test and video examination in July, August, and September 2011.[6] The tests were administered again in October and November 2013.

On November 22, 2013, the DOJ informed the DOC by email that its investigation into "whether the selection procedure for correctional officers at RIDOC complies with Title VII" was complete. (Nov. 22, 2013 Email (Exhibit L)). The DOJ did not state the result of the investigation in the email. *Id.* On November 25, 2013, the DOC was advised for the first time in a telephone conference with the DOJ that allegations of Title VII violations would be forthcoming in a letter. The DOJ sent the letter to the DOC on November 26, 2013. The letter arrived just two weeks after the DOC administered the selection examinations in October and November 2013 to correctional officer candidates. (Nov. 26, 2013 Letter (Exhibit M)). Aside from the telephone conference the day before, this letter was the first time the DOJ made allegations against the DOC, and claimed that the DOC is "engaged in a pattern or practice of discrimination against African Americans and Hispanics with respect to the hiring of entry-level

[6] The candidates who took the September 2011 examinations and were selected for the academy populated Class 79 (academy dates February to April 2012) and Class 80 (academy dates March to May 2013). The examinations were administered in June and October 2012 for three individuals who had been on military leave. The eligibility list associated with the 2011 (and June/October 2012) examinations expired on August 15, 2013.

Correctional Officer ('CO') positions."[7] *Id.* The DOJ alleged in the letter that DOC "has caused an adverse impact on African-American and Hispanic applicants" reaching back to 2000, despite the fact that no complaints or charges have ever been brought to the DOC's attention. *See id.* The letter also alleged without support, that DOC's examinations were not job-related or consistent with business necessity. *Id*.

The November 26, 2013 letter stated that "[w]e invite Rhode Island to discuss with us entering into a consent decree incorporating the measures we believe must be taken in order to comply with Title VII." (Exhibit M). The DOJ's proposed mandatory measures included: the cessation of the current written cognitive test and video examination (which had just been administered to over 2,200 applicants); adoption and implementation of proposed screening and selection employment practices that comply with Title VII; and the provision of "make-whole relief" to African-American and Hispanic applicants who were allegedly harmed by the DOC's use of the written and video examinations for the period of 2000 to present. *Id.* The DOC immediately informed the 2013 candidates that the selection process was suspended until further notice; no action has been taken with regard to the 2013 examinations.

On February 10, 2014, the DOJ filed the instant lawsuit, claiming that DOC violated Title VII and seeking prospective injunctive relief and retrospective "make whole" relief for those who "have been harmed or will be harmed as a result of the discriminatory policies and practices" as alleged. (Complaint, Doc. 1, Prayer for Relief ¶ d).

[7] The November 26, 2013 letter was entitled "Authorized Suit against the State of Rhode Island and its Department of Corrections, pursuant to Section 707 of Title VII of the Civil Rights Act of 1964, as amended, with respect to the hiring of entry-level correctional officers." (Exhibit M).

IV. ARGUMENT

A. The DOJ failed to provide timely notice.

The DOJ ignored the statutory framework of title VII by failing to file a charge or timely notice to the DOC and by failing to attempt meaningful conciliation before bringing this action. The DOJ commenced this action on February 10, 2014, alleging an unintentional "pattern or practice" disparate impact discrimination case under Section 707 of Title VII, 42 U.S.C. § 2000e-6. (Complaint, Doc. 1, ¶¶ 35-36). Section 707 is the vehicle for the Attorney General to bring actions against State and local government employers and for the EEOC to bring actions against private and Federal Government employers to challenge "pattern or practice" discrimination. *See* 42 U.S.C. § 2000e-6. The DOJ now seeks relief that is individual in nature (Complaint, Doc. 1, Prayer for Relief ¶ d) and unavailable under Title VII in such a pattern or practice case without having first complied with procedural safeguards, such as timely notice of alleged violations. The DOJ has failed to follow the relevant procedures and, in essence, contends that it operates outside of any limitations period.

Neither Congress nor any First Circuit authority has exempted the DOJ from following the notice and conciliation provisions of Title VII in seeking individual relief, including monetary damages. In the usual case, a Title VII claim must be built on the procedural framework. Specifically, a person claiming to be aggrieved by an allegedly unlawful employment practice must file a charge with the EEOC. Section 706(b) (42 U.S.C. § 2000e-5(b)). The charge must be in writing, under oath, and must be filed within one hundred and eighty (180) days after the allegedly unlawful employment action occurred.[8] Section 706(b) and

[8] If the aggrieved person has filed with a state or local agency with authority to grant or seek relief from unlawful employment practices, the charge must be filed within three hundred (300) days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(e)(1).

(e)(1) (42 U.S.C. § 2000e-5(b) and (e)(1)). Notice of the charge, including the date, place, and circumstances of the alleged unlawful employment practice, must be served on the employer ten (10) days after the charge is filed. Section 706(b) and (e)(1)(42 U.S.C. § 2000e-5(b) and(e)(1)). The EEOC may then investigate the charge and make a determination in a prompt manner, not more than 120 days from date of filing. Section 706(b) (42 U.S.C. § 2000e-5(b)). If the EEOC determines reasonable cause exists to support the allegation, then the EEOC must work to conciliate the issue. Section 706(b) (42 U.S.C. § 2000e-5(b)). The EEOC may refer a case to the DOJ to pursue a civil action in the event that no conciliation agreement with a State or local government defendant is reached. Section 706(f)(1) (42 U.S.C. § 2000e-5(f)(1)).

Title VII pattern and practice suits are brought pursuant to Section 707, 42 U.S.C. § 2000e-6. Section 707(a), states in relevant part that:

> "Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by *this subchapter*, and that the pattern or practice is of such a nature and is intended to deny *the full exercise of the rights herein described*, the Attorney General may bring a civil action in the appropriate district court of the United States…requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure *the full enjoyment of the rights herein described*." 42 U.S.C. § 2000e-6(a) (emphasis added).

There is no explicit provision for individual relief within the confines of Section 707(a). This Section refers to other provisions of Title VII and signifies that Section 707(a) must be read within the framework of Title VII as a whole, inclusive of procedural requirements.[9]

[9] The DOJ's Complaint recognizes that Title VII must be read as a whole by referencing Section 703(k) (42 U.S.C. § 2000e-2(k)) and noting that DOC can demonstrate that a challenged practice is job related and consistent with business necessity. (*See* Complaint, Doc. 1, ¶¶ 31-33). Congress codified the elements and burdens of a disparate impact claim in 42 U.S.C. § 2000e-2(k) (Section 703(k)), but such language is not specifically set forth in Section 707.

Section 707(a) in no way excuses the DOJ from complying with the temporal limits and notice requirements set out in Title VII. Congressional amendments and Presidential actions demonstrate that the DOJ cannot ignore such procedures and requirements. As part of the 1972 amendments to Title VII, Congress enacted Section 707(c), 42 U.S.C. § 2000e-6(c), which states:

> "[e]ffective two years after March 24, 1972, the functions of the Attorney General under this section shall be transferred to the Commission, together with such personnel, property, records, and unexpended balances of appropriations, allocations, and other funds employed, used, held, available, or to be made available in connection with such functions unless the President submits, and neither House of Congress vetoes, a reorganization plan pursuant to chapter 9 of Title 5, inconsistent with the provisions of this subsection. The Commission shall carry out such functions in accordance with subsections (d) and (e) of this section."

This transfer of functions from the DOJ to the EEOC led to some confusion and uncertainty concerning the DOJ's authority to bring pattern or practice actions against State and local governments. H.Rep. No. 95-1069. Prior to the 1972 amendments, the DOJ was the only entity that could file a pattern or practice suit against any defendant. Section 707(c) transferred the authority to bring pattern or practice suits to the EEOC. This provision is subject to a 1978 Executive Reorganization Plan, initiated by President Carter.[10]

In President Carter's message to Congress, he affirmed that the Reorganization Plan No. 1 of 1978 would "[c]larify the Attorney General's authority to initiate 'pattern or practice' suits under Title VII in the public sector." *See* Notes to 42 U.S.C. § 2000e-4, Message from President

[10] Under Chapter 9 of Title 5, Congress authorized the President to restructure and reorganize the executive branch to promote economy, expeditious administration, and efficient operation. 5 U.S.C. § 901. This authority for restructuring can group, coordinate, and consolidate agencies and functions of Government, reduce the number of agencies, or consolidate agencies with similar functions to eliminate overlapping and duplication of effort. 5 U.S.C. § 901. Section 707(c) authorized such a reorganization plan and neither house of Congress voted to reject the plan.

Carter to Congress. The message further confirmed that while the DOJ litigates cases involving State and local governments, the EEOC may bring pattern or practice suits against other defendants.

Section 5 of the Reorganization Plan No. 1 of 1978, 43 F.R. 19807, 92 Stat. 3781, entitled "Transfer of Public Section 707 Functions" states:

> "[a]ny function of the Equal Employment Opportunity Commission concerning initiation of litigation with respect to State or local government, or political subdivisions *under Section 707* of Title VII of the Civil Rights Act of 1964, as amended, (42 U.S.C. 2000e-6, [section 2000e-6 of this title] and all necessary functions related thereto, including investigation, findings, *notice and an opportunity to resolve the matter without contested litigation*, are hereby transferred to the Attorney General, *to be exercised by him in accordance with procedures consistent with said Title VII* [section 2000e *et seq*. of this title]... ." (emphasis added).

The Title VII Reorganization Plan was accepted by Congress without change. Section 5 was incorporated into an Executive Order. *See* Executive Order No. 12068, 43 F.R. 28971, June 30, 1978. Section 5 requires the Attorney General to exercise "Section 707" powers "in accordance with procedures consistent with said Title VII [section 2000e *et seq.* of this title]." As such, the DOJ must exercise Section 707 authority in accordance with all sections and parts of Title VII, including the procedures set forth in Section 706.

The Reorganization Plan and Executive Order along with Section 707(c) have the full force of law. By enacting Section 707(c), Congress recognized that a later presidential reorganization plan could modify the enforcement scheme of Title VII. The 1978 Reorganization, including the directive that the DOJ under Section 707 exercise authority "in accordance with procedures consistent with said Title VII," has remained intact with each subsequent Congress and President. *See* Section 5, Reorganization Plan No. 1, 43 F.R. 19807, 92 Stat. 3781.

The 1972 congressional amendments, the Reorganization Plan, and the Executive Order brought coherence to Title VII, unifying the enforcement scheme. Such a unified enforcement scheme requires consistency, according all defendants the same procedural safeguards and due process. The Reorganization Plan's "language reiterates many of the s[ection] 706 procedural prerequisites to litigation… ." *U.S. v. Fresno Unified School Dist.,* 592 F.2d 1088, 1095-1096 (9th Cir. 1979). The language explicitly references the procedural safeguards contained in Section 706, including that a defendant receive notice and an opportunity to resolve the matter without litigation. The Ninth Circuit addressing the intent of the 1978 Reorganization reasoned that "[t]he apparent intent of the Reorganization Plan is to incorporate all s[ection] 706 requirements applicable to pattern or practice suits." *Id*. at 1095-1096. *Fresno* held that the Attorney General may litigate a pattern or practice suit against a public employer so long as Section 706 procedural requirements are satisfied.[11] *Id.* at 1096.

Just as the Reorganization Plan requires the Attorney General to follow Section 706 procedures, the plain and unequivocal language of Section 707(e) mandates that the EEOC must conduct a Section 707 action in accordance with Section 706 procedures.[12] *See EEOC v. Bass*

[11] *Fresno* did not address the question of which procedures apply in pattern and practice suits *See U.S. v. Fresno Unified School Dist.,* 592 F.2d 1088, 1096 n. 5 (9th Cir. 1979).

[12] Though district courts have had varied interpretations of the applicability of Section 706 procedures to Section 707(e), the recent trend is that "[t]he plain language of § 707(e) authorizes the EEOC to investigate and act on a charge of a pattern or practice of discrimination, and mandates that such actions be taken in accordance with the procedures of §706." *EEOC v. Bass Pro Outdoor World, LLC*, 884 F.Supp.2d 499, 522-23 (S.D. Texas, 2012) (*quoting EEOC v. Kaplan Higher Educ. Corp*., 790 F.Supp.2d 619, 623 (N.D. Ohio, 2011); *see also U.S. EEOC v. Global Horizons, Inc.*, 904 F.Supp.2d 1074 (D. Hawaii, 2012); *EEOC v. PBM Graphics Inc*., 877 F.Supp.2d 334, 351-352 (M.D. NC 2012); *but cf. EEOC v. Sterling Jewelers, Inc.*, No. 08-706, 2010 WL 86376 (W.D.N.Y. 2010); *EEOC v. LA Weight Loss,* 509 F.Supp.2d 527 (D. Maryland, Northern Division, 2007); *EEOC v. Mitsubishi Motor Mfg. of America, Inc*., 990 F.Supp. 1059 (C.D. Ill. 1998).

Pro Outdoor World, LLC, 884 F.Supp.2d 499, 522-523 (2012); *EEOC v. Global Horizons,* 904 F.Supp.2d 1074, 1093 (2012). Regardless of whether the matter involves the DOJ or the EEOC these procedural requirements must be followed.

It is well established that timeframes are important in discrimination cases. *See Jensen v. Frank*, 912 F.2d 517, 521 (1st Cir. 1990) ("This court has respected Title VII's temporal strictures, and, accordingly, has taken a narrow view of equitable modification in Title VII cases."). Underlying the language and structure of Title VII is the Congressional intent to provide an expeditious and swift resolution of alleged discrimination. Section 707 is explicit that "pattern or practice" actions are to be "in every way expedited." *See* 42 U.S.C. § 2000e-6(b). The Supreme Court has reasoned that "[b]y choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination." *Mohasco Corp. v. Silver*, 447 U.S. 807, 825 (1980). The Court noted that in this "statutory scheme…Congress carefully prescribed a series of deadlines measured by number of days—rather than months or years… ." *Id.* at 825-826. As such, the Court respected "the compromise embodied in the words chosen by Congress." *Id.* at 826. Title VII actions are designed for prompt notification of the underlying allegation and the statute delineates specific timeframes for the filing of a charge and determination of reasonable cause to achieve such purposes.

The DOJ failed to provide the DOC with timely notice of the time, date, and circumstances of the alleged unlawful employment practices as would have been provided to a private or Federal employer defendant. A private or Federal employer would have been provided notice within ten (10) days of the filing of a charge with the EEOC and reasonable cause would have been determined not more than 120 days from the filing of such charge. *See* 42 U.S.C. §

2000e-5. The purpose of these procedures is to bring the alleged unlawful employment practice to the attention of the employer to expeditiously address and cure the issue if possible. Indeed, a private or Federal employer would have an absolute defense to claims going back 14 years. However, the first time the DOJ alleged a Title VII violation with any information pertaining to the time, date, and circumstances of the alleged unlawful employment practices was in the November 26, 2013 letter. There was no timely notice of any of the challenged practices, nor did the DOJ engage in meaningful efforts to conciliate the matter to resolve it expeditiously and without contested litigation. Under Title VII's procedural regime, litigation "is not a remedy of first resort." *Rivera-Diaz v. Humana Insurance of Puerto Rico, Inc.*, 2014 WL 1395064 at *2 (1st Cir. 2014)(*quoting Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005)). While the primary aim of Title VII is to eliminate discriminatory barriers to employment, the DOJ has frustrated Title VII's goals of providing an expeditious resolution of alleged violations through timely notice, due process, and meaningful conciliation.

The internal procedures are of heightened importance because Title VII itself does not contain a statute of limitations. The Supreme Court recognized the importance of the procedures contained in Section 706 in rejecting the use of state statute of limitations in a case brought by the EEOC. *See Occidental Life Ins. Co. of California v. E.E.O.C.*, 432 U.S. 355, 367-372 (1977). The Court reasoned that a state statute of limitations can "under some circumstances directly conflict with the timetable for administrative action expressly established in the 1972 Act." *Id.* at 369. As previously noted, in Section 706, Congress codified several procedural safeguards designed for Title VII defendants. The *Occidental* Court recognized that applying analogous state statute of limitations was unnecessary because of the internal procedures and temporal limitations provided in Section 706. *See Occidental,* 432 U.S. at 372-373. The Court stated that:

> "[t]he absence of inflexible time limitations on the bringing of lawsuits will not, as the company asserts, deprive defendants in Title VII civil actions of fundamental fairness or subject them to the surprise and prejudice that can result from the prosecution of stale claims. Unlike the litigant in a private action who may first learn of the cause against him upon service of the complaint, the Title VII defendant is alerted to the possibility of an enforcement suit within 10 days after a charge has been filed. This prompt notice serves, as Congress intended, to give him an opportunity to gather and preserve evidence in anticipation of a court action."

Occidental, 432 U.S. at 372. Instead of following a state statute of limitations, the *Occidental* Court emphasized the use and practicality of following proscribed Title VII procedures.

Furthermore, it is well-settled that that the government is acting within its sovereign capacity where it seeks to enforce rights belonging to it; however, it steps outside of its sovereign capacity when it seeks to recover sums due to individual citizens. *U.S. v. Georgia Power Co.*, 474 F.2d 906, 923 (1973) (*citing United States v. Beebe,* 127 U.S. 338, 346 (1888); *United States v. Summerlin,* 310 U.S. 414 (1940)). Based on this distinction, the Fifth Circuit stated that "[i]nsofar as the pattern or practice suit constitutes a proper legal conduit for the recovery of sums due individual citizens rather than the treasury, it is a private and not a public action." *Georgia Power,* 474 F.2d at 923. In this action, the DOJ is seeking "make whole" relief on behalf of individuals. In this respect, it is acting outside of its sovereign capacity and therefore must comply with the requirements of Section 706.

The DOJ is seeking "make whole" relief, which is individual in nature. The only provisions for such relief, and the procedures by which the relief may be obtained in Title VII are Sections 706(e)(3)(b) and (g)(1) (42 U.S.C. § 2000e-5(e)(3)(b) and (g)(1)). Section 706(g)(1) states in relevant part that:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate,

> which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. *Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission...* ." 42 U.S.C. § 2000e-5(g)(1)(emphasis added).

The ability to obtain a maximum of two years of back pay is premised on the filing of a charge indicating the time, place, and circumstances of the unlawful discrimination. *See* 42 U.S.C. § 2000e-5(b) and (e)(1). The DOJ has ignored the mandated procedures in Title VII in this action against the State of Rhode Island. As there has been no charge or timely notice served on the DOC, there is no date from which the two year maximum of back pay liability or any other individual relief could attach.

Moreover, a private employer or a Federal defendant would be entitled to timely notice and conciliation before any consideration of individual liability. The structure and purpose of Title VII require that the sections be construed and harmonized together to support a coherent and consistent enforcement regime. *See Gustafson v. Alloyd Co.,* 513 U.S. 561, 569 (1995) (noting that a statute "is to be interpreted as a symmetrical and coherent regulatory scheme"). Both Federal and State government defendants should be afforded the same procedural process in Section 707 "pattern or practice" actions. It is an absurd and inequitable result, inconsistent with Title VII, to afford greater protection to the Federal Government than to a State government. Such an unfettered authority would allow the DOJ to revive individual claims long since barred by the procedures set forth in Title VII, and would allow the DOJ to file a complaint seeking relief for an unlimited period of time even beyond the 14 years at issue here. The asymmetrical application of Section 707 the DOJ seeks here is contrary to Congressional intent. This is precisely what the DOJ seeks in the instant Complaint. In this action, no individual relief

can be obtained since the DOJ did not comply with Title VII timeframes and procedural requirements. As such, the Complaint must be dismissed.

B. Time limitations apply to all federal causes of action seeking individual relief.

If the internal procedures of Title VII, specifically those identified in Section 706 (42 U.S.C. § 2000e-5), do not apply in the instant case, then the application of the analogous state statute of limitations must apply to any claims of individual relief. The *Occidental* Court recognized that the application of an analogous state statute of limitations would conflict with and frustrate the internal timeframes of Title VII that govern individual relief in actions brought by the EEOC. *See Occidental*, 432 U.S. at 367-372. The Supreme Court has recognized that a case without a limitations period "would be utterly repugnant to the genius of our laws." *Adams v. Woods*, 2 Cranch 336, 342 (1805). The Supreme Court "has long followed the rule that, unless the United States was suing in its sovereign capacity, 'in the absence of any provision of the act of Congress creating the liability, fixing the limitation of time for commencing actions to enforce it, the statute of limitations of the particular State is applicable." *Occidental*, 432 U.S. at 375 (Rehnquist, J. dissenting) (*quoting McLaine v. Rankin*, 197 U.S. 154, 158 (1905)). Here, the relief sought in this case is individual in nature and outside of the sovereign capacity of the United States. "[C]laim[s] for backpay and reinstatement benefit an individual, not the government." *Dole v. Hopple Plastics Inc*., 902 F.2d 33 at *4 (6th Cir. 1990) (unpublished)(addressing back pay and sovereign capacity in a Consumer Credit Protection Act case). A limitations period must apply.

V. CONCLUSION

For the reasons set forth, and those to be advanced at oral argument, the State respectfully requests that this Honorable Court dismiss the DOJ's Complaint.

Respectfully submitted:

STATE OF RHODE ISLAND, and
RHODE ISLAND DEPARTMENT
OF CORRECTIONS

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