

No. 11-1957

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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George McReynolds, et al.  
Plaintiffs-Appellants,

v.

Merrill Lynch & Co., Inc., Merrill Lynch, Pierce,  
Fenner & Smith, Bank of America Corporation,  
Defendants-Appellees.

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Appeal From the United States District Court  
For the Northern District of Illinois, Eastern Division  
Case No. 1:08-cv-06105  
The Honorable Judge Robert W. Gettleman

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**BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL  
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES  
AND IN SUPPORT OF AFFIRMANCE**

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Rae T. Vann  
NORRIS, TYSSE, LAMPLEY  
& LAKIS, LLP  
1501 M Street, N.W., Suite 400  
Washington, DC 20005  
(202) 629-5600  
[rvann@ntll.com](mailto:rvann@ntll.com)

Attorneys for *Amicus Curiae*  
Equal Employment Advisory Council

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Appellate Court No: 11-1957

Short Caption: McReynolds v. Merrill Lynch & Co.

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Attorney's Signature: s/ Rae T. Vann

Date: September 28, 2011

Attorney's Printed Name: Rae T. Vann

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes [X] No

Address: NORRIS, TYSSE, LAMPLEY & LAKIS, LLP

1501 M Street, N.W. Suite 400; Washington, DC 20005

Phone Number: (202) 629-5600 Fax Number: (202) 629-5601

E-Mail Address: rvann@ntll.com

**FEDERAL RULE 29(c)(5) STATEMENT**

No counsel for a party authored this brief in whole or in part;

No party or counsel for a party contributed money that was intended to fund the preparation or submission of this brief; and

No person other than *amicus curiae*, its members or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

Respectfully submitted,

s/ Rae T. Vann

Rae T. Vann

NORRIS, TYSSE, LAMPLEY

& LAKIS, LLP

1501 M Street, N.W., Suite 400

Washington, DC 20005

(202) 629-5600

[rvann@ntll.com](mailto:rvann@ntll.com)

Attorneys for *Amicus Curiae*

Equal Employment Advisory Council

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The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* contingent on the granting of the accompanying Motion for Leave. The brief urges this Court to affirm the decision below and thus supports the position of Defendants-Appellees.

### **INTEREST OF THE *AMICUS CURIAE***

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 of the nation's largest private sector companies, collectively providing employment to roughly 20 million people throughout the United States. They all are employers subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*; the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*; the Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*, and other antidiscrimination laws.

EEAC member companies, many of which conduct business nationwide, are strongly committed to equal employment opportunity and seek to establish and enforce internal policies that are consistent with federal employment non-discrimination laws. This commitment includes ensuring that compensation policies are implemented without regard to race, sex, or any other legally protected characteristic.

As employers, and as potential defendants to Title VII discrimination claims, EEAC's members have a direct and ongoing interest in the issues presented in this appeal regarding the proper scope and application of the statute as a whole and, in

particular, Section 703(h). As a national representative of large employers, EEAC has perspective and experience that can help the Court assess issues of law and public policy that have been raised in this case, beyond the help that the lawyers for the parties can provide. *Cf. Ryan v. CFTC*, 125 F.3d 1062, 1063 (7th Cir. 1997).

Accordingly, EEAC seeks to bring these countervailing policy considerations to the Court's attention and assist the Court in putting the arguments of the Plaintiffs-Appellants into proper perspective. Mindful of this Court's admonitions in *Ryan*, EEAC's *amicus* brief does not rehash legal arguments addressed in the parties' briefs. Rather, it offers observations and perspectives on the issues, based on the collective experience of EEAC's member companies.

For example, EEAC's brief explains the importance to the nation's largest employers of developing and maintaining nondiscriminatory, production-based incentive programs that can be uniformly and consistently applied without fear of Title VII challenge, as was contemplated by Congress in enacting Section 703(h). It observes that increasing global competition and other market changes have led many industry leaders to refocus their efforts to retain and reward top performers, and explains how an adverse ruling by this Court would frustrate those efforts.

Since 1976, EEAC has participated as *amicus curiae* in over 600 cases before the United States Supreme Court, this Court<sup>1</sup>, and other federal courts of appeals, many of which have involved Title VII questions. Because of its experience in these

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<sup>1</sup> See, e.g., *Ameritech Benefit Plan Comm. v. Commun. Workers of Am.*, 220 F.3d 814 (7th Cir. 2000); *Kyles v. J.K. Guardian Sec. Servs.*, 222 F.3d 289 (7th Cir. 2000); *Moranski v. General Motors Corp.*, 433 F.3d 537 (7th Cir. 2005).

matters, EEAC is well situated to brief the Court on the relevant concerns of the business community and the significance of this case to employers generally.

### STATEMENT OF THE CASE

The relevant facts, for purposes of this brief, can be summarized quite simply. Plaintiffs-Appellants have challenged the validity of a production-based retention bonus program that was put into place in connection with Defendant-Appellee Bank of America's January 2009 acquisition of Defendant-Appellee Merrill Lynch. *McReynolds v. Merrill Lynch & Co.*, No. 08-cv-6105, 2011 U.S. Dist. LEXIS 33444, at \*4 (N.D. Ill. Mar. 29, 2011). They claim that the retention bonus program unlawfully discriminates on the basis of race in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* *Id.*

Specifically, Plaintiffs-Appellants assert that because African-Americans were discriminatorily denied, through inferior job assignments and other actions, the opportunity to produce at high rates, and that bonuses under the program were paid only to the most productive workers, the bonus program itself is unlawful. *Id.* at \*4-\*5. They do not challenge the alleged underlying discrimination in the instant action.

The district court granted Defendants-Appellees' motion to dismiss, concluding that Section 703(h) of Title VII insulates the bonus retention program from challenge because it is a bona fide, facially nondiscriminatory "merit system" or a "system which measures earnings by quantity or quality of production." *Id.* at \*8 (citation omitted). It found that "[s]o long as the system itself was adopted without

a discriminatory intent it is bona fide and immunized under § 703(h), even if it perpetuates the effects of other acts of discrimination that clearly violate Title VII.” *Id.* at \*9 (citation omitted). Because Plaintiffs-Appellants challenge only the validity of the bonus retention program and not alleged discrimination with respect to the opportunity to generate production, the trial court dismissed the action for failure to state a claim on which relief may be granted. *Id.* at \*13. This appeal ensued.

### **SUMMARY OF ARGUMENT**

The district court was correct. The retention bonus program at issue is protected from challenge by operation of Section 703(h) of Title VII, because it constitutes a bona fide, production-based compensation system that applies across-the-board to all employees, regardless of race, color, religion, sex or national origin. Any other interpretation would render Section 703(h) a dead letter and would call into question countless compensation programs providing benefits to millions of workers throughout the United States.

Plaintiffs-Appellants, supported by *amicus* EEOC, contend that the retention bonus program cannot be “bona fide” within the meaning of Section 703(h), because discriminatory employment practices caused them to produce less, thus impacting their eligibility to receive bonuses under the program. At the same time, they concede that the retention bonus program itself was facially nondiscriminatory and applied to all employees in the same manner. Their argument is not supported by the plain text of the statute, and thus properly was rejected by the district court.

Title VII Section 703(a) provides that it “shall be an unlawful employment practices for an employer...to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s race....” 42 U.S.C. § 2000e-2(a) (emphasis added). Section 703(h) goes on to describe what is *not* an unlawful employment practice:

Notwithstanding any other provision of this subchapter, it *shall not be an unlawful employment practice* for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide ...system that measures earnings by quantity or quality of production, [so long as such differences are] not the result of an intention to discriminate ....

42 U.S.C. § 2000e-2(h) (emphasis added). Here, the differences in compensation were caused by uniform application of the neutral, retention bonus program – not, for instance, because any person was excluded on the basis of race.

*Amicus* EEOC seems to argue that Section 703(h) should be read to mean that *any* discriminatory conduct that is claimed to affect an individual’s eligibility to receive earnings closer to the higher end of a compensation system automatically places the system itself outside the scope of protection as a bona fide program.

That cannot be, as it would mean that any time a Section 703(a) pay *practices* violation is asserted, a company’s neutral compensation *system* loses its Section 703(h) protection. Such a reading is inconsistent with Title VII’s text, as well as the EEOC’s own policy interpretation. It also would limit significantly, or eliminate entirely, the ability of employers to differentiate between superior and marginal workers through production-based financial incentives.

Recent studies of the talent management practices of large, global employers confirm that the ability to retain exceptional performers is a top concern, even in times of financial uncertainty. Indeed, over two-thirds of business respondents who have formal retention programs in place indicate that they intend to increase incentive – both financial and non-financial – as part of those programs. An adverse ruling by this Court would severely impede those legitimate business aims.

Construing Section 703(h) in the manner urged by Plaintiffs-Appellants and *amicus* EEOC also would encourage frivolous class litigation premised on the existence of any company-wide compensation system that is common to a group of employees. Such an approach would undermine the traditional role of the courts as gatekeepers in eliminating meritless cases at the class certification stage, thereby minimizing the enormous pressure placed on defendants to settle such claims.

## **ARGUMENT**

### **I. Facially Nondiscriminatory, Production-Based Financial Incentive Programs Designed To Spur Retention of the Most Talented Workers Are Quintessential “Bona Fide” Systems Entitled, for Good Reason, to Special Protection Under Section 503(h)**

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.*, prohibits discrimination against an individual “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1). Although Title VII also generally prohibits application of any policy, practice or procedure that has a statistically significant adverse impact on a protected group, 42 U.S.C. § 2000e-2(k)(1)(A), the statute accords special protection to bona fide, facially neutral

compensation systems, even if their application happens to produce a disparate impact on a statutorily protected group.

Specifically, Section 703(h) of Title VII provides that “it shall not be an unlawful employment practice ...to apply different standards of compensation ...pursuant to a bona fide ...system which measures earnings by quantity or quality of production ....” 42 U.S.C. § 2000e-2(h). “Bona fide” in this context “requires that any differences in treatment not be the result of an intention to discriminate because of race ....” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 353 (1977) (quotations omitted). Section 703(h) thus is “a definitional provision ...[that] delineates which employment practices are illegal and thereby prohibited and which are not.” *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 758 (1976)).

Defendants-Appellees’ retention program calculated bonus amounts based on quantity of production, regardless of race. The district court below therefore properly concluded that it constitutes a bona fide compensation system within the meaning of Section 703(h). Such an interpretation is in accord with the plain text of the statute and well-established Supreme Court precedent. It also aligns with the compensation practices the nation’s leading employers.

Indeed, the U.S. Equal Employment Opportunity Commission (EEOC), which has submitted an *amicus curiae* brief urging reversal of the decision below, itself concedes that base salary and wages “often make up only part of the compensation package for employees,” EEOC Compl. Man. Section 10: Compensation

Discrimination, at C. Non-base Compensation (Dec. 2000 & Supp. 2011)<sup>2</sup>, and that other forms of non-base compensation, *such as bonuses and commissions*, frequently round out an employee's total compensation. In its *Compliance Manual* section on investigating Title VII compensation discrimination charges, the agency goes on to instruct its field staff that "non-base compensation items -- such as bonuses, commissions, and perquisites -- usually are a function of an employer policy defining who is eligible to receive them, and in what amount. ... If all employees are eligible for the same non-base compensation, *then no potential exists for discriminatory application of eligibility standards.*" *Id.* (emphasis added).

The following two examples, which are both contained in the *Compliance Manual*, are particularly helpful in reinforcing this principle, and further support the district court's conclusions below:

Example 10: CP, an economist at a management consulting firm, files a charge alleging that she has been denied participation in R's bonus program because of her sex. The investigation reveals that R limits participation in its bonus program to management consultants, and that no economists at the firm, including males, participate in R's bonus program. The charge should be dismissed without a cause finding because nondiscriminatory eligibility standards explain why CP does not participate in R's bonus program.

\* \* \*

Example 13: R, a thriving computer software company, has an incentive program by which employees receive bonuses in the form of stock options. The stock options give employees the right, after a three-year vesting period, to buy company stock at the market price at the time the bonuses were awarded. All programmers are eligible for the program. CP, a Hispanic programmer, files a charge against R alleging that he received fewer stock options in year 20XX than employees who

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<sup>2</sup> Available at <http://www.eeoc.gov/policy/docs/compensation.html>

are not Hispanic. R provides evidence that the number of stock options granted to each programmer is tied to the sales of the software packages for which the programmer is responsible. R also demonstrates that other Hispanics working on projects different than CP's received more stock options than CP and non-Hispanic programmers working on CP's project. The investigator finds no evidence that R's explanation is not credible. Therefore, the charge should be dismissed without a cause finding.

*Id.*

Thus, despite the EEOC's contentions to the contrary as *amicus* here, it is obvious that from a Title VII enforcement perspective, Defendants-Appellees' retention bonus program, which was made available to all employees regardless of race or any other protected characteristic, constitutes the quintessential bona fide, production-based system intended to be protected from challenge under Section 703(h).

A. Section 703(h) Frees Employers To Differentiate Between Top- and Lower-Tiered Performers

As noted, total compensation goes beyond base pay, and includes other forms of remuneration not limited to performance-based financial incentives. If retention bonuses are deemed to fall outside the purview of Section 703(h), so too would many other legitimate forms of employee compensation, exposing employers to an ever-present threat of substantial liability simply for having attempted to differentiate among top- and lower-tiered employees.

It is well-settled law that courts should not act as "super personnel department[s]" by second-guessing an employer's legitimate business decisions. *Hiatt v. Rockwell Int'l Corp.*, 26 F.3d 761, 772 n.13 (7th Cir. 1994). As long as the

decision does not result in a discriminatory employment practice, the courts have permitted companies to use their own judgment as to what is right or wrong for a particular company's operations. *See e.g., Traylor v. Brown*, 295 F.3d 783 (7th Cir. 2002). If this Court were to adopt Plaintiffs-Appellants' interpretation of Section 703(h), employers with formulaic compensation systems that apply to large segments of their employee populations would be forced to seriously consider dismantling those programs, thus frustrating traditional employer prerogatives and disadvantaging those workers who benefit greatly from them.

B. Even in Times of Economic Stress, American Businesses Have Made Retention of Top Talent a Key Strategic Priority

Permitting legitimate retention bonus programs that are applied in a nondiscriminatory manner to be challenged under Title VII also would undermine efforts by employers to compete in an increasingly global market for top producers. "Even amidst high unemployment, the competition for talent continues to heat up." Deloitte Consulting, *Talent Edge 2020: Blueprints for the new normal*, at 5 (Dec. 2010).<sup>3</sup> In a recent study of talent management practices and initiatives at large, global companies, 63% of respondents expressed moderate to considerable concern over their ability to retain top talent over the following twelve months. *Id.* at 2. For those companies that have developed formal retention plans, 69% "will ramp up financial and non-financial incentives in the year ahead." *Id.*

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<sup>3</sup> Available at [http://www.deloittehumancapital.at/wp-content/6\\_Talent\\_WegweiserKrise.Studie.pdf](http://www.deloittehumancapital.at/wp-content/6_Talent_WegweiserKrise.Studie.pdf)

Retention bonuses are one example of the type of financial incentive that might be offered to discourage employees with valuable skills sets or institutional knowledge from jumping to the competition. Indeed, “[t]he primary purpose of retention bonuses is to encourage select employees with critical skills or knowledge to remain with the company when other retention incentives fail.” Michael R. Maryn, *Severance and Retention Plans: Practical Considerations*, 34 ALI-ABA Bus. L. Course Materials J. 4 (June 2010, No. 3), 24th Ann. Emp. Benefits Inst. (U. Mo. Kan. City 2010), at 2.<sup>4</sup> Where, as here, a business acquisition has been announced, retention bonuses can be used “to encourage employees who are critical to operations of the employer (or business unit) during this period of transition to remain with the company and keep them focused on enhancing the value of the business.” *Id.* at 3. Their use should not be undermined by misapplication of Title VII principles, as Plaintiffs-Appellants argue.<sup>5</sup>

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<sup>4</sup> Available at <http://98.130.207.135/images/stories/downloads/maryn%20-%20severance%20and%20retention%20plans%20presentation.pdf>

<sup>5</sup> It is worth noting that the compensation systems of many large U.S. employers are subject to strict, federal regulatory oversight, further ensuring that they are established, maintained and applied in a lawful manner. For instance, federal government contractors subject to the affirmative action program requirements of Executive Order 11,246 and its implementing regulations are required to conduct, at least annually, in-depth analyses of their total compensation systems to detect potential evidence of race-based pay disparities. See 41 C.F.R. § 60-2.17(b)(3). Collectively, an estimated 1,500 to 2,500 compliance evaluations are conducted each year at *amicus* member establishments.

II. Allowing Plaintiffs To Challenge a Bona Fide, Nondiscriminatory Financial Incentive *Program*, Rather Than the Underlying *Practices* Affecting Each Employee's Ability To Participate in the Program, Would Encourage Frivolous Class Litigation

In order to proceed as a class under Title VII, plaintiffs are required to satisfy all four requirements of Rule 23(a), and at least one of the requirements of Rule 23(b), of the Federal Rules of Civil Procedure. Fed. R. Civ. Pro. Rule 23; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). The larger a class, the greater the potential liability and defense costs, which very well could lead to what some courts have called judicial “blackmail.” *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (footnote omitted). As Judge Posner has observed, when companies face millions, or in some cases, billions, of dollars in potential liability as a result of a class action, “[t]hey may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citation omitted).

Allowing plaintiffs to challenge a bona fide, production-based incentive program as a whole, rather than the underlying practices affecting each individual employee's ability to participate in the program, would encourage frivolous Title VII litigation by making it easier for plaintiffs to assert such claims on a class wide basis and, in so doing, create enormous pressure on a class action defendant to settle.

## CONCLUSION

For all of the foregoing reasons, the Equal Employment Advisory Council respectfully urges the Court to affirm the district court's decision below.

Respectfully submitted,

*s/ Rae T. Vann* \_\_\_\_\_

Rae T. Vann

NORRIS, TYSSE, LAMPLEY

& LAKIS, LLP

1501 M Street, N.W., Suite 400

Washington, DC 20005

(202) 629-5600

[rvann@ntll.com](mailto:rvann@ntll.com)

*Attorneys for Amicus Curiae*

Equal Employment Advisory Council

## CERTIFICATE OF COMPLIANCE

I, Rae T. Vann, hereby certify that this Brief Of The Equal Employment Advisory Council As *Amicus Curiae* In Support Of Defendants-Appellees And In Support Of Affirmance complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). This brief is written in Century Schoolbook twelve-point typeface using MS Word 2003 word processing software and contains 3,086 words.

*s/ Rae T. Vann*

---

Rae T. Vann

NORRIS, TYSSE, LAMPLEY

& LAKIS, LLP

1501 M Street, N.W., Suite 400

Washington, DC 20005

(202) 629-5600

[rvann@ntll.com](mailto:rvann@ntll.com)

Attorneys for *Amicus Curiae*

Equal Employment Advisory Council



**CERTIFICATE OF SERVICE**

**Certificate of Service When All Case Participants Are CM/ECF Participants**

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s/ \_\_\_\_\_