No. 17-2227

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ALEKA RUGGIERO,

Plaintiff-Appellant,

v.

MOUNT NITTANY MEDICAL CENTER,

Defendant-Appellee.

On Appeal from the United States District Court
for the Middle District of Pennsylvania
The Honorable Matthew W. Brann, District Judge

REPLY OF *AMICUS CURIAE* EEOC IN SUPPORT OF ITS MOTION TO PRESENT ORAL ARGUMENT ON TIME CEDED BY PLAINTIFF-APPELLANT RUGGIERO

Amicus Curiae Equal Employment Opportunity Commission ("EEOC" or "Commission") files this reply in support of its motion to present oral argument on time ceded by Plaintiff-Appellant Aleka Ruggiero.

1. To recapitulate, the Commission requested leave to participate in oral argument on five (5) minutes of time ceded by

Plaintiff-Appellant Ruggiero because this appeal raises issues relevant to the Commission's interest in the effective enforcement of Title I of the Americans With Disabilities Act, as amended, 42 U.S.C. § 12101 *et seq.* Granting the Commission's request would not diminish argument time allotted to Defendant-Appellee Mount Nittany Medical Center, nor would it enlarge total argument time or delay this Court's proceedings.

2. Mount Nittany asserts two arguments in opposition to the Commission's motion: (1) that "the Commission has no substantial interest in this appeal" and (2) that "allowing the Commission to present oral argument would result in unnecessary duplication or repetition." Mount Nittany Resp. 1. Neither argument provides grounds to deny the Commission's request for leave to participate.

3. First, in support of its contention that "the Commission has no substantial interest in the appeal," Mount Nittany states that "the Commission identifies no specific aspect either of the pleading standards of ADA claims or of Plaintiff's claims in particular that would justify its involvement in any oral argument of this matter." Mount Nittany Resp. ¶ 4. As a threshold matter, Mount Nittany provides no authority for the idea that an amicus must assert a "substantial"

interest to participate in oral argument, and does not explain what makes an interest "substantial." Moreover, Mount Nittany ignores that the Commission articulated an interest in this appeal based on the fact that Congress charged the Commission with administering, interpreting, and enforcing Title I of the ADA. *See* EEOC Mot. ¶ 2. The issue in this appeal—pleading standards for ADA claims—is related to the merits of ADA claims, and falls under the Commission's purview. Additionally, the Commission's amicus brief discussed the EEOC's ADA regulations and interpretive guidance, *see* EEOC Br. 12-13, 17-18, 23-25, 27-28, and the EEOC has a clear interest in the interpretation of those regulatory materials.

4. Mount Nittany adds that "[t]he resolution of [the] issues [in this appeal] will not impact the Commission at all." *Id.* ¶ 6. However, the question of ADA pleading standards is directly relevant to enforcement litigation in which the Commission is a plaintiff. Also, the Commission has an interest in the ability of individual litigants to pursue ADA lawsuits because, due to the Commission's limited resources, the vast majority of such suits are brought by individuals acting as private attorneys general.

5. Mount Nittany further states that "if the fact that pleading standards were at issue was sufficient to allow the Commission to participate at oral argument, the Commission would effectively have carte blanche to participate in every appeal of every [Fed. R. Civ. P.] 12 dismissal nationwide, and [Fed. R. App. P.] 29(a)(8) would be eviscerated." Mount Nittany Resp. ¶ 4. Mount Nittany overstates the scope of the Commission's request to participate in oral argument. The Commission did not claim that it should be permitted to present argument in any appeal involving pleading standards, regardless of the cause of action. Instead, the EEOC requested leave to present argument in the present appeal—in which it filed an amicus brief—based on the Commission's interest in the effective enforcement of the ADA's protections from workplace discrimination. The EEOC referred this Court to several other appeals that involved pleading standards under federal anti-discrimination statutes, in which the Commission presented oral argument. EEOC Mot. ¶ 4 nn.1&2.

6. As Mount Nittany acknowledges, the Commission referred this Court to several cases in which courts of appeals, including this Court, allowed the EEOC to present oral argument. Mount Nittany

Resp. ¶ 5; *see also* EEOC Mot. ¶ 4 nn.1&2. Mount Nittany seeks to distinguish one of those cases, *Karlo v. Pittsburgh Glass Works, LLC*, 849 F.3d 61 (3d Cir. 2017), on the rationale that *Karlo* involved a "substantial and novel" legal issue, while the present appeal allegedly does not. Mount Nittany Resp. ¶¶ 5-6. Mount Nittany argues that the Commission should be allowed to present oral argument only in appeals that involve a "substantial and novel" issue, but provides no authority for this proposition, and does not define "substantial." *Id.* ¶ 6. However, the Commission has an interest in a wide range of issues impacting enforcement of federal anti-discrimination statutes and courts, including this Court, may find oral presentation by the Commission useful even where an appeal does not raise a novel legal issue.

7. *Karlo* is the only case the EEOC cited that Mount Nittany seeks to distinguish. Mount Nittany does not address, for example, *Connelly v. Lane Construction*, 809 F.3d 780 (3d Cir. 2016), in which this Court allowed the EEOC to present oral argument. *Connelly* is closely analogous to the present case because it involved pleading standards under Title VII, another statute that the Commission enforces.

8. Mount Nittany further states, without providing authority, that the EEOC should not be permitted to present oral argument because, "as an executive agency, the Commission has ample resources at its disposal to advance its position on matters relating to its enforcement of the ADA, including but not limited to regulations, guidance, enforcement initiatives, and so on." Mount Nittany Resp. ¶ 7. However, Rule 29(a) permits a federal agency to file amicus briefs without leave of court, regardless of whether the agency may advance its position by other means. Moreover, Congress gave the EEOC authority to litigate—including as amicus—in addition to the Commission's authority to promulgate regulations.

9. In summary, the EEOC has articulated an interest in this appeal and in presenting oral argument, and the Commission asks this Court to grant leave to participate, should this Court schedule argument.

10. Second, Mount Nittany argues that allowing the Commission to present oral argument would be repetitious and duplicative.

11. Mount Nittany acknowledges that "neither Rule 29 nor its Committee Notes address whether and under what circumstances amicus curiae should be permitted to participate in oral argument." Mount Nittany Resp. ¶ 11. Nevertheless, Mount Nittany claims that "the Committee Notes to Rule 29 repeatedly emphasize that the input of amicus curiae is neither helpful nor desirable when it presents arguments to the Court that are repetitious and duplicative of the arguments presented by the party whom it supports." Mount Nittany Resp. ¶ 11. However, the Committee Notes are inapposite to the EEOC's motion, and the EEOC's oral presentation would not be duplicative.

12. To begin, the 1998 Committee Note (on which Mount Nittany primarily relies) is inapposite to the EEOC's motion. Rule 29(a)(2) permits federal agencies (and states) to file an amicus brief without leave of court, but Rule 29(a)(3) requires that other potential amici file a motion explaining "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3). The 1998 Committee Note pertains to Rule 29(a)(3), not Rule 29(a)(2), and discusses the circumstances

under which courts should grant non-governmental entities leave to file amicus briefs, with a focus on assessing whether such briefs are relevant to an appeal. *See* Fed. R. App. P. 29 (Comm. Note 1998) (referring to Rule 29, subdivision (b), which is equivalent to the current Rule 29(a)(3)).[1]

13. Additionally, the 1998 Committee Note also cites concerns about burdening court staff and facilities as a reason to disfavor certain amicus briefs of non-governmental entities. Again, although the 1998 Committee Note is inapposite, such concerns are not present here. The Commission's amicus brief is already part of the appellate record. And, as explained, granting the Commission's request would not enlarge total argument time or delay this Court's proceedings.

14. Mount Nittany relies on the 1998 Committee Note in claiming that "the Commission's Amicus Brief nearly completely

[1] Mount Nittany also asserts that the 2010 Committee Note to Rule 29 "stat[es] that the input of amicus curiae should '*avoid duplicative arguments*' and '*avoid duplication*.'" Mount Nittany Resp. ¶ 11 (emphasis added). To the extent that Mount Nittany suggests that any duplication disqualifies amici from participation in oral argument, the full text of the Committee Note does not support that implication. Fed. R. App. P. 29 (Comm. Note 2010) ("It should be noted that coordination between the amicus and the party whose position the amicus supports is desirable, to the extent that it helps to *avoid duplicative arguments*. ... Now that the filing deadlines are staggered, coordination may not always be essential in order to *avoid duplication*.") (emphasis added).

overlaps Plaintiff's Appellant Brief." Mount Nittany Resp. ¶ 12. However, the EEOC formulates its views—through a lengthy process culminating in approval from the bipartisan Commissioners—and prepares its amicus briefs independently of the party it is supporting. Therefore, the Commission's amicus briefs reflect the Commission's views, not the position of the party it is supporting, although the Commission and the party may agree on certain issues.

15. Moreover, the Commission's brief in this appeal does not "nearly completely overlap[]" Plaintiff-Appellant Ruggiero's brief, as Mount Nittany claims. This is well-illustrated by the fact that Mount Nittany's response brief on the merits responds separately to multiple points raised in the EEOC's amicus brief. *See* Mount Nittany Br. 16 n.4, 19 n.7, 32 n.12, 34 n.13, 46 n.17, 50 n.20. Also, the Commission's brief contributes agency expertise on the ADA regulations the Commission promulgated and the Commission's interpretive guidance to those regulations. *See* EEOC Br. 12-13, 17-18, 23-25, 27-28. Accordingly, the Commission's participation in oral argument would not duplicate Ruggiero's presentation.

16. In summary, the Committee Notes that Mount Nittany cites are inapposite to the EEOC's motion. Even if they were relevant, the Commission's participation in oral argument would not be duplicative and would not burden this Court.

WHEREFORE, for the reasons above and the reasons stated in its motion, the Commission respectfully requests leave to present oral argument in this appeal, should this Court hold argument, using five (5) minutes of time ceded by Plaintiff-Appellant Ruggiero.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Anne W. King, hereby certify that I electronically filed the foregoing with this Court on November 29, 2017, via the appellate CM/ECF system. I also certify that the following counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system:

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