IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 19-1739

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

STATE OF RHODE ISLAND DEPARTMENT OF CORRECTIONS; STATE OF RHODE ISLAND,

Defendants-Appellees

JAYSON BADILLO,

Claimant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

APPELLEES' JOINT REPLY IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY AFFIRMANCE

The United States, the State of Rhode Island and the Rhode Island Department of Corrections (collectively, appellees) respectfully submit this reply in support of their motion for summary affirmance. Claimant-Appellant Jayson Badillo waited 17 months after being notified of a proposed settlement agreement before moving to intervene. Because Badillo has not identified any substantial

question that could support finding that the district court abused its discretion in denying his motion to intervene, appellees respectfully request that this Court summarily affirm. See Loc. R. 27.0(c).

ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Denying Badillo's Motion To Intervene Under Rule 24(a)(1)

1. Badillo's response reiterates his argument that Section 706 of Title VII, 42 U.S.C. 2000e-5(f)(1), gives him an unconditional statutory right to intervene under Rule 24(a)(1). Response 8-11. As appellees previously explained, apart from the fact that Badillo did not timely move to intervene, this is not a Section 706 case. Motion 11-13, 20-21. Instead, the United States brought this lawsuit under Section 707(a) of Title VII, 42 U.S.C. 2000e-6(a), which confers independent statutory authority on the Attorney General to initiate pattern-or-practice cases against state or local governments. There is no provision in Section 707 for intervention as of right. See *United States* v. *Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826, 843 (5th Cir. 1975) (noting that Section 707 "is conspicuously silent in regard to intervention").

In support of his argument that Section 706's intervention authorization applies here, Badillo incorrectly claims there is no difference "either legally or procedurally" between this Section 707 pattern-or-practice case and an individual claim under Section 706. Response 10. The district court previously held that

there are important procedural differences between them. See *United States* v. *Rhode Island Dep't of Corr.*, 81 F. Supp. 3d 182, 187-188 (D.R.I. 2015) ("[T]he Attorney General, while bringing a lawsuit pursuant to Section 707 of Title VII, is not required to adhere to any of the statutory prerequisites found in Section 706 of that statute."). There are also important, substantive differences. Section 707's purpose is "to provide the government with a swift and effective weapon to vindicate the broad public interest in eliminating unlawful practices, at a level which may or may not address the grievances of particular individuals." *Allegheny-Ludlum Indus., Inc.*, 517 F.2d at 843. In contrast, Section 706 addresses individual grievances and includes "requirements that charges be filed, investigations conducted, and an opportunity to conciliate afforded [to] the respondent." *Ibid.* Thus, the lack of an intervention authorization in Section 707 is by design: "To expedite these [pattern-or-practice] suits, Congress did not provide private individuals with the unconditional right to intervene in suits brought pursuant to Section 707." *EEOC* v. *Bass Pro Outdoor World, LLC*, 826 F.3d 791, 795 (5th Cir. 2016) (citation and internal quotation marks omitted).

Contrary to Badillo's argument, Section 707 and Section 706 cases do not necessarily involve "identical proof" and seek "identical relief." Response 10. Different burden-shifting frameworks apply to claims brought under the two provisions. In *McDonnell Douglas Corporation* v. *Green*, 411 U.S. 792, 802

(1973), the Supreme Court set out the burden-shifting framework for individual claims, and in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 336 (1977), it established the framework for pattern-or-practice claims brought under Section 707. See *United States* v. *City of NY*, 717 F.3d 72, 84 (2d Cir. 2013) (discussing differences between *McDonnell Douglas* and *Teamsters* frameworks). In a pattern-or-practice case, the plaintiff must make a *prima facie* showing of pervasive discrimination (often through the use of statistical evidence), but can meet that burden without "show[ing] discrimination against any particular present or prospective employee." *Ibid.* In an individual Section 706 case, by contrast, a private plaintiff must prove that "she has suffered an adverse employment action at the hands of her employer." *Luceus* v. *Rhode Island*, 923 F.3d 255, 258 (1st Cir. 2019) (citation, internal quotation marks, and brackets omitted). Thus, Section 707 and Section 706 cases will often proceed differently and involve different types of proof and evidence.

2. Given these differences, it is unsurprising that courts have repeatedly held that the right to intervene provided in Section 706 has no application to pattern-or-practice suits brought under Section 707. See, *e.g.*, *Allegheny-Ludlum Indus., Inc.*, 517 F.2d at 843 ("Nothing in [Section] 707 * * * conferred an unconditional right of intervention upon any private individual or association thereof."); accord *Bass Pro Outdoor World, LLC*, 826 F.3d at 795; see also *EEOC*

v. *United Air Lines, Inc.*, 515 F.2d 946, 949 (7th Cir. 1975) (holding that the "statutory right of intervention that attaches by virtue of section 706 is * * * not applicable to these claims" under Section 707); *EEOC* v. *JBS USA, LLC*, No. 10-cv-00318, 2012 U.S. Dist. LEXIS 193912, at *12 (D. Neb. Sept. 28, 2012); *EEOC* v. *JBS USA LLC*, No. 10-cv-2103, 2011 U.S. Dist. LEXIS 145102, at *8 (D. Colo. Dec. 16, 2011).

To be sure, the United States also has the option of bringing Section 706 cases on behalf of individuals, assuming a charge has been filed with the Equal Opportunity Employment Commission and efforts at conciliation have failed. See 42 U.S.C. 2000e-5(f)(1). No charge was filed here. As the Supreme Court explained in *Waffle House*, when the government files suit in response to a charge, "the employee has no independent cause of action, although the employee may intervene in the [government's] suit." *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 291 (2002). Badillo repeatedly cites *Waffle House* as if it demonstrates that he could not file his own suit because the United States filed this case. See Response 2, 9, 21. That is not so. The passage in *Waffle House* Badillo cites is discussing intervention in Section 706 cases brought by the government after a charge has been filed. 534 U.S. at 291. This is not such a case: the United States has not sued on behalf of any particular individuals and the suit has no effect on any individual's legal claims unless that individual affirmatively opts in to accept the

offered relief. As this Court has already recognized, "[t]he order approving the settlement here does not itself provide any individual relief or finally dispose of any right or claim Badillo might have had." *United States* v. *Rhode Island Dep't of Corr.*, No. 18-1462, 2018 WL 6079524, at *2 (1st Cir. Nov. 7, 2018) (Judgment).

3. Finally, Badillo argues that courts "liberally grant motions to intervene under Rule 24(a)(1), even after judgment has entered, so the intervenor can appeal." Response 11. But none of the cases he cites stand for such a proposition. In *Alstom Caribe, Inc.* v. *Geo. P. Reintjes Co.*, 484 F.3d 106, 111 (1st Cir. 2007), this Court granted leave to intervene on appeal in a dispute regarding disbursement of funds under Rule 67 of the Federal Rules of Civil Procedure. The case did not involve Rule 24(a)(1). Likewise, both *United States* v. *City of Chicago*, 870 F.2d 1256 (7th Cir. 1989), and *Stallworth* v. *Monsanto, Co.*, 558 F.2d 257 (5th Cir. 1977), involved motions to intervene not under Rule 24(a)(1), but under Rule 24(a)(2), that were filed within weeks of the intervenors learning that their interests were potentially affected. None of these cases helps Badillo here.

In sum, the district court did not abuse its discretion in denying Badillo's motion to intervene pursuant to Rule 24(a)(1).

B. The District Court Did Not Abuse Its Discretion In Denying Badillo's Motion To Intervene Under Rule 24(a)(2)

Badillo's response also fails to demonstrate that the district court abused its discretion in denying the motion to intervene as of right under Rule 24(a)(2). Intervention under Rule 24(a)(2) requires a movant to show: (1) the motion is *timely*, (2) the existence of a sufficient interest in the property or transaction that is the subject of the lawsuit, (3) a realistic threat that disposition of the action will impair that interest, and (4) that interest is not adequately represented by existing parties. Fed. R. Civ. P. 24(a) and (a)(2) (emphasis added). Failure to satisfy "any one of [these factors] dooms intervention." *Public Serv. Co. of N.H.* v. *Patch*, 136 F.3d 197, 204 (1st Cir. 1998). The court did not abuse its discretion in concluding that Badillo's 17-month delay rendered his intervention motion untimely. Motion 11-15. While the court appropriately denied intervention based on timeliness alone, Badillo failed to meet any of the requirements for intervention under Rule 24(a)(2). Motion 21-22.

1. Badillo's response makes four arguments in support of his contention that the district court abused its discretion in denying his motion because of its untimeliness. None has any merit.

First, Badillo argues that the district court erred by addressing only timeliness and no other Rule 24(a)(2) factor. Response 12. Not so. When a court determines that a motion to intervene is untimely, it need not "consider whether

other conditions for intervention under Rule 24 were satisfied" in order to deny the motion, or affirm its denial on appeal. *NAACP* v. *New York*, 413 U.S. 345, 369 (1973). As this Court has explained, "timeliness [] is the sentinel that guards the gateway to intervention." *Candelario-Del-Moral* v. *UBS Fin. Serv. Inc. of P.R.* (*In re Efron*), 746 F.3d 30, 35 (1st Cir. 2014). In *In re Efron*, this Court found no abuse of discretion in the district court's "sensible" denial of intervention solely on the basis of the untimeliness, with no analysis of any other factor. *Ibid.*

Second, Badillo argues that his motion to intervene was timely because "[l]ack of knowledge of the lawsuit may excuse delay in attempting to intervene." Response 17. But Badillo had no lack of knowledge. After receiving notice of the proposed settlement on December 6, 2017 (Doc. 84-1, at 2), Badillo retained counsel and filed multiple rounds of objections to the agreement but nonetheless waited more than 17 months before moving to intervene. See Motion 5-10. Badillo's dilatory filing cannot be excused for lack of knowledge.

Third, Badillo argues that his motion was timely because he moved to intervene within a month of being notified of the specific amount of his potential award. Response 18. This fact does not establish timeliness. On December 19, 2017, Badillo's attorney filed a written objection to the proposed settlement agreement arguing that the $450,000 settlement fund was insufficient. Doc. 84;

see Doc. 84-2, at 1, 4-12. In January 2018, the parties responded to Badillo's objections on the record, and explained that the proposed settlement was without stipulation of liability and that monetary relief was only one of several remedies aimed at addressing Rhode Island's allegedly discriminatory practices. Doc. 85-1, at 10-15. This same January 2018 filing included a declaration reporting that notice of the settlement agreement had been mailed to 2237 potential claimants. Doc. 85-7, at 3-4. Thus, Badillo has long been on notice that the monetary relief the settlement proposed to provide to individual claimants would not come anywhere close to the six-figure sum that he is seeking for himself alone.

Fourth, Badillo claims that a presumption of timeliness ought to apply to his motion, no matter how late filed, because he is similar to a "member of a class seek[ing] to intervene in a class action." Response 19. But this Court has already recognized that Badillo is not similarly situated to an unnamed member of a class action and that the district court's approval of the settlement more than a year ago did not bind or prejudice him. Judgment, 2018 WL 6079524, at *2.

2. Badillo's response also fails to show that he satisfies any of the factors other than timeliness that are required for intervention under Rule 24(a)(2). Response 12-16. The mere fact that he is a potential claimant under this pattern-or-practice suit does not show that this case impairs his interests. As this Court already concluded, nothing in the agreement binds Badillo unless he affirmatively

opts in. See Judgment, 2018 WL 6079524, at *2. Nor does Badillo's dissatisfaction with the amount of monetary relief available establish that the United States is not adequately representing the interests of all potential claimants, Badillo included. See *United Air Lines, Inc.*, 515 F.2d at 950 (holding that disagreement with government's litigation choices does not render representation inadequate).

In sum, the district court did not abuse its discretion in denying Badillo's motion to intervene pursuant to Rule 24(a)(2).

C. Denial Of Badillo's Motion To Intervene Did Not Prejudice Him, But Allowing Intervention Would Cause Serious Prejudice To The Parties And Other Claimants

Finally, Badillo contends that the district court abused its discretion by failing to adequately consider prejudice. Response 20. The argument is meritless. Badillo's repeated insistence, for example, that he has been prejudiced because he is due significantly more monetary relief (in the form of lost pay) is baseless and speculative. See Response 7. Aside from the fact that this is a settlement of a case in which liability has not been established, there is no evidence in the record establishing that, but for the selection devices at issue in this suit, Badillo would even have been hired by the Rhode Island Department of Corrections.

Nor is Badillo's dissatisfaction with his individual relief a proper basis for unraveling the entire settlement agreement, which the parties have almost entirely

implemented at this point. Badillo's assertion that the parties have not been prejudiced by the passage of time between December 2017 and May 2019 is remarkable. Response 22. Both the district court's final approval of the settlement agreement and the near-complete implementation of that agreement occurred during that time frame. Badillo says it would not have mattered if he had promptly moved to intervene because the parties would have objected anyway. Response 23. But Badillo would be differently situated had he promptly sought permissive intervention (for purposes of preserving his right to appeal) rather than claiming that he has an unconditional right to intervene in the litigation at any point, no matter the prejudice to the parties and other claimants.

As this Court already noted, before his initial attempt at appealing the district court's approval of the settlement agreement, Badillo "could have filed a motion to intervene in the district court but did not" and had "failed to show why intervention should be permitted now." Judgment, 2018 WL 6079524, at *3; see also *United States* v. *New Jersey*, 522 F. App'x 167, 168-169 (3d Cir. 2013) (unpublished) (affirming the district court's denial of objectors' motion to intervene to challenge a settlement of the United States' Title VII pattern-or-practice case because the motion was untimely and filed "at a point that would unduly prejudice the parties"). Badillo's failing is even more glaring now, when other claimants have filed their acceptances of individual relief awards, checks are

soon to be issued, and Rhode Island is moving ahead with hiring following its implementation of new Title VII-compliant selection processes in August and September of this year. See Doc. 80-1, at 14-16; Motion 17.

Badillo admits that the "precise point" of his intervention is to "upset the[] Settlement Agreement." Response 22. But he has identified no basis for doing so at this late date or any reason to find that the district court abused its discretion in denying his motion to intervene. This case has come nearly to a close, and this Court should not give Badillo an opportunity to attempt to unwind a settlement agreement that the district court determined more than 16 months ago was fair, reasonable, and adequate. Doc. 99. This appeal presents no substantial question for review. Loc. R. 27.0(c).

CONCLUSION

For the foregoing reasons, this Court should summarily affirm the district court's denial of Badillo's motion to intervene.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this reply:

(1) complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(c) because it contains 2599 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

s/ Anna M. Baldwin
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Date: September 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2019, I electronically filed the APPELLEES' JOINT REPLY IN SUPPORT OF THEIR JOINT MOTION FOR SUMMARY AFFIRMANCE with the United States Court of Appeals for the First Circuit by using the CM/ECF system.

I certify that all participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anna M. Baldwin
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