THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2015

An Annual Report on EEOC Charges, Litigation, Regulatory Developments and Noteworthy Case Developments

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2015

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INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2015** (hereafter "Report"), our fifth annual Report, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also offers an analysis of what the EEOC has and has not accomplished, and the implications of those outcomes. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

This year's Report is organized into the following sections:

Part One—Looking Back at FY 2015: A Review of EEOC Successes and Failures, and Significant Cases and Developments to Watch for in FY 2016—is a preview to the Report as a whole. This chapter encapsulates the EEOC's litigation and policy achievements and setbacks for the fiscal year, topics that are fleshed out in the chapters that follow.

Part Two discusses EEOC charge activity, litigation and settlements in FY 2015, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

Part Three focuses on legislative and regulatory activity involving the EEOC. This chapter includes a discussion of agency initiatives beyond formal rule-making efforts, including the Commission's issuance of both formal and informal guidance on a variety of contentious issues, and the holding of public meetings on several agency priorities. This chapter highlights recent and emerging trends at the agency level, as well as the Commission's efforts to adhere to its Strategic Plan. References are made to more comprehensive Littler updates and/or reports for a more in-depth discussion of the topic, as applicable.

Part Four summarizes the EEOC's investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations. Case law addressing the EEOC's authority to do so is discussed in this chapter as well. Appendix C to this Report is a companion guide, summarizing select subpoena enforcement actions undertaken by the EEOC during FY 2015.

Part Five of the Report focuses on FY 2015 litigation in which the EEOC was a party. This discussion is broken into several topic areas, including: (1) pleading deficiencies raised by employers; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) the state of employer challenges based on the EEOC's alleged failure to meet its conciliation obligations prior to filing suit following the U.S. Supreme Court's decision in *EEOC v. Mach Mining*; (4) intervention-related issues, both when the EEOC attempts to enter a case through intervention and when third parties attempt to join as plaintiffs in EEOC-filed lawsuits; (5) class discovery issues in EEOC litigation, including the scope of discovery in class-based or pattern-or-practice cases, the use of experts, ESI, and discovery of EEOC-related documents; (6) general discovery issues involving both employers and the EEOC in litigation between the parties; (7) favorable and unfavorable summary judgment rulings and lessons learned; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are a useful resource that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury awards. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief in FY 2015. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2015. Finally, **Appendix D** highlights notable summary judgment decisions by claim type.

We hope that this Report serves as a useful resource for employers in their EEO compliance activities and provides helpful guidance when faced with litigation involving the EEOC.

I. LOOKING BACK AT FY 2015: A REVIEW OF EEOC SUCCESSES AND FAILURES, AND SIGNIFICANT CASES AND DEVELOPMENTS TO WATCH FOR IN FY 2016

The EEOC reached major milestones in FY 2015. The agency celebrated its 50th anniversary and the 25th anniversary of the Americans with Disabilities Act. As significantly, the EEOC was a party to two cases before the U.S. Supreme Court, *EEOC v. Mach Mining, LLC*[1] and *EEOC v. Abercrombie & Fitch Stores*,[2] and had a prominent role in *Young v. UPS*,[3] as the impact of the agency's 2014 guidance on pregnancy discrimination[4] was discussed in the Court's decision.

This introductory section to the 2015 Annual Report on EEOC Developments provides a summary of key agency and case developments over the past fiscal year, concentrating on the EEOC's focus on systemic[5] investigations and related litigation and the EEOC's current priorities based on its Strategic Enforcement Plan (SEP).[6]

A. Agency Developments

The past fiscal year started out with some difficult challenges for the EEOC based on a report issued on November 24, 2014, by Lamar Alexander (R-TN), Chairman of the Senate Committee on Health, Education, Labor and Pensions (HELP). The report found:

> [T]oday's EEOC is pursuing many questionable cases through sometimes overly aggressive means—and, as a result, has suffered significant court losses that are embarrassing to the agency and costly to taxpayers. Courts have found EEOC's litigation tactics to be so egregious they have ordered EEOC to pay defendants' attorney's fees in ten cases since 2011. The courts have criticized EEOC for misuse of its authority, poor expert analysis, and pursuit of novel cases unsupported by law.[7]

The November 2014 report by Sen. Alexander immediately preceded the confirmation hearing for David Lopez, who was nominated for a second term as General Counsel for the EEOC. While Lopez faced significant challenges, he was approved for a new term as General Counsel on December 3, 2014 by a Senate vote of 54-43. On that same day, Charlotte Burrows was approved as a new EEOC Commissioner by a Senate vote of 93-2. The Commission ended the year with a 3-2 Democratic majority, with Jenny Yang appointed by President Obama as the Chair of the Commission, and David Lopez continuing in his role as General Counsel. These developments cleared the way for the EEOC's continued focus on its systemic initiative and its current list of priorities.

Even so, the agency faced additional criticism by the Republican members of the HELP Committee in an oversight hearing held on May 19, 2015.[8] During this hearing, Sen. Tim Scott (R-SC) was critical of the agency spending resources on EEOC-initiated litigation where a discrimination charge had not even been filed.[9] General Counsel Lopez responded by stating such lawsuits involved only a "small fraction" of the EEOC's litigation docket. He responded to criticism regarding one pending large-scale age discrimination lawsuit, which was initiated based on a Commissioner's charge, explaining, "There is a lot of information in that case with evidence of age discrimination." Lopez otherwise highlighted what he viewed as some major achievements during his role as General Counsel, but also stated that litigation should be the "enforcement tool of last resort."[10]

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1 *EEOC v. Mach Mining*, LLC, 135 S. Ct. 1645 (2015).

2 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015).

3 *Young v. United Parcel Service*, 135 S.Ct. 1338 (2015).

4 EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues, No. 915.003 (Updated June 25, 2015).

5 The EEOC has defined systemic cases as "pattern-or-practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." *See* EEOC Systemic Task Force Report (March 2006) at 1, *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

6 The EEOC's Strategic Enforcement Plan, which was adopted by the EEOC on December 12, 2012, is available on the EEOC's website at http://www.eeoc.gov/eeoc/plan/sep.cfm.

7 *See* HELP Committee Press Release, *Alexander Report Finds EEOC Missteps Costing Taxpayers and Victims of Workplace Discrimination* (Nov. 11, 2014), *available at* http://www.help.senate.gov/chair/newsroom/press/alexander-report-finds-eeoc-missteps-costing-taxpayers-and-victims-of-workplace-discrimination.

8 *See* Senate HELP Committee hearing, *Oversight of the Equal Employment Opportunity Commission: Examining EEOC's Enforcement and Litigation Programs* (May 19, 2015), *available at* http://www.help.senate.gov/hearings/oversight-of-the-equal-employment-opportunity-commission-examining-eeocs-enforcement-and-litigation-programs.

9 *See* Kevin McGowan, *EEOC Officials Respond to GOP Criticisms During Senate Committee Oversight Hearing*, Daily Labor Report (May 19, 2015), *available at* http://www.bna.com/eeoc-officials-respond-n17179926736/.

10 *Id.*

Chair Yang also testified at the Senate HELP Committee hearing and highlighted what she viewed as significant achievements by the agency, including "ensuring efficient and effective enforcement by using integrated strategies that encourage prompt and voluntary resolution of charges," explaining:

- Voluntary compliance remains the preferred means of preventing and remedying employment discrimination.
- In FY 2014, EEOC's mediation program successfully helped employers and employees voluntarily resolve 7,846 (77%) of the 10,221 mediations it conducted.
- Over the past three years, EEOC has worked with employers to conciliate and voluntarily resolve a greater percentage of cases than in recent history—and with successful conciliations rising from 27% in FY 2010 to 38% in FY 2014. The success rate for the conciliation of systemic charges is even higher (47%), particularly significant as these charges are more complex and have the potential to improve practices for many workers.
- In 2012, the Commission reaffirmed the importance of systemic enforcement in its Strategic Plan and Strategic Enforcement Plan. Because of these efforts, at the end of FY 2014, 57 out of 228, or 25% of the cases on the EEOC's litigation docket, were systemic. This is the largest proportion of systemic lawsuits on the EEOC's docket since tracking began in FY 2006.
- In 2014, EEOC's success rate for conciliation of systemic charges of discrimination was 47%.[11]

B. Key Statistics for FY 2015

On November 19, 2015, the EEOC issued its annual Performance and Accountability Report (referred to as the EEOC's "PAR") for Fiscal Year 2015.[12] The PAR reviews the agency's achievements over the past fiscal year, and includes statistics relating to EEOC charge activity and litigation.

According to the FY 2015 PAR, there was a minor increase in the number of discrimination charges compared to those filed in FY 2014 (89,895 in FY 2015 compared to 88,878 in FY 2014). Even so, the level of charge activity has decreased over the past few years. There were 4,000 fewer charges filed in FY 2015 compared to FY 2013 (93,727 charges) and an approximate 10,000-charge decrease from FY 2011 (99,947 charges).[13]

Despite the general decrease in the number of charges filed with the agency over the past couple of years, the EEOC's backlog of private-sector charges (referred to by the agency as the "Private Sector Charge Inventory") has continued to increase. During FY 2015, the backlog increased to 76,408, increasing slightly from 75,935 charges in FY 2014.[14] While this inventory increase was modest, the EEOC had already raised concerns at the end of FY 2014 based on the "major challenge" of its charge inventory, which had increased 7.28% from 70,781 charges to 75,935 between FY 2013 and FY 2014.[15] The backlog increased despite hiring 90 investigators. Even with turnover, the net increase in investigators was approximately 60. The EEOC attempted to explain the backlog challenge by referring to the impact of "losing experienced investigators" and the need "to ensure high quality standards for charge processing," but acknowledged, "As it does each year, the EEOC faces a fundamental challenge in efficiently processing the pending inventory of private-sector discrimination charges while improving the quality of charge processing."[16]

Even so, the most significant trend to closely monitor from an employer's perspective is the EEOC's focus on systemic investigations. During FY 2015, there was a slight increase in the number of systemic investigations completed by the EEOC, and more importantly, in the total monetary recovery based on the resolution of systemic investigations. The EEOC completed 268 systemic investigations in FY 2015, compared to 260 in FY 2014, but the amount obtained in resolving systemic charges increased dramatically from $13 million to $33.5 million.[17] While this increase at first blush may be alarming, it is more in line with the amounts recovered in FY 2012 and FY 2013 when the EEOC obtained

11 *See Statement of Jenny R. Yang, Chair U.S. Equal Employment Opportunity Commission Committee on Health, Education, Labor and Pensions U.S. Senate* (May 19, 2015), *available at* http://www.eeoc.gov/eeoc/legislative/yang_5-19-15.cfm.

12 *See* EEOC's *FY 2015 PERFORMANCE AND ACCOUNTABILITY REPORT* (herein "FY 2015 PAR") and Press Release, EEOC, *EEOC Issues FY 2015 Performance Report* (Nov. 19, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/11-19-15.cfm.

13 *See* Barry A. Hartstein, et al., Littler's *Annual Report on EEOC Developments: Fiscal Year 2014* at 18, *available at* http://www.littler.com/annual-report-eeoc-developments-fiscal-year-2014.

14 *Compare* FY 2015 PAR at 11 to FY 2014 PAR at 46, available at *available at* http://www.eeoc.gov/eeoc/plan/2014par.pdf; *see also* Press Release, EEOC, *EEOC Issues FY 2014 Performance Report* (Nov. 18, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm.

15 *See* FY 2015 PAR at 52 and FY 2014 PAR at 46.

16 *See* FY 2015 PAR at 52.

17 *Compare* FY 2015 PAR at 36 to FY 2014 PAR at 29.

$36.2 million and $40 million, respectively, through the resolution of systemic investigations.[18] More troublesome, however, is the continued increased likelihood of a reasonable cause finding based on a systemic investigation. The EEOC made a reasonable cause finding in 99 out of the 268 systemic investigations completed in FY 2015 (36.0%),[19] which is in a range similar to the number of reasonable cause findings in FY 2014 and FY 2013 (45% and 35%, respectively).[20] This number is in stark contrast to the EEOC's published statistics showing that historically, the EEOC has issued reasonable cause findings in less than five percent (5%) of the charges filed with the agency.[21]

Next, turning to litigation, the EEOC has continued its "new normal" by decreasing the number of lawsuits it files. In FY 2015, the agency filed only 142 merits lawsuits.[22] While this was a slight increase from the 133 lawsuits filed in FY 2014,[23] this trend is similar to the number filed in FY 2013 (131 merits lawsuits) and FY 2012 (122 merits lawsuits), and in sharp contrast to the number of suits filed in prior years (250 or more).[24]

Among the 142 lawsuits filed in FY 2015, a total of 42 involved "multiple victims," which included 16 systemic lawsuits (*i.e.*, impacting 20 or more individuals).[25] While this number may not appear to be significant, a review of the EEOC's cases on its active docket at the end of FY 2015 shows that approximately 40% of the EEOC's active docket (88 out of 218 cases) involves multiple-victim lawsuits, which includes 48 pending lawsuits involving challenges to alleged systemic discrimination (22%).[26] Also worth noting is that among the 142 lawsuits filed by the agency during FY 2015, the largest number of lawsuits involved claims under the ADA—37% (53 lawsuits).

C. Key Procedural Developments

Over the past fiscal year, the EEOC's multi-step procedure for investigating and conciliating discrimination claims prior to suing was closely reviewed by the courts. The impact of the Supreme Court's decision in *EEOC v. Mach Mining* on the conciliation process was one of the most hotly debated issues among EEO attorneys over the past year, and recent decisions since *Mach Mining* have addressed the impact of that decision. The potential reach of *Mach Mining* in limiting a court's review of the EEOC's investigation process was also discussed in the Second Circuit's decision in *EEOC v. Sterling Jewelers*.[27]

1. Impact of Mach Mining

Mach Mining involved litigation initiated by the EEOC and what actions had to be taken by the agency before suing an employer. The focus of the lawsuit was Title VII of the Civil Rights Act of 1964, which expressly states that if the Commission finds "reasonable cause" to believe there is a violation of the Act, the EEOC must first "endeavor to eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation and persuasion."[28] However, the pivotal language relied on by the EEOC to argue that any review of its conciliation obligation is limited stems from the additional statutory provision stating the EEOC may sue an employer if "the Commission has been unable to secure from respondent a conciliation agreement *acceptable* to the Commission."[29]

From the EEOC's perspective, the above language was relied on to argue that the "statutory directive to attempt conciliation" is "not subject to judicial review," relying on the ruling by the Seventh Circuit in favor of the EEOC.[30] The employer relied on case authority that had imposed a "good faith" obligation on the EEOC concerning its conduct during the conciliation process.

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18 *See* FY 2012 PAR at 28, *available at* http://www.eeoc.gov/eeoc/plan/2012par.cfm, and FY 2013 PAR at 32, *available at* http://www.eeoc.gov/eeoc/plan/2013par.cfm.

19 While the number of reasonable cause findings for systemic investigations completed in FY 2015 is not included in the FY 2015 PAR, this information was provided to Littler by a senior official at the agency.

20 *See* FY 2014 PAR at 27 and FY 2013 PAR at 32.

21 *See* EEOC statistics, "All Statutes, FY 2007- FY 2014," *available at* http://eeoc.gov/eeoc/statistics/enforcement/all.cfm.

22 *See* FY 2015 PAR at 34.

23 *See* FY 2014 PAR at 27.

24 *See* Littler's *2014 Annual Report on EEOC Developments* at 20.

25 *See* FY 2015 PAR at 34.

26 *Id*.

27 *EEOC v. Sterling Jewelers*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015), *reh'g denied* (2d Cir. Dec. 1, 2015).

28 29 U.S.C. §2000e-5(b).

29 29 U.S.C. §2000e-5(f)(1).

30 *See EEOC v. Mach Mining*, 738 F. 3d 171, 177 (7th Cir. 2013).

The Supreme Court struck a balance between the two polar positions, holding there is a "strong presumption" favoring judicial review of administrative actions. The Court further held, however, that judicial review would be limited. Based on a reasonable cause finding, the Court contemplates notice to the employer of the EEOC's finding of the alleged violation, and explained what was expected:

> Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result. And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the alleged discriminatory practice.[31]

The Court described this obligation as a "barebones review" that gives the EEOC "expansive discretion . . . to decide how to conduct conciliation efforts and when to end them." Any failure by the EEOC would require merely staying the action and requiring the EEOC to meet its conciliation obligation. In fulfilling this statutory requirement, the EEOC is required only to "tell the employer about the claim – essentially, what practice has harmed which person or class – and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance." In the Court's view, a "sworn affidavit from the EEOC stating that it has performed its obligations but that its efforts have failed will usually suffice to show that it has met the conciliation requirement."

While the impact of *Mach Mining* on the conciliation process remains unsettled, two courts recently reached opposite conclusions when reviewing the EEOC's conduct during the conciliation process.

In one decision, *EEOC v. Ohio Health*,[32] as part of a summary judgment motion, the employer took strong exception to the EEOC's approach to the conciliation process. In staying the action and remanding the case for 60 days to require mediation between the parties, the court reviewed the mandate of the Supreme Court's ruling in *Mach Mining* and concluded "the EEOC has failed to engage in good faith conciliation efforts." In *Ohio Health*, the district court was presented with an employer declaration asserting that the EEOC had presented its demands during conciliation as a "take-it-or-it proposition, failed to provide information requested by [the employer], demanded a counter offer, and then declared that conciliation efforts have failed despite [the employer] having made it clear that it was ready and willing to negotiate." The court rejected the EEOC's argument that because it had already filed a complaint, "only a public resolution was possible." The court found this position "ridiculous" and cautioned the EEOC that if it "continues down this dangerous path and fails to engage in good faith efforts at conciliation," it potentially would be subject to "contempt and dismissal of this action for failure to prosecute."

In contrast, in *EEOC v. Jet Stream Ground Services, Inc.*,[33] the district court rejected the employer's motion for partial summary judgment where there was an ongoing exchange of proposals during conciliation, but the employer took exception to the EEOC's approach to conciliation. The employer argued that the EEOC did not engage in a "sincere and reasonable conciliation" because it initially proposed that the employer create a settlement fund for "aggrieved individuals" who had not yet been identified, and because the EEOC "demanded that [the employer] reinstate all other aggrieved individuals that it could identify." The employer argued also that the EEOC negotiations on behalf of the interveners evidenced its "bad faith because the EEOC did not negotiate in an individualized manner," and instead made significant economic demands for a group of purported victims "while rejecting individualized offers."

In denying the employer's motion, the district court in *Jet Stream* acknowledged that the employer "would have preferred individualized settlement counter-offers to match its own," but *Mach Mining* does not mandate such conduct by the EEOC during the conciliation process. Rather, "the Commission is entitled to 'expansive discretion…over the conciliation process'" and "its efforts need not involve any specific steps or measures." The court concluded that the EEOC had engaged in "substantive conciliation efforts," and "applying the 'limited' scope of review mandated by *Mach Mining*," the EEOC's settlement efforts "were sufficient to fulfill Title VII's conciliation requirements."

2. Challenging Scope of EEOC Investigations

The broad reach of *Mach Mining* was also recently discussed in the context of limiting the scope of review of EEOC investigations. Two decisions addressed the issue: (1) a federal court of appeals (Second Circuit) in *EEOC v. Sterling*

31 *Mach Mining,* 135 S.Ct. 1645, No. 13-1019, slip op. at 13.

32 *See EEOC v. Ohio Health Corp*., 2015 U.S. Dist. LEXIS 84016 (S. D. Ohio June 29, 2015).

33 *EEOC v. Jet Stream Ground Services, Inc*., 2015 U.S. Dist. LEXIS 130838 (D. Colo. Sept. 29, 2015).

Jewelers[34] and (2) a district court in Illinois in *EEOC v. AutoZone, Inc.*[35] In both cases, the courts relied on *Mach Mining* and determined they would not delve into evaluating the merits of the investigation, and thus rejected efforts to limit the scope of "nationwide" lawsuits filed by the EEOC.

In *Sterling Jewelers*, the EEOC filed a nationwide lawsuit alleging a pattern or practice of sex discrimination regarding promotion and compensation. Following discovery, the magistrate granted summary judgment in favor of the employer, taking the view that the EEOC's lawsuit was fatally defective because the EEOC did not conduct a nationwide investigation prior to suing. The magistrate further held that the EEOC could not rely on the findings of a statistical expert retained by the charging parties' attorneys, and the subsequent nationwide lawsuit was therefore improper and was justifiably dismissed with prejudice.[36] A district court judge affirmed the magistrate's findings.[37]

In reversing the district court's ruling, the Second Circuit underscored that the courts "may not review the sufficiency of an [EEOC] investigation – only whether an investigation occurred." The court explained that similar to the conciliation process, "an affidavit from the EEOC, stating that it performed its investigative obligations and outlining the steps taken to investigate the charges, will usually suffice." From the court's perspective, "Allowing courts to review the sufficiency of an EEOC investigation would effectively make every Title VII suit a two-step action: First, the parties would litigate the question of whether EEOC had a reasonable basis for its initial finding, and only then would the parties proceed to litigate the merits of the action." Similar to *Mach Mining*, the Second Circuit concluded there should be only a limited review of the EEOC investigation process, and such efforts should not be permitted to derail litigation by the EEOC. On October 23, 2015 the employer requested a rehearing and full court review of the three-judge panel decision and submitted that the appellate panel was incorrect in relying on the *Mach Mining* decision.[38]

The *AutoZone* case stemmed from three individual charges of disability discrimination at three Illinois stores. Reasonable cause determinations were issued in September 2012 based on the alleged failure to accommodate and the termination of the charging parties. Eight months later, the EEOC amended each determination, finding the employer discriminated against the charging party and a "class of other employees at its stores throughout the United States" based on an attendance policy in which employees were assessed points and eventually discharged for absences, including disability-related absences.

Following unsuccessful conciliation efforts, the EEOC filed a nationwide ADA lawsuit against the company, challenging its attendance plan. Although the lawsuit was filed in May 2014, the issue regarding the scope of the lawsuit did not arise until after the EEOC's Amended Complaint, filed in the fall of 2014, which led to the employer moving to limit discovery to the three stores in which the charging parties worked. In its November 4, 2015 decision, the court determined that the employer was seeking a protective order and then focused on the employer's argument that the EEOC could not expand its lawsuit beyond the three stores because there was "not an adequate nationwide investigation" to support a nationwide lawsuit against the employer.

In rejecting the employer's motion in *AutoZone*, the court underscored that "Title VII does not define 'investigation' or outline any steps the EEOC is required to take in conducting its investigation," and relied on a Seventh Circuit decision in *EEOC v. Caterpillar, Inc.*,[39] prohibiting parties from challenging the sufficiency of an EEOC's investigation.[40] The court also relied on *Mach Mining* and the view that the courts should play a limited role in reviewing the EEOC's pre-suit procedures, explaining, "Although *Mach Mining* focuses on the 'conciliation' requirement and *Caterpillar* addresses only the 'investigation' requirement, *Mach Mining* supports the reasoning applied in *Caterpillar*." Relying on *Mach Mining*, the district court concluded that its sole focus should be whether an "investigation" occurred, as required by Title VII, and "not whether the investigation was sufficient to support the charges brought by the EEOC." The court also concluded that based on *Mach Mining*, Title VII "does not mandate any particular investigative techniques or standards."

The Court also found the reasoning of the Second Circuit decision in *Sterling Jewelers* to be persuasive. The court held that "at least under the facts at issue here, the EEOC has met its burden to show that it investigated by issuing a determination that: (1) state that the EEOC investigated and; (2) identifies the alleged discrimination discovered during the investigation."

34 *EEOC v. Sterling Jewelers, Inc.*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015), *reh'g denied* (2d Cir. Dec. 1, 2015).

35 *EEOC v. AutoZone, Inc.*, 2015 U.S. Dist. LEXIS 149849 (N.D. Ill. Nov. 4, 2015).

36 *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014) (Magistrate Judge recommendation).

37 *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014).

38 *EEOC v. Sterling Jewelers, Inc.*, No. 14-1782-CW (2d Cir.) (Notice of Appeal filed Oct. 23, 2015).

39 *EEOC v. Caterpillar, Inc.*, 409 F. 3d 831 (7th Cir. 2005).

40 *See Id.*

3. Continued Debate over Permissible Scope of EEOC Investigations

Employers continue to grapple with the scope of the EEOC's investigative authority. An ongoing concern is whether a charge might lead to a systemic investigation by the EEOC.[41] While a systemic charge can arise as a pattern-or-practice charge, Commissioner's charge or "directed investigation" involving potential age discrimination or equal pay violations,[42] the most frequent issue of concern is when the EEOC expands an individual charge into a systemic investigation.

The courts generally have broadly interpreted the EEOC's investigative authority, and FY 2015 was no different. The best illustration is the Ninth Circuit's decision in *EEOC v. McLane Company, Inc*.,[43] in which the Ninth Circuit ordered an employer to comply with the EEOC's request for "pedigree information" (*i.e.*, name, Social Security number, last known address, and telephone number) based on a subpoena enforcement action after the EEOC expanded its investigation of an individual sex discrimination charge (based on pregnancy) stemming from the charging party's termination for failing to achieve the minimum required score on a isokinetic strength test upon her return to work.

In the *McLane* case, all new employees and employees returning from leave exceeding 30 days had to take the test. The charging party's termination occurred after she took the test three times and failed to receive the minimum score required for her position. During the investigation, the employer disclosed that it used the resistance test at its facilities nationwide for all positions classified as physically demanding. The EEOC ultimately expanded its investigation nationwide for the division in which the charging party was employed and required the pedigree information for all those who had taken the test. For all those who were terminated after taking the test, the EEOC requested the reason for termination.

The subpoena enforcement action arose after the employer failed and/or refused to provide the requested information. The district court concluded that the EEOC did not need to know the pedigree and related information to determine whether the company used the test to discriminate on the basis of sex and refused to enforce the subpoena. The Ninth Circuit reversed and relied on the Supreme Court's decision in *EEOC v. Shell Oil,*[44] which upheld the EEOC's right to information as part of a systemic investigation based on the view that the "relevance standard….encompasses 'virtually any material that might cast light on the allegation against the employer.'" Based on requiring the information, "the EEOC will be better able to assess whether use of the test has resulted in a 'pattern or practice' of disparate treatment."

A Wisconsin federal district court decision, *EEOC v. Union Pacific Railroad Company*,[45] also is illustrative of the expansive view courts have taken regarding the EEOC's investigative authority. In *Union Pacific*, the EEOC was investigating the charges of two former employees who alleged race discrimination. During the investigation, the EEOC issued right-to-sue notices to the charging parties, who then sued in federal court. The court subsequently granted summary judgment in favor of the employer. In the interim, despite the EEOC's issuance of the right-to-sue notices and the charging parties' filing of individual lawsuits, the EEOC asserted it was legally entitled to continue to pursue a pattern-or-practice investigation based on information acquired during the initial investigation. A subpoena enforcement action then followed, and the court upheld the EEOC's right to the information based on the view that "[t]he permissible scope of an EEOC lawsuit is not confined to the specific allegations in the charge; rather, it may extend to any discrimination like or related to the substance of the allegations in the charge and which reasonably can be expected to grow out of the investigation triggered by the charge."

The above decisions should be contrasted with at least one appeals court decision during the past fiscal year, *EEOC v. Royal Caribbean Cruises, Ltd*.[46] In this case the Eleventh Circuit joined ranks with the Tenth Circuit[47] in limiting the

41 The EEOC has defined systemic cases as "pattern-or-practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." *See* EEOC Systemic Task Force Report (Mar. 2006) at 1, *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

42 *See* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, at 31-32, *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2013.

43 *EEOC v. McLane Company, Inc*., 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).

44 *EEOC v. Shell Oil*, 466 U.S. 54 (1968).

45 *EEOC v. Union Pacific Railroad Company*, 2015 U.S. Dist. LEXIS 57305 (E.D. Wis. May 1, 2015).

46 *EEOC v. Royal Caribbean Cruises, Ltd.,* 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

47 *See EEOC v. Burlington Northern Santa Fe Railroad*, 669 F. 3d 1154 (10th Cir. 2012). In 2012, in *Burlington Northern*, the Tenth Circuit ruled that the EEOC was entitled only to evidence relevant to the charges under investigation, and rejected enforcement of a subpoena seeking data on a nationwide basis in connection with a charge of disability discrimination filed by two men who applied and were rejected for the same type of job in the same state.

scope of a subpoena in an ADA[48] claim in which the EEOC attempted to discover information to support a pattern-or-practice claim against an employer when it was faced solely with an individual ADA claim. The court sided with the employer on both "relevance" and "burdensomeness" grounds. The favorable impact of this decision should be tempered based on the Eleventh Circuit's view that the EEOC could seek such information in a Commissioner's charge, but the EEOC had not elected that option in dealing with the matter under investigation.

D. Key Litigation Developments—Impact of EEOC's Strategic Enforcement Plan

Over the past year, the EEOC has continued to increase its focus on systematic investigations and related litigation based on the EEOC's Strategic Enforcement Plan.[49] The EEOC's "national priorities," as discussed in the plan, are: (1) eliminating barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing issues; (4) enforcing equal pay laws; (5) preserving access to the legal system; and (6) preventing harassment though systemic enforcement and targeted outreach. Discussed below is a review of the EEOC's litigation efforts and related actions involving these priorities over the past fiscal year.

1. Eliminating Barriers in Recruitment and Hiring

a) Claims of Alleged Intentional Discrimination

During the past year the EEOC has continued to pursue numerous class-based "failure-to-hire" lawsuits involving claims of alleged intentional discrimination. The EEOC has not singled out any type of discrimination in such large-scale litigation, which includes lawsuits alleging race, national origin, age and sex discrimination.[50] Some of the EEOC's key pending (or recently settled) failure-to-hire lawsuits are:

- *EEOC v. Mavis Discount Tire Inc.*, filed in federal court in New York in January 2012,[51] alleges a pattern or practice of discriminating against female applicants at its branch stores in four states in the Northeast (New York, Connecticut, Massachusetts, and Pennsylvania). The lawsuit initially stemmed from an individual charge of sex discrimination that expanded into a systemic investigation and determination that the employer discriminated against a class of female employees. Although both parties indicated their plans to move for summary judgment following the close of discovery, only the EEOC did so on February 13, 2015.[52] On September 11, 2015, the district court denied the EEOC's summary judgment motion.
- *EEOC v. Bass Pro Outdoor World, LLC*, filed in Texas federal district court in September 2011. The lawsuit stems from a Commissioner's charge filed in 2007, initially focusing on African American applicants and employees, but was later amended to include Hispanic applicants and employees.[53] The Letter of Determination, issued on April 29, 2011, made a reasonable cause finding that since 2005, the employer had engaged in a nationwide pattern or practice of discriminating against African American and Hispanic individuals in hiring on the basis of race and national origin. Since the filing of the lawsuit, which was based on Sections 706 and 707 of Title VII alleging a pattern or practice of discrimination, the parties have been embroiled in ongoing procedural disputes. A key issue pending in the U.S. Court of Appeals is whether the EEOC can pursue a pattern-or-practice claim seeking compensatory or punitive damages under Section 706 of Title VII.[54]
- *EEOC v. Texas Roadhouse*, filed in Massachusetts federal court in October 2011,[55] involves allegations that the company "engaged in a nationwide pattern or practice of age discrimination in hiring hourly 'front of the house'

48 Pub. L. No. 101-336 (1990), *codified at* 42 U.S.C. §§ 12101-12213 (2000).

49 The EEOC's Strategic Enforcement Plan, which was adopted by the EEOC on December 12, 2012, is available on the EEOC's website at http://www.eeoc.gov/eeoc/plan/sep.cfm.

50 *See, e.g., EEOC v. Bass Pro Outdoor World. LLC,* Case No. 4-11-cv-03425 (S.D. Tex.) (filed Sept. 21, 2011) (race and national origin discrimination); *EEOC v. Texas Roadhouse,* Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011) (age discrimination); *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination); *EEOC v. Cintas*, Case No. 2:04-cv-40132 (E.D. Mich.) (filed May 10, 2004) (sex discrimination); *EEOC v. Mavis Discount Tire Inc. et al*, Case No. 1:12-cv-00741 (S.D.N.Y.) (filed Jan. 31, 2012); *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).

51 *See* Press Release, EEOC, *Mavis Discount Tire Sued by EEOC for Sex Discrimination in Hiring* (Jan. 12, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-31-11.cfm.

52 *See Mavis Discount Tire, Inc*., *supra* note 50, Docket No. 110.

53 *See generally*, *EEOC v. Bass Pro Outdoor World, LLC*, Appellant's and Appellee's briefs, Case No. 1520078 (5th Cir.).

54 *See* discussion below regarding the discussion of claims under Section 706 and 707 under Title VII.

55 *See* Press Release, EEOC, *Texas Roadhouse Refused to Hire Older Workers Nationwide, EEOC Alleges in Lawsuit* (Oct. 3, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-3-11.cfm.

employees."[56] Here, too, the parties were involved in procedural disputes at the outset of the litigation. The employer challenged whether a pattern-or-practice claim could even proceed under the Age Discrimination in Employment Act (ADEA). This argument was rejected by the court based on the finding, "Absent any authority in this Circuit that pattern or practice claims cannot be brought under the ADEA and law in other circuits supporting the viability of a pattern or practice claim in the context of the ADEA, the Court will not dismiss the complaint on the basis that the EEOC cannot bring such a claim."[57] Over the past fiscal year, discovery disputes have included the employer's request for information concerning the EEOC's hiring practices for certain entry-level positions, which was rejected by the court.[58] Discovery will continue into 2016, and summary judgment motions are due in July 2016.[59] The *Texas Roadhouse* case also is significant because it illustrates the risks to employers under the ADEA – the lawsuit was based on a "directed investigation" under the ADEA initiated by the EEOC and thus was not based on a charge of discrimination filed by an applicant or employee.[60]

- *EEOC v. Cintas Corporation*[61] involved a pattern-or-practice claim of sex discrimination dating back to 2004. This case—settled on November 11, 2015 for $1.5 million—had gone back and forth from a federal court in Michigan to the U.S. Court of Appeals for the Sixth Circuit, and served as the linchpin for the EEOC's pursuit of pattern-or-practice claims in which the agency seeks compensatory and punitive damages for large-scale class actions against employers.[62] The lawsuit, the last leg of which was based on an Amended Complaint filed in March 2013,[63] focused on the alleged failure by the employer to hire females as route sales drivers/service sales representatives at the company's Michigan facilities. Over the past fiscal year, the dispute focused on the EEOC's failure to identify by name the purported class members for whom the EEOC would be seeking monetary relief. This information was ultimately produced following a court order, although the court denied a request for sanctions against the EEOC for its delay.[64]
- *EEOC v. Performance Food Group*, filed in Maryland federal court in June 2013, involves a claim that the employer "engaged in a pattern or practice of failing to hire female applicants for operative positions at distribution centers nationwide."[65] The court adopted the reasoning of the Sixth Circuit in the *Cintas* litigation, permitting the pattern-or-practice claim against the employer to proceed.[66] During the past year, the EEOC did not prevail on the argument that the employer should be "judicially estopped" from changing its position from that set forth at the administrative stage to its subsequent determination that certain individuals who allegedly made sex-based discriminatory remarks, "lacked hiring oversight or control over any employees" at the affected facilities. The court ruled, however, that the EEOC should be permitted to conduct further discovery regarding the claim.[67]
- *EEOC v. Darden Restaurants, Inc.*,[68] filed in Florida federal court in February 2015, challenges the employer's hiring practices nationwide and alleges that individuals are excluded from both "front of the house" and "back of

56 *Id.*

57 *EEOC v. Texas Roadhouse*, 2014 U.S. Dist. LEXIS 125867 (D. Mass. Sept. 9, 2014).

58 *Texas Roadhouse*, 2014 U.S. Dist. LEXIS 125869 & 2014 U.S. Dist. LEXIS 125865 (D. Mass. Sept. 9, 2014).

59 *Id.*, Case No. 11-11732-DJC Docket No. 365.

60 In *Texas Roadhouse*, the employer also filed a related FOIA suit against the EEOC on September 30, 2014, seeking a declaratory judgment and requesting, among other items, disclosure of various documents, including documents relating to all investigations and complaints since January 1, 2007, leading to the filing of the lawsuit against the employer. See *Texas Roadhouse, Inc. et al v. EEOC*, Case No. 3:14-cv-652 (W.D. Ky. filed Sept. 30, 2014). However, on March 3, 2015, the court issued a judgment in favor of the EEOC, finding that: (1) the EEOC did respond to 3 of the 4 requests and the employer should have amended its complaint and argued that the EEOC's responses were inadequate; and (2) "the Court finds that Texas Roadhouse must first appeal to the EEOC the EEOC's decision to redact or withhold certain documents pursuant to FOIA exemptions," and "the Court will dismiss without prejudice Texas Roadhouse's FOIA claims so that Texas Roadhouse first may administratively exhaust those claims." *EEOC v. Texas Roadhouse*, 2015 U.S. Dist. LEXIS 25468 (W.D. Ky. Mar. 3, 2015).

61 *See EEOC v. Cintas Corporation*, Case No. 2:04-cv-40132-SFC-RSW, Docket No. 1095 (E.D. Mich.) (Amended Complaint filed Mar. 13, 2013).

62 In *Serrano & EEOC v. Cintas,* 699 F. 3d 884 (6th Cir. 2012), *reh'g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied*, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013), the U.S. Court of Appeals for the Sixth Circuit reversed a district court and held that the EEOC could pursue a "pattern or practice" claim under Section 706. *See* Press Release, EEOC, *Sixth Circuit Issues Second Victory to EEOC in Sex Discrimination Case Against Cintas Corp.* (Jan. 17, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-17-13.cfm.

63 *See EEOC v. Cintas Corporation*, Case No. 2:04-cv-40132-SFC-RSW, Docket No. 1095 (E.D. Mich.) (Amended Complaint filed Mar. 13, 2013).

64 *Cintas Corp.*, Docket No. 1142 (Aug. 20, 2015). The August 20, 2015 order provides a summary of the history of the lawsuit against Cintas.

65 *See* Press Release, EEOC, *EEOC Sues Performance Food Group for Nationwide Sex Discrimination in Hiring* (June 17, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-17-13a.cfm.

66 *See EEOC v. Performance Food Group*, Case No. 1:13-cv-01712-MJG, Docket No. 38 (D. Md. Mar. 12, 2014).

67 *Performance Food Group*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014).

68 *EEOC v. Darden Restaurants, Inc*., Case No. 1:15-cv-20561-JAL, Docket No. 1 (S.D. Fla.) (filed Feb. 12, 2015).

> the house" positions based on age. This case has again placed at issue whether pattern-or-practice claims could be brought under the ADEA. The employer argued that the EEOC was resting solely on the view of the Tenth Circuit, which has permitted such claims, and that the court instead should consider the U.S. Supreme Court's view that the provisions under Title VII and the ADEA are not interchangeable.[69] The employer also challenged the EEOC's motion that this class-based ADEA lawsuit should be bifurcated for liability and damages.[70] On November 9, 2015, the court ruled on both motions. In dealing with pattern-or-practice claims under the ADEA, the court acknowledged that the ADEA does not reference pattern-or-practice actions, but rejected the employer's motion to dismiss and concurred with the Tenth Circuit and "jurisprudence of this Circuit and other circuits that have permitted pattern-or-practice claims in ADEA cases."[71] On the other hand, the court denied the EEOC's motion to bifurcate discovery and trial into two phases (*i.e.*, liability and liquidated damages in Phase I and individual liability and damages in Phase II). Rather, the court ruled that discovery regarding all aspects would proceed simultaneously. The court also denied the request to bifurcate trial "at this time, but without prejudice to refile such request upon the completion of discovery."[72]

One of the most pivotal cases for employers to closely monitor is the *Bass Pro* case, in which the Fifth Circuit is reviewing whether the EEOC can pursue pattern-or-practice claims under Section 706 of Title VII and thus seek compensatory and punitive damages in such actions. As referenced above, only one federal circuit court of appeal has addressed this issue to date. In *Serrano v. Cintas,*[73] the Sixth Circuit reversed a district court and held that the EEOC could pursue a pattern-or-practice claim under Section 706. This holding is significant because it provides the EEOC with two avenues for pursuit of claims under Section 706: (a) presenting circumstantial evidence under *McDonnell Douglas*'s[74] familiar burden-shifting analysis; or (b) meeting a heightened *prima facie* case standard to establish a pattern or practice of discrimination under *International Brotherhood of Teamsters v. United States*.[75] While under *McDonnell Douglas* the burden of proof remains with the EEOC, under the *Teamsters* framework, once the EEOC establishes a pattern or practice of discrimination, the burden of proof shifts to the defendant on the question of individual liability. Permitting a pattern-or-practice claim under Section 706 allows the EEOC to potentially recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

b) Challenges to Neutral Employment Policies

The EEOC's results during FY 2015 were far more mixed based on EEOC challenges to neutral employment practices having a disparate impact on a protected group.

One of the EEOC's most significant losses over the past fiscal year was the Fourth Circuit's ruling in *EEOC v. Freeman*,[76] which dealt with the EEOC's challenge to the employer's use of criminal and credit history in the hiring process. In *Freeman*, the court never reached the ultimate issue because it merely affirmed the district court's summary judgment ruling, which struck down the findings the EEOC's statistical expert relied on to support the disparate impact claim of discrimination involving African American applicants. The concurring opinion of one of the judges was critical of the EEOC and its "disappointing litigation conduct," finding, "The Commission's work of serving 'the public interest' is jeopardized by the kind of missteps that occurred here." On remand, the EEOC also did not fare well based on the district court judge awarding $938,771.50 to the employer, aside from his harsh criticism of the EEOC:

> World-renowned poker expert Kenny Rogers once sagely advised, "You've got to know when to hold 'em. Know when to fold 'em. Know when to walk away." In the Title VII context, the plaintiff who wishes to avoid paying a defendant's attorneys' fees must fold 'em once its case becomes so groundless that continuing to litigate is unreasonable, i.e. once it is clear it cannot have a winning hand. In this case, once Defendant Freeman revealed the inexplicably shoddy work of the EEOC's expert witness in its motion to

69 *Id*., Docket Nos. 7. *See also* Docket Nos. 20 (Response) and 22 (Reply).

70 *Id*., Docket Nos. 27 and 29.

71 *EEOC v Darden Restaurants*, 2015 U.S. Dist. LEXIS 151742 (S.D. Fla. Nov. 9, 2015).

72 *Id*.

73 *Serrano v. Cintas*, 699 F. 3d 884 (6th Cir. 2012), *reh'g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied*, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013).

74 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

75 *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

76 *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015). *See also* Barry A. Hartstein, Rod M. Fliegel, Jennifer Mora and Carly Zuba, *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment*, Littler Insight (Feb. 23, 2015), *available at* http://www.littler.com/update-criminal-background-checks-impact-eeoc-v-freeman-and-ongoing-challenges-continuously-changing.

> exclude that expert, it was obvious Freeman held a royal flush, while the EEOC held nothing. Yet, instead of folding, the EEOC went all in and defended its expert through extensive briefing in this Court and on appeal. Like the unwise gambler, it did so at its peril. Because the EEOC insisted on playing a hand it could not win, it is liable for Freeman's reasonable attorneys' fees.[77]

Despite the setbacks in the *Freeman* decision, the EEOC has continued to actively litigate cases involving criminal background checks. The two primary lawsuits, which were aggressively litigated by both the EEOC and employers in FY 2015, were *EEOC v. BMW Manufacturing Co. LLC*, which was pending in the federal district court in South Carolina (and recently settled)[78] and *EEOC v. Dolgencorp LLC*, which remains pending in the Northern District of Illinois.[79] Based on these lawsuits, the EEOC alleged that the respective policies disproportionately screened out African Americans, were not job-related or consistent with business necessity, and failed to include an individualized assessment prior to screening out applicants for employment.[80] In the *BMW* case, after a federal judge denied competing summary judgment motions to both sides,[81] a consent decree was approved by the court on September 8, 2015, as requested by the parties, in which BMW agreed to a settlement payment of $1.6 million, modification of its criminal history policy and related training.[82] The parties remain knee-deep in discovery-related issues in the *Dolgencorp* case.

The EEOC has prevailed in a challenge to its 2012 criminal history guidance, but the issue is now on appeal in the Fifth Circuit. In *State of Texas v. EEOC*,[83] the state filed a complaint for declaratory and injunctive relief, arguing the EEOC's guidance ignored state and local law that disqualified convicted felons from holding certain jobs. Rejecting that argument, the court on August 20, 2014, dismissed the lawsuit and held that the guidance was not a final agency action and the lawsuit was premature because no action had been brought against the State of Texas based on the guidance. On August 25, 2014, the State of Texas filed a Notice of Appeal with the Fifth Circuit, and the matter remains pending before the federal appellate court.[84]

On July 9, 2015, in *EEOC v. Crothall Services Group, Inc.*,[85] the EEOC sued a Pennsylvania employer alleging that relying on criminal background tests in the hiring process "constitutes a test or selection procedure" based on the "Uniform Guidelines on Employee Selection Procedures."[86] Based on the lawsuit, the EEOC has alleged the employer was required "to make, keep, and have available for inspection records or other information which will disclose the impact which its tests or other selection procedures have upon employment opportunities of persons identifiable by race, sex, or ethnic group," and maintain such records for review and inspection.[87]

Finally, in dealing with hiring barriers, the EEOC also has started to directly challenge employer testing practices. In August 2015, a major retailer agreed to pay $2.8 million to resolve a Commissioner's Charge following a reasonable cause finding by the EEOC that "three employment assessments formerly used by [the employer] disproportionately screened out applicants for exempt-level professional positions based on race and sex."[88] As part of resolving the charge, the employer agreed to discontinue use of the assessments in its selection procedures for exempt-level personnel. The employer also agreed to "perform a predictive validity study for all exempt assessments currently in use and any new assessments" the employer expects to use and to "monitor the assessments it uses for exempt-level professional positions for adverse impact based on race, ethnicity and gender."[89]

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77 *See EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. Sept. 3, 2015).

78 *See EEOC v. BMW Manufacturing Co. LLC ,* Case No. 13-cv-01583 (D.S.C., Spartanburg Div.) (filed June 11, 2013) ("BMW Case").

79 *EEOC v. Dolgencorp LLC*, Case No. 13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

80 *See* Press Release, EEOC, *EEOC Files Suit Against Two Employers for Use of Criminal Background Checks*, (June 11, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm.

81 *See* BMW Case, Docket No. 231 (July 30, 2015).

82 *Id*., Docket No. 243.

83 *State of Texas v. EEOC*, Case No. 5-13-cv-00255 (N.D. Texas, Lubbock Div.) (filed Nov. 4, 2013).

84 Case No. 14-10949 (5th Cir.) (Appeal filed Aug. 25, 2014).

85 *See EEOC v. Crothall Services Group Inc*., Case No. 2:15-cv-03812 , Docket No. 1(E.D. Pa.) (filed July 9, 2015) ("Crothall Services Group Complaint").

86 29 CFR part 1607, Section 2C and part 1607, Section 16Q.

87 *See* Crothall Services Group Complaint.

88 *See* Press Release, EEOC, *Target Corporation to Pay $2.8 Million to Resolve EEOC Discrimination Finding* (Aug. 24, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm.

89 *Id*.

During the coming year, based on comments by EEOC representatives, it is anticipated that the EEOC will continue to closely review pre-employment testing practices and may take a closer look at reliance on "big data" in the hiring process.[90]

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

During the past fiscal year, the EEOC has been involved in several pattern-or-practice lawsuits dealing with immigrant workers. Claims for such workers are sometimes tied to other related lawsuits filed by private counsel, which include broad-based causes of action. In reviewing EEOC litigation, the civil rights agency had very mixed results based on the outcome of such litigation.

One of the most complex cases has involved Signal International LLC, which was involved in EEOC and related litigation in federal court in both Texas and Louisiana.[91] According to the EEOC action, which remains pending in Louisiana federal court, Signal allegedly engaged in a pattern or practice of unlawful activities involving a class of Indian workers at facilities in Mississippi and Texas that included: (1) requiring Indian employees to live in a main camp on company property, in crowded and substandard housing conditions; (2) subjecting Indian employees to oppressive conditions in the main camp, such as providing poor quality food, subjecting employees to searches and seizures; (3) refusing or restricting their right to have visitors; (4) charging monetary penalties for rule violations; (5) deducting in excess of $1,000 per month from Indian employees' wages for food and housing; and (6) limiting Indian employees' freedom of movement and access to the local community.[92] The lawsuit included claims of ethnic epithets and derogatory language toward the Indian workers.

The employer in *EEOC v. Signal* vigorously disputed the allegations, contending it built housing for the Indian workers based on Hurricanes Katrina and Rita and submitted that the 500 affected foreign workers would not have found housing due to these conditions. The employer acknowledged it struggled at times with a first-time landlord, but denied any decisions were ever influenced by race or national origin.[93]

On May 6, 2015, the district court issued a ruling postponing the *EEOC v. Signal* trial on an "indefinite" basis.[94] The court's decision stemmed from the employer's unopposed motion to delay the trial, pending the outcome in the Fifth Circuit's decision in *EEOC v. Bass Pro,* explaining that a ruling in *Bass Pro* "may bear on whether the EEOC can bring pattern-and-practice claims under both §§706 and 707."[95] In the interim, on December 18, 2015, the EEOC announced that a $5 million settlement was entered into to resolve the lawsuit against Signal. Although the company filed a "notice of filing bankruptcy" in the matter on July 13, 2015,[96] the "settlement establishes a claims process and ensures that all aggrieved individuals included in the litigation may receive relief in spite of the bankruptcy proceedings."[97]

Aside from the EEOC lawsuit against Signal, the related private litigation against Signal demonstrates the complexity of the issues involved in dealing with immigrant workers. In a related private lawsuit filed in Louisiana on behalf of various Indian workers, the jury returned a verdict of over $14 million in favor of the workers based on factual allegations similar to those in the EEOC lawsuit. In the related litigation, various claims were asserted, including: (1) alleged violations of the Trafficking Victims Protection Act; (2) alleged violations of the Racketeer Influence and Corrupt Organizations (RICO) Act; (3) misrepresentation; (4) breach of contract and promissory estoppel; (5) false imprisonment; and (6) intentional infliction of emotional distress.[98]

90 *See Use Big Data with Caution, EEOC Counsel Urges Employers*, Law 360 (Sept. 15, 2014); *see also* EEOC Meeting dated April 15, 2015, *EEOC at 50: Confronting Racial and Ethnic Discrimination In the 21st Century Workplace* , and Testimony of Kathleen Lundquist, *available at* http://www.eeoc.gov/eeoc/meetings/4-15-15/lundquist.cfm. *See also* Marko Mrkonich , *et al*., *The Big Move Toward Big Data in Employment*, pp. 8-12, Littler Report (Aug. 4, 2015), *available at* http://www.littler.com/publication-press/publication/big-move-toward-big-data-employment.

91 *See EEOC v. Signal International LLC,* Case No. 2:12-cv-00557-SM-DEK (E.D. La.) (filed Apr. 20, 2011). *Kurian David et al v. Signal International, LLC*, Case No. 08-cv-01220-SM-DEK (E.D. La.) (filed Mar. 7, 2008); and *Samuel et al v. Signal International LLC* et al, Case No. 1:13-cv-323 (E.D. Tex.) (filed May 21, 2013).

92 *EEOC v. Signal*, Docket No. 626 (Joint Statement of Case, May 6, 2015).

93 *Id*.

94 *See EEOC v. Signal*, Docket No. 631 (May 7, 2015).

95 *See EEOC v. Signal*, Docket No. 631 (May 7, 2015). A discussion of the key issues being debated in the Fifth Circuit in the *Bass Pro* case involving Section 706 v. Section 707 and the impact on any potential trial is explained in the employer's motion to continue the trial date. *See EEOC v. Signal,* Docket No. 623 (May 1, 2015).

96 *Id*., Docket No. 643 (Notice of Bankruptcy filed July 7, 2015).

97 Press Release, EEOC, *Signal International, LLC to Pay $5 Million to Settle EEOC Race, National Origin Lawsuit* (Dec. 18, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/12-18-15.cfm.

98 *See Kurian David et al v. Signal International, LLC*, Case No. 08-cv-01220-SM-DEK, Docket No. 2299 (Plaintiff's Memorandum in Support of Motion for Entry of Judgment, Feb. 24, 2015). A summary of the history of the litigation is included in the Plaintiff's Memorandum.

During FY 2015, aside from *EEOC v. Signal*, in looking after the interests of vulnerable workers, the EEOC focused primarily on finishing up some major litigation on behalf of agricultural workers. This litigation involved two major lawsuits against Global Horizons, a farm labor contractor, and various grower defendants who were included in the lawsuits filed in Hawaii and the State of Washington.[99] The lawsuits were highly publicized in an EEOC press release when the suits initially were filed within a week of one another in April 2011.[100] The EEOC asserted claims similar to those in the *Signal* case, alleging that Global Horizons "enticed Thai male nationals into working at the farms with the false promises of steady, high-paying agricultural jobs along with temporary visas allowing them to live and work in the U.S. legally." The EEOC alleged that aside from high recruitment fees for the Thai workers, Global Horizons also confiscated the workers' passports and threatened deportation if they complained, and additional abuses then followed.[101] The EEOC alleged that the defendant farms "not only ignored abuses, but also participated in the obvious mistreatment, intimidation, harassment, and unequal pay of the Thai workers."

In the fall of 2014, the EEOC announced major settlements with various grower defendants in the Hawaii litigation,[102] followed by default judgments of $8.7 million award against Global Horizons and one grower defendant, plus an additional default judgment against Global Horizon for $8.1 million.[103]

The above awards and settlements are in stark contrast to the findings in the related litigation in the State of Washington. Although a default judgment was entered against Global Horizons on September 28, 2015,[104] the district court judge in the Washington case took strong exception with the EEOC including the defendant growers in the lawsuit, finding "[T]he evidence and documentation pertaining to the parties' pre-lawsuit communications and the EEOC's investigation (or lack thereof) as to the Grower Defendants shows that the EEOC was not prepared to allege plausible, reasonable, or non-frivolous Title VII claims against the Grower Defendants." The court referred to EEOC investigation notes in which Thai workers provided information that the grower defendants did not treat them unfairly in terms of compensation or in any other manner and treated them the same as Latino workers. The EEOC was left with a "joint-employer" theory without legal or factual support. In a scathing opinion finding that an award of legal fees against the EEOC was appropriate for its conduct, the court stated:

> In summary, this is an exceptional cases where the EEOC failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants.[105]

3. Addressing Emerging and Developing Issues

Based on its Strategic Enforcement Plan, the EEOC—in describing "emerging and developing issues" the agency will focus on as part of its "national priorities"—the EEOC expressly referred to several concerns: (1) ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams; (2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA); and (3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions. Religious accommodation issues also appear to fall within this framework, as evidenced by the EEOC's role in bringing this issue before the U.S. Supreme Court in *EEOC v. Abercrombie*.

During the past year, the EEOC placed particular emphasis on various emerging issues under our EEO laws, especially pregnancy, religious discrimination and LGBT protection under Title VII. The EEOC also continued to aggressively litigate employee rights under the ADA.

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99 *See EEOC v. Global Horizons et al,* Civil Action No. 11-00257 (D. Haw.) (filed Apr. 11, 2011) and *EEOC v. Global Horizons* et al, Case No. CV-11-3-45EFS (E.D. Wash) (filed Apr. 19, 2011).

100 *See* Press Release, EEOC, *EEOC Files Its Largest Farm Worker Human Trafficking Suit Against Global Horizons, Farms* (Apr. 20, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-20-11b.cfm.

101 *Id*.

102 *See* Press Release, EEOC, *Judge Approves $2.4 Million EEOC Settlement with Four Hawaii Farms for over 500 Thai Farmworkers* (Sept. 5, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-5-14.cfm.

103 *See EEOC v. Global Horizons*, 2014 U.S. Dist. LEXIS 175851 (D. Haw. Dec. 19, 2014).

104 See *EEOC v. Global Horizons* et al, Case No. CV-11-3-45EFS, Docket No. 667 (E.D. Wash) (Notice of Default Judgment entered Sept. 28, 2015).

105 *EEOC v. Global Horizons, Inc*., 2015 U.S. Dist. LEXIS 37674 (E.D. Wash., Mar. 18, 2015).

a) Pregnancy Discrimination

While the EEOC was not a party in *Young v. United Parcel Service*, decided by the U.S. Supreme Court on March 25, 2015, the civil rights agency injected itself into the dispute by issuing updated "Enforcement Guidance on Pregnancy Discrimination and Related Issues" literally two weeks after the Supreme Court granted certiorari in the case.[106] In the updated pregnancy guidance, issued in July 2014, the EEOC rejected the Fourth Circuit's decision in *Young* and essentially adopted the plaintiff's view regarding "light duty" work, claiming that pregnant workers were entitled to light duty if provided to other workers performing similar work.

The timing of the updated guidance in July 2014 was a point of contention among the Commissioners, as evidenced by the strongly worded objections by Commissioners Lipnic and Barker who voted against the Guidance.[107] In the *Young* decision, the Supreme Court also took exception with the EEOC's July 2014 guidance, which provided that "[a] n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (*e.g.* a policy of providing light duty only to workers injured on the job)."

In rejecting the Solicitor General's view that the Court "should give special, if not controlling weight to this guideline," the Court focused on prior precedent,[108] explaining that "the rulings, interpretations and opinions of an agency charged with the mission of enforcing a particular statute, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance," but underscored that the "weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control."[109] The Court was troubled by the "timing, consistency, and thoroughness of consideration," underscoring that the EEOC's 2014 guidelines were issued "only recently, after this Court had granted certiorari in this case," and otherwise found that the EEOC was taking a position in which its previous guidelines were silent, the position taken was inconsistent with positions previously advocated, and in which the agency does not "explain the basis for its latest guidance."[110] The Court concluded, "[W]e cannot rely significantly on the EEOC's determination."

Based on *Young*,[111] the EEOC reissued its pregnancy discrimination guidance several months later, on June 25, 2015, and explained:

> The updates to the Guidance are limited to several pages about the U.S. Supreme Court's recent decision in *Young v. UPS,* issued in March 2015. The updated Guidance reflects the Supreme Court's conclusion that women may be able to prove unlawful pregnancy discrimination if the employer accommodated some workers but refused to accommodate pregnant women. The Court explained that employer policies that are not intended to discriminate on the basis of pregnancy may still violate the Pregnancy Discrimination Act (PDA) if the policy imposes significant burdens on pregnant employees without a sufficiently strong justification.[112]

106 Certiorari was granted in *Young v. UPS* on July 1, 2014. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-1226.htm. The EEOC issued its guidance two weeks later on July 14, 2014. *See* Press Release, EEOC, *EEOC Issues Updated Enforcement Guidance on Pregnancy Discrimination And Related Issues* (July 14, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm.

107 See Ilyse Schuman, *EEOC Issues New Enforcement Guidance on Pregnancy Discrimination over Commissioner Objections*, Littler ASAP (July 14, 2014), *available at* https://www.littler.com/publication-press/publication/eeoc-issues-new-enforcement-guidance-pregnancy-discrimination-over.

108 The Court relied on *Skidmore v. Swift & Co,* 323 U.S. 134, 140 (1944).

109 *Id.*

110 For a discussion of the deference to be given to EEOC guidance, see *El v. SEPTA*, 479 F. 3d 232, 243-244 (3d Cir. 2007). As explained in the *El* decision, there are generally three recognized categories of deference that the courts will accord to an agency's rulemaking and interpretations:
- *Chevron Deference.* Chevron Deference is the most deferential standard and is generally accorded to an agency's regulations interpreting a statute that is tasked with enforcing or interpreting, after such regulations have gone through a notice and comment period. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S 837 (1984).
- *Auer Deference*. This approach is also highly deferential and generally applies to an agency's interpretation of ambiguities in the agency's own formal regulations. Generally, such interpretations are binding unless they are plainly erroneous or inconsistent with the regulation. *Auer v. Robbins*, 519 U.S. 452 (1997).
- *Skidmore Deference.* This is a less deferential standard that is often applied to an agency's informal guidance, rules, policy statements, and other publications that no not go through a formal notice and comment period. *Skidmore v. Swift & Co*., 323 U.S. 434, 440 (1944).

111 For a detailed analysis of the *Young* decision, see Joseph P. Harkins, *et al*., *The Heavy Burden of Light Duty: Young v. UPS*, Littler Insight (Mar. 31, 2015), *available at* http://www.littler.com/heavy-burden-light-duty-young-v-ups.

112 *See* Press Release, EEOC, *EEOC Issues Updated Pregnancy Discrimination Guidance* (June 25, 2015) *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-25-15.cfm.

As significantly, based on the EEOC's updated pregnancy guidance, employers also need to be sensitive to potential reasonable accommodation obligations under the ADA based on the expanded definition of protected disabilities in the ADA based on the ADAAA. According to the EEOC's guidance, "[T]here is no requirement that impairment last a particular length of time to be considered substantially limiting,"[113] thus applying its provisions to cover pregnancy-related disabilities.

During the past year, employers also have become more vulnerable to suit by the EEOC. As an example, during the fiscal year 2015, the agency only filed 142 lawsuits, but this included at least 13 lawsuits by the EEOC involving pregnancy discrimination, which frequently were coupled with ADA claims.[114] Despite the EEOC's renewed focus on pregnancy discrimination and related lawsuits against employers, FY 2015 brought to a close the largest lawsuit filed by the EEOC involving alleged pregnancy discrimination—*EEOC v. Bloomberg LP*[115]—after nearly eight years of litigation. During that litigation, the court rejected the EEOC's pattern-or-practice claim in August 2011,[116] issued a final dismissal order of all remaining claims on November 7, 2014,[117] considered an employer's motion for attorneys' fees filed on December 24, 2014,[118] and received notices of appeal filed by the EEOC and employer on May 7, 2015.[119] On July 15, 2015, the EEOC ultimately agreed to drop the *Bloomberg* lawsuit in its entirety, which was coupled with the employer's withdrawal of its motion for attorneys' fees.[120]

b) Religious Discrimination

EEOC v. Abercrombie,[121] in which the EEOC was front and center before the U.S. Supreme Court, is a good example of the agency's approach to emerging issues. The lawsuit, which involved a case of first impression, asked whether Title VII's requirement to make an accommodation absent undue hardship to a religious practice applied only where the employer had knowledge of the applicant's need for an accommodation. The applicant, who wore a headscarf, was denied employment based on the belief she wore the headscarf for religious reasons and the employer had a "Look Policy" that prohibited "caps." Following discovery, the EEOC filed and prevailed on summary judgment, but was reversed by the Tenth Circuit. In holding that the Tenth Circuit erred in ordering entry of summary judgment for the employer, the Court determined it was sufficient that a "motivating factor" for the employer's decision was the desire to avoid making an accommodation based on the belief that the applicant wore the headscarf for religious reasons. In the Court's view "Title VII requires otherwise-neutral policies to give way to the need for an accommodation."

The EEOC recently updated its "Fact Sheet on Recent Religious Discrimination Litigation," which included discussion of the *Abercrombie* case and a favorable settlement in *EEOC v. Mims Distributing*, in which the EEOC sued based on the employer's allegedly refusing to hire an applicant who declined to cut his hair for religious reasons.[122] On October 22, 2015, the EEOC also announced a jury award of $240,000 to two Muslim truck drivers who allegedly were fired from their jobs as over-the-road truck drivers when they refused to transport alcohol because it violated their religious beliefs.[123]

Also noteworthy is a recent EEOC tactic—"dual track" litigation filed by the EEOC involving two separate, but virtually identical, lawsuits against the same employer (JBS USA LLC). In *JBS*, the EEOC filed two separate lawsuits on the same day against JBS in Nebraska and Colorado, respectively, based on the alleged failure to accommodate the religious prayer practices of its Muslim workers.[124]

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113 *See* discussion of the Americans with Disabilities Act in Section II of the guidance at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

114 *See* EEOC Press Releases at http://www.eeoc.gov/eeoc/newsroom/release/index.cfm; *see also* FY 2015 PAR at 34. While the EEOC's PAR does not identify the number of pregnancy discrimination lawsuits, Littler monitors all EEOC court filings, and the number of pregnancy discrimination lawsuits is based on monitoring lawsuits filed by the EEOC during FY 2015.

115 *EEOC v. Bloomberg LP*, 751 F.Supp.2d 628 (S.D.N.Y.2010).

116 *EEOC v. Bloomberg LP*, 778 F.Supp.2d 458 (S.D.N.Y. 2011).

117 *EEOC v. Bloomberg LP,* No. 07 Civ. 8383(LAP), Docket No.595.

118 *Id*., Docket Nos. 598-599.

119 *Id*., Docket No. 717.

120 *Id*., Docket No. 722.

121 135 S.Ct. 2028 (2015).

122 *See* EEOC, *Fact Sheet on Recent EEOC Religious Discrimination Litigation* (Last updated Feb. 19, 2015), *available at* http://www.eeoc.gov/eeoc/litigation/selected/religious_discrimination_facts.cfm.

123 *See* Press Release, EEOC, *Jury Awards $240,000 to Muslim Truck Drivers In EEOC Religious Discrimination Suit* (Oct. 22, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/10-22-15b.cfm.

124 *See EEOC v. JBS USA LLC,* Case No. 8:10-cv-00318 (D. Neb.) (filed Aug. 30, 2010) ("*JBS Nebraska Lawsuit*") and *EEOC v. JBS USA LLC*, Case No. 1:10-cv-02103 (D. Colo.) (filed Aug. 30, 2010) ("*JBS Colo. Lawsuit*").

The EEOC has faced numerous challenges in the Nebraska litigation, which included an employer victory in October 2013 striking down a pattern-or-practice claim in Phase I of the litigation, finding the requested multiple prayer breaks posed an undue hardship on the employer.[125] The district court also granted a motion to dismiss and judgment on the pleadings based on the remaining class-type claims under Section 706 of Title VII in Phase II, finding, "[A]t a minimum, an EEOC complaint must provide either the names of all class member or some indication of the size and scope of the class," and "dependence upon facts supporting pattern-or-practice claims also renders the EEOC Complaint ambiguous and potentially confusing for purposes of Phase II."[126] This led to a Fourth Amended Complaint being filed by the EEOC in August 2015.[127] Although the Court has set a trial date for June 2016, the employer has filed an additional motion to dismiss a portion of the lawsuit.[128]

Despite the EEOC's setbacks in the Nebraska litigation, the rulings in the Colorado litigation have been more favorable to the EEOC. As an example, in July 2015, the Colorado federal court denied JBS' motion for summary judgment seeking to strike the pattern-or-practice claims. In rejecting an estoppel argument, the court concluded there were factual differences in the operations between the two facilities (*e.g.*, staffing levels and "larger time windows in which management could schedule breaks"), and stated, "Although both cases involve application of the same rule of law and involve claims that are closely related, JBS has failed to establish that the f actual differences between this case and the Nebraska case are legally insignificant and the Court further finds that the balance of considerations weighs against finding that the identity of issue element is satisfied."[129]

c) Discrimination Based on Sexual Orientation or Gender Identity or Expression

During FY 2015, the EEOC continued its emphasis on reducing LGBT-related discrimination by employers. The EEOC made it abundantly clear it continues to broadly interpret discrimination on the basis of sex to include discrimination based on sexual orientation and gender identity or expression.

The most significant activity involved transgender workers. In April 2015, in reversing an agency action that restricted a transgender employee from using a common female restroom and required the employee to use a single-use restroom called the "executive restroom," the Commission held that the agency violated Title VII's prohibition against sex discrimination.[130] The Commission relied, in part, on its 2012 ruling in *Macy v. Department of Justice*,[131] in which it held that discrimination against a transgender individual is, by definition, discrimination based on sex in violation of Title VII. According to the Commission's decision, when an employer takes action because someone is transgender, it is discrimination whether the treatment is because the individual has expressed his or her gender in a non-stereotypical manner, because the employer is uncomfortable with a person who has transitioned their gender, or because the individual is transitioning from one gender to another. In any event, the employer is "making a gender-based evaluation" in violation of Supreme Court precedent.[132]

The EEOC also appeared in and/or initiated litigation on behalf of two other transgender employees, which included: filing an amicus brief in January 2015 arguing against dismissal of a lawsuit where the defendant sought to dismiss the case because Title VII did not extend to the plaintiff, who was transgender,[133] and suing in June 2015 on behalf of a transgender employee who claimed she was denied use of a woman's restroom and allegedly subjected to harassment by her supervisors and co-workers when they intentionally used the wrong pronouns to refer to her.[134] In a press release announcing the most recent lawsuit, the EEOC stated this was the third lawsuit filed by the EEOC "on the basis of gender

125 *See* JBS Nebraska Lawsuit, Docket No. 516 (Oct. 11, 2013).

126 *Id.*, *EEOC v. JBS*, 2015 U.S. Dist. LEXIS 96946 (D. Neb. July 24, 2015).

127 *Id*. Docket No. 730 (Aug. 20, 2015).

128 *Id*. Docket Nos. 751, 752 and 757.

129 *See EEOC v. JBS,* 2015 U.S. Dist. LEXIS 93244 (D. Colo. July 17, 2015).

130 *See Lusardi v. John M. McHugh, Secretary, Dept. of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015).

131 EEOC Appeal No. 020120821 (Apr. 20, 2012).

132 *See Lusardi v. John M. McHugh, Secretary, Dept. of the Army*, EEOC Appeal No. 0120133395 (Apr. 1, 2015) (*quoting Macy v. Department of Justice*, EEOC Appeal No. 020120821 and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)).

133 *See Jamal v. Saks & Co*., 4-14-cv-01782, Docket No. 17 (S.D. Tex) (*Amicus* brief filed Jan. 22, 2015), although the case was privately resolved prior to any ruling on the motion to dismiss.

134 *See EEOC v. Deluxe Financial Services Corp*. Case No. 15-cv-02646 (D. Minn.) (filed June 4, 2015).

identity/transitioning/transgender status and that the EEOC has "made clear through its federal sector decisions that transgender individuals are protected under Title VII."[135]

One of these lawsuits involving transgender employees, pending in federal court in Michigan, recently became extremely contentious when the employer served discovery requests that sought information regarding the employee's anatomy, the progress of the employee's gender transition (including medical and psychological records), and the employee's familial background and prior intimate relationships.[136] While the magistrate judge assigned to the case granted the EEOC's request for a protective order to avoid having the transgender employee respond to such discovery, the parties remain in conflict over the scope of Title VII regarding transgender employees and the scope of discovery relating to claims of discrimination based on transgender status under Title VII.[137]

During FY 2015, the Commission reaffirmed its position that sexual orientation claims are covered by Title VII.[138] In February 2015, the Commission reversed an agency's decision regarding comments made to a federal employee by his co-worker that he was a "homo" and was "going to hell," which the employee reported to his supervisor, who did nothing.[139] The Commission, relying on U.S. Supreme Court precedent in *Oncale v. Sundowner Offshore Services, Inc.*,[140] found that the "hateful nature of the alleged comments," coupled with the lack of adequate response by his supervisor stated a viable claim of harassment on the basis of sex due to gender-based stereotyping. In July 2015, the Commission reversed an agency's decision as to an employee's claim he was not selected for a position because he was gay.[141] In reviewing the federal worker's claim, the Commission stated in unequivocal terms, "[W]e conclude that sexual orientation is inherently a sex-based consideration," and "an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."

d) Disability Discrimination Claims

Disability discrimination continues to be the most frequently litigated issue by the EEOC. Over the past several years, including FY 2015, the largest number of lawsuits filed by the EEOC have been claims under the ADA.[142] The EEOC has aggressively litigated ADA pattern-or-practice claims and also has taken numerous individual ADA lawsuits to trial, although the EEOC has had mixed results at trial and disappointing results at the federal appellate level. The EEOC was also proactive on the regulatory front in addressing ADA matters, issuing proposed regulations to address the interplay between the ADA and the Affordable Care Act (ACA).

In recent years, the EEOC has repeatedly challenged employers that are viewed as having inflexible maximum leave policies and failing to provide reasonable accommodations to employees seeking to return from leave, taking the view they violate the ADA. As significantly, the EEOC remains deeply entrenched in a nationwide ADA pattern-or-practice lawsuit filed in August 2009—*EEOC v. United Parcel Service*[143]—filed in the Northern District of Illinois involving similar allegations.

The EEOC has treated attendance plans in a similar manner to fixed-leave policies. Failing to accommodate disabilities under a no-fault attendance policy creates exposure for employers as evidenced by a nationwide ADA lawsuit,

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135 *See* Press Release, EEOC, *EEOC Sues Deluxe Financial for Sex Discrimination Against Transgender Employee* (June 5, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-5-15.cfm. One of the three lawsuits settled in April 2015, as discussed Press Release, EEOC, *Lakeland Eye Clinic will Pay $150,000 to Resolve Transgender / Sex Discrimination Lawsuit* (Apr. 13, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm.

136 *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc*., Case No. 2:14-cv13710 (E.D. Mich.) (filed Sept. 25, 2014).

137 *Id.* Docket No. 34 (Motion for Protective Order filed Sept. 24, 2015). The EEOC conceded in its reply brief filed in support of its Motion for Protective Order and at oral argument that, since the District Judge previously had ruled "transgender or transsexual status is currently not a protected class under Title VII," the only remaining theory of discrimination was based on a sex stereotyping claim. Based on that concession, the magistrate judge granted the EEOC's Motion for Protective Order. The defendant has since appealed that discovery ruling and continues to seek to obtain anatomical, medical and psychological, and other intimate details relating to the plaintiff. For its part, the EEOC has indicated it is preserving its right to appeal the district judge's ruling regarding the scope of Title VII as relates to transgender employees.

138 *See Complainant v. U.S. Postal Service,* EEOC Appeal No. 0120133382 2015 WL 755097 (Feb. 11. 2015); *Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA*), EEOC Appeal No. 0120133080 (July 15, 2015).

139 *Complainant v. U.S. Postal Service*, EEOC Appeal No. 0120133382 2015 WL 755097 (Feb. 11, 2015).

140 *Oncale v. Sundowner Offshore Services, Inc*., 523 U.S. 75, 79 (1998).

141 *Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA*), EEOC Appeal No. 0120133080 (July 15, 2015).

142 As an example, aside from FY 2015, in which 53 of the 142 merits lawsuits filed by the EEOC involved ADA claims, a similar practice has occurred over the past several years: In FY 2014, there were 49 ADA lawsuits among the 167 lawsuits filed by the EEOC. In FY 2013, there were 51 ADA lawsuits among the 148 lawsuits filed by the EEOC. *See* EEOC, Litigation statistics, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

143 *EEOC v. United Parcel Service*, Case No. 1:09-cv-05291 (N.D. Ill.) (filed Aug. 27, 2009).

EEOC v. AutoZone, Inc.,[144] also filed in the Northern District of Illinois, in which the EEOC alleges that the employer discriminated against those suffering from disabilities in violation of the ADA.

On November 5, 2015, an employer also agreed to a $1.7 million settlement with the Chicago office of the EEOC involving another challenge to an attendance plan. The EEOC faulted the employer's "nationwide policies to issue attendance points for medical-related absences; not allowing intermittent leave as a reasonable accommodation; and not allowing leave or an extension of leave as a reasonable accommodation."[145]

The EEOC has not been reluctant to take ADA cases to trial during the past fiscal year. In October 2014, a Florida jury found that an employer discriminated against a licensed security guard with only one arm, who was removed from his post following a customer complaint.[146] Next, in January 2015, an Arkansas jury ruled in favor of the EEOC based on a claim that a trucking firm unlawfully denied a reasonable accommodation to a truck driver who had self-reported alcohol abuse, and then terminated his employment.[147] In June 2015, in federal court in Alaska, the EEOC prevailed in challenging an employer that withdrew its initial job offer to an experienced oil rig worker because he had no vision in his left eye.[148]

However, the above jury verdicts in favor of the EEOC during FY 2015 should be contrasted with less favorable federal court rulings, as illustrated by several cases:

- In an ADA action in in Massachusetts, *EEOC v. Chipotle Mexican Grill,*[149] the EEOC argued that the charging party, who suffered from cystic fibrosis, was able to perform the essential functions of the job and that she was fired one day after the employee's immediate manager learned of her disability. The employer argued it knew of her disability when she was hired, she was employed three months, she understood customer service was a critical part of the job, the employee received a written warning based on various customer complaints about her rudeness to customers, and one week later a customer complained about an employee, vowing never to return to the restaurant, and after the company learned it was the charging party, she was fired because of her poor interactions with customers. On August 10, 2015, a jury rendered a verdict in favor of the employer.
- In *EEOC v. AutoZone, Inc*.,[150] filed in federal court in Wisconsin, the EEOC focused on the termination of a Parts Sales Manager, whose employment was terminated based on indefinite lifting restrictions. The employer submitted that the store was leanly staffed, often with only one or two employees, including the manager on duty, and on various occasions the charging party had to work alone. The charging party admitted that lifting over 15 pounds was an essential function of the job, and securing parts for customers was part of the manager's job, aside from assisting customers in taking parts to their cars. After suffering a shoulder injury, the plaintiff was temporarily accommodated for approximately two years, but based on permanent medical restrictions not to lift over 15 pounds, the charging party's employment was terminated. On November 21, 2014, a jury ruled in favor of the employer and denied the EEOC's motion for a new trial. The EEOC filed a notice of appeal on April 8, 2015. On January 4, 2016, the Seventh Circuit affirmed the district court's denial of the EEOC's motion for a new trial.
- *In EEOC v. Vicksburg Healthcare LLC*,[151] a federal court in Mississippi issued a summary judgment ruling in favor of an employer and rejected an ADA claim. The lawsuit stemmed from an employee's termination after she sued for disability benefits based on a physician's finding she was "temporarily totally disab[led]" for an indefinite period. In challenging the employer's motion for summary judgment, the EEOC argued that an individual may be

144 *See EEOC v. AutoZone, Inc*., Case No. 14-cv-3385 (N.D. Ill.) (Complaint filed May 9, 2014) (Amended Complaint filed Aug. 5, 2014). *See also* Press Release, EEOC, *EEOC Nationwide Disability Discrimination Case Against Autozone to Proceed* (Nov. 3, 2015), *available at http://eeoc.gov/eeoc/newsroom/release/11-3-15b.cfm.*

145 *See* Press Release, EEOC, *Pactiv to Pay $1.7 Million to Settle EEOC Disability Discrimination Class Investigation* (Nov. 5, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/11-5-15a.cfm.

146 *See* Press Release, EEOC, *Jury Finds In Favor Of EEOC That One-Armed Security Guard Was Fired Because Of His Disability* (Oct. 23, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-23-14.cfm.

147 *See* Press Release, EEOC, *Jury in EEOC Suit Says Old Dominion Freight Line Must Pay Former Driver $119,612 for Disability Bias* (Jan. 16, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-16-15.cfm.

148 *See* Press Release, EEOC, *Jury Finds Parker Drilling Liable in EEOC Disability Discrimination Suit* (June 4, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-4-15.cfm.

149 *EEOC v. Chipotle Mexican Grill*, Case No. 1:153-cv-11503 , Docket 117 (D. Mass. Aug. 10, 2015); *see also*, *EEOC v. Chipotle Mexican Grill*, Case No. 1:153-cv-11503, Docket No. 91 (Joint Pre-Trial Memorandum filed May 21, 2015).

150 *EEOC v. AutoZone, Inc*., Case No. 2:12-cv-00303, Docket No. 209 (E.D. Wis.) (Jury Verdict for Employer), Docket N. 229 (Decision and Order Denying Plaintiff's Motion for a New Trial), Docket No. 230 (Notice of Appeal by EEOC), No. 15-1753 (7th Cir. Jan. 4, 2016) (Motion for New Trial Denied).

151 *EEOC v. Vicksburg Healthcare LLC*, Case No. 3:13-cv-00895, Docket Nos. 121-122 (S.D. Miss. Aug. 27, 2015) (summary judgment in favor of employer); *see also* Docket No. 124 (EEOC Notice of Appeal filed Oct. 29, 2015).

totally disabled and still be a qualified individual with a disability, relying on the U.S. Supreme Court's decision in *Cleveland v. Policy Management Systems Corp.*[152] In rejecting the EEOC's argument, the court concluded "The EEOC has the burden of producing a sufficient explanation under *Cleveland* for the discrepancy between a total disability benefits claim and the assertion that [the employee] was qualified for her job. Because the EEOC has failed to do so, [the employer] is entitled to summary judgment on both the EEOC's failure to accommodate and discriminatory claims."

The EEOC also did not fare well on appeal in ADA cases, as illustrated by decisions in the First, Fourth, Sixth and Tenth Circuits:

- In *EEOC v. Kohl's,*[153] which dealt with an alleged failure to accommodate an employee, the First Circuit affirmed a summary judgment ruling for the employer because the employee, who suffered from diabetes, claimed that an erratic work scheduled aggravated her condition, and quit after she demanded a schedule that allowed her to work from 9:00 a.m. to 5:00 p.m. or from 10:00 a.m. to 6:00 p.m., but was told there was no position with those hours. The employee refused the employer's offer to rethink her resignation and discuss alternative accommodations. In the view of the First Circuit, "when an employer initiates an interactive dialogue in good faith with an employee for the purpose of discussing potential reasonable accommodations for the employee's disability, the employee must engage in a good-faith effort to work out potential solutions with the employer prior to seeking judicial redress."
- *EEOC v. Womble Carlyle Sandridge & Rice*[154] dealt with an employee who worked at law firm in an office services job in which many functions required heavy lifting. Following a diagnosis of lymphedema, a condition caused by breast cancer, she had difficulties lifting and suffered a work-related injury while lifting. This led to a lifting restriction of no more than 10 pounds, which was accommodated by providing light-duty assignments for approximately six months. Some months later, the employee's restrictions became permanent, which led to reassessing the employee's capabilities. After the determination was made that there were no available alternative jobs, the employee was placed on medical leave and terminated after the permitted leave expired. In affirming summary judgment in favor of the employer, the Fourth Circuit held the employer was not required to permanently excuse the employee from the lifting tasks "because doing so would force [the employer] to create a modified light-duty position, which the ADA does not require," nor was the employer required to permanently assign other employees to help the affected employee with all heavy lifting tasks because that "would in effect reallocate essential functions, which the ADA does not require."
- The Sixth Circuit also ruled in favor of an employer in rejecting an ADA claim in *EEOC v. Ford Motor Company*,[155] which focused on telecommuting. The affected employee, who suffered from irritable bowel syndrome, requested telecommuting up to four days a week, which far exceeded company policy, and the employee worked in a highly interactive role as a "resale buyer" that required personal interaction with suppliers. While the company made some accommodations to permit a limited amount of telecommuting, it proved unsuccessful and the affected employee already had been experiencing performance problems. Although the company did not grant her requested telecommuting schedule, the company advised the employee it could accommodate her in other ways, such as moving her closer to the restroom or looking for jobs better suited for telecommuting, but the employee's response to the denial of her request was the filing of an ADA claim. In deciding whether to affirm the summary judgment ruling in favor of the employer, the Sixth Circuit faced the question, "Is regular and predictable on-site job attendance an essential function . . . of [the employee's] resale-buyer position?" In the court's view, "We hold that it is." The court concluded it was not writing on a "clean slate"; rather, the "general rule" is that "an employee who does not come to work cannot perform any of his job functions, essential or otherwise." The court also determined that the employee's proposal of up to four days of telecommuting, which removed the essential function of being on the job site, was "unreasonable." The court rejected the EEOC's view that technology created a genuine dispute of fact "as to whether regular on-site attendance is essential."

Aside from reasonable accommodation issues, one of the most significant issues regarding the ADA over the past year involves the EEOC and the health care community. The EEOC took a position at odds with the Affordable Care Act[156] by targeting and challenging wellness programs. Under the ACA, wellness programs are encouraged for both

152 *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795 (1999).

153 *EEOC v. Kohl's Dept. Store*, 2014 U.S. App. LEXIS 24043 (1st Cir. Dec. 19, 2014).

154 *EEOC v. Womble Carlyle Sandridge & Rice*, 2015 U.S. App. LEXIS 10874 (4th Cir. June 26, 2015).

155 *EEOC v. Ford Motor Company*, 782 F.3d 753 (6th Cir. 2015).

156 Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010), *codified at* 42 U.S.C. § 18001 (2010).

large and small employers. For example, the ACA provides grants for up to five years to small employers that establish wellness programs. It also permits employers to offer employee rewards in the form of discounts and waivers for wellness programs and increase the incentives that can be offered.[157]

The EEOC has been involved in several lawsuits challenging wellness programs over the past year,[158] which included attempting to enjoin a wellness program during the EEOC's investigation concerning the legality of the wellness program. In late October 2014 in *EEOC v. Honeywell,* the EEOC filed a petition for a temporary restraining order and preliminary injunction and argued there would be "irreparable harm" to: (1) the EEOC, because it would be unable to prevent imminent violation of antidiscrimination laws; and (2) employees, "because they will be forced to go through an unlawful test without knowing whether their rights will be remedied in the future."[159] Less than one week later, on November 6, 2014, the court denied the EEOC's motion, explaining, "Recent lawsuits filed by the EEOC highlight the tension between the ACA and the ADA and signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law."[160]

Since that time, the primary EEOC lawsuit that has placed wellness programs front and center is *EEOC v. Flambeau, Inc.* in which the EEOC asserted that the company's wellness program required that employees submit to biometric testing and a health risk assessment (HRA) or face cancellation of medical insurance, unspecified disciplinary action for failing to attend the scheduled testing, and a requirement to pay the full premium to stay covered. In the EEOC's view:

> Flambeau used biometric testing and the HRA to gather medical and disability information from its workforce. The biometric test and HRA were thus generally not allowed by the ADA. Only if Flambeau could demonstrate that its means of gathering information were "voluntary" could Flambeau be in compliance with the ADA. But the test and HRA were required for employees to continue getting the normal employee health insurance. That makes the test and HRA non-voluntary as a matter of law. As a result, Flambeau violated the ADA and is liable for the effects of its action.[161]

From the employer's perspective:

> The EEOC is wrong as a matter of law. Indeed, Flambeau's wellness program satisfied the ADA's "safe harbor provision" because it was a term of a bona fide benefit plan, based on "underwriting risks, classifying risks, or administering such risks" and not inconsistent with Wisconsin law. Moreover, the program was "voluntary" pursuant to the ADA because Flambeau never required employees to participate as a condition of their employment with the Company. As a result, Flambeau respectfully requests the Court to grant summary judgment in the Company's favor with respect to the instant lawsuit.[162]

On December 30, 2015, the U.S. District Court for the Western District of Wisconsin agreed, finding that the wellness program fell within the ADA's safe harbor provision. According to the court, the "wellness program requirement constituted a 'term' of its health insurance plan and that this term was included in the plan for the purpose of underwriting, classifying and administering health insurance risks." [163] In addition, the court agreed with the defendant that the wellness program was not a subterfuge for discrimination, as there was no evidence that the company used the information from its health-related tests and assessments "to make disability-related distinctions with respect to employees' benefits."[164]

In the interim, the EEOC also has addressed wellness programs based on proposed regulations issued by the EEOC. On April 16, 2015, the EEOC announced a proposed rule, as published in the *Federal Register* on April 20, 2015,

157 *See* Ilyse Schuman *et al*., *The Labor, Employment and Benefits Law Implications of the Affordable Care Act - Are You Prepared?* Littler Report at 7-10 (May 9, 2013), *available at* http://www.littler.com/publication-press/publication/workplace-policy-institute-labor-employment-and-benefits-law-implicati.

158 *See EEOC v. Orion Energy Systems, Inc.*, Case No. 1:14-cv-01019 (E.D. Wis.) (filed Aug. 20, 2014); Press Release, EEOC, *EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee* (Aug. 20, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm; *EEOC v. Flambeau, Inc.,* Case No 3:14-cv-00638 (W.D. Wis.) (filed Sept. 30, 2014); Press Release, EEOC, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm; and *EEOC v. Honeywell Int'l Inc.*, Case No. 14-cv-04517 (D. Minn.) (filed Oct. 27, 2014).

159 *EEOC v. Honeywell Int'l Inc.*, Case No. 14-cv-04517 (D. Minn.) (filed Oct. 27, 2014).

160 *EEOC v. Honeywell Int'l Inc.*, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014).

161 *See EEOC v. Flambeau, Inc.*, *supra* note 158, Docket No. 15, p. 2 (filed July 15, 2015).

162 *Id.*, Docket No. 9, p. 2 (filed July 15, 2015).

163 *EEOC v. Flambeau, Inc.,* 2015 U.S. Dist. LEXIS 173482, at *7 (W.D. Wis. Dec. 30, 2015).

164 *Flambeau*, 2015 U.S. Dist. LEXIS 173482, at *19.

that "makes clear that wellness programs are permitted under the ADA," focuses on a requirement that participation be voluntary, but explains that companies "may offer incentives of up to 30 percent of the total cost of employee-only coverage in connection with incentive programs."[165] This proposed rule was followed by a second proposed rule, announced on October 29, 2015, which provides that employers offering wellness programs as part of group health plans also may offer incentives "in exchange for an employee's spouse providing information about his or her current or past health status."[166] This proposed rule expands the incentive to 30% of the total cost of the plan in which the employee and any dependents are enrolled. The comment period for the April 2015 proposed rule ended on June 19, 2015, and remains under review. The comment period for the most recent proposed rule ends on January 28, 2016.[167]

4. Enforcing Equal Pay Laws

Similar to prior years, there was limited activity involving the Equal Pay Act (EPA) during FY 2015, but the issue continues to gain increased attention by the EEOC. On April 13, 2015, EEOC Chair Jenny Yang issued a statement on Equal Pay Day,[168] and underscored: (1) according to U.S. Census income data, women earn "just 78 cents on the dollar" compared to men's average earnings; (2) since the creation by the White House of the Equal Pay Task Force in 2010, through administrative enforcement efforts "the EEOC has obtained over $85 million in monetary relief for victims of sex-based wage discrimination;" (3) the EEOC recently issued a new equal pay fact sheet;[169] and (4) the EEOC "provided training on equal pay issues at events across the country that reached nearly 40,000 attendees." Chair Yang also referred to the EEOC having filed a "friend of the court" brief based on the EPA claim in the Fifth Circuit in *Margaret Thibodeaux-Woody v. Houston Community College.*[170] In reversing summary judgment in favor of the employer, the Fifth Circuit rejected the claim that the plaintiff's lower salary was due to a "factor other than sex." Although the employer argued that the salary differential from a male counterpart was due to the differences in approach to salary negotiation, there existed evidence that the plaintiff was not permitted to negotiate her salary. Therefore, a "practice is not a bona fide 'factor other than sex' if it is discriminatorily applied."[171]

During FY 2015, there were only seven EPA lawsuits filed by the EEOC. For example, in April 2015, a class-based lawsuit was filed in Maryland federal court—*EEOC v. Maryland Insurance Administration*[172]—in which the EEOC has asserted that since 2009, the employer paid three named employees "and a class of similarly situated female investigators and enforcement officers lower wages than it paid to their male counterparts who were doing substantially equal work under similar working conditions."

In October 2015, the EEOC filed two individual EPA actions. In *EEOC v. Prince George's County*,[173] the EEOC asserts that a female engineer was hired and told she could not negotiate her salary, but two weeks later a male engineer was hired who requested and received a starting salary that was $10,000 more than hers. Similarly, in *EEOC v. Stanley Martin Companies*,[174] the EEOC alleges that a female was hired as a budget analyst, that she performed purchasing manager duties for lower pay than male purchasing managers, and when she was promoted to purchasing manager, she still was paid less than the male purchasing managers.

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165 *See* Press Release, EEOC, *EEOC Issues Proposed Rule on Application of the ADA to Employer Wellness Programs* (Apr. 16, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-16-15.cfm.

166 *See* Press Release, EEOC, *EEOC Issues Proposed Rule to Amend Title II of GINA* (Oct. 29, 2015*), available at* http://www.eeoc.gov/eeoc/newsroom/release/10-29-15.cfm.

167 80 Fed. Reg. 75,956 -75,957 (Dec. 7, 2015). *See also* discussion of the most recent proposed wellness rule by Ilyse Schuman et al.*, The EEOC Issues Proposed Rule on Gina and Wellness Programs,* Littler Insight (Nov. 17, 2015) *available at http://www.littler.com/publication-press/publication/eeoc-issues-proposed-rule-gina-and-wellness-programs.*

168 *See* Statement of Chair Jenny Yang at http://www.eeoc.gov/eeoc/chair/equal_pay_day.cfm.

169 *See* EEOC, *Equal Pay Day, the EEOC, and Pay Discrimination*, *available at* http://www.eeoc.gov/eeoc/publications/equal_pay_day.cfm.

170 *Id. See also* see *Margaret Thibodeaux-Woody v. Houston Community College*, No. 13-20738 (5th Cir.) (*Amicus* brief filed Apr. 5, 2014) and decision by the Fifth Circuit reversing summary judgment in favor of the employer and remanding the case for further finding. *Id.*, Docket No. 00512837766 (5th Cir. Nov. 14, 2014).

171 *Id.*

172 See *EEOC v. Maryland Insurance Administration*, Civil Action No. 1:15-cv-01091-JFM (D. Md.) and Press Release, EEOC, *EEOC Sues Maryland Insurance Administration for Sex-Based Pay Discri*mination (Apr. 20, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/4-20-15a.cfm.

173 *See EEOC v. Prince George's County*, Case No. 8:15-cv-2942 (D. Md); *see also* Press Release, EEOC, *EEOC Sues Prince George's County for Pay Discrimination* (Oct. 1, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/10-1-15e.cfm.

174 *See EEOC v. Stanley Martin Companies*, Case No.1:15-cv-1246 (E.D. Va.) and Press Release, EEOC, *Stanley Martin Companies, LLC Sued By EEOC For Pay Discrimination* (Oct. 2, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/10-2-15b.cfm.

5. Preserving Access to the Legal System

The EEOC's stated priority involving "preserving access to the legal system" has involved challenges to employer practices that "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts."[175] Over the past year, the EEOC has continued to pursue litigation challenging releases and an arbitration agreement, taking the view that such documents interfere with an individual's access to the Commission. The arguments made by the EEOC in its recent litigation may have a far broader impact for two primary reasons: (1) the EEOC is broadly interpreting its authority to file pattern-or-practice lawsuits even absent a charge of discrimination or retaliation; and (2) the EEOC has further submitted that when filing a pattern-or-practice lawsuit not based on a charge of discrimination or retaliation, it has the right to go directly to court with no duty to conciliate, which is even broader than *Mach Mining*.

In *EEOC v. CVS Pharmacy, Inc.*,[176] which involves a challenge to a severance agreement that included a general release, the underlying charge stemmed from a claim that an employee was terminated based on her sex and race, not any attack regarding the severance agreement. The EEOC dismissed the underlying charge and advised the employer there was "reasonable cause" to believe that based on the severance agreement, the employer was engaged "in a pattern or practice of resistance to the full enjoyment of rights secured by Title VII."[177] The EEOC then sued without engaging in conciliation.

To support its motion to dismiss or for summary judgment,[178] the employer in *CVS* focused on the express terms of the severance agreement, which provided it did not "interfere with [an] Employee's right to participate in a proceeding with any…government agency enforcing discrimination laws" and did not "prohibit [an] Employee from cooperating with any such agency." As significantly, the employer challenged the EEOC's basis for the EEOC's pattern-or-practice claim and asserted that a lawsuit only could be pursued where there was a claim of a "pattern of discrimination," and the EEOC had conceded that it was not asserting any claim of discrimination by suing the employer. The employer relied on the legislative history for Title VII, which supported the view that the pattern-or-practice provision of Title VII was included in order to ensure that a lawsuit could be filed whenever there was "reasonable cause to believe there is a pattern or practice of discrimination." The employer pointed to a wealth of case authority "squarely recognizing that Section 706's procedures, including conciliation, extend to the EEOC's Section 707 [patterns or practice] suits," and "Congress's intent, across the board, was to 'promote conciliation rather than litigation' of Title VII cases."

The gist of the EEOC's response was that, based on the severance agreement, the employer was engaging in a "pattern or practice conduct designed to deter its employees" from exercising their rights under the Act.[179] In addressing the jurisdictional basis for its suit, the EEOC focused on the express language of Section 707 of Title VII, which provides that when there is reasonable cause to believe there has been "a pattern or practice of *resistance* to the full enjoyment of any rights," a civil action may be filed against an employer. Although a provision in Section 707 referred to acting under the procedures in Section 706, which requires conciliation before suing, the EEOC argued that conciliation was required only when the EEOC was investigating or acting on a "charge" of a pattern or practice of discrimination. The EEOC submitted that because it was attacking "resistance" to rights protected under Title VII, it could challenge employer conduct beyond "unlawful employment practices," which included "deterring employees to exercise their right to initiate, assist, and participate in investigations under Title VII." The EEOC argued that because its actions were not based on a charge, it was not bound by any conciliation requirement under Section 706 of the Act.

In granting the employer's motion to dismiss, the district court did not address the substance of the employer's claim involving the EEOC's challenge to the separation agreement.[180] Instead, the court focused on the procedural issues leading to the lawsuit and dismissed the lawsuit based on the EEOC's failure to conciliate prior to suing. The district court rejected the EEOC's attempt to expand the meaning of the term "resistance" in Section 707 of Title VII beyond discrimination and retaliation.[181] In the court's view, based on review of applicable authority, while Congress in 1972 may have transferred authority from the Justice Department to the EEOC to institute pattern-or-practice lawsuits, the EEOC

175 *See* EEOC Strategic Enforcement Plan, *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

176 *See EEOC v. CVS Pharm., Inc.*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014), *EEOC v. CVS Pharm., Inc.*, No. 14-3653 (7th Cir.) (Appeal filed Dec. 5, 2014); (7th Cir.) (decision issued Dec. 17, 2015).

177 *Id.*

178 *See EEOC v. CVS Pharm., Inc.*, No. 14–cv–00863, Docket Nos. 16 and 29.

179 *Id.*, Docket No. 27.

180 Another recent lawsuit in which the EEOC challenged a separation agreement is *EEOC v. College America*, 2014 U.S. Dist. LEXIS 167055 (D. Colo. Dec. 2, 2014), which was tied to an ADEA claim, in which the court upheld dismissal of a claim involving the EEOC's attack on the separation agreement based on the EEOC's lack of notice and failure to engage in conciliation prior to filing suit against the employer.

181 *Id.,* Docket No. 33 (Oct. 7, 2015).

was granted authority "to bring charges of a pattern or practice of discrimination and not as creating a separate cause of action." The district court concluded that the 1972 Amendment to Title VII "did not authorize the EEOC to forego the procedures in Section 706," including conciliation, and the EEOC was thus "not authorized to file this suit against [the employer] and [the employer] is entitled to judgment as a matter of law."[182] The EEOC filed an appeal with the Seventh Circuit, which heard oral argument on October 29, 2015.[183]

On December 17, 2015, a three-judge Seventh Circuit panel sided with CVS, rejecting the Commission's claim that it can sue without engaging in conciliation or alleging the employer engaged in discrimination.[184] According to the court, "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding." The court noted further, "because there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," the EEOC is required to comply with all of the pre-suit procedures—including conciliation—contained in Section 706 when it pursues "pattern or practice" violations.[185] As significantly, the court on its own elected to clarify a prior Seventh Circuit decision to underscore that the EEOC also cannot proceed in any matter in the absence of a charge, explaining, "The 1972 Amendments [to Title VII] gave the EEOC the power to file pattern or practice suits on its own, but Congress intended the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge."[186]

The *CVS* case should be contrasted with the district court's September 1, 2015, opinion in *EEOC v. Doherty Enterprises, Inc.*,[187] which also dealt with a claim by the EEOC that the employer engaged in a "pattern or practice of resistance to the full enjoyment of rights secured by Title VII." In *Doherty*, the EEOC focused on applicants and employees being required to sign an arbitration agreement that prohibited filing of discrimination charges with the EEOC and instead required the parties to resolve their disputes through arbitration.[188] Similar to *CVS*, the employer moved to dismiss based on the EEOC's suing without an underlying charge of discrimination and the EEOC's failure to engage in conciliation prior to suing the employer.

In taking exception with the district court opinion in *CVS*, the court in *Doherty* broadly interpreted Section 707 and the "resistance" language. While agreeing with the district court's opinion in *CVS* that the EEOC could sue in the absence of a discrimination charge, the court in *Doherty* ruled contrary to the court in *CVS* in holding Section 707 was not limited to claims involving "unlawful employment practices," explaining:

> Significantly, Congress chose not to use the term "unlawful employment practices" with respect to section 707(a) which is in stark contrast to the use of the term "unlawful employment practices" in section 706. The Court can only conclude that because Congress chose to use different language in the two sections, it manifested different intent; namely, that a resistance claim is not limited to cases involving an unlawful employment practice. Instead, a resistance claim may be brought to stop a pattern and practice of resistance to the full enjoyment to Title VII rights.

In *Doherty*, the court held that the procedures in Section 706 were not required for "resistance" claims, and neither a charge nor conciliation was required prior to suing.[189]

In a final discussion involving EEOC processes, some additional discussion is warranted regarding EEOC challenges to releases. The Third Circuit's decision in *EEOC v. Allstate Insurance Company*[190] provides some guidance on the EEOC's approach to challenging releases of Title VII claims and the response by the courts. In *Allstate,* based on changing the way it sold insurance, the company reorganized and shifted to an independent contractor model and terminated the at-will employment of its sales agents, offering them the opportunity to work as independent contractors on the condition

182 *Id.* at pp. 8-9.

183 *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653 (7th Cir.) (Appeal filed Oct. 29, 2015).

184 *EEOC v. CVS Pharmacy, Inc.*, No. 14-3653 (7th Cir. Dec. 17, 2015).

185 *CVS Pharmacy*, slip op. at 14.

186 *Id.* at 16.

187 *EEOC v. Doherty Enterprises, Inc.*, Case No. 14-cv-81184, Docket No. 32 (S.D. Fla.) (filed Sept. 18, 2014).

188 After the suit was filed, the employer submitted that any employee could file a charge, and the arbitration provision merely applied to a subsequent action by an applicant or employee.

189 It also should be noted that in the EEOC's appeal of the *CVS* decision, the EEOC filed a supplemental submission with the Seventh Circuit following issuance of the *Doherty* opinion arguing that its rationale should be adopted. The employer also submitted a response, taking exception to any reliance on the district court's opinion in *Doherty*. *See supra* note 183, regarding the Seventh Circuit appeal in *CVS*, Appeal No. 14-3653, Document Nos. 29 (EEOC Submission, Sept. 2, 2015) and 30 (Employer Response, Sept. 4, 2015).

190 *EEOC v. Allstate Insurance Company*, 2015 U.S. App. LEXIS 2330 (3d Cir. Feb. 13 2015).

of waiving their legal claims against the employer, including claims arising under Title VII, the ADEA and the ADA. The EEOC argued that a requirement to execute a release constituted unlawful discrimination on various grounds, including the contention that withholding a privilege of employment (*i.e*., the conversion option) in exchange for the release was "per se retaliatory," and the refusal to waive discrimination claims constituted "protected opposition activity."

In rejecting the EEOC's arguments, the Third Circuit expressly stated "[i]t is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled," and even the employment discrimination laws contemplate releases may be required, as shown by the Older Workers' Benefit Protection Act. The court also rejected the view that "refusing to sign a release constitutes opposition to unlawful discrimination," explaining, "In our view, such inaction does not communicate opposition sufficiently specific to quality as protected employee activity."

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

During the past fiscal year, the EEOC reiterated its view that harassment remains a major priority of the Commission. The agency held a meeting in January 2015 that focused on harassment.[191] In March 2015, Chair Yang set up the "EEOC Select Task Force on the Study of Harassment in the Workplace,"[192] explaining, "Complaints of harassment span all industries, include many of our most vulnerable workers, and are included in 30% of the charges that we receive."

In October 2015, the EEOC announced the findings of a "panel of experts" and referred to a "multi-prong strategy essential to preventing workplace harassment," which included "Placing pressure on companies by buyers, empowering bystanders to be part of the solution, multiple access points for reporting harassment, prompt investigations, and swift disciplinary action when warranted, along with strong support from top leadership, are some of the measures employers can take to prevent workplace harassment."[193] On December 7, 2015, the EEOC task force also held a public meeting in which a panel of experts discussed the bases of workplace harassment extending beyond sex and race to include age, disability, religion, national origin, sexual orientation, and gender identity. A second panel told the task force how the creative use of social media can spread an anti-harassment message, especially among millennials, or give a platform for workers to bring complaints to the public's attention.[194]

During the past fiscal year, the EEOC also publicized its success in litigating harassment cases.

- On October 24, 2014, based on sexual harassment claims brought to trial by the EEOC, a Texas jury awarded three former employees for a medical services provider a total of $499,000 ($82,000 in back pay and benefits, $167,000 in back pay and benefits, and $250,000 in compensatory and punitive damages, respectively).[195]
- On December 22, 2014, the Eighth Circuit also reversed a $4.7 million attorneys' fee award in favor of the employer in the long-running, class-based sexual harassment lawsuit in *EEOC v. CRST*, and remanded the case for further findings. On December 4, 2015, however, the U.S. Supreme Court agreed to review this case.[196]
- On April 22, 2015, the Sixth Circuit affirmed the judgment of a federal district court in Tennessee. The case involved an action against a logistics firm by the EEOC regarding alleged sexual harassment by a supervisor against female employees. The court denied the employer's motion for a new trial based on alleged erroneous jury instructions. The EEOC lawsuit focused on alleged sexual harassment and retaliation involving four female workers who were awarded $1.5 million in compensatory and punitive damages.[197]

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191 *See* EEOC, *Meeting of January 14, 2015 – Workplace Harassment*, *available at* http://www.eeoc.gov/eeoc/meetings/1-14-15/index.cfm. *See also* Press Release, EEOC, *Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting* (Jan. 14, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm.

192 *See* Press Release, EEOC, Press Release, *EEOC to Study Workplace Harassment* (Mar. 20, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-30-15.cfm.

193 *See* EEOC, *Select Task Force Meeting of October 22, 2015 – Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, and Press Release, EEOC, *Multi-Prong Strategy Essential to Preventing Workplace Harassment* (Oct. 23, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm.

194 *See* EEOC, Press Release, *Many Bases of Discrimination Can Lead to Harassment, Panel of Experts Tells EEOC Task Force* (Dec. 8, 2015), *available at* http://eeoc.gov/eeoc/newsroom/release/12-8-15.cfm.

195 *See EEOC v. Emcare Inc.*, Case No. 3:11-cv-02017, Docket No. 104 (N.D. Tex) (Jury Verdict, Oct. 24, 2014). The employer filed a post-trial motion with the court seeking to set aside or lower the verdict or order a new trial.

196 *See EEOC v. CRST Van Expedited, Inc.*, 2014 U.S. App. LEXIS 24130 (8th Cir. Dec. 22, 2014); *CRST Van Expedited, Inc. v. EEOC,* No. 14-1375, *cert. granted* (U.S. Dec. 4, 2015).

197 *EEOC v. New Breed Logistics*, 2015 U.S. App. LEXIS 6650 (6th Cir. Apr. 22, 2015), *affirming* 962 F. Supp. 2d 1001 (W.D. Tenn. 2013).

- On September 9, 2015, the EEOC entered into a $3.8 million settlement with a utility company to resolve a class-based charge based on claims of alleged sexual harassment and/or other forms of sex discrimination involving as many as 300 women workers in field positions. The New York Attorney General, EEOC and employer were parties to the agreement.[198]
- On September 10, 2015, the EEOC announced a $17 million sexual harassment verdict against a produce growing and packing operation in Florida. The jury awarded $2,425,000 in compensatory damages and $15 million in punitive damages to the five female farmworkers who intervened in the EEOC's suit. The trial was limited to damages based on the corporate defendant having defaulted and did not participate in the trial. This amount was later reduced to $8.9 million in light of Title VII's statutory caps.[199]

It is noteworthy, however, that the EEOC elected not to announce a defense verdict in a harassment lawsuit initially publicized by the EEOC in a press release it issued when it sued the employer in 2013.[200] On August 5, 2015, a jury rendered a verdict in favor of the employer, a quick service restaurant group, after a trial in a case in which the EEOC claimed that a store manager subjected a 16-year-old employee to unwanted sexual advances and removed her from the schedule after her mother complained.[201] In post-trial submissions, among various challenges, the EEOC challenged the admissibility of the testimony of a health care provider who failed to support the employee's claim that she had complained of sexual harassment.[202]

E. Anticipated Trends for FY 2016

As employers review their EEO policies, practices and procedures to identify issues to focus on during the coming year, the above discussion hopefully will assist in that effort. Based on review of the FY 2015 case developments involving EEOC investigations and litigation dealing the agency's "national priorities," employers should take into consideration the following EEOC developments and trends in preparing for FY 2016:

- *The EEOC Will Continue to Focus on Systemic Investigations and Related Litigation.* When dealing with policies and/or practices that raise EEO concerns, the EEOC has not been reluctant to expand individual charges into systemic investigations. The EEOC's favorable track record in making broad-based requests for information through subpoena enforcement actions also has been strengthened—from the EEOC's perspective—by the Ninth Circuit's decision in *EEOC v. McLane Company, Inc.*[203] This case supported the EEOC's request for "pedigree information" about other employees as part of a systemic investigation of alleged unlawful conduct. Even in the Eleventh Circuit, where the court limited the scope of inquiry when the EEOC attempted to expand its request beyond an individual charge, the court reinforced the view that mere issuance of a Commissioner's charge may provide significant latitude to the civil rights agency when making broad-based requests for information.[204] As significantly, when faced with the prospect of related pattern-or-practice litigation initiated by the EEOC, the agency has been emboldened by the Second Circuit's decision in *EEOC v. Sterling Jewelers Inc.*[205] that a court "may not review the sufficiency of an [EEOC] investigation, only whether an investigation occurred." However, one significant case to watch is the pending Fifth Circuit case, *EEOC v. Bass Pro Outdoor World LLC*,[206] which will determine whether the EEOC can seek compensatory and punitive damages and jury trials based on Section 706 of Title VII, or whether it will be limited to Section 707 equitable relief. Only one federal court of appeals has addressed this issue to date, *Serrano v. Cintas*,[207] in which the Sixth held that the EEOC could pursue pattern-or-practice claims and seek related relief under Section 706.

198 *See* Press Release, EEOC, *Con Edison To Pay $3.8 Million To Resolve Sex Discrimination/Harassment Charges Filed With New York A.G. And U.S. EEOC* (Sept. 9, 2015) *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-9-15.cfm.

199 *See* Press Release, EEOC, *EEOC Wins Jury Verdict of over $17 Million for Victims of Sexual Harassment and Retaliation at Moreno Farms* (Sept. 10, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm. *See also EEOC v. Moreno Farms, Inc*., Case No. 1:14-cv-23181 (S.D. Fla.) (Filed Aug. 28, 2014; Verdict on Liability Jan. 5, 2015; Verdict on Damages Sept. 11, 2015; Injunctive Relief Ordered Oct. 5, 2015).

200 *See* Press Release, EEOC, *EEOC Sues Memphis Foods for Sexual Harassment of 16-Year-Old Female Employee* (Sept. 12, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-12-13a.cfm.

201 *See EEOC v. Memphis Foods LLC*, Case No. 2:13cv-02712, Docket Nos. 1 and 123 (W.D. Tenn.) (Complaint filed Sept. 11, 2013; Jury Verdict Aug. 5, 2015).

202 *Id*., Docket No. 131 (Sept. 15, 2015).

203 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).

204 *EEOC v. Royal Caribbean,* 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

205 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015).

206 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014), *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 1520078 (5th Cir.) (Order granting appeal filed Feb. 10, 2015).

207 *See EEOC v. Texas Roadhouse*, *supra* notes 57-62.

- *Anticipate Increased EEOC Investigations Absent a Charge of Discrimination and Related Lawsuits, Based on "Directed" Investigation (Involving Age Discrimination and Equal Pay Claims) and Pattern-or-Practice "Resistance" Claims.* The EEOC has statutory authority to initiate ADEA and EPA investigations even absent a charge of discrimination, which may include broad-based requests for information.[208] While the EEOC has not historically published statistics involving the number of such directed investigations, one of the EEOC's largest pending age discrimination lawsuits, *EEOC v. Texas Roadhouse*, stems from a directed investigation. An employer cannot appeal to the agency a subpoena issued based on such investigations. Instead, the employer may risk a subpoena enforcement action if an agreement on the scope of information and/or documents cannot be reached with the agency. Based on the EEOC's pattern-or-practice authority, challenges to releases and/or arbitration agreements may arise in the complete absence of a charge of discrimination when the agency is claiming an employer is "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" under Title VII.[209]
- *Anticipate Continued Debate Regarding the Impact of Mach Mining on the Conciliation Process and EEOC Investigations.* While the Supreme Court in *Mach Mining* ruled that judicial review of the EEOC's conciliation efforts would be limited, the court nevertheless held that EEOC "must engage the employer in some form of discussion" to resolve the matter. During the coming year, the key issue will be whether the court's limited review will impact the EEOC's approach to conciliation. So far, in one case in which the EEOC allegedly made a "take or leave it proposition," *EEOC v. Ohio Health*,[210] the district court took strong exception to the EEOC's conduct. In another case—*EEOC v. Jet Stream*[211]—in which the EEOC rejected an individualized settlement approach and instead focused on settlement for "aggrieved individuals" who had not yet been identified, the court refused to examine the EEOC's conciliation efforts. In *EEOC v. Sterling Jewelers*,[212] the Second Circuit also relied, in part, on *Mach Mining* in concluding there should be only limited review of the EEOC investigation process.
- *Employers Will Continue to Face Scrutiny Based on Policies and/or Practices That Are Viewed as Creating Hiring Barriers Involving Any Protected Status.* The EEOC has focused on large-scale claims of intentional discrimination, including claims of race, sex and age discrimination, particularly at companies where there appears to be a significant underrepresentation of individuals in a protected group. Neutral employment practices that may have a disparate impact on a protected group also are subjecting employers to closer scrutiny of their hiring practices. Although recent litigation has focused on criminal history,[213] the EEOC has also been closely reviewing other pre-employment hiring practices, including pre-employment testing by employers.[214]
- *There will be a Continued Expansion of Pregnancy Discrimination Claims.* Based on *Young v. UPS,* the Supreme Court expanded the scope of coverage for pregnancy discrimination claims to the extent that an employer accommodates some workers but fails to accommodate similarly situated pregnant workers. As significantly, the EEOC's guidance clarifies that failing to accommodate pregnant employees may expose employers to ADA claims based on temporary disabilities caused by pregnancy. The EEOC has also clarified based on its guidance that employers may be subject to disparate impact claims to the extent an employer policy, such as eligibility for and/or limits on leave, unfairly impacts pregnant workers.
- *Issues of Religious Discrimination Will Continue to Evolve, Including the Scope of Undue Hardship.* While the issue addressed in *EEOC v. Abercrombie* (*i.e.*, whether the obligation to make reasonable accommodation to a religious practice arises only where the employer has knowledge of the need for a religious accommodation) was a matter of first impression, the scope of reasonable accommodation for religious practices most likely will get increased attention over the coming year. Care must be taken with both grooming and appearance policies and issues of requested time off, including breaks for religious practices. In dealing with the latter issue, two cases to closely monitor are *EEOC v. JBS*, pending in federal courts in Nebraska and Colorado.

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208 *See EEOC v. McLane Company, Inc*., 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015) (age discrimination) and *EEOC v. Performance Food Group*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014) (sex discrimination).

209 *See EEOC v. CVS Pharmacy*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014), *EEOC v. CVS Pharm., Inc*., No. 14-3653 (7th Cir.) (Appeal filed Dec. 5, 2014, decision issued Dec. 17, 2015)and *EEOC v. Doherty*, 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).

210 *EEOC v. Ohio Health Corp*., 2015 U.S. Dist. LEXIS 84016 (S. D. Ohio June 29, 2015).

211 *EEOC v. Jet Stream Ground Services, Inc*., 2015 U.S. Dist. LEXIS 130838 (D. Colo. Sept. 29, 2015).

212 *EEOC v. Sterling Jewelers*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015), *reh'g denied* (2d Cir. Dec. 1, 2015).

213 *See, e.g., EEOC v. Freeman*, 2015 U.S. App. LEXIS 2592 (Feb. 20, 2015); *EEOC v. BMW Manufacturing Co. LLC,* Case No. 13-cv-01583 (D.S.C., Spartanburg Div.) (filed June 11, 2013); *EEOC v. Dolgencorp LLC*, Case No. 13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

214 *See supra* notes 88-90.

- *The EEOC Will Continue to Broadly Interpret LGBT Rights in the Workplace.* Over the past couple of years, the EEOC has made it abundantly clear it will continue to challenge what it believes are discriminatory employment practices affecting transgender workers. A case to closely monitor is *EEOC v. R.G. & G.R Funeral Homes, Inc.*,[215] pending in Michigan federal court. The EEOC has stated in unequivocal terms that discrimination based on sexual orientation "is necessarily an allegation of sex discrimination under Title VII."[216] Despite the failure of Congress to amend Title VII to include discrimination on the basis of sexual orientation and/or gender identity, the EEOC will seek to protect such workers based on the prohibition of sex discrimination.
- *Special Care Should be Taken with ADA Claims Based on the EEOC's Ongoing Close Scrutiny of Such Claims*. Over the past several years, the EEOC has filed more ADA lawsuits than any other type of discrimination claim, and FY 2015 was no different.[217] Three areas should be monitored during FY 2016: (1) employers with inflexible leave policies will continue to face a high risk of litigation by the EEOC, and employers should closely monitor *EEOC v. UPS*, a pattern-or-practice ADA lawsuit pending in federal court in Chicago, in which the EEOC is challenging what the EEOC views as an inflexible leave policy; (2) employers that fail to engage in the interactive process in dealing with requests for reasonable accommodation also may be vulnerable to cause findings and potential litigation by the EEOC; and (3) employer wellness policies determined not to be "voluntary" by the EEOC will create risk for employers. The EEOC's proposed regulations involving wellness programs providing for incentives for participation will also need to be watched based on their potential impact on wellness programs.
- *Increased Attention Will Be Placed on Equal Pay Issues.* Although the EEOC has filed a limited number of equal pay lawsuits in recent years, EEOC Chair Yang has underscored the pay disparity between the average earnings of women and men ("just 78 cents on the dollar" compared to men's wages based on U.S. census data). The EEOC has also issued a new publication discussing equal pay, and is providing extensive training on equal pay issues. These developments are a strong indication that increased attention will be placed on equal pay issues during the coming year. The EEOC's ability to initiate directed investigations focusing on equal pay without a discrimination charge even being filed also raises the stakes for employers. The class-based equal pay lawsuit filed by the EEOC in federal court in Maryland (*EEOC v. Maryland Insurance Administration*) is a case to closely monitor during the coming year.
- *The EEOC Will Continue to Vigorously Challenge Release Agreements and Arbitration Agreements that Are Viewed as Deterring or Interfering with an Individual's Right to File EEO Claims.* The EEOC has taken an aggressive approach by suing in the absence of a charge and challenging release and arbitration agreements, particularly shown by *EEOC v. CVS Pharmacy* and *EEOC v. Doherty*, respectively. In initiating such litigation, the EEOC is expected to continue to rely on Section 707 of Title VII and argue that an employer is "engaged in a pattern or practice of resistance to the full enjoyment of any of the rights" under Title VII in challenging such agreements. While the court in *Doherty* has fully endorsed the EEOC's approach, in *CVS*, the Seventh Circuit recently rejected the EEOC's position regarding its conciliation requirements prior to filing suit. Regardless of the procedural steps the courts will require, it seems clear that the EEOC will continue to take an active role in these issues. It would not be surprising if future litigation also included attacks on arbitration agreements that precluded class-type claims.
- *The EEOC Will Continue to Take an Active Role in Attacking Harassment in the Workplace.* Aside from the EEOC's generally successful track record in litigating harassment cases over the past fiscal year, and identifying ongoing concerns of harassment spanning all industries, the EEOC set up a special task force to address this issue. These developments are a clear signal to employers that during the coming year, the EEOC will continue to vigorously investigate harassment charges, including potentially expanding such investigations to cover other workers when faced with such charges, and vigorously litigating such claims against employers.

This opening section is intended to highlight significant developments over the past fiscal year, with particular focus paid to the EEOC's Strategic Plan, and related Strategic Enforcement Plan and systemic initiative. This section also provides a preview of anticipated trends for the coming year. A detailed review, update and analysis of regulatory developments, EEOC investigations and key developments in EEOC-related litigation, are included throughout this Annual Report on EEOC Developments.

215 *EEOC v. R.G. & G.R Funeral Homes, Inc*., Case No. 2:14-cv-13710 (E.D. Mich.) (filed Sept. 25, 2014).

216 *See Complainant v. Antony Foxx, Secretary, Dept. of Transportation (FAA*), EEOC Appeal No. 0120133080 (July 15, 2015).

217 According to the FY2015 PAR. among the 142 lawsuits filed by the agency during FY 2015, 53 contained ADA claims (*i.e.*, 37% of all EEOC lawsuits filed during FY 2015).

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

As discussed in this Report's opening section, the EEOC announced the publication of its FY 2015 Performance and Accountability Report (FY 2015 PAR) on November 16, 2015. In its 50th anniversary year of the establishment of the EEOC, the EEOC states that it "strengthened its ability to enforce the federal equal employment opportunity laws efficiently and effectively[,]" and "managed its charge workload in fiscal year 2015 strategically."[218] The FY 2015 PAR notes the Commission received 89,385 private-sector charges. This figure represents a slight increase of 1% from the previous year and curbs a three-year decline in the number of private-sector charges filed from FY 2012 through FY 2014. As shown by the following chart, the 89,385 charges filed in FY 2015 is 11% lower than the highest amount of charges recorded in FY 2011 (99,947):[219]

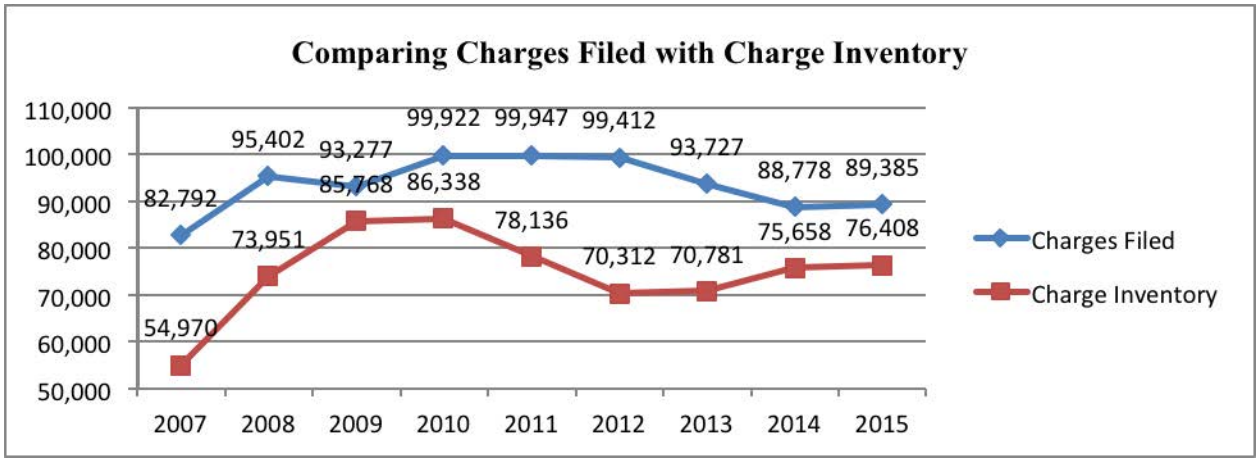
FISCAL YEAR	NUMBER OF CHARGES	% INCREASE/ DECREASE
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%

The EEOC "has worked to prioritize its enforcement and outreach in light of the number of charges it receives and the agency's limited resources."[220] To this end, the EEOC resolved 92,641 charges, but in turn, received 89,385 new charges. However, the EEOC's inventory of charges (*i.e.*, its charge backlog or "pending workload") now stands at 76,408. Moreover, the FY 2015 PAR states that the "EEOC faces a fundamental challenge in efficiently processing the pending inventory of private-sector discrimination charges while improving the quality of charge processing."[221] Indeed, since Jenny R. Yang was appointed as EEOC Chair in FY 2014, charge inventory has risen overall by 7.95%.

FISCAL YEAR	CHARGE INVENTORY	% INCREASE/ DECREASE
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%

218 *See* EEOC FY 2015 PAR at 11.
219 *Id.* at 32.
220 *Id.* at 31.
221 *Id.* at 52.

To combat this growing trend in its charge inventory, the EEOC hired 90 new investigators to process these discrimination claims.[222] This is a net increase of 16 investigators from FY 2014.[223] In addition, the EEOC has attempted to leverage technology in its charge handling, which includes the piloting of a secure portal where employers submit documents and communicate with investigators. Other technological advancements include options to the public to perform self-screening, submit pre-charge inquiries, and schedule intake interview appointments online.[224] However, as shown on the chart below, it remains to be seen whether the EEOC will be able to reduce its backlog in FY 2016 and beyond.



B. Continued Focus on Systemic Investigations and Litigation

In March 2006, as part of the EEOC's Systemic Task Force Report, the Commission reported that "combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency's daily work." While the EEOC had been involved in systemic investigations long before the Task Force was formed, the Commission clearly has been committed to expanding this initiative since 2006. The EEOC's Systemic Task Force defined systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."[225]

On February 2, 2015, the Commission modified its Strategic Plan for Fiscal Years 2012 through 2016 ("Strategic Plan").[226] Under Strategic Objective I, the EEOC is to accomplish its mission of "stop[ping] and remedy[ing] unlawful employment discrimination" through "strategic law enforcement."[227] Specifically, one of the EEOC's main strategies is to "use administrative and litigation mechanisms to identify and attack discriminatory policies and other instances of systemic discrimination."[228] The EEOC's performance measures for this particular strategy state that "22-24% of the cases in the agency's litigation docket" will be systemic cases by FY 2018.[229] Currently, the EEOC is meeting its goal – by fiscal year-end 2015, 48 of the 218 cases on its active litigation docket, or 22%, are reported as systemic cases.[230]

In meeting this performance metric, the EEOC has "continued to evaluate and refine systemic efforts" in FY 2015, which include specific plans in each EEOC district that primarily addresses (1) uses of resources, (2) coordination, and (3) investigation handling.[231] In addition, the Commission has continued its technology initiatives such as *The Systemic Watch List*, "a software tool that matches ongoing investigations or lawsuits," as well as the growth of the EEOC's *CaseWorks* system that "provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery and enable collaboration in the development of cases for litigation."[232]

222 *Id.* at 52.
223 *Id.*
224 *Id.* at 30, 32.
225 *Id.* at 22.
226 The Strategic Plan was approved by the Commission on February 22, 2012.
227 *Id.* at 17.
228 *Id.*
229 *Id.* at 18.
230 *Id.* at 22.
231 *Id.* at 35.
232 *Id.*

C. Systemic Investigations – A Comparison of the Last Four Fiscal Years

A review of the Commission's PARs for the last four fiscal years demonstrates a return to the monetary recovery trend that was present prior to FY 2014.

SYSTEMIC INVESTIGATIONS	2012	2013	2014	2015
Number Completed	240	300	260	268
Settlements or Conciliation Agreements[233]	65	63	78	70
Monetary Recovery	$36.2 million	$40 million	$13 million	$33.5 million
Reasonable Cause Findings	94	106	118	109
Systemic Lawsuits Filed	12	21	17	16

The agency credits the increase in the monetary recoveries received on its recruitment of more lead systemic investigators at the end of FY 2014 who are "dedicated exclusively to development and coordination of systemic investigations."[234] However, the data indicates that there lacks a marked increase in the EEOC's level of productivity despite its significant investment in personnel and technology.

As discussed elsewhere in this Report, the Commission has continued to seek assistance from the courts during the course of various investigations, particularly systemic investigations. For FY 2015, the Commission referred to having filed 32 "subpoena enforcement actions,"[235]which is in line with similar subpoena enforcement filing figures from prior years—*i.e.*, FY 2014 (34 "subpoena enforcement actions"), FY 2012 (33 "subpoena enforcement and other actions"),[236] and FY 2013 (17 "subpoena enforcement and other actions")[237]

D. EEOC Litigation and Systemic Initiative

For FY 2015, consistent with the EEOC's current focus on "strategic law enforcement," the EEOC filed 142 "merits" lawsuits, 9 more than in FY 2014, which included 100 individual suits, 26 non-systemic class suits and 16 systemic suits.[238] Until FY 2013, there had been a steady decrease in the number of merits lawsuits filed since FY 2005 – a total of 381 suits were filed in that year.[239] Overall, however, there has been a dramatic decrease (by about 50%) in merits lawsuits filed over the past three years: 261 merits lawsuits were filed in FY 2011 compared to the 133 merits suits filed in FY 2014 and the 142 merits suits filed in FY 2015.

233 The EEOC FY 2015 PAR states, "In fiscal year 2015, the EEOC field offices resolved 268 systemic investigations and obtained over $33.5 million in remedies in those resolutions. These resolutions included voluntary conciliation agreements following 70 systemic investigations in which the Commission had found reasonable cause to believe that discrimination occurred." FY 2015 PAR at 36. As stated in the FY 2014 PAR, "[i]n FY 2014, the agency obtained pre-determination settlements in 34 systemic investigations and conciliation agreements in 44 systemic investigations. FY 2014 PAR at 29. According to the FY 2013 PAR, 63 of the agency's systemic investigations were resolved through the EEOC's conciliation process. FY 2013 PAR at 32. In FY 2012, there were 46 successful conciliations of investigations and pre-determination settlements in 19 systemic investigations. FY 2012 PAR at 28.

234 FY 2015 PAR. at 35.

235 FY 2014 PAR at 27.

236 *Id.* at 27.

237 *Id.* at 39.

238 FY 2015 PAR at 35.

239 *See* EEOC, EEOC Litigation Statistics, FY 1997 through FY 2014, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

YEAR	INDIVIDUAL CASES	"MULTIPLE VICTIM" CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC "MERITS"[240] LAWSUITS
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142

Particularly noteworthy is that a vast majority of the EEOC's lawsuits are filed during the last two months of the EEOC's fiscal year. As an example, between August 1, 2015 and September 30, 2015, the EEOC filed 81 lawsuits, which was 57% of the lawsuits filed during the entire fiscal year.[241] Similarly, during FY 2014, of the 133 lawsuits filed, 75 suits (56%) were filed during the last two months of the fiscal year.

In reviewing all new court filings, the EEOC lawsuits included 83 Title VII claims, 53 Americans with Disabilities Act (ADA) claims, 14 Age Discrimination in Employment Act (ADEA) claims, 7 Equal Pay Act (EPA) claims, and 2 Genetic Information Non-Discrimination Act (GINA) clam.[242] Based on a review of reported filings by the EEOC and Littler's tracking of all EEOC filed lawsuits, a more detailed breakdown indicates the following:

Causes of Action	Number of Lawsuits
ADA Claims	53
Multiple Claims	40
Retaliation	23
Sex Discrimination or Related Harassment	39
Pregnancy Discrimination	13
Racial Discrimination or Related Harassment	18
Age Discrimination	14
Religious Discrimination or Related Harassment	6
National Origin Discrimination or Related Harassment	10

240 *See id.* The EEOC has defined "merits" suits as direct lawsuits or by intervention involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

241 Littler monitored EEOC court filings over the past fiscal year, and the information reported on the Commission's timing for filing its lawsuits in FY 2015 is based on the firm's tracking.

242 FY 2014 PAR at 25.

The top 12 states for EEOC lawsuits filed over the past fiscal year are as follows:[243]

State	Number of Lawsuits
Texas	17
Illinois	16
Maryland	13
California	11
Arizona	9
North Carolina	9
Florida	8
Michigan	7
Pennsylvania	7
Georgia	6
New York	6
Tennessee	6

With respect to the Commission's efforts on behalf of non-systemic class suits and its systemic initiative, the FY 2015 PAR described active EEOC lawsuits as follows:

- Among the 218 lawsuits on its active docket at the end of FY 2015, 40 (18%) were non-systemic class cases and 48 (22%) involved challenges to systemic discrimination, thus showing that 40% of all pending matters involve claims on behalf of more than one purported victim.[244]
- In FY 2015, the Commission filed 16 systemic lawsuits.
- The Commission resolved 155 merits lawsuits during FY 2015 and recovered $65.3 million, which included 87 Title VII claims, 61 ADA claims, 12 ADEA claims, one EPA claim, and one GINA claim.[245]

Based on the EEOC's new Strategic Plan, a central aim is "combat[ing] employment discrimination through strategic law enforcement."[246] A key performance measure has been the establishment of a "baseline" by examining the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against that baseline. For FY 2012, the Commission established a baseline of 20%; the FY 2015 target was to increase the percentage of systemic cases on the agency's litigation docket to approximately 20-22% of all active cases.[247] In FY 2014, the EEOC "reported that 48 out of 218, or 22% of the cases on its litigation docket were systemic, meeting the annual target."[248] By FY 2016, "the agency projects that 22-24% of cases on its active litigation docket will be systemic cases."[249]

243 Littler monitored EEOC court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not make publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis, although charge activity on a state-by-state basis has been available from the Commission's website since May 2012. *See* EEOC, FY 2009 - 2013 EEOC Charge Receipts by State (includes U.S. Territories) and Basis*, *available at* http://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm.

244 FY 2015 PAR at 35.

245 *Id*. at 35.

246 *Id*. at 10.

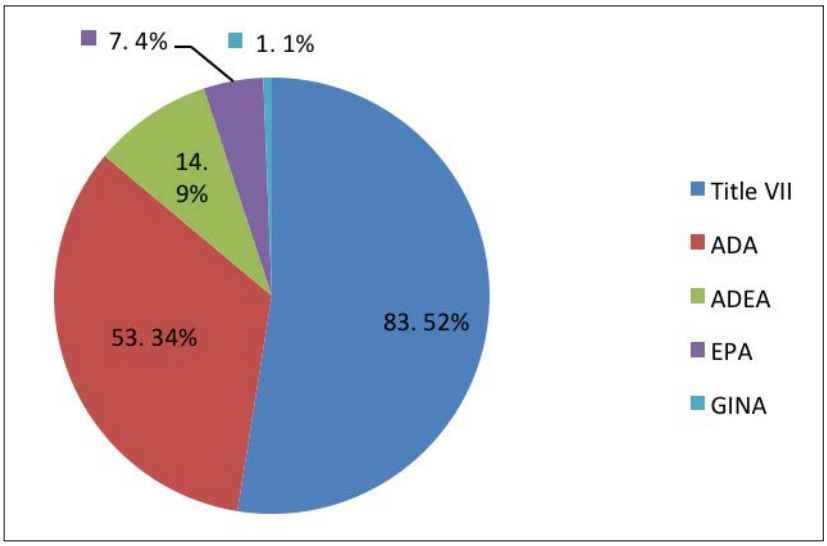
247 *Id*. at 22.

248 *Id*.

249 FY 2014 PAR at 15.

E. Highlights From EEOC Litigation Statistics

As mentioned previously, for FY 2015 the Commission reported that of the 142 merit lawsuits filed, 83 of those claims implicated Title VII, 53 contained ADA claims, 14 contained ADEA claims, 7 lawsuits involved EPA claims, and 1 contained a GINA claim.[250]



As the Commission has continued its enforcement of statutes traditionally under its purview, FY 2015 marks the third time the Commission has pursued litigation based on genetic information since the Commission issued its final regulations on GINA in 2010.[251] In all seven lawsuits, the EEOC focused on the fact that the defendant companies requested family medical history when conducting physical examinations.[252] In four of the cases, physical examinations occurred after an offer of employment had been made to the candidates, whereas the remaining cases involved the company requiring a mandatory physical exam as part of the employees' continued employment. Also of note, in four of the seven GINA lawsuits filed by the Commission since 2013, the agency alleged pattern-or-practice violations by the company, which further highlights the EEOC's efforts in this new, untapped area.[253] Moreover, in all seven lawsuits, the EEOC included claims of disability discrimination based on the ADA.[254]

250 FY 2015 PAR at 35. However, Littler's own files indicate that the EEOC filed at least two lawsuits alleging violations of GINA in FY 2015. *See EEOC v. Honeywell International*, No. 0:14-cv-4517 (Minn. Oct. 27, 2014); and *EEOC v. Bedford Weaving, Inc.*, No. 6:15cv27 (W.D. Va. Aug. 13, 2015).

251 FY 2011 PAR at 5. The EEOC issued its final rule implementing the GINA employment provisions on November 9, 2010.

252 *See EEOC v. Fabricut, Inc.*, No. 4:13-cv-248 (N.D. Okla. Apr. 29, 2013); *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013); *EEOC v. All Star Seed*, No. 2:13-cv-7196 (E.D. Cal. Sept. 30, 2013); *EEOC v. Cummins Power Generation, Inc.*, No. 14-cv-03408-SRN-SER (D. Minn. Sept. 8, 2014); *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014); *EEOC v. Honeywell International*, No. 0:14-cv-4517 (Minn. Oct. 27, 2014); and *EEOC v. Bedford Weaving, Inc.*, No. 6:15cv27 (W.D. Va. Aug. 13, 2015).

253 *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013), *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014); *EEOC v. Honeywell International*, No. 0:14-cv-4517 (Minn. Oct. 27, 2014); and *EEOC v. Bedford Weaving, Inc.*, No. 6:15cv27 (W.D. Va. Aug. 13, 2015).

254 *See EEOC v. Fabricut, Inc.*, No. 4:13-cv-248 (N.D. Okla. Apr. 29, 2013); *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013); *EEOC v. All Star Seed*, No. 2:13-cv-7196 (E.D. Cal. Sept. 30, 2013); *EEOC v. Cummins Power Generation, Inc.*, No. 14-cv-03408-SRN-SER (D. Minn. Sept. 8, 2014); *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014); *EEOC v. Honeywell International*, No. 0:14-cv-4517 (Minn. Oct. 27, 2014); and *EEOC v. Bedford Weaving, Inc.*, No. 6:15cv27 (W.D. Va. Aug. 13, 2015).

F. Mediation Efforts

In its FY 2015 PAR, the "EEOC's mediation, settlement and conciliation efforts serve as prime examples of an investment in strategies to resolve workplace disputes early, efficiently, and with lasting impact."[255] Out of a total of 10,579 mediations conducted, the EEOC was able to obtain 8,243 mediated resolutions. Moreover, the Commission secured $157.4 million in monetary benefits for complainants through its mediation program. Comparatively, the number of mediated resolutions has increased since FY 2014 in which there were a total of 7,846 mediated resolutions out of 10,221 conducted.[256]

G. Significant EEOC Settlements and Monetary Recovery

As discussed above, in fiscal year 2015, the EEOC placed a high priority on systemic discrimination redress. To that end, the EEOC increased its focus on charges of alleged discrimination that have a broad impact on an industry, profession, company, or geographic area; invested its resources in increasing the number of investigators and social science research staff it employs; and continued its technology initiatives, which led to the completion and expansion of software tools and systems that both improved coordination in the development of systemic investigations and enabled collaboration in the development of cases for litigation.

These efforts resulted in a number of high-dollar settlements. At least 11 settlements involving the EEOC exceeded $1,000,000 in FY 2015. Two of these settlements were for more than $10 million, both of which involved race and national origin discrimination claims. The most significant settlement of $14.5 million involved a nationwide pattern and practice of race and national origin discrimination.[257] Specifically, the EEOC alleged the company assigned minorities to the lowest-level jobs, failed to train and promote minorities, tolerated a hostile work environment, and retaliated against employees who complained about discriminatory practices.

Another notable settlement involved Local 28 of the Sheet Metal Workers' International Association. Here, the EEOC alleged that the Union discriminated against non-white journeypersons on the basis of race. The EEOC estimates that settlement payments will reach about $12.7 million since the settlement includes payment on a per hour basis based on services performed.

One other notable settlement involved an automobile manufacturing facility, where criminal background screenings of all existing logistics employees were required. The EEOC contended that the screening process had a disparate impact on African American employees and that there was no business necessity justification for the new requirements. The parties resolved the matter for $1.6 million to be paid out to 56 aggrieved individuals.

While fewer in number, jury verdicts in FY 2015 were no less greater in award amounts. On September 10, 2015, a unanimous Florida jury awarded five former farm employees nearly $17.4 million in a lawsuit alleging sexual harassment and retaliation. The five female claimants alleged two of the owner's sons and a third male supervisor engaged in graphic and extreme acts of sexual harassment, including groping, sexual advances, and attempted rape. The amount was later reduced to $8.9 million in light of Title VII's statutory caps.

The EEOC was not always the victor, however. Also in September, a federal judge ordered the agency to pay more than $938,000 in attorneys' fees to defendant Freeman, the prevailing party in a decision handed down by the Fourth Circuit in February 2015.[258] The EEOC had alleged the defendant's use of background checks had a disparate impact on African American and female job applicants, and was therefore unlawful. In support of its argument, the EEOC relied on expert testimony the district court found "rife with analytical errors" and "completely unreliable." The district court ultimately granted Freeman's motion for summary judgment, which the Fourth Circuit affirmed.[259] Because the EEOC continued to pursue a case that was essentially unwinnable, the nearly $1 million fee award was appropriate, the court reasoned.

With respect to monetary recovery for direct, indirect, and intervention lawsuits by statute, the EEOC secured $56.9 million in Title VII resolutions, $6.2 million in ADA resolutions, $819,500 in ADEA resolutions, $0 in EPA resolutions, and $1.3 million in resolutions involving more than one statute.

255 FY 2015 PAR at 32.

256 FY 2015 PAR at 32-33.

257 According to the EEOC, the company will provide $12,260,000 into a settlement fund for distribution to the class. Related charges filed with the EEOC resulted in separate out-of-court conciliation agreements that, when combined with the nearly $12.3 million settlement, provide for total monetary relief of $14.5 million.

258 *EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. Sept. 3, 2015).

259 *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

The majority of the EEOC litigation remains "single victim" suits, with a sharp increase from 89 individual suits in FY 2013 to 105 in FY 2014. Although the EEOC continues its trend of filing and settling systemic, pattern or practice and "class" claims, there has been a marked decrease in such claims in FY 2014 from the year prior. Employers should consider this trend when evaluating their corporate policies or practices that may be susceptible to an EEOC challenge.

Appendix A of this Report includes a description of other notable consent decrees and conciliation agreements averaging $1 million or more, as well as significant judgments and jury verdicts.

H. Appellate Cases

Analyzing the cases in which the EEOC appealed or filed an amicus brief is a good way to determine which issues and legal theories the Commission deems most important. The agency has created a searchable database on its website where it posts such amicus and appellate information.[260] As the agency noted in the FY 2015 PAR, by the end of fiscal year, the EEOC was involved in 31 appeals in EEOC enforcement actions, and had filed amicus briefs in 20 private lawsuits.[261] In addition, a number of other significant appellate cases that were filed in prior fiscal years were decided in FY 2015. Of the decided cases, the results were decidedly mixed. The EEOC had some significant wins as well as losses this year. During this time, the Commission honed in on a number of issues affecting job applicants, including religious accommodations, disability accommodations, and criminal background checks.

1. Significant Wins for the EEOC

As discussed in the first section of this Report, the U.S. Supreme Court's decision in *EEOC v. Abercrombie & Fitch Stores, Inc.*[262] was a significant win for the Commission. In *Abercrombie*, the EEOC filed an action against the company on an applicant's behalf. The EEOC claimed that Abercrombie had refused to hire the applicant because her headscarf allegedly violated the company's "Look Policy." In the litigation that followed, the company argued it could not be liable for disparate treatment under Title VII because the employer could not demonstrate that it had "actual knowledge" of the applicant's need for a religious accommodation. In overruling the Tenth Circuit's decision, the Supreme Court held that an applicant "need only show that his need for an accommodation was a motivating factor in the employer's decision" to demonstrate that she had been subjected to disparate treatment based on a protected category. In doing so, the Court set forth a new rule for disparate treatment claims based on failure to accommodate a religious practice: "An employer may not make an applicant's religious practice, confirmed or otherwise, a factor in employment decisions." Regardless of the employer's knowledge of an applicant's need for an accommodation, "an employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed." Additionally, the Court rejected the argument that a claim based on a failure to accommodate an applicant's religious practice must be raised as a disparate impact claim, not a disparate treatment claim. The Court went further in prohibiting disparate treatment based on the need for religious accommodations by observing that even neutral policies may constitute intentional discrimination under a disparate treatment theory. It explained that Title VII demands more than mere neutrality with regard to religious practices. Rather, employers are required to make accommodations to otherwise-neutral policies.

The EEOC was also victorious in *EEOC v. Mach Mining*, in which the Supreme Court reversed the Seventh Circuit ruling that EEOC conciliations could not be reviewed to determine whether the EEOC had fulfilled its Title VII duty to attempt conciliation.[263] Instead, the Court held that "Congress rarely intends to prevent courts from enforcing its directives to federal agencies [and] [f]or that reason, this Court applies a 'strong presumption' favoring judicial review of administrative action." However, the Court did narrow the scope of judicial review of the EEOC's conciliation activities to a "barebones review" of the measures enumerated in 42 U.S.C. §2000e–5(b): "that the EEOC communicate in some way (through 'conference, conciliation, and persuasion') about an 'alleged unlawful employment practice' in an 'endeavor' to achieve an employer's voluntary compliance." This decision "allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them. And such review can occur consistent with the statute's non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (i.e., statements made or positions taken) during those discussions."

260 Commission Appellate and Amicus Briefs, http://www1.eeoc.gov/eeoc/litigation/briefs.cfm?redirected=http://www.eeoc.gov/eeoc/litigation/index.cfm.

261 FY 2015 PAR at 34.

262 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (U.S. 2015).

263 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).

The EEOC celebrated another significant win in *EEOC v. New Breed Logistics*.[264] In *New Breed,* the Sixth Circuit affirmed a $1.5 million judgment in a sexual harassment and retaliation claim, holding that the district court had properly denied a Rule 59(a) motion for a new trial after finding that there was sufficient evidence to support the jury's verdict because a demand that a supervisor cease his harassing behavior constituted a protected activity under Title VII. Specifically, the EEOC had presented evidence to the jury to show that: (1) the relevant decision makers knew of or could have reasonably been persuaded by individuals who knew of the protected activity; and (2) causation between the employees' protected activities and the termination of their employment could have been inferred due to their close temporal proximity. Furthermore, the district court found that the EEOC submitted evidence sufficient for the jury to reject the employer's legitimate, nonretaliatory reasons for discharging the employees as pretextual and had, therefore, demonstrated that the protected activity was the "but-for" cause of the adverse employment actions. The court further held that the employer was not entitled to a new trial on the sexual harassment verdict because the supervisor's sexual harassment of the employees had resulted in a tangible employment action for which the employer could be vicariously liable. Finally, the district court held that the employer was not entitled to judgment as a matter of law or a new trial as to the punitive damages award because the EEOC had presented evidence sufficient to show that the supervisor acted with malice or reckless indifference to federally-protected rights in retaliating against the claimants.

One FY 2015 decision that can be deemed an EEOC win on the attorneys' fee front will get a second look in 2016. *EEOC v. CRST Van Expedited, Inc.*[265] has been an ongoing saga involving a suit the EEOC filed against a trucking company, claiming that it violated Title VII by subjecting 154 female employees to a hostile work environment. The district court had dismissed many of these claims, but the EEOC appealed, and the parties eventually settled the claim of one of the women alleging harassment. The court then awarded the employer over $4.7 million in fees and costs, holding that the employer was the "prevailing party" with respect to the remaining 153 claimants. The award also encompassed a sanction for the EEOC's failure to reasonably investigate and conciliate in good faith its claims against the employer. After the EEOC appealed, the Eighth Circuit reversed the portion of the district court's award of attorneys' fees that had been based on a purported pattern-or-practice claim, holding that the EEOC had not made such a claim. The court of appeals also reversed the lower court's award of attorneys' fees relating to the dismissal of 67 claims based on the EEOC's alleged failure to investigate and conciliate, holding that courts may not review the sufficiency of an investigation but, rather, only whether an investigation had occurred. Additionally, the Eighth Circuit found that the district court had improperly failed to individually analyze whether each of the 153 claims was "frivolous, unreasonable, or groundless," as required by legal precedent. Accordingly, the case was remanded back to the district court to make individual assessments on the merits of the remaining claims.

In May 2015, the company filed a petition for certiorari after the full Eighth Circuit refused to revisit the appellate panel's decision to overturn the attorneys' fee award. On December 4, 2015, the U.S. Supreme Court agreed to take up the case, and consider whether a dismissal of a Title VII case, based on the EEOC's failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of a attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k).

Of note in *EEOC v. Northern Star Hospitality,*[266] is the Seventh Circuit's decision to join the Third and Tenth Circuits in affirming a tax-component award in the Title VII context. The court asserted at the start that there was no question that the former employer, now dissolved, engaged in discriminatory and retaliatory activity. Rather, the question at issue was whether there was successor liability to allow recovery for the aggrieved party, and if so, whether, along with the front pay and back pay granted, the law would allow for a tax-component award to offset impending income-tax liability on the lump-sum back-pay award. Regarding the successor liability question in the federal employment law context, the court held that appellants met the following five-factor test: "(1) whether the successor had notice of the pending lawsuit; (2) whether the predecessor could have provided the relief sought before the sale or dissolution; (3) whether the predecessor could have provided relief after the sale or dissolution; (4) whether the successor can provide the relief sought; and (5) whether there is continuity between the operations and work force of the predecessor and successor." With the issue of successor liability resolved, the court then held that because the wronged employee would be bumped into a higher tax bracket upon his receipt of back pay, and because the resulting tax increase "would not have occurred had he received the pay on a regular, scheduled basis, [and]...had he not been unlawfully terminated," not allowing for the tax component award would not make him whole and, as a result, would "offend" Title VII's remedial scheme.

264 *EEOC v. New Breed Logistics*, 783 F.3d 1057 (6th Cir. 2015).

265 *EEOC v. CRST Van Expedited, Inc.*, 774 F.3d 1169 (8th Cir. 2014), *CRST Van Expedited, Inc. v. EEOC,* No. 14-1375, *cert. granted* (U.S. Dec. 4, 2015).

266 *EEOC v. Northern Star Hospitality, Inc. d/b/a Sparx Restaurant*, 777 F.3d 898 (7th Cir. 2015).

2. Significant Wins for the Employer

In *EEOC v. Freeman*,[267] the Fourth Circuit affirmed summary judgment in favor of the employer where the EEOC had challenged the employer's use of criminal background and credit history checks in the hiring process. The EEOC had alleged that background and credit history checks had a disparate impact on African American and male applicants, and that the credit checks had a disparate impact on African American job applicants. In a unanimous decision, the court affirmed summary judgment in favor of the employer, agreeing with the lower court's exclusion of the EEOC expert's testimony based on numerous errors that made the expert opinions unreliable. The court admonished the EEOC to be "constantly vigilant that it does not abuse the power conferred upon it by Congress," noting that the EEOC's "conduct in this case suggests that its exercise of vigilance has been lacking." Notably, the court did not address the underlying issue of whether the background and credit checks used by the employer had a disparate impact on certain protected categories.

Another key appellate case in FY 2015 centered on improper jury instructions in an ADA case. In *EEOC v. Beverage Distributors Co.*,[268] the EEOC brought an enforcement action against a beverage distributor for allegedly discriminating against a job applicant based on his disability when it withdrew its conditional offer of employment as a Night Warehouse Loader upon being informed that the applicant was legally blind. The jury found the company liable for discrimination because it found claimant was not a "direct threat" to himself or others.

On appeal, the company argued, among other things, that the direct threat jury instruction constituted reversible error. An employer can defend against a failure-to-hire ADA claim by asserting that the individual posed a "direct threat to the health or safety of themselves or others."[269] A "direct threat" involves "a significant risk of substantial harm to the health or safety of the [person] or others that cannot be eliminated or reduced by reasonable accommodation."[270] The jury instruction claimed the company had to "prove" by a "preponderance of the evidence" that the individual posed a direct threat. The instruction claimed also that "an employer's subjective belief that a direct threat exists, even if maintained in good faith, is not sufficient unless it is objectively reasonable."[271] According to the Tenth Circuit, this instruction constituted reversible error. The company "should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary."[272] The court noted also that the second part of the instruction did not cure the error by directing the jury, without explanation, to consider the reasonableness of the company's belief.[273]

In 2015, several appellate cases also addressed issues surrounding disability accommodations for employees as well as applicants. For example, in *EEOC v. Womble Carlyle Sandridge & Rice, LLP*,[274] the EEOC had filed suit on behalf of an employee who had been injured on the job due to heavy lifting. The injury occurred after the employee had experienced complications from breast cancer treatment and surgery. The employee submitted a doctor's note to her employer stating that, due to the risk of lymphedema – a condition caused by breast cancer treatment that affects the circulatory and immune symptoms and is triggered by heavy lifting – she could not lift more than 10 pounds. Her employer accommodated her 10-pound lifting restriction for six months by assigning her light-duty work, including a large scanning project. However, the employee's supervisors testified that, after the scanning project was complete, the employee was mostly idle and worked no more than 20% of each day. After the employer considered whether the employee could be transferred to another position, the employee was placed on a medical leave of absence. When her leave ran out, her employment was terminated. The district court granted summary judgment in favor of the employer, reasoning that the lifting restriction prevented the employee from performing an essential function of her job, and that excusing the employee from all heavy lifting would not have been a reasonable accommodation. The Fourth Circuit affirmed, holding that summary judgment was appropriate because the employee was not a "qualified individual" as defined by the ADA because she could not perform essential functions of her job and the EEOC could not identify any reasonable accommodation to enable performance of the essential functions.

267 *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

268 *EEOC v. Beverage Distributors*, 2014 U.S. Dist. LEXIS 155791 (D. Colo. Nov. 1, 2014).

269 29 C.F.R. § 1630.15(b)(2).

270 29 C.F.R. § 1630.2(r).

271 *EEOC v. Beverage Distributors*, 2015 U.S. App. LEXIS 4067, at *6 (10th Cir. Mar. 16, 2015).

272 *Beverage Distributors*, 2015 U.S. App. LEXIS 4067, at *7.

273 A new trial was set for 2016, but the parties agreed to a settlement in late 2015. *See* Press Release, EEOC, *Beverage Distributors Company to Pay $160,000 to Settle EEOC Disability Lawsuit* (Dec. 7, 2015), *available at http://www.eeoc.gov/eeoc/newsroom/release/12-7-15a.cfm.*

274 *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 616 Fed. Appx. 588 (4th Cir. 2015).

Additionally, in *EEOC v. Ford Motor Co.*,[275] the Sixth Circuit affirmed the lower court's order granting summary judgment in favor of the employer where the EEOC alleged that the employer had failed to reasonably accommodate the claimant under the ADA by denying her telecommuting request and also had retaliated against her. The claimant, a former resale buyer for the employer, had sought an accommodation to work from home for up to four days per week on an as-needed basis. The employer denied her request because regular and predictable attendance at work was essential to the claimant's highly interactive job. After denying her request for this accommodation, the employer terminated her employment for chronic attendance issues and poor performance. While the EEOC argued that other resale buyers' telecommuting practices and advanced technology created a genuine issue of material fact as to whether on-site attendance was an essential function of her job, the court held that claimant's testimony did not contradict the evidence that a resale buyer could not telecommute on an unpredictable basis without resulting in decreased production standards. The court also held that the telecommuting practices of other resale buyers were predictable, unlike the claimant's request to telecommute intermittently, and that no technology existed that would make the claimant's highly interactive position able to be effectively performed at home. The court explicitly stated that its ruling requires summary judgment where an employer's judgment regarding essential job functions is "job-related, uniformly enforced, and consistent with business necessity." Additionally, the court determined that no reasonable jury could find that claimant's employment was terminated for reasons other than her well-documented poor performance.

In another noteworthy case, *EEOC v. Allstate Ins. Co.*,[276] the EEOC alleged that the employer's policy requiring terminated at-will employees to sign a release of potential legal claims in exchange for continued employment as independent contractors constituted unlawful retaliation, even though the release language did not preclude these former employees from filing a claim with the EEOC. The Third Circuit affirmed the lower court's grant of the employer's motion for summary judgment, reasoning that the releases were knowingly and voluntarily signed and adequate consideration had been offered in exchange for the employees' release of claims. Furthermore, the court noted that the employer could have simply fired the employees without providing them with options for continued work and that the EEOC had failed to explain why financial pressure to sign a release in exchange for future work was more offensive to the anti-retaliation statutes than the pressure an employee is bound to feel when required to sign a release in exchange for severance pay.

3. Key Cases for Systemic Litigation

Two appellate cases—one decided and one pending—have significant implications for systemic litigation. Whether the EEOC can pursue a pattern-or-practice claim seeking compensatory or punitive damages under Section 706 of Title VII is front-and-center in *EEOC v. Bass Pro Outdoor World, LLC*.[277] In late 2014, a Texas district court judge ruled that the EEOC could support race discrimination claims on behalf of employees who were allegedly denied jobs by using representative data and showing that the company had engaged in a pattern of discriminatory practices. In April 2011, the EEOC had issued a Determination that the company discriminated against African American applicants and employees on the basis of their race in its retail stores and other facilities across the country in violation of Section 706 of Title VII. Notably, the court permitted the EEOC to use the "*Franks/Teamsters*" model of proof, meaning that every class member is presumed to have been discriminated against, unless the employer can prove otherwise. The EEOC, therefore, was permitted to file the lawsuit on behalf of a large group of individuals, even though no individual applicants or employees had been identified during the investigation.

The district court granted the company's motion for interlocutory appeal of the court's decision to grant the EEOC's Motion for Application of the *Franks/Teamsters* Model to the Section 706 hiring claim and its denial of the company's Renewed Motion for Summary Judgment. In granting the company's motion for interlocutory appeal of the order allowing the EEOC to use the *Teamsters* model of proof, which was typically used in Section 706 claims brought in class actions certified under Rule 23 and in Section 707 "pattern-or-practice" claims, the court found that whether the EEOC could use the *Teamsters* model of proof would impact the future course of litigation. For this reason, immediate appeal would advance the termination of litigation because, if the EEOC could not use the *Teamsters* model of proof, the parties would be required to retry each individual case in accordance with the *McDonnell Douglas* burden-shifting paradigm. In granting the company's interlocutory appeal of its denial of summary judgment on the EEOC's Section 706 claims, the court reasoned that a prerequisite to filing a Section 706 claim is that the EEOC must conduct an investigation and

275 *EEOC v. Ford Motor Co.*, 782 F.3d 753, 757 (6th Cir. 2015).

276 *EEOC v. Allstate ins. Co.*, 778 F.3d 444 (3d Cir. 2015).

277 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014); *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 1520078 (5th Cir.) (Order granting appeal filed Feb. 10, 2015).

conciliation of the claims, and the company had argued that the EEOC had not conducted an investigation, as the agency had never identified the names of the alleged victims of discrimination and had not provided the company with enough information to allow it to identify those individuals. If the court had held otherwise, the EEOC's failure to investigate would be the basis for summary judgment for Bass Pro on the Section 706 claims. Therefore, an interlocutory appeal would materially advance the termination of the litigation, because if the decision were reversed, the Section 706 claims would be dismissed. Texas district courts are divided on whether to allow the EEOC to proceed on Section 706 claims on behalf of a large group of individuals where no individual applicants or employees have been identified during the investigation, and the appeal in this case has not yet been decided. As previously discussed, only one federal circuit court of appeal has held that the EEOC could pursue a pattern-or-practice claim under Section 706.[278]

In the same case, the court also granted Bass Pro's motion to certify an interlocutory appeal of the court's order denying its summary judgment motion, opening the door to the question of whether courts may properly assess the sufficiency of an EEOC investigation, rather than merely determining whether one occurred. The company had argued that the EEOC had abdicated its responsibility to conciliate in good faith and asked the court to dismiss the lawsuit. In response, the EEOC essentially asked the court not to consider the company's motion, arguing that the sufficiency of a party's efforts to conciliate were not subject to judicial review. The court agreed and denied Bass Pro's motion for summary judgment on the issue.

In a separate case stemming from systemic allegations, *EEOC v. Sterling Jewelers, Inc.*,[279] the Second Circuit emphasized the EEOC's independent authority to determine the necessary scope of investigation. In *Sterling Jewelers*, the EEOC filed a Title VII action against a jewelry company, alleging that it had engaged in a nationwide practice of sex-based pay and promotion discrimination. The court vacated the district court's order granting summary judgment to the employer, holding that the district court, although purporting to examine the existence of the EEOC's investigation, improperly considered its sufficiency. The court held that the nature and extent of an EEOC investigation is within the agency's discretion and that a court's review of such an investigation would extend judicial review too far.

The company filed a petition for a rehearing *en banc*, which the Second Circuit denied on December 1, 2015.

A full discussion of noteworthy pending and decided appellate and amicus cases can be found in Appendix B of this Report.

278 *Serrano v. Cintas*, 699 F. 3d 884 (6th Cir. 2012), *reh'g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied*, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013).

279 *EEOC v. Sterling Jewelers Inc.*, 801 F.3d 96 (2d Cir. 2015), *reh'g denied* (2d Cir. Dec. 1, 2015).

III. EEOC REGULATORY AGENDA AND RELATED DEVELOPMENTS

A. Update on the Commission and Congressional Oversight

In FY 2015, the Commission operated with a full five-member panel with a Democratic majority, allowing the agency to advance an aggressive agenda, including current enforcement priorities as detailed in the Strategic Enforcement Plan[280] and more worker-friendly guidance. On December 3, 2014, the Senate voted to confirm the nominations of Charlotte Burrows as a Commissioner, and David Lopez as General Counsel, of the U.S. Equal Employment Opportunity Commission.[281] The remaining Commissioners and their term expirations are as follows:

- Constance Barker (R) (July 1, 2016)
- Charlotte Burrows (D) (July 1, 2019)
- Chai Feldblum (D) (July 1, 2018)
- Victoria Lipnic (R) (July 1, 2020)
- Jenny Yang (D) (Chair) (July 1, 2017)

The confirmation of Burrows and Lopez came at a time when some members of Congress had been critical of the EEOC's regulatory and enforcement agenda. Shortly before the confirmation votes, Senator Lamar Alexander (R-TN) issued a report criticizing the agency's recent activities: *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency*.[282] Senator Alexander, Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, and others have reiterated concerns, expressed in the Report, that there exists a lack of transparency regarding the agency's issuance of guidance documents without soliciting meaningful public input, and that the agency pours too much of its energy and resources into litigating "high-profile" lawsuits and not enough into addressing filed discrimination charges.[283]

Senator Alexander reiterated these concerns during a May 19, 2015 HELP Committee hearing examining EEOC's enforcement and litigation programs. During the hearing, EEOC Chair Yang and General Counsel Lopez responded to a variety of questions from Senator Alexander and others on the Committee about the agency's charge backlog, its proposed rule governing wellness programs under the Americans with Disabilities Act, and the use of Commissioner's charges and directed investigations to pursue alleged discrimination when no claimant has come forward.

The House Education and Workforce Committee had similarly been scrutinizing the EEOC's litigation and enforcement activity. On March 24, 2015, the House Subcommittee on Workforce Protections held a hearing on a series of bills that would provide greater transparency and accountability for the EEOC. The legislation, introduced by Subcommittee Chairman Tim Walberg (R-MI), includes H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015" and H.R. 550, "EEOC Transparency and Accountability Act." Even though this legislation may not advance through both Houses of Congress and make it to the President's desk, it nonetheless reflects Congress' criticism of the EEOC's enforcement and litigation strategy. Scrutiny of the agency is expected to continue for the remainder of the current Republican-controlled Congress.

B. EEOC Strategic Enforcement Plan and Updates on Strategic Plan

In FY 2012, the EEOC introduced its Strategic Plan for Fiscal Years 2012 – 2016 ("the Strategic Plan"),[284] which sets forth its strategy for achieving its fundamental mission to stop and remedy unlawful employment discrimination, and directed the Commission to develop a Strategic Enforcement Plan (SEP) that: (1) establishes priorities; and (2) integrates

280 EEOC, United States Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

281 Press Release, EEOC, Charlotte Burrows Sworn in as EEOC Commissioner (Jan. 13, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-13-15.cfm; Ilyse W. Schuman, *Senate Confirms EEOC Nominations*, Littler ASAP (Dec. 3, 2014), http://www.littler.com/publication-press/publication/senate-confirms-eeoc-nominations-0.

282 Lamar Alexander, Minority Staff Report, U.S. Senate Committee on Health, Education, Labor and Pensions, EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities, and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency (Nov. 24, 2014), *available at* http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf.

283 Ilyse W. Schuman, *Senate Confirms EEOC Nominations*, Littler ASAP (Dec. 3, 2014), Ilyse W. Schuman, *HELP Committee Considers EEOC Nominations*, Littler ASAP (Nov. 13, 2014); *see also* Ilyse W. Schuman, *EEOC Officials Field Pointed Questions During Senate Committee Hearing*, Littler ASAP (May 19, 2015).

284 For general background about the Strategic Plan, *see* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2012*, at 8-10 (2012), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2012.

all components of the EEOC's private, public, and federal sector enforcement.[285] The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.

To accomplish its mission, the EEOC identified the following three objectives and outcome goals: (1) combatting employment discrimination through strategic law enforcement; (2) preventing employment discrimination through education and outreach; and (3) delivering excellent and consistent service through a skilled and diverse workforce and effective systems. To this end, the Strategic Plan identifies strategies for achieving each outcome goal and 14 performance measures for gauging the EEOC's progress.

On December 17, 2012, the EEOC approved the SEP for Fiscal Years 2013 – 2016.[286] The SEP reaffirms the agency's objective of strategic enforcement. It is intended to promote more strategic use of agency resources to advance the EEOC's mission of stopping and remedying unlawful discrimination and focus and coordinate the EEOC's programs so they have a sustainable impact in reducing and deterring workplace discrimination.[287] The SEP identifies six priorities for nationwide enforcement in the private and public sectors, including: (1) eliminating systemic barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing employment discrimination issues, such as ADA Amendment Act issues, LGBT (lesbian, gay, bisexual and transgender individuals) coverage under Title VII, and accommodating pregnancy; (4) enforcing equal pay laws to target practices that discriminate based on gender; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.[288]

As part of the initiative, the EEOC has focused on screening tools that may adversely impact groups protected under the law (*e.g.*, pre-employment tests, background screens, date of birth screens in online applications).[289] The EEOC continues to focus on disparate pay, job segregation, harassment, trafficking, and discriminatory language policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

To implement these priorities, the EEOC prioritizes certain types of charges filed with the agency and gives preference to litigation involving SEP or EEOC district enforcement priority issues. Additionally, the SEP reaffirms the EEOC's focus on pursuing systemic cases – "pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."[290] With respect to systemic enforcement, the SEP specifically notes that the EEOC district offices are expected to coordinate with each other so as to avoid duplication and to improve efficiencies through collaboration, consultation and strategic partnerships among the offices. According to the agency's FY 2015 Performance Accountability Report, 48 out of 218 (22%) of the cases on the EEOC's litigation docket were systemic.[291] While the EEOC developed the SEP as a strategy for reducing discrimination, the SEP, as a whole, places more emphasis on enforcement and litigation than on prevention efforts and conciliation.

Fiscal Year 2015 marked the EEOC's 50th anniversary. The agency used the milestone as an opportunity to reflect on the progress made since its inception, as well as the work that remains to be done, and to reiterate its priorities consistent with the SEP.

On April 15, 2015, the Commission held a public meeting at Miami Dade College in Miami, Florida aimed at confronting racial and ethnic discrimination in the 21st century workplace – the first public Commission meeting held outside of Washington D.C. in more than a decade.[292] The meeting's discussion was focused on removing the barriers to

285 EEOC, United States Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016 (2012), *available at* http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

286 EEOC, United States Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

287 Press Release, EEOC, EEOC Approves Strategic Enforcement Plan (Dec. 18, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-18-12a.cfm.

288 *See* Strategic Enforcement Plan FY 2013-2016, *supra* note 286; *see also* Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?*, Littler ASAP (Nov. 7, 2012).

289 *See* Strategic Enforcement Plan FY 2013-2016, *supra* note 286; *see also* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2014*, at 46-47, 52-54 (2015), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2014.

290 *See* Barry A. Hartstein, *EEOC Seeks Feedback on Draft Strategic Enforcement Plan*, Littler ASAP (Sept. 6, 2012).

291 FY 2015 PAR at 22.

292 Press Release, EEOC, *Race and National Origin Discrimination Persist 50 Years after EEOC's Founding, Experts Say* (Apr. 15, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-15-15.cfm.

opportunity for individuals based on color, race, and national origin, including criminal background screenings that tend to disproportionately disqualify African American and Hispanic job applicants.[293] The panelists urged employers to follow the Commission's Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions, and to adopt evidence-based employment policies as recommended by the agency. One panelist also cautioned against the practice of using online screening that gauges bio data and personality measures in the hiring process as these assessments may have a disparate impact on racial and ethnic minorities. The assessments, the panelist explained (like criminal background screening), can be designed to have more job relevance thereby reducing barriers to employment for racial and ethnic minorities.

On July 1, 2015, the Commission held another meeting during which it reflected on the agency's progress and its continuing challenges in eradicating employment discrimination.[294] The discussion was focused primarily on the progress made by minorities and women in the workforce since the EEOC's inception. The panelists warned that, though these groups initially made great strides (*e.g.*, increasing their presence in senior-level positions), their progress has since stagnated. The panelists discussed various strategies for breaking barriers to inclusion and urged employers to cultivate a diverse culture through proper screening, training, policies and codes of conduct, and internal grievance channels.

On August 3, 2015, the EEOC released a report titled "American Experiences versus American Expectations" to mark its 50th anniversary celebration.[295] The report illustrates significant changes to the demographics of the workforce since the EEOC opened its doors in 1965, as well as continuing challenges to equal opportunity in employment by tracking data submitted by employers in their EEO-1 reports. Despite notable progress (including an increase in the number of women and minorities in senior-level positions), the agency noted that women and minorities remain concentrated in lower-paying positions, demonstrating that there is still work to be done.

C. Noteworthy Regulatory Activities: Initial Planned Agenda and Significant Anticipated Guidance

In FY 2015, the EEOC returned its attention to regulatory activity and guidance designed to advance its enforcement priorities as detailed in the Strategic Enforcement Plan, particularly guidance that the agency was not able to advance in FY 2014. On April 20, 2015, the Commission issued a long-awaited proposed rule regarding employer-sponsored wellness programs and the ADA.[296] The day after the fiscal year ended, the EEOC followed up with a proposed rule amending regulations under the Genetic Information Nondiscrimination Act of 2008 (GINA) to address employer-provided inducements to employees' spouses or other family members who respond to questions about their current or past medical conditions on health risk assessments.[297] The EEOC also revised its pregnancy guidance following the U.S. Supreme Court's opinion in *Young v. United Parcel Service*,[298] after the Court declined to give deference to the pregnancy guidance the EEOC issued in FY 2014.[299] Other items the EEOC advanced included proposed rules that apply to federal-sector employment and updated discrimination complaint procedures.

1. Wellness Programs and the ADA

With the prevalent use of employer-sponsored wellness programs, the EEOC has continued to signal an interest in focusing on those programs and their compliance with federal laws, including the ADA, GINA, and other statutes enforced by the EEOC. After initiating a series of lawsuits challenging employer-sponsored wellness programs and prompted by congressional scrutiny of the EEOC's position on wellness programs, the EEOC issued a long-awaited proposed rule on April 20, 2015, providing guidance on how employers may structure their wellness programs so that they do not run afoul

293 *EEOC Meeting, EEOC at 50: Confronting Racial and Ethnic Discrimination in the 21st Century Workplace* (Apr. 15, 2015), *available at* http://www.eeoc.gov/eeoc/meetings/4-15-15/.

294 Press Release, EEOC, *EEOC Considers Past, Looks Toward Future* (July 15, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/7-1-15c.cfm; *see also EEOC Meeting*, *EEOC at 50: Progress and Continuing Challenges in Eradicating Employment Discrimination* (July 1, 2015), *available at* http://www.eeoc.gov/eeoc/meetings/7-1-15/index.cfm.

295 Press Release, EEOC, *EEOC Releases Report on the American Workplace* (Aug. 13, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-3-15.cfm.

296 Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21659 (Apr. 20, 2015) (to be codified at 29 C.F.R. 1630); *see also* Ilyse W. Schuman, Russell Chapman, and Michelle Thomas, *EEOC Issues Long-Awaited Proposed Rule on Employer Wellness Programs,* Littler Insight (May 14, 2015).

297 80 Fed. Reg. 66853 -66862 (Oct. 1, 2015). *See also* Ilyse Schuman, Russell Chapman, and Barry Hartstein, *The EEOC Issues Proposed Rule on GINA and Wellness Programs*, Littler Insight (Nov. 17, 2015).

298 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

299 Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

of the ADA.[300] The proposed rule defines "employee health program," explains what it means for an employee health program to be "voluntary," and identifies incentives employers may offer as part of a voluntary employee health program and requirements that apply concerning notice and confidentiality of medical information obtained as part of a voluntary employee health program.[301]

a) Definition of Employee Health Program

Under the proposed rule, to qualify as a wellness program, the program must have a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.[302]

b) Definition of "Voluntary"

The wellness program must also be voluntary. The Commission explained that to be a voluntary program, an employer: (1) cannot require an employee to participate in such a program; (2) may not deny coverage under any of its group plans or particular benefits packages within a group health plan; (3) generally may not limit the extent of such coverage; and (4) may not take any other adverse action against employees who refuse to participate in an employee health program or fail to achieve certain health outcomes.[303]

Notably, the proposed rule does not provide guidance regarding what it means for an employer to require its employees to participate in a wellness program. Presumably, the Commission intended this phrase to mean that an employer cannot take an adverse employment action against an employee for his or her non-participation (*e.g.*, noting non-participation in an employee's performance evaluation, disciplining an employee for non-participation, etc.).[304]

c) Notice

For an employee's participation in a wellness program to be considered voluntary, the employer must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the employer uses to prevent improper disclosure of medical information.[305]

d) Financial Incentives

Offering financial incentives that do not exceed 30% of the total cost of *employee-only* coverage (which includes both employee and employer contributions) is sufficient for the wellness program to be considered voluntary.[306] The financial incentive can be in the form of either a reward or a penalty.

Notably, the 30% cap set forth in the EEOC's proposed rule differs from that permissible under the Affordable Care Act (ACA) and the Health Insurance Portability and Accountability Act (HIPAA), which is 30% of the cost of coverage in which the employee is enrolled with respect to outcome-based wellness programs. Although the ACA and HIPAA cap does not apply with respect to participatory wellness programs, the EEOC regulation imposes the cap on participatory wellness programs that are part of a group health plan.[307] Therefore, under the ACA and HIPAA, if an employee enrolls in family coverage, the maximum incentive limit would be 30% of the cost of family coverage.[308] By contrast, the EEOC's

300 Amendments to Regulations Under the Americans with Disabilities Act, 80 Fed. Reg. 21659 (Apr. 20, 2015) (to be codified at 29 C.F.R. 1630); *see also* Ilyse W. Schuman, Russell Chapman, and Michelle Thomas, *EEOC Issues Long-Awaited Proposed Rule on Employer Wellness Programs,* Littler Insight (May 14, 2015); Ilyse W. Schuman, *EEOC Issues Proposed Rule Addressing ADA Compliance and Wellness Programs,* Littler ASAP (Apr. 16, 2015).

301 *See* 80 Fed. Reg. 21,659-21,670 (Apr. 20, 2015).

302 80 Fed. Reg. at 21,667.

303 *Id.* at 21,668.

304 *Id.* at 21,662.

305 *Id.* at 21,668.

306 *Id.*

307 *Id.* at 21,662.

308 *Id.* at 21,661

proposed rule appears to limit the incentive to 30% of the cost of employee-only coverage even if the employee is enrolled in family coverage.[309]

e) Privacy

The proposed rule states that medical information collected via an employee health program may only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of the specific individuals, except as needed to administer the health plan and for other limited purposes.[310] If the wellness program is part of a group health program, the individually identifiable health information collected from or created about participants as part of the wellness program is protected health information under HIPAA's privacy, security, and breach notification rules.[311]

While the proposed rule provides some guidance about the parameters of permissible "voluntary" employee wellness programs under the ADA, it diverges from the ACA regulations in some important respects. The EEOC proposal does not fully account for the treatment of incentive-based programs under the statute, and also restricts wellness programs in ways not contemplated by the final ACA regulations.

On March 2, 2015 (prior to the Commission-issued proposed rule), lawmakers introduced a bill titled the Preserving Employee Wellness Programs Act, which sought to reaffirm the parameters for wellness programs set forth in the ACA and HIPAA and declared that workplace wellness programs offering a reward to participants do not run afoul of the ADA or GINA if they comply with certain Public Health Service Act requirements.[312] As of the date of this publication, other than holding a subcommittee hearing on the bill on March 24, 2015, Congress has not advanced this measure. However, during the May 19, 2015 hearing before the Senate HELP Committee, Senator Alexander criticized the proposal for failing to solve the problem employers face in trying to institute wellness programs that comply with both the ADA and the ACA regulations. Senator Alexander urged the EEOC to review the Preserving Employee Wellness Programs Act before issuing the final rule. Depending on what form the final rule takes, further legislative action on the bill remains possible.

2. Wellness Programs and GINA

On October 30, 2015, the EEOC issued a Notice of Proposed Rulemaking to amend the regulations implementing Title II of GINA as they relate to employer wellness programs that are part of group health plans.[313] The proposed rule clarifies that an employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including as part of a wellness program; and (3) provides information about his or her current or past health status. The proposal carves a narrow exception to the general prohibition on providing incentives in exchange for an employee's genetic information. The EEOC's final rule on Title II of GINA provided that an employer could not offer a financial inducement for providing genetic information as part of a wellness program. However, the final rule did not expressly address the issue of spousal incentives, leaving employers without clarity as to whether the practice is permissible.

The proposed rule caps the total incentive amount for an employee and spouse to participate in a wellness program that is part of a group health plan and collects information about current or past health status at 30% of the total annual cost of the plan in which the employee and any dependents are enrolled. However, the maximum portion of an incentive that may be allocated to an employee's participation may not exceed 30% of the total cost of self-only coverage. While capped inducements in exchange for information about a spouse's health status are permitted, the proposed rule does not permit inducements in exchange for current or past health status information about an employee's children, either biological or adopted. The proposed rule adds additional requirements to the GINA Title II regulations with respect to wellness programs. Any health or genetic services in connection with which an employer requests genetic information be "reasonably designed to promote health or prevent disease." The employer also must obtain authorization from the spouse when collecting information about the spouse's past or current health status, although a separate authorization for the acquisition of this information from the employee is not necessary. The EEOC has requested comments on

309 *Id.*

310 *Id.* at 21,669.

311 *Id.*

312 Preserving Employee Wellness Programs Act, H.R. 1189, S. 620, 114th Cong. (2015).

313 80 Fed. Reg. 66,853-66,862 (Oct. 30, 2015).

possible additional changes to the GINA regulations that, if adopted, may further complicate the use of wellness programs by employers.

3. Pregnancy Discrimination

The issue of accommodating pregnancy remains a priority for the EEOC consistent with the SEP. In FY 2014, the EEOC issued Enforcement Guidance on Pregnancy Discrimination and Related Issues (Pregnancy Guidance), providing guidance on the Pregnancy Discrimination Act (PDA), the ADA, and other laws affecting pregnant workers.[314] The timing of the release of the Pregnancy Guidance was controversial because the EEOC issued the guidance before the U.S. Supreme Court had ruled in *Young v. United Parcel Services*, a case involving the issue of whether and to what extent an employer must provide pregnant employees with work accommodations, such as light duty, under the PDA.[315]

In *Young*, the Fourth Circuit held that pregnant employees are not entitled to accommodations—such as light duty assignments—merely because some other employee within the company enjoyed a similar accommodation on the basis of another condition or disability.[316] The Supreme Court granted a writ of certiorari to hear the appeal from the Fourth Circuit.[317] While pending, the EEOC issued its Pregnancy Guidance, flatly rejecting the Fourth Circuit's decision in *Young*, and adopting the broad view that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (*e.g.*, a policy of providing light duty only to workers injured on the job)."[318] The Commission approved the Pregnancy Guidance in a 3-2 vote over the strong objections by Commissioners Constance Barker and Victoria Lipnic.[319]

On March 25, 2015, the Supreme Court issued its much-anticipated opinion in *Young*, reversing the Fourth Circuit.[320] But in doing so, the Court did not give the Pregnancy Guidance the deference the United States requested,[321] declining to impose what some referred to as a "most favored nation status" on pregnant women under the PDA. Instead, the Court explained that a pregnant employee can establish a *prima facie* claim under the PDA by showing that "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[322] If the employee can do so, the employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. To prevail, a pregnant employee must then show that the employer's legitimate, nondiscriminatory reason is pretextual.

Essentially, a pregnant plaintiff suing under the PDA will have to establish that an employer's stated reason for denying an accommodation—which will generally be drawn in neutral terms—is either pretextual or insufficiently strong to justify the burden placed on the pregnant employee, and thus gives rise to an inference of discrimination. For instance, one way a pregnant employee can make this showing is if an employer accommodates a "large percentage" of nonpregnant employees while failing to accommodate a "large percentage" of pregnant employees.[323] The Supreme Court noted that this approach is consistent with its longstanding rule that a plaintiff can use circumstantial evidence to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than it treats those outside the protected class.[324]

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314 EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014); *see also Annual Report on EEOC Developments: Fiscal Year 2014*, at 47-49.

315 *See generally Annual Report on EEOC Developments: Fiscal Year 2014*, at 47-49.

316 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013).

317 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, No. 12-1226, 81 U.S.L.W. 3602 (U.S. July 1, 2014).

318 Joseph P. Harkins, et al., *The Heavy Burden of Light Duty: Young v. UPS*, Littler ASAP (Mar. 31, 2015).

319 Victoria A. Lipnic, *Statement of EEOC Comm'r Victoria A. Lipnic, Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014), *available at* http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf; *see also* Constance S. Barker, *Public Statement of EEOC Comm'r Constance S. Barker, Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014), *available at* http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf.

320 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

321 Notably, the Supreme Court is less likely to accord deference to the EEOC's published guidance if it is released after a writ of certiorari is granted. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2543 (Alito, J., dissenting) ("[T]here is an argument that deference may be unwarranted.") (*citing Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1355 (2015)).

322 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

323 *Young*, 135 S. Ct. at 1354.

324 *Id.* at 1355.

On June 25, 2015, the EEOC revised its Pregnancy Guidance in light of *Young v. UPS*, but made clear that it largely expects that plaintiffs will be able to successfully establish *prima facie* claims in most instances where an employer fails to accommodate a pregnant employee:

> As the Court noted, "the burden of making this showing is not 'onerous.'" For purposes of the prima facie case, the plaintiff does not need to point to an employee that is "similar in all but the protected ways." For example, the plaintiff could satisfy her prima facie burden by identifying an employee who was similar in his or her ability or inability to work due to an impairment *(e.g., a*n employee with a lifting restriction) and who was provided an accommodation that the pregnant employee sought.[325]

The EEOC further reiterated the Supreme Court's statement that whatever the employer's purported reason for denying an accommodation, "[t]hat reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates.'"[326] Thus, although the Supreme Court's ruling did not go as far as the EEOC's initial 2014 Pregnancy Guidance, the EEOC emphasized that most of its original guidance has not changed, signaling that it intends to continue aggressive enforcement efforts in the area of pregnancy accommodation.

4. Federal Sector

In FY 2014, the EEOC made additional progress to implement the SEP in the federal sector by approving the Federal Sector Complement Plan (FCP).[327] The FCP describes strategies for implementing the SEP's priorities and the federal sector's complementary priorities, and recommends strategies to improve communication, oversight, and consistency across the federal sector.[328] The FCP proposes several strategies for achieving the SEP's goal of preserving access to the legal system, including ensuring that federal employees are aware of their rights and preventing improper agency procedural dismissals of Equal Employment Opportunity (EEO) complaints.[329]

Since 2014, the EEOC has undertaken a public relations offensive on the topic of the federal claims process. In May 2014, for instance, the EEOC invited public comments "on how it can amend its regulations to clarify the federal government's obligation to be a model employer of individuals with disabilities."[330] Later, in September 2014, the EEOC took additional steps to implement these strategies by issuing guidance to federal agencies regarding methods for ensuring that employees and applicants are aware of their rights under EEO laws and regulations.[331] In an effort to reduce the number of incorrect procedural dismissals of EEO complaints, the EEOC also issued a report that identifies common errors federal agencies made in dismissing EEO complaints.[332]

In FY 2015, the EEOC made continued efforts to streamline the charge and complaint process in the federal sector. In March 2015, the EEOC hosted an online Twitter chat session regarding Section 508 of the Rehabilitation Act to discuss how technology impacts federal workers with disabilities.[333] In August 2015, the agency issued guidance, revising its Management Directive 110 (MD-110), providing Commission policies, procedures, and guidance regarding the federal

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325 EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), *available at* http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm; *see also* Press Release, EEOC, *EEOC Issues Updated Pregnancy Discrimination Guidance* (June 25, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-25-15.cfm.

326 *Id.*

327 *Id.*

328 EEOC, Office of Federal Operations and Office of Field Programs Federal Sector Complement Plan to the Strategic Enforcement Plan (2013), *available at* http://www.eeoc.gov/eeoc/plan/federal_complement_plan.cfm.

329 *Id.*

330 The Federal Sector's Obligation to Be a Model Employer of Individuals with Disabilities, 79 Fed. Reg. 27824 (May 15, 2014) (to be codified at 29 C.F.R. 1614).

331 EEOC, Preserving Access to the Legal System: A Practical Guide to Providing Employees with Adequate Information About Their Rights under Federal Equal Employment Opportunity (EEO) Laws and Regulations (Sept. 2, 2014), *available at* http://www.eeoc.gov/federal/preserving_access.cfm.

332 EEOC, Preserving Access to the Legal System: Common Errors by Federal Agencies in Dismissing Complaints of Discrimination on Procedural Grounds (Sept. 15, 2014), *available at* http://www.eeoc.gov/federal/reports/dismissals.cfm.

333 Press Release, EEOC, *EEOC to Hold Twitter Chat on Implementation of Section 508 of the Rehabilitation Act* (Mar. 26, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-26-15.cfm.

sector complaint process as set forth in 29 C.F.R. Part 1614.[334] This is the first major revision to MD-110 since 1999 and reflects case law developments and the evolution of the federal workplace and EEO practices.[335]

These regulatory efforts in the federal sector will likely continue as the period for the current SEP closes in 2016.

5. EEOC's Digital Charge System

On May 6, 2015, the EEOC began implementing a digital charge system by rolling out an electronic pilot program.[336] The program uses a platform entitled "ACT Digital," which allows employers to electronically review and respond to charges.[337] The EEOC says that the move to electronic filing is being done because "[a]s a federal agency, the EEOC has a responsibility to streamline and make more efficient its service delivery to better serve the public."[338]

Use of the electronic platform was available only in select cities initially, but has expanded rapidly, and will likely cover every charge filed with the EEOC across the United States. For now, employers are able to:

- View and download the charge;
- Review an invitation to mediate and respond to it;
- Submit a Position Statement to EEOC; and
- Provide/verify respondent contact information, including the designation of a legal representative.

These are the capabilities available in "Phase I" of the project, but other capabilities may soon be available as well.[339]

D. Current and Anticipated Trends

With its Democratic majority, the EEOC is likely to continue pursuing initiatives related to recruiting and hiring procedures and practices, religious accommodation, retaliation, workplace harassment, and sexual orientation and gender identity, disability, race and national origin discrimination. However, as long as Republicans retain control of both the Senate and House, the EEOC could face greater challenges in advancing its agenda, and closer examination of its activities.

1. Recruiting and Hiring Issues

For the past several years, the EEOC has focused on the impact certain hiring practices may have on protected groups, and has identified eliminating systematic barriers in recruitment and hiring as an enforcement priority in the agency's SEP.[340] Specifically, the EEOC has devoted significant attention to policies and practices that exclude applicants based on an applicant's criminal history.

In FY 2012, the EEOC issued updated guidance regarding the use of arrest and conviction records by employers in hiring and employment decisions.[341] After the EEOC subsequently initiated lawsuits challenging employer background check policies and reliance on criminal history, the attorneys general of numerous states criticized the suits and called on the EEOC to rescind its guidance and drop its lawsuits.[342] To alleviate employer confusion, at the end of FY 2013, the

334 EEOC, Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO-MD-110), (Aug. 5, 2015), *available at* http://www.eeoc.gov/federal/directives/md110.cfm; *see also* Press Release, EEOC, *EEOC Issues Updated Federal Sector Guidance* (Aug. 6, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-6-15.cfm.

335 Press Release, EEOC, EEOC Issues Updated Federal Sector Guidance (Aug. 6, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-6-15.cfm.

336 EEOC, EEOC Respondent Portal User's Guide (Apr. 23, 2015), *available at* http://www.eeoc.gov/employers/respondent_portal_users_guide.cfm; Press Release, EEOC, *EEOC Takes First Steps in Digital Charge System* (May 5, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-6-15.cfm.

337 *Id.*

338 EEOC, About ACT Digital – EEOC's Digital Charge System and Its First Phase of Implementation, *available at* http://www.eeoc.gov/employers/act-digital-phase-1.cfm.

339 *Id.*

340 EEOC, United States Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012); *see also Annual Report on EEOC Developments: Fiscal Year 2014* at 46-47, 52-54.

341 Barry Hartstein, Rod Fliegel, Marcy McGovern, and Jennifer Mora, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012).

342 For general background regarding the EEOC lawsuits and the state attorneys general's response, *see* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, at 27 (2014), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2013.

EEOC clarified its guidance on Title VII liability concerning criminal background checks.[343] In part, the EEOC's guidance addressed concerns over applying disparate impact analysis to an employer's use of criminal history screens. Notably, the EEOC stated it "was not illegal for employers to conduct or use the results of criminal background checks" and that employers were not required to use individualized assessments instead of bright-line screens.[344]

In March 2014, the EEOC and the U.S. Federal Trade Commission (FTC) co-published further guidance about employer use of background checks.[345] The EEOC published these regulations while cases were still pending before the courts that could impact this area of the law.[346] The EEOC and the FTC provided "best practice" guidelines regarding: the steps employers should take before they obtain background information; the legal use of background information; and recommendations for disposing of background information.[347] The EEOC warned that employers should not make employment decisions based on background issues that may be more common among individuals of certain protected categories, thereby causing a disparate impact based on race, color, national origin, sex, or religion.[348] The FTC also provided guidance regarding how the Fair Credit Reporting Act applies to employer-conducted background checks. Employers must provide applicants and employees with written notice that a report may be obtained for employment purposes and that the information contained in the report may be used in employment decisions.[349]

Although employers should continue to closely monitor their hiring policies as they relate to criminal background checks, the EEOC has faced a few setbacks as some courts have provided support for the continued use of employer background checks. In *EEOC v. Kaplan Higher Education Corp.*, which dealt with credit background checks, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision that the EEOC failed to meet its threshold burden of proving the employer's screening practices disproportionately excluded protected class members.[350] In that case, the EEOC had sued the defendants for using the same type of background check that the EEOC itself uses.[351] As significant is *EEOC v Freeman*,[352] which involved both credit and criminal background checks, in which the EEOC was strongly taken to task in a concurring opinion for attempting to use faulty expert testimony to press its case against an employer.[353] Notably, however, *Kaplan* and *Freeman* were resolved on the narrow basis that the EEOC's expert testimony was unreliable under Fed. R. Civ. P. 702. Thus, these cases do not categorically preclude the EEOC from bringing suit against employers who use pre-employment screening tools on job applicants.

Despite these high-profile setbacks for the EEOC in disparate impact discrimination lawsuits challenging criminal record screening policies, in FY 2015, the EEOC succeeded in achieving a significant settlement (consent decree) in a similar suit against an auto manufacturer.[354] The EEOC challenged the company's criminal conviction policy that restricted facility access to company employees and employees of contractors with certain criminal convictions. The company's policy did not have a time limit regarding convictions and excluded job applicants with certain convictions. On September 8, 2015, a federal district court judge approved a consent decree that requires the company to pay $1.6 million to 56 claimants and to significantly scale back its criminal background check procedures.[355]

In the same vein, an Illinois federal court recently rejected another employer's efforts to take discovery on the EEOC's pre-hire screening process, holding that the EEOC's policies were not sufficiently relevant to the suit that had been brought against the defendant in that case.[356] While hardly a major victory in the wake of the *Freeman* opinion,

343 Ilyse Wolens Schuman, *EEOC Clarifies Guidance on Criminal Background Checks*, Littler ASAP (Sep. 25, 2013).

344 *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, *supra* note 341.

345 Ilyse Wolens Schuman, *EEOC & FTC Issue Joint Guidance on Employment Background Checks*, Littler ASAP (Mar. 11, 2014).

346 *See, e.g.*, *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

347 *EEOC & FTC Issue Joint Guidance on Employment Background Checks*, *supra* note 345.

348 EEOC, Background Checks, What Employers Need to Know (Mar. 10, 2014), *available at* http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

349 *Id*.

350 *EEOC v. Kaplan Higher Educ. Corp*, 748 F.3d 749, 750 (6th Cir. 2014).

351 *Kaplan Higher Educ. Corp*, 748 F.3d at 750.

352 *Freeman*, 778 F.3d 463.

353 *Freeman*, 778 F.3d at 472-73.

354 *See* Jennifer Mora and Rod Fliegel, *EEOC Settles Background Check Litigation with BMW, But Also Faces Steep Attorneys' Fees in Freeman Case*, Littler Insight (Sept. 22, 2015).

355 Press Release, EEOC, *BMW to Pay $1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit* (Sept. 8, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm.

356 *EEOC v. DolgenCorp LLC*, No. 1:13-cv-04307, 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015); *see also* Rod Fliegel and Molly Shah, *Federal Court Limits Employer's Right to Discover Information About the EEOC's Own Hiring Policies and Expands the EEOC's Rights on Discoverability*, Littler Insight (May 13, 2015).

this decision and the aforementioned settlement will likely embolden the EEOC to try to limit the ways employers use background checks.

Separate and apart from the EEOC's efforts, more states and localities are enacting "ban-the-box" legislation that precludes employers from asking about criminal background checks at certain stages of an employment application.[357] These laws vary widely by jurisdiction and by the type of employer being regulated. Thus, employers should continue to monitor this and related areas of the law affecting recruiting and hiring policies and practices.

2. Religious Accommodation

As the workforce has become increasingly diverse, employers face various issues regarding religious garb and grooming practices. In FY 2014, the EEOC issued a practical guide to assist employers and employees titled, "Religious Garb and Grooming in the Workplace: Rights and Responsibilities."[358] The EEOC published these guidelines at a time when many issues related to religious garb and grooming practices remained unresolved in the courts.

On June 1, 2015, the Supreme Court issued its opinion in *Abercrombie & Fitch Stores, Inc.*,[359] addressing, in part, the validity of the EEOC's guidance. In that decision, the Court held that to avoid summary judgment in a religious accommodation case, a job applicant with a bona fide need for a religious accommodation must prove only that a prospective employer's desire to avoid the accommodation was a motivating factor in its decision not to hire her – *i.e.,* she need not prove the employer had actual knowledge of her need for religious accommodation.

The Supreme Court found in the EEOC's favor, ruling:

- Title VII affirmatively obligates employers to make exceptions to neutral employment policies to accommodate employees' religious beliefs and practices;
- A failure to make such an exception is a form of disparate treatment; it is intentional discrimination "because of" religious practice;
- The Tenth Circuit erred when it inserted an "actual knowledge" requirement to Title VII's prohibition against disparate treatment on the basis of religious practice; and
- An employer that makes an employment decision with the motive of avoiding a religious accommodation violates Title VII, even if the applicant or employee needing accommodation never requested accommodation and the employer lacks actual knowledge that accommodation is needed because of religion.[360]

The *Abercrombie* decision leaves little doubt that Title VII requires employers to make exceptions to their neutral employment policies to accommodate religious practices.[361] The High Court, however, provided no practical guidance for employers regarding how best to handle a suspicion that a particular candidate may need a religious accommodation to perform his or her job duties. Accordingly, the EEOC is expected to continue to seek enforcement consistent with its guidelines regarding religious grooming practices.

3. Retaliation

After experiencing a drastic increase in the number of retaliation charges filed during FY 2014, in 2015, the Commission turned its focus to address ways employers can reduce retaliation in the workplace.[362] On June 17, 2015, the Commission held a meeting entitled "Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention," during which the panelists focused primarily on the chilling effect created by workplaces that permit retaliation – *i.e*., that employees in these environments are less likely to report any unlawful discrimination or harassment.[363] The takeaway for

357 *See* Jennifer Mora, *Private-Sector Employers Doing Business with Local Governments May Be Subject to Even More Ban-the-Box and Other Laws Restricting Consideration of Criminal Records*, Littler Insight (July 13, 2015).

358 EEOC, Religious Garb and Grooming in the Workplace: Rights and Responsibilities (Mar. 6, 2014), *available at* http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm; *see also Annual Report on EEOC Developments: Fiscal Year 2014*, at 49-50.

359 *EEOC v. Abercrombie & Fitch Stores, Inc*., 135 S.Ct. 2028 (2015).

360 Jane Ann Himsel, *What Matters is Motive: Religious Accommodation Need as a "Motivating Factor" in Employment Decisions,* Littler Insight (June 2, 2015).

361 *Id.*

362 Press Release, EEOC, *EEOC Releases Fiscal Year 2014 Enforcement and Litigation Data* (Feb. 4, 2015), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/2-4-15.cfm.

363 Press Release, EEOC, *Commissioners Examine Strategies to Reduce Retaliation in the Workplace* (June 17, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-17-15.cfm; *see also EEOC Meeting*, *Meeting of June 17, 2015 - Retaliation in the Workplace: Causes, Remedies, and Strategies for Prevention* (June 17, 2015), *available at* http://www.eeoc.gov/eeoc/meetings/6-17-15/.

employers was the need to focus on creating a workplace of diversity and inclusion and implement effective complaint procedures to create workplaces where employees feel comfortable reporting discrimination, harassment, and retaliation.[364]

4. Workplace Harassment

In FY 2015, the EEOC renewed its focus on the issue of workplace harassment and reiterated its commitment to educating employers and employees as a strategy to deter future violations, consistent with the EEOC's priorities in the SEP. On January 14, 2015, new EEOC Chair Jenny Yang presided over the first Commission meeting of her tenure and announced the formation of the Select Task Force on Workplace Harassment (STF), co-chaired by Commissioners Chai Feldblum and Victoria Lipnic, to convene experts from the employer community, workers' advocates, human resources experts, academics, and others in an effort to identify effective strategies that work to prevent and remedy harassment in the workplace.[365] "Through this task force we hope to better reach workers to ensure they know their rights and to better reach employers to promote best practices," said Chair Yang.[366] At the meeting, various individuals testified regarding the prevalence of harassment in the workplace, and Chair Yang mentioned that 30% of all charges filed involve some claim of workplace harassment.[367]

The STF subsequently held a public meeting on June 15, 2015, to explore to scope of workplace harassment and research already existing on the issue.[368] While the task force concluded that no one solution could be a "silver bullet" in solving the problem of workplace harassment, one researcher noted that "training [that] is live, rather than done on a computer, lasts more than four hours and includes role-playing that puts the trainee in the place of a stigmatized co-worker, when combined with specific goal setting by a mentor or supervisor, can have the greatest effect" in minimizing workplace harassment.[369]

Separately, in its Quarterly Digest, the EEOC included an article on workplace harassment that offered some guidance to employers for drafting internal policies on such harassment:

> [A]n anti-harassment policy at a minimum should clearly explain the prohibited conduct and address all forms of harassment, including race, color, gender (both sexual and non-sexual), age, national origin, disability, religion, and genetic information. In addition, an anti-harassment policy and complaint procedure should contain, at a minimum,
>
> 1. a clear explanation of prohibited conduct;
> 2. assurance that employees who make claims of harassment or provide information related to such claims will be protected against retaliation;
> 3. a clearly described complaint process that provides accessible avenues for complainants;
> 4. assurance that employer will protect the confidentiality of the individuals bringing harassment claims to the extent possible;
> 5. a complaint process that provides a prompt, thorough, and impartial investigation; and
> 6. assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.[370]

For employers interested in further reducing potential incidents of workplace harassment, having a policy that at least includes the above components, and using live training, are likely positive steps toward that outcome.

364 Press Release, EEOC, *Commissioners Examine Strategies to Reduce Retaliation in the Workplace* (June 17, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-17-15.cfm.

365 Press Release, EEOC, *Workplace Harassment Still a Major Problem Experts Tell EEOC at Meeting* (Jan. 14, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-14-15.cfm.

366 *Id.*

367 *Id.* Commissioner Yang announced membership of the STF at the EEOC's meeting on March 30, 2015. Press Release, EEOC, *EEOC to Study Workplace Harassment* (Mar. 30, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-30-15.cfm.

368 Press Release, EEOC, *No Quick Fix for Workplace Harassment, Social Scientists Tell EEOC Task Force at Open Meeting* (June 15, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-15-15a.cfm; Press Release, EEOC, *EEOC Task Force to Probe Workplace Harassment at Public Meeting on June 15* (June 8, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-8-15.cfm.

369 *Id.*

370 Office of Federal Operations, EEOC, The Law of Harassment: Assisting Agencies in Developing Effective Anti-Harassment Policies, Vol. XXV, No. 3 (Summer 2014), *available at* http://www.eeoc.gov/federal/digest/xxv-3.cfm; *see also* Press Release, EEOC, *New 'Digest of EEO Law' Issued by EEOC* (Mar. 4, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-4-15.cfm.

5. Sexual Orientation and Gender Identity Discrimination

Sexual orientation and gender identity continue to be emerging issues that the EEOC will target in the next several years.[371] The EEOC has primarily approached this issue through efforts to apply Title VII's prohibition on sex discrimination provisions to discrimination against lesbian, gay, bisexual and transgender individuals.

Although the plain language of Title VII does not explicitly prohibit discrimination on the basis of sexual orientation or sexual identification, over the past several years, the EEOC has advanced a theory of "sexual stereotyping" as an impermissible form of sex discrimination. In a trailblazing departure from earlier rulings, the Commission took the position in *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*,[372] that discrimination against an individual because that person is transgender is discrimination because of sex. In July 2013, the EEOC issued a ruling, determining that Macy's employer violated Title VII by discriminating against Macy because she is transgender.[373]

At the end of FY 2014, the EEOC filed its first two lawsuits over alleged sex discrimination against transgender individuals, clearly relying on the rationale of the *Macy* decision.[374] The EEOC has also filed numerous amicus curie briefs in various courts addressing sexual orientation and gender identity discrimination issues.[375] For instance, in *Muhammed v. Caterpillar Inc.*, the EEOC filed an amicus brief and requested rehearing following affirmance by the Seventh Circuit of a summary judgment ruling in favor of the employer in a case involving alleged sex- and race-based harassment that included alleged anti-gay remarks.[376] Although the rehearing was denied on October 16, 2014, the EEOC claimed a partial victory because "the panel issued an amended opinion removing its original rulings regarding the scope of Title VII coverage," and "(t)he opinion no longer repeats or relies upon statements from prior Seventh Circuit decisions that Title VII does not prohibit sexual-orientation discrimination or retaliation for related opposition conduct."[377]

On July 16, 2015, the EEOC issued a potentially groundbreaking decision in *Baldwin v. Dep't of Transportation*,[378] unequivocally finding that sexual orientation discrimination constitutes impermissible sex discrimination under Title VII.[379] The Commission held, "Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." In reaching its conclusion, the Commission stated, "Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual Orientation' as a concept cannot be defined or understood without reference to sex."

In support of its decision, the Commission relied heavily on the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins*,[380] wherein the Court held that discrimination on the basis of sexual stereotyping or gender expectations was impermissible sex discrimination. The *Baldwin* decision has the potential to impact every charge of sexual orientation or gender identity discrimination, regardless of whether a state legislature or Congress ever passes legislation expressly directed at such discrimination.[381]

In subsequent publications, the EEOC has acknowledged that its decision essentially expands the definition of sex discrimination to include conduct that is not expressly prohibited by statute.[382] The EEOC's decision may be entitled to

371 *See* Strategic Enforcement Plan FY 2013-2016, *supra* note 286.

372 *Macy v. Holder*, EEOC Appeal No. 0120120821 (Apr. 20, 2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

373 *Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Agency Complaint No. ATF-2011-00751, DJ Number 187-9-149 (July 8, 2013), *available at* http://www.documentcloud.org/documents/726679-doj-decision-redacted.html#document/p1.

374 Press Release, EEOC, *EEOC Sues Detroit Funeral Home Chain for Sex Discrimination Against Transgender Employee* (Sept. 25, 2014), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/9-25-14d.cfm; Press Release, EEOC, *EEOC Sues Lakeland Eye Clinic for Sex Discrimination Against Transgender Employee* (Sept. 25, 2014), available at http://www1.eeoc.gov/eeoc/newsroom/release/9-25-14e.cfm.

375 For an updated list of EEOC litigation regarding Title VII and LGBT-related discrimination, *see* EEOC, Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII (last updated Aug. 27, 2015), *available at* http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm.

376 *See Muhammad v. Caterpillar*, 767 F.3d 694 (7th Cir. 2014).

377 *See* Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII, *supra* note 375.

378 *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080 (July 16, 2015), *available at* http://www.eeoc.gov/federal/reports/lgbt_cases.cfm; *see also* Denise M. Visconti and Kyle M. Nageotte, *EEOC Rules Discrimination Based on Employee's Sexual Orientation Is Sex Discrimination Under Title VII*, Littler Insight (July 20, 2015).

379 *Baldwin v. Dep't of Transp.*, EEOC Appeal No. 0120133080, at *14 (July 16, 2015), *available at* http://www.eeoc.gov/federal/reports/lgbt_cases.cfm.

380 490 U.S. 228 (1989).

381 *See EEOC Rules Discrimination Based on Employee's Sexual Orientation Is Sex Discrimination Under Title VII*, *supra* note 378.

382 Robyn Dupont and Nichole Davis, *Gender Identity and Sexual Orientation Coverage under Title VII Case Law Update: Review of Pre and Post Macy Title VII Protections for LGBT Employees* (Aug. 2015), *available at* http://www.eeoc.gov/federal/digest/xxvi-1.cfm#article.

at least some deference by federal courts, and it is almost certain that the EEOC and plaintiffs alike will seek to apply this decision and its rationale to both public and private employers.[383] This is particularly true given the decision was not limited to the specific facts of the case; rather, the EEOC announced a broader interpretation that applies to any individual who has suffered discrimination based on his or her sexual orientation, and affords such individuals recourse under Title VII.

In FY 2015, the EEOC also reissued its guide on the rights and processes available to federal-sector applicants and employees who allege sexual orientation or gender identity discrimination.[384] The agency substantially revised the guide to reflect major developments in the law. The EEOC's focus on sexual orientation and gender identity discrimination comes at a time when there has been a significant influx of discrimination charges received at the agency involving these issues.[385]

6. ADA

The EEOC has also continued to focus on disability discrimination in both the private and public sector. On July 25, 2015, the EEOC commemorated the 25th anniversary of the Americans with Disabilities Act by partnering with the Department of Justice (DOJ).[386] During the event, the two agencies released a Memorandum of Understanding to streamline their coordination of investigations of disability discrimination complaints and to increase their collaborative efforts in the areas of ADA guidance, outreach, and training.

To advance its commitment to extend employment opportunities to individuals with disabilities, the EEOC has also worked with agencies across the federal government to increase equal employment opportunities within federal agencies. As part of its efforts, on July 23, 2015, the EEOC, the Office of Personnel Management (OPM) and the Department of Labor (DOL), finished their revision of the "ABC's of Schedule A" brochures to provide federal agencies and job applicants with updated information about the use of the Schedule A hiring authority.[387] The Schedule A hiring authority is a vehicle for federal agencies to streamline the hiring process for qualified individuals with intellectual, severe physical, or psychiatric disabilities.[388]

7. Race and National Origin Discrimination

During its public meeting at Miami Dade College on April 15, 2015, the Commission heard from panelists about the challenges and best practices to promote equal employment opportunity for racial and ethnic minorities 50 years after the passage of the Civil Rights Act of 1964 and the creation of the EEOC in 1965.[389] The agency indicated that it will continue to focus on race and national origin discrimination and renewed its commitment to "remove barriers to achieve broad and sustained compliance with [the agency's] anti-discrimination laws."[390]

383 *See EEOC Rules Discrimination Based on Employee's Sexual Orientation Is Sex Discrimination Under Title VII*, *supra* note 378.

384 EEOC, Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment: A Guide to Employment Rights, Protections, and Responsibilities (rev. June 2015), *available at* http://www.opm.gov/LGBTGuide; *see also* Press Release, EEOC, *Agencies Release Guide on LGBT Discrimination Protections for Federal Workers* (June 3, 2015), available at http://www.eeoc.gov/eeoc/newsroom/release/6-3-15.cfm.

385 EEOC, What You Should Know About EEOC and the Enforcement Protections for LGBT Workers, *available at* http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

386 Press Release, EEOC, *EEOC Celebrates 25th Anniversary of the Americans with Disabilities Act* (July 22, 2015), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/7-22-15c.cfm; *see also EEOC Meeting, A Celebration of the 25th Anniversary of the Americans with Disabilities Act - Re-Broadcast of the U.S. Department of Justice, Equal Employment Opportunity Commission, and Access Board ADA Anniversary Event* (July 23, 2015), *available at* http://www.ada.gov/ada_25th_anniversary/25th_event_livevideo.html.

387 Press Release, EEOC, *EEOC Chair Yang Calls for Renewed Effort to Hire People with Disabilities* (Oct. 15, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-15-14.cfm.

388 *Id.*

389 Press Release, EEOC, *Race and National Origin Discrimination Persist 50 Years after EEOC's Founding, Experts Say* (Apr. 15, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-15-15.cfm.

390 *EEOC Meeting, EEOC at 50: Confronting Racial and Ethnic Discrimination in the 21st Century Workplace* (Apr. 15, 2015), *available at* http://www.eeoc.gov/eeoc/meetings/4-15-15/.

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Authority to Conduct Class-Type Investigations

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions in the event of an employer's failure or refusal to provide requested information or data or to make requested personnel available for interview.[391] The EEOC continues to exercise this option, particularly when dealing with systemic investigations.

A brief review of the scope and limits on the EEOC's investigative authority follows, including procedural rules in challenging such authority, and federal court decisions over the past year. Appendix C of this Report provides a detailed summary of select subpoena enforcement actions filed during FY 2015.

Systemic investigations can arise based upon any of the following: (1) an individual files a pattern-or-practice charge or the EEOC expands an individual charge into a pattern-or-practice charge; (2) the EEOC commences an investigation based on the filing of a "Commissioner's Charge;" or (3) the EEOC initiates, on its own authority, a "directed investigation" involving potential age discrimination or equal pay violations.

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.[392] Unlike individual litigants asserting class action claims, the EEOC need not meet the stringent requirements of Rule 23 to initiate a pattern-or-practice lawsuit against an employer. Thus, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals, beyond the charging parties, who are identified during the investigation."[393]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, Commissioner's Charges),[394] based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a Commissioner's Charge, the EEOC is entitled to investigate broader claims.

Finally, the EEOC may initiate a systemic investigation under either the Age Discrimination in Employment Act or the Equal Pay Act. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination,[395] seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute.[396]

1. Scope of EEOC's Investigative Authority

While EEOC requests for information arise under each of the statutes enforced by the agency, the Commission's requests for information under Title VII are illustrative, as they permit the civil rights agency to "at all reasonable times have access to...any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[397] The leading case interpreting this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[398] which is frequently cited in subpoena enforcement litigation, particularly for the proposition that the EEOC is "entitled to access only evidence 'related' to the

391 For a more detailed discussion of the EEOC's authority to investigate charges of discrimination, *see* Barry Hartstein, *An Employer's Guide to Systemic Investigations and Subpoena Enforcement Actions*, Littler Report (August 2011), *available at* http://www.littler.com/publication-press/publication/employers-guide-eeoc-systemic-investigations-and-subpoena-enforcement-.

392 *See* 42 U.S.C. § 2000e-5(b).

393 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). *But see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v Royal Caribbean Cruises, Ltd.,* 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014) (denying the EEOC's attempt to subpoena information to help support an pattern-or-practice claim, when the case at issue involved one individual only).

394 See 42 U.S.C. § 2000e-5(b) (a charge may be filed either "by or on behalf of a person claiming to be aggrieved, or by a member of the Commission").

395 Over the past year, the EEOC also has taken the view that it can pursue "pattern or practice" claims and litigation in the absence of a charge based on "resistance" to the exercise of rights protected under Title VII, but such action taken by the EEOC to date has focused on initiating litigation without extensive investigations by the EEOC based on the issue in dispute (*e.g.,* severance agreements and arbitration). *See, e.g., EEOC v. CVS Pharmacy*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014); (7th Cir.) (decision issued Dec. 17, 2015); *EEOC v. Doherty Enterprises*, 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).

396 *See, e.g.,* 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").

397 42 U.S.C. § 2000e-8(a). *See also* 29 U.S.C. § 626(a) (ADEA); 29 C.F.R. § 1626.15 (ADEA); 29 U.S.C. § 211 (FLSA); 29 U.S.C. § 206(d) (EPA); 29 C.F.R. § 1620.30 (EPA); EEOC Compliance Manual, § 22.7.

398 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).

charge under investigation…courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer."[399] However, in *Shell Oil*, the Court noted also, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[400]

Challenges to subpoena enforcement actions typically focus on two issues: (1) relevance and (2) burdensomeness. As discussed below, the courts have limited the circumstances in which an employer can be successful in challenging a subpoena on "relevance" grounds, and in recent years employers have been most successful in limiting such challenges in the Tenth and Eleventh Circuit when the EEOC has made broad-based requests for information when faced solely with an individual charge of discrimination.[401] With respect to burdensomeness, courts begin by presuming that compliance should be enforced to further the EEOC's legitimate inquiry into matters of public interest. Thus, an employer must demonstrate the demands are unduly burdensome or unreasonably broad, such as by showing that "compliance would threaten the normal operation of a respondent's business."[402]

2. Potential Waiver of Right to Challenge EEOC Subpoenas

Based on recent actions by the EEOC, employers must take care to ensure that any challenge to a subpoena is filed on a timely basis. For any Title VII or ADA claim, an employer must file a petition to modify or revoke within five business days of service of the subpoena.[403] The EEOC has recently taken an aggressive stance on the "waiver" issue when dealing with employers that have generally failed to respond to the EEOC's requests for information and subpoenas. Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.[404]

Recent filings in which the EEOC has argued that the employer waived the right to challenge a subpoena are consistent with the Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[405] discussed in Littler's FY 2013 Annual Report, in which a federal appeals court supported the EEOC's view that an employer waived the right to challenge a subpoena by failing to file a Petition to Modify or Revoke. In *Aerotek*, a staffing agency was ordered to comply with a broadly worded subpoena that was pending for more than three years because the company filed objections *one day* late. The staffing company was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients.

Although Aerotek provided the EEOC with approximately 13,000 pages of documents in response to the subpoena, the agency claimed the company failed to provide additional requested information. The district court held that Aerotek filed its Petition to Revoke or Modify the subpoena six days after the subpoena was issued, instead of the statutorily-

399 *Shell Oil Co.*, 466 U.S. at 59.

400 *Id.*

401 *See EEOC v Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012); *EEOC v Royal Caribbean Cruises, Ltd.,* 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014). In isolated circumstances, employers have been successful in challenging a subpoena based on a claim that the EEOC was involved in a "fishing expedition." *See EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002). *See also EEOC v. Sterling Jewelers Inc.*, 2013 U.S. Dist. LEXIS 141489, *20 (W.D.N.Y. Sept. 23, 2013).

402 *EEOC v. United Airlines*, 287 F.3d at 653. As discussed below, only the 11th Circuit has applied a different standard, applying a burdensomeness test that "weigh[s] such equitable criteria as reasonableness and oppressiveness" and "impl[ies] a balancing of hardships and benefits." *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) *citing EEOC v. Packard Elec. Div., Gen. Motors Corp*., 569 F.2d 315, 318 (5th Cir.1978). "The use of 'such … criteria' and the plural of 'hardship' and 'benefit' clearly indicates that a district court may consider a number of factors in this analysis, rather than requiring specific types of evidence on a single factor." *Id.*

403 *See EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at *9-29 (D. Ariz. Sept. 30, 2009) (providing a thorough discussion of case law discussing the potential "waiver" of a right to challenge administrative subpoena). *See also EEOC v. Cuzzens of GA, Inc*., 608 F.2d 1062, 1064 (5th Cir. 1979); *EEOC v. Cnty of Hennepin*, 623 F. Supp. 29, 33 (D. Minn. 1985); *EEOC v. Roadway Express, Inc*., 569 F. Supp. 1526, 1528 (N.D. Ind. 1983). Note, in addition, that there is no right to appeal subpoenas issued by the EEOC under the ADEA or EPA.

404 *See, e.g., EEOC v. Chrome Zone LLC*, Case No. 4:13-mc-130 (S.D. Tex. Feb. 22, 2013) (EEOC motion to compel employer's compliance with subpoena, arguing waiver by failure to file a Petition to Revoke or Modify Subpoena where the employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 14831, at **11-12 (E.D. Cal. Oct. 15, 2013); *EEOC v. Mountain View Medical Center*, Case No. 2:13-mc-64 (D. Ariz. July 30, 2013) (same). *But see EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting irrelevant information despite employer's failure to file a Petition to Revoke or Modify Subpoena, reasoning a procedural ruling was inappropriate given (1) the absence of established case law on the issue under the ADA, (2) the sensitive and confidential nature of the information subpoenaed, which related to employees' medical conditions, and (3) the fact that the employer had twice objected to the scope of the EEOC's inquiry before the enforcement action was filed).

405 *EEOC v. Aerotek,* 498 Fed. Appx. 645 (7th Cir. 2013).

required five days. The Seventh Circuit agreed, finding that "Aerotek has provided no excuse for this procedural failing and a search of the record does not reveal one...We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because Aerotek has waived its right to object."[406]

The Sixth Circuit is considering a similar issue in *EEOC v. Helping Hand Home Health Care*.[407] Investigating allegations that Helping Hand honored requests from its customers to send to their homes nurses of a particular race, the EEOC issued a subpoena requesting information concerning such requests from patients. Helping Hand submitted to the EEOC written objections, asserting such information was irrelevant, unduly burdensome, and protected by patient privacy laws. However, it failed to file a Petition to Revoke or Modify the subpoena. The EEOC filed for enforcement, and the Eastern District of Michigan issued an opinion rejecting Helping Hand's arguments and noting that they were not timely raised in a Petition to Modify or Revoke.[408] The Sixth Circuit is expected to rule on this issue shortly.

Relatedly, in *EEOC v. Century Health*,[409] the EEOC sought to enforce a subpoena it had served on the employer's Vice President of Employee Relations. The individual who was purportedly served had left her employment several months before the subpoena's delivery to the employer's headquarters, where the subpoena had been left with a temporary employee filling in that day as receptionist. The EEOC sought to enforce the subpoena, claiming the employer had failed to timely file a Petition to Revoke or Modify. The district court disagreed, looking to the EEOC's Compliance Manual to determine the EEOC had failed to follow its own procedural requirements for service. The employer argued service had not been effectuated because the addressee had vacated her position months before the subpoena was delivered. The EEOC claimed the subpoena was directed to the position rather than the individual addressee. The court noted that the Compliance Manual required service on the employer's Chief Executive Officer, and that the employer's counsel had provided the EEOC with the employer's agent for service of process. Thus, the court deemed the EEOC's service ineffective and denied the EEOC's motion to enforce the subpoena.

It should be additionally noted, however, that an employer does not even have the option to file a petition to modify or revoke a subpoena when faced with subpoenas involving ADEA and EPA claims.

A recent district court opinion highlighted an additional procedural requirement in responding to a subpoena-related action—namely, that an employer cannot respond to an EEOC enforcement action without legal representation. In *EEOC v. Ayala AG Services*,[410] the EEOC sought enforcement of its administrative subpoena seeking information related to the investigation of two sexual harassment charges. The enforcement action went to hearing, at which a former employee of the company appeared to inform the court that the company had gone out of business.

The court explained that the respondent was a business entity and, as such, can appear in federal court only through licensed counsel or, in the case of a sole proprietorship, by personal appearance. The individual who purported to appear on behalf of the employer was neither the sole owner nor licensed counsel. Thus, the court deemed his appearance ineffective and enforced the subpoena based on the employer's failure to properly appear and the EEOC's proof that the subpoena was issued pursuant to the EEOC's investigative authority, procedurally valid, and relevant to the charges under investigation.

3. Review of Recent Cases Involving Broad-Based Investigation by EEOC

a) Court of Appeals Decisions

Employers continue to grapple with the scope of the EEOC's investigative authority, and an ongoing concern is whether a particular charge might lead to a systemic investigation by the EEOC.[411] While a systemic charge can arise as a pattern-or-practice charge, Commissioner's charge or directed investigation involving potential age discrimination or equal pay violations,[412] the most frequent concern is the EEOC's expansion of an individual charge into a systemic investigation.

406 *Aeroteck,* 498 Fed. Appx. at 648.

407 *EEOC v. Helping Hand Home Health Care Corp.*, 2015 U.S. Dist. LEXIS 88620 (E.D. Mich. May 20, 2015); *EEOC v. Helping Hand Home Health Care Corp.*, No. 13-MC-51043 (6th Cir.) (Notice of Appeal filed June 10, 2015).

408 *Id.*

409 *EEOC v. Century Health*, 2014 U.S. Dist. LEXIS 150918 (D. Colo. Oct. 23, 2014).

410 *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 148431 (E.D. Cal. Oct. 15, 2013).

411 The EEOC has defined systemic cases as "pattern-or-practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." *See* EEOC Systemic Task Force Report (Mar. 2006) at 1, *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

412 *See* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, at 31-32.

In recent years, the courts, including the U.S. Circuit Courts of Appeal, frequently have sided with the EEOC regarding the agency's broad-based requests for information.[413] The most recent example is the Ninth Circuit decision in *EEOC v. McLane Company, Inc*.,[414] In *McLane*, the EEOC's investigation began with an individual charge of sex discrimination in which a former employee alleged she was unlawfully discharged for failing to achieve the minimum score on an isokinetic strength test required for her position upon return from maternity leave. During the investigation, the employer disclosed that the test at issue was administered throughout its facilities nationwide for all positions classified as "physically demanding" upon an employee's return from leave over 30 days.

As a result, the EEOC expanded its investigation to include all of the employer's facilities nationwide, seeking information concerning the employees who were subjected to the strength test, including their results and information about any subsequent termination for employees who achieved sufficient test results. The employer cooperated with many of the EEOC's requests, but refused to produce information specifically identifying the employees who took the test, including their names, social security numbers, addresses, and telephone numbers, as well as information concerning employees who achieved acceptable scores but were later terminated for other reasons. The employer argued, *inter alia*, that such personal information was unnecessary to the EEOC's investigation given all the other information that had already been provided. The Ninth Circuit held, however, that the EEOC had met its burden to establish the requested information was relevant and need not establish any "particularized necessity."[415] Thus, the Ninth Circuit ordered the employer to produce nationwide employee contact information and social security numbers so the EEOC could contact employees for interview.

Other federal appeals courts, however, have placed limits on the EEOC's subpoena power. In 2010, the Third Circuit in *EEOC v. Kronos Inc.,* limited a subpoena beyond the protected class (but otherwise enforced a broad-based subpoena).[416] In 2012, in *EEOC v. Burlington Northern Santa Fe Railroad*,[417] the Tenth Circuit ruled that the EEOC was entitled only to evidence relevant to the charges under investigation, and rejected enforcement of a subpoena seeking data on a nationwide basis in connection with a charge of disability discrimination filed by two men who applied and were rejected for the same type of job in the same state.

In 2014, in *EEOC v. Royal Caribbean Cruises, Ltd*.,[418] the Eleventh Circuit joined ranks with the Tenth Circuit in limiting the scope of a subpoena in an ADA claim, in which the EEOC attempted to discover information to support a pattern-or-practice claim against an employer when it was faced solely with an individual ADA claim.[419] The court sided with the employer on both "relevance" and "burdensomeness" grounds. The favorable impact of this decision should be tempered based on the Eleventh Circuit's view that the EEOC had the option of seeking such information in a Commissioner's charge, but the EEOC had not elected that option in dealing with the matter under investigation.

While the Ninth Circuit decision in *McLane* is a reminder of the broad leeway given the EEOC in the investigation process, *Royal Caribbean* and *Burlington Northern* suggest that the scope of a charge and scope of an EEOC's investigation, at least in the Tenth and Eleventh Circuits, will continue to be issues that are carefully considered by both employers and the EEOC moving forward.

b) District Court Cases

In *EEOC v. Forge Indus. Staffing*,[420] the EEOC sought enforcement of a subpoena requesting company-wide information about the respondent employer's employment application, which included a provision requiring all claims against the respondent within six months, regardless of the statutory limitations period. The employer objected, arguing that the information requested was irrelevant to the charge under investigation, which was an individual claim of harassment and retaliation. The court agreed, likening the subpoena to the one at issue in *Royal Caribbean Cruises*, discussed *supra*, in which the EEOC's request for company-wide information was overbroad in light of the

413 *See* Barry A. Hartstein, *An Employer's Guide to EEOC Systemic Investigations and Subpoena Enforcement Actions,* Littler Report (Aug. 1, 2011), *available at* http://www.littler.com/files/press/pdf/AnEmployersGuideToSystemicInvestigationsAndSubpoenaEnforcementActions.pdf.

414 *EEOC v. McLane Company, Inc.*, 2015 U.S. App. LEXIS 18702 (9th Cir. Oct. 27, 2015).

415 2015 U.S. App. LEXIS 18702, at *13-14.

416 *EEOC v Kronos Incorporated*, 620 F. 3d 287 (3d Cir. 2010).

417 *EEOC v Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012).

418 *EEOC v Royal Caribbean Cruises, Ltd.,* 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014).

419 Pub. L. No. 101-336 (1990), *codified at* 42 U.S.C. §§ 12101-12213 (2000).

420 *EEOC v. Forge Indus. Staffing*, 2014 U.S. Dist. LEXIS 164552 (S.D. Ind. Nov. 24, 2014).

individual charge under investigation, which itself raised no issues of possible broad-based discrimination. Describing the information requested as only "generously described as tangential to the underlying charge," the court deemed it irrelevant to the EEOC's investigation and unduly burdensome for the employer to produce.

In *EEOC v. A'Gaci*,[421] the EEOC's investigative scope was also limited – though regarding the type of discrimination rather than the breadth. In that case, the EEOC sought hiring and applicant information on the basis of race, sex, and age. However, the charge under investigation was limited to a claim of retaliation, which was premised upon protected activity of reporting allegedly discriminatory hiring practices. The employer objected to the EEOC's subpoena, arguing it constituted investigation into hiring practices that were unrelated to the charge of retaliation. The court agreed, ruling the EEOC did not have jurisdiction to investigate the employer's hiring practices absent a charge made on behalf of an aggrieved individual alleging discriminatory failure to hire. However, the court also ruled that the demographics of the employer's applicant pool and the applicants who were hired during the charging party's tenure were relevant to his reasonable belief that the employer was engaged in discriminatory hiring practices. Thus, it ordered the employer to produce such information as was in its possession. Finally, the court also noted that the EEOC could investigate the employer's allegedly discriminatory hiring practices if it so chose by filing and pursuing a Commissioner's Charge.

By contrast, where information sought has broad implications but is related to the underlying charge, the EEOC's subpoena will be enforced. In on recent case,[422] the EEOC sought information concerning the identity of all employees with disabilities who had been adversely affected by the employer's no-fault attendance policy, under which the charging party claimed she was wrongfully terminated in violation of the ADA. The employer objected, claiming information related to other employees was irrelevant to the individual charge under investigation. The court disagreed, however, distinguishing *Royal Caribbean* and *United Airlines* to find the information was relevant to the individual's charge and not unduly burdensome to produce.[423]

Court have even enforced EEOC administrative subpoenas where the charging parties were already issued a right-to-sue letter and subsequently litigated their claims to final resolution in federal court. In *EEOC v. Union Pacific Railroad*,[424] the EEOC sought information concerning the employer's testing program to assess the qualification of applicants for promotion. By the time the subpoena enforcement action was filed, the EEOC issued right-to-sue letters to the two charging parties, who filed claims in federal court. By the time the subpoena enforcement action was ripe for determination, the charging parties' cases had been dismissed on summary judgment. Thus, the employer moved to dismiss the subpoena enforcement action, arguing the EEOC no longer had jurisdiction to investigate the charges after issuing right-to-sue letters. The court noted that the Fifth Circuit had ruled that the EEOC's jurisdiction ended upon its issuance of a right-to-sue letter, but that the Ninth Circuit had reached the opposite conclusion, finding "the EEOC controls the charge regardless of what the charging party decides to do." The Wisconsin court sided with the Ninth Circuit, noting the EEOC's role in representing the public interest as well as that of charging parties. In so holding, the judge found irrelevant the fact that the charges alleged only individual discrimination rather than a pattern or practice of discrimination, finding the scope of the EEOC's investigation was appropriate given the charge allegations. In support of this holding, the court noted that the EEOC had discovered, in the course of its investigation, that none of the 10 people promoted to the disputed position were African American. Thus, it deemed the EEOC justified in seeking evidence related to a pattern or practice of discrimination.[425]

Recent district court decisions have also highlighted the importance of employers' overall cooperation with the investigative process. In *EEOC v. V&J Foods*,[426] the EEOC sought documents and information from the employer, including the charging party's personnel file. The employer failed to produce any information for over a year, and then eventually complied partially in fits and spurts. When the EEOC sought enforcement of the subpoena, the employer's only argument was that the EEOC did not make a reasonable attempt to explain its theory of liability so as to establish the relevance of the

421 *EEOC v. A'Gaci, LLC*, 2015 U.S. Dist. LEXIS 14317 (W.D. Tex. Feb. 5, 2015), issued the same day as *EEOC v. A'Gaci, LLC*, 2015 U.S. Dist. LEXIS 14319 (W.D. Tex. Feb. 5, 2015), discussed in the next section.

422 *EEOC v. Trinity Health Corp.*, 2015 U.S. Dist. LEXIS 60994 (N.D. Ind. May 11, 2015).

423 *See also, EEOC v. City of Richmond*, 2015 U.S. Dist. LEXIS 540 (N.D. Cal. Jan. 2, 2015) (Holding the EEOC's subpoena should be enforced because: (1) the subpoena was within the EEOC's investigative authority; (2) the EEOC satisfied its own procedural requirements; and (3) the information sought was relevant to the investigation).

424 *EEOC v. Union Pac. R.R. Co.*, 2015 U.S. Dist. LEXIS 57305 (E.D. Wis. May 1, 2015).

425 *See also*, Press Release, EEOC, *Federal Court Approves EEOC Subpoena in Investigation of Union Pacific* (May 5, 2015) *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-4-15a.cfm.

426 *EEOC v. V&J Foods, Inc.*, 2015 U.S. Dist. LEXIS 88620 (E.D. Wis. Jul. 7, 2015).

requested material. However, the relevance of the requested information was evident on the face of the subpoena and, given the employer's extended failure to comply, the court granted enforcement in summary fashion.[427]

4. Confidentiality

In some circumstances, even where courts are willing to enforce EEOC administrative subpoenas, employers may face additional issues related to the confidentiality of information shared with the EEOC. In *EEOC v. Bashas' Inc.*,[428] the district court ordered the employer to comply with an administrative subpoena, but the parties could not agree to the terms of a confidentiality order. The district court entered its own confidentiality order, which the EEOC appealed, arguing the order prohibited the EEOC from sharing information acquired with the charging parties "to the extent deemed necessary to effectively enforce the law."[429] At oral argument before the Ninth Circuit, the EEOC abandoned this position, agreeing it would not share information provided by the employer during the pendency of the investigation or thereafter, except as required by the Freedom of Information Act. The appellate court referred the matter back to the district court, noting that the EEOC would be bound by its concession at oral argument throughout the case, but not in any other case.

In a similar case, the U.S. District Court for the Western District of Texas ruled that the employer was entitled to a protective order related to an EEOC administrative subpoena and related enforcement action.[430] In *EEOC v. A'Gaci*, the EEOC sought information related to allegedly discriminatory hiring practices. The employer petitioned the court to seal the EEOC's motion for enforcement and the parties' related briefing, and also requested a protective order. The employer claimed the documents sought by the EEOC contained both confidential business information as well as personnel and payroll information. The court noted that filings under seal are disfavored under its local rules, but found the EEOC was prohibited under Title VII from making public the charge and information obtained in the course of its investigation. Thus, the court sealed the pleadings and issued a protective order.

B. Conciliation

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[431] Only after "[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer."[432] If the EEOC fails to conciliate in good faith prior to filing suit, the court may stay the proceedings to allow for conciliation or dismiss the case.[433] Employers in recent years have challenged the sufficiency of the EEOC's investigation and conciliation efforts.

In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining, LLC v. EEOC.*[434] Before *Mach Mining*, a significant circuit split existed regarding the scope of judicial review of the EEOC's conciliation efforts. As discussed below, the Supreme Court has now clarified that the EEOC's conciliation efforts *are* judicially reviewable, but the EEOC has broad discretion in the efforts it undertakes to conciliate.

The following discusses FY 2015 pre- and post-*Mach Mining* conciliation decisions.

1. Pre-*Mach Mining:* Challenge by EEOC to Any Conciliation Obligation

In *EEOC v. College America of Denver, Inc.*, a case in which the court ultimately determined the EEOC failed to conciliate its claims challenging an employer's separation agreements, the EEOC had argued it attempted to conciliate separate, unrelated claims and that a case cannot be dismissed for lack of conciliation if there has been any effort to conciliate.[435] The district court rejected that argument, reasoning that to satisfy its conciliation obligations, the EEOC must provide an employer "an adequate opportunity to respond to all charges and negotiate possible settlements." Since

427 *See also EEOC v. Aerotek, Inc.*, Case No. 1:15-cv-00275 (N.D. Ill. Mar. 10, 2015) (summarily enforcing the EEOC's subpoena in light of a prior enforcement action involving the similar facts). *See also* Press Release, EEOC, *Federal Court Approves Another EEOC Subpoena in Investigation of Aerotek* (Mar. 25, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/3-25-15a.cfm.

428 *EEOC v. Bashas' Inc.*, 2014 U.S. App. LEXIS 19132 (9th Cir. Oct. 7, 2014).

429 *Bashas' Inc.*, 2014 U.S. App. LEXIS 19132, at *2.

430 *EEOC v. A'Gaci, LLC*, 2015 U.S. Dist. LEXIS 14319 (W.D. Tex. Feb. 5, 2015), issued the same day as the identically captioned decision, *EEOC v. A'Gaci, LLC*, 2015 U.S. Dist. LEXIS 14317 (W.D. Tex. Feb. 5, 2014), discussed in the section immediately above.

431 *See, e.g., EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 35915 (D. Haw. Mar. 16, 2012) (*citing* 42 U.S.C. § 2000-e5(b)).

432 *Global Horizons*, 2012 Dist. LEXIS 35915, at *12.

433 *EEOC v. Global Horizons,* 2013 U.S. Dist. LEXIS 53282 (E.D. Wash. Apr. 12. 2013), at *21.

434 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).

435 *EEOC v. College America of Denver, Inc.*, 75 F. Supp. 3d 1294, 1302-03, 2014 U.S. Dist. LEXIS 167055 (D. Colo. Dec. 2, 2014).

there was no evidence that the EEOC had made *any* effort to conciliate its allegations that the separation agreements at issue violated the ADEA, the court refused to grant a stay of proceedings to permit conciliation on that claim.[436] As a result, the court dismissed the EEOC's Second Claim for Relief "for lack of jurisdiction as a result of the EEOC's failure to satisfy the jurisdictional prerequisites of notice and conciliation."[437] The court allowed the EEOC's retaliation claim to stand.

In *EEOC v. Mel-K Mgmt Co.*, the Northern District of Ohio granted the EEOC's motion to strike evidence proffered in support of an employer's motion to dismiss for failure to conciliate, holding the EEOC's communications with an employer during conciliation are confidential and may not be used to support a challenge to the EEOC's conciliation efforts, absent the EEOC's written consent.[438] The court reasoned that "[n]othing said or done during and as a part of [conciliation] may be made public by the EEOC, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned."[439] "This explicit prohibition against disclosure is absolute" the court noted, "and 'contains no exception allowing such information to be admitted for a collateral purpose, such as to satisfy a court that the EEOC's efforts to conciliate were sufficient.'"[440] The court therefore granted the EEOC's motion to strike the proffered evidence of the EEOC's conciliation communications.

In *EEOC v. Kmart Corp.*, the District of Maryland held, as the Northern District of Ohio had in *Mel-K Mgmt. Co.*, that the plain language of Title VII prohibits the use of conciliation communications as evidence in support of a failure to conciliate defense, absent the EEOC's written consent.[441] In *Kmart Corp.*, the employer sought to attach email correspondence, exchanged during the conciliation process in support of a motion for leave to amend its answer to reassert a failure-to-conciliate defense. The EEOC moved to strike the employer's submission, and the court granted the agency's motion, noting that "[s]ection 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), on its face, prohibits the EEOC from making the communications public and also prohibits all parties from using the communication as evidence in a subsequent proceeding without the written consent of the persons concerned."[442] Despite striking the conciliation communications, the court rejected the EEOC's argument that the employer's motion was futile, finding that the employer could still establish the EEOC had not conciliated in good faith by showing the EEOC had not attempted to conciliate.[443]

In *EEOC v. Parker Drilling Co.*, the District of Alaska held that conciliation is a jurisdictional prerequisite to filing suit.[444] Declining to adopt a standard for evaluating the sufficiency of the EEOC's conciliation efforts, the court analyzed those efforts under the Eleventh Circuit's three-part inquiry, which it deemed the most rigorous approach, and concluded that the EEOC's conciliation efforts were adequate. Specifically, the court noted that the EEOC corresponded with the employer on multiple occasions, outlining its reasonable cause for believing the employer violated Title VII, responding to the employer in a "reasonable and flexible manner," and offering an opportunity for voluntary compliance.[445] The court stated that "[t]he EEOC's obligation to seek conciliation in good faith does not require it to convince a respondent of the merits of its position nor to compromise claims it considers meritorious for the sake of avoiding litigation."[446]

2. Post-*Mach Mining*: Impact of Supreme Court Decision

As noted, thr most important development relating to the conciliation process was the decision by the U. S. Supreme Court in *Mach Mining, LLC v. EEOC.*[447] Before *Mach Mining*, there was a split among circuits regarding whether the EEOC's conciliation efforts were subject to judicial review and the extent of that review. For example, the Fourth and Sixth Circuit Courts of Appeals had adopted a standard deferential to the EEOC, under which a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review."[448] The Second, Fifth and Eleventh Circuit Courts of Appeals, however, required courts to evaluate "the reasonableness and responsiveness of the EEOC's conduct under all

436 *College America of Denver, Inc.*, 75 F. Supp. 3d at 1302-03.

437 *Id.*

438 *EEOC v. Mel-K Mgmt Co.*, 2015 U.S. Dist. LEXIS 8733, at **2-3 (N.D. Ohio Jan. 26, 2015).

439 *Mel-K Mgmt Co.*, 2015 U.S. Dist. LEXIS 8733, at **2-3.

440 *Id.* at *3.

441 *EEOC v. Kmart Corp.*, 2014 U.S. Dist. LEXIS 147560 (D. Md. Oct. 15, 2014).

442 *Kmart Corp.*, 2014 U.S. Dist. LEXIS 147560, at **4-5.

443 *Id.* at **6-9.

444 *EEOC v. Parker Drilling Co.,* 2015 U.S. Dist. LEXIS 34937 (D. Alaska Mar. 20, 2015).

445 *Parker Drilling Co.,* 2015 U.S. Dist. LEXIS 34937, at **7-22.

446 *Id.* at *19.

447 *Mach Mining, LLC v. EEOC,* 135 S.Ct. 1645 (2015).

448 *EEOC v. Radiator Specialty Co.,* 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

the circumstances." According to these courts, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.[449]

In *Mach Mining*, the Supreme Court unanimously resolved the circuit split by holding that the EEOC's attempts to conciliate a discrimination charge before filing a lawsuit *are* judicially reviewable.[450] The Supreme Court vacated a decision by the U.S. Court of Appeals for the Seventh Circuit that had held the EEOC's conciliation efforts during the administrative charge process were not judicially reviewable and thus not a possible affirmative defense. The Supreme Court ruled that, although Title VII gives the EEOC "wide latitude" to choose which informal conciliation methods to employ, it also provides "concrete standards" for what the conciliation process must entail.

Specifically, the Court held that, to meet its statutory conciliation obligations, the EEOC must inform the employer about the specific discrimination allegation(s) and that notice must describe what the employer has done and which employees (or class of employees) have suffered. The EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. While the Court held that judicial review of these requirements is appropriate, it also held that the scope of judicial review is "narrow." A court is to conduct a "barebones review" of the conciliation process and the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them." Significantly, a court is not to examine positions taken by the agency during the conciliation process. The Court noted that, although a sworn affidavit from the EEOC stating that it has performed these obligations would generally suffice to show that it has met the conciliation requirement, if an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or attempt to engage in a discussion about conciliating the claim, then a reviewing court will be tasked with conducting "the fact-finding necessary to resolve that limited dispute." Importantly, the Court held that even if a court finds for an employer on the issue of the EEOC's failure to conciliate, the appropriate remedy is to order the EEOC to undertake the mandated conciliation efforts. Some courts previously had dismissed lawsuits based on the EEOC's failure to meet its conciliation obligation, but that drastic measure appears no longer available, based on the Court's decision.

Federal courts have begun to interpret the EEOC's conciliation obligations post-*Mach Mining*. In *EEOC v. OhioHealth Corp.*,[451] the Southern District of Ohio cautioned that even under *Mach Mining*, the EEOC's obligation to conciliate was not an "aspirational activity" and the EEOC must engage in conciliation that includes: (a) notice to the employer about the specific allegation; and (b) some form of discussion to give the employer an opportunity to remedy the allegedly discriminatory practice. The court found that the EEOC failed to meet its conciliation obligations because it did not "prepare [and transmit to the employer] a dollar amount that includes lost wages and benefits, applicable interest, and any appropriate attorney fees and costs." Because the conciliation requirements were not met, the court stayed the action for 60 days and directed the EEOC to engage in good-faith conciliation. The court also rejected as "ridiculous" the EEOC's view that private conciliation was no longer possible after suit had been filed and cautioned that a failure to engage in the conciliation process in good faith would result in the imposition of "any or all consequences available."[452]

In *EEOC v. Jet Stream Ground Services, Inc.*,[453] however, the district court took the opposing viewpoint regarding the sufficiency of the EEOC's conciliation efforts. In this case, the employer and EEOC had engaged in an ongoing exchange of proposals. The employer objected to the EEOC's efforts, claiming the Commission did not engage in a "sincere and reasonable conciliation" because it initially proposed that the employer create a settlement fund for "aggrieved individuals" who had not yet been identified, and because the EEOC "demanded that [the employer] reinstate all other aggrieved individuals that it could identify." The employer also criticized the EEOC's negotiating on behalf of interveners, claiming such actions not taken in an "individualized manner" constituted bad faith.

The court rejected the employer's contention, holding that *Mach Mining* gives the EEOC "expansive discretion… over the conciliation process" and that "its efforts need not involve any specific steps or measures." In essence, the court interpreted *Mach Mining* as requiring only a limited scope of review of the EEOC's conciliation efforts.

449 *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Asplundh Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003).

450 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).

451 *EEOC v. OhioHealth Corp.*, 2015 U.S. Dist. LEXIS 84016 (S.D. Ohio June 29, 2015).

452 *OhioHealth Corp.*, 2015 U.S. Dist. LEXIS 84016 at *13.

453 *EEOC v. Jet Stream Ground Services, Inc.*, 2015 U.S. Dist. LEXIS 130838 (D. Colo. Sept. 29, 2015).

3. General Investigation and Conciliation Obligations

Employers had challenged the sufficiency of the EEOC's conciliation efforts after the EEOC has filed suit, alleging that the EEOC's lack of sufficient pre-litigation conciliation efforts deprives the court of subject matter jurisdiction. However, this theory has not been accepted by the courts. For example, in *EEOC v. Global Horizons, Inc.*, an employer tried to dismiss a national origin discrimination lawsuit, claiming the court lacked subject matter jurisdiction because the EEOC had not satisfied its conciliation obligations.[454] The court rejected the argument, holding the EEOC's pre-suit requirements (*i.e.*, notice, investigation, reasonable-cause determination, and conciliation) are not subject matter jurisdiction requirements, but elements of the EEOC's claim.[455] It held that, where the EEOC has failed to satisfy its pre-suit requirements, the proper challenge is a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a Rule 56 motion for summary judgment.[456] Similarly, in *EEOC v. Pioneer Hotel*, the employer moved to dismiss the EEOC's lawsuit under Rule 12(b)(1), arguing the court was without subject matter jurisdiction to "hear the present Title VII action because the EEOC failed to engage in a good faith attempt at conciliation pursuant to 42 U.S.C. § 2000e-5(b)."[457] Like other courts, the district court rejected this argument,[458] holding conciliation was not a jurisdictional prerequisite to a Commission suit.[459] The court noted that before 2006, a finding of good-faith conciliation was a "jurisdictional condition precedent to suit by the EEOC[,]"[460] but since the U.S. Supreme Court opinion in *Arbaugh v. Y&H Corp.,*[461] holding several provisions of Title VII to be "claim elements" instead of jurisdictional requirements, the requirement to conciliate is considered part of EEOC's claim, not jurisdictional.

In 2014, these holdings continued. For example, in *EEOC v. Farmers Ins. Co.*, a district court rejected an employer's effort to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1).[462] The court noted that the "Supreme Court has made clear that a statutory requirement is jurisdictional only where there is 'clear indication that Congress wanted the rule to be jurisdictional.'"[463] Finding no such indication in Title VII, the district court held that the preconditions to the EEOC filing a lawsuit "are not jurisdictional" and denied the motion to dismiss.[464]

Although most courts favor the position that failure to conciliate does not raise a question of jurisdiction, a few opinions have found to the contrary. In *EEOC v. La Rana Hawaii, LLC*,[465] the District of Hawaii determined that it was still bound to follow the Ninth Circuit's 1982 decision in *EEOC v. Pierce Packing Co.*,[466] which held that conciliation was a jurisdictional prerequisite. The court noted that the ruling had been called into doubt by the Supreme Court's decision in *Arbaugh*, but said there was no "controlling precedent explicitly overturning" *Pierce Packing* and the court therefore could not depart from it.[467] Further, as noted above, the District of Alaska held in *EEOC v. Parker Drilling Co.*[468] that conciliation is a jurisdictional prerequisite to suit and that the proper challenge to the adequacy of conciliation is a motion to dismiss for lack of jurisdiction under Rule 12(b)(1).

Employers also sometimes use the EEOC's failure to conciliate as an affirmative defense. In *Kmart Corp.*, the EEOC argued against allowing an employer to amend its answer to assert failure to conciliate as an affirmative defense, stating that the defense was futile because the EEOC is only required to make an attempt at conciliation.[469] In granting the employer's motion for leave to amend the answer, the court found the affirmative defense was not futile because the

454 *Global Horizons,* 2013 U.S. Dist. LEXIS 53282, at *23.

455 *Id.* at **24-26.

456 *Id.* at *28.

457 *EEOC v. Pioneer Hotel, Inc.*, 2012 U.S. Dist. LEXIS 63553, at *6 (D. Nev. May 4, 2012).

458 *See, e.g., EEOC v. Wedco, Inc.,* 2013 U.S. Dist. LEXIS 33880 (D. Nev. Mar. 11, 2013) (holding conciliation requirement not jurisdictional, but instead a statutory prerequisite that may be attacked via Rule 12(b)(6) motion to dismiss); *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 72836 (E.D. Wash. May 24, 2012) (holding while Title VII's conciliation requirement is a precondition to suit, it is not a jurisdictional requirement); *see also EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243, 1255 (E.D. Cal. 2012) ("Title VII's conciliation requirement is a precondition to suit, but is not jurisdictional.").

459 *Pioneer Hotel,* 2012 U.S. Dist. LEXIS 63553, at *7.

460 *Id.* at *7.

461 *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 503, 126 S. Ct. 1235 (2006).

462 *EEOC v. Farmers Ins. Co.,* 2014 U.S. Dist. LEXIS 74318 (E.D. Cal. May 30, 2014).

463 *Farmers Ins. Co.,* 2014 U.S. Dist. LEXIS 74318, at *13, *quoting Henderson v. Shinseki,* 131 S.Ct. 1197, 1203 (2011).

464 *Farmers Ins. Co.,* 2014 U.S. Dist. LEXIS 74318, at *18.

465 *EEOC v. La Rana Hawaii, LLC,* 888 F. Supp. 2d 1019 (D. Haw. 2012).

466 *EEOC v. Pierce Packing Co.* 669 F.2d 605 (9th Cir. 1982).

467 *La Rana*, 888 F. Supp. 2d at 1043.

468 *EEOC v. Parker Drilling Co.,* 2015 U.S. Dist. LEXIS 34937 (D. Alaska Mar. 20, 2015).

469 *Kmart Corp.*, 2014 U.S. Dist. LEXIS 147560 at **6-7.

employer could succeed on the defense if it could show that the EEOC failed to conciliate in good faith.[470] Although the *Kmart* case preceded the Supreme Court decision in *Mach Mining*, because *Mach Mining* confirmed that conciliation efforts are subject to judicial review, it seems reasonable to conclude that employers still can plead failure to conciliate as an affirmative defense.

Two other significant FY 2015 addressed the interpretation of Section 707 and whether conciliation is required for "resistance" cases in the absence of a charge.[471]

In *EEOC v. CVS Pharmacy*, the EEOC sued the employer in the Northern District of Illinois, alleging that several provisions of the company's standard release of claims violated Title VII because they allegedly interfered with employees' rights to file administrative charges, communicate voluntarily, and participate in investigations with the EEOC and other fair employment practice agencies.[472] The company moved to dismiss, based in part on the EEOC's failure to conciliate. The EEOC conceded that it had not engaged in conciliation, but argued that conciliation is not required before filing a pattern-or-practice suit under Section 707(a). Citing the legislative history of the transfer of power from the Attorney General to the EEOC under the 1972 amendments, the EEOC argued that Congress vested in it the power to bring pattern-or-practice lawsuits "without certain prerequisites," including conciliation.[473] The court rejected the EEOC's argument, holding that Congress' "transfer of prosecutorial authority in 707(a) from the Attorney General was not intended to create a cause of action for the EEOC other than those specifically conferred on the commission pursuant to 707(e) and subject to the procedures provided in 706, including the obligation of conciliation."[474] The court also rejected the EEOC's argument that claims brought under 707(a) are distinct from those brought under 706(e), finding no authority supporting that position. Accordingly, the court held the EEOC was not authorized to file suit because it had not engaged in conciliation. On appeal, a three-judge Seventh Circuit panel agreed, emphasizing "because there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," the EEOC is required to comply with all of the pre-suit procedures—including conciliation—contained in Section 706 when it pursues "pattern or practice" violations.[475] The appellate court also held that the EEOC also could not circumvent the Section 706 pre-suit procedure, which requires a charge of discrimination prior to filing any suit under the Act.

Finally, in *EEOC v. Doherty Enterprises, Inc.*, the Southern District of Florida disagreed with the holding in *EEOC v. CVS Pharmacy* and ruled that the EEOC may file a pattern-or-practice claim under Section 707 without attempting to conciliate.[476] As in *CVS Pharmacy*, the EEOC filed suit alleging the employer's use of an agreement, this time an arbitration agreement, constituted "a pattern and practice of resistance to the full enjoyment of rights secured by Title VII."[477] The employer moved to dismiss the complaint, arguing, among other things, that the EEOC failed to conciliate its claims.[478] The court rejected the employer's failure-to-conciliate defense, reasoning that the Sections 707(a) and 706(e) causes of action are analytically distinct, and that the EEOC only needs reasonable cause before filing a complaint alleging a pattern-or-practice claim under Section 707. In other words, "section 707 does not require the EEOC to receive a charge, nor does it require conciliation."[479]

470 *Id.* at *8.

471 A more detailed discussion of this issue can be found in Section I of this Report.

472 *EEOC v. CVS Pharmacy*, 70 F. Supp. 3d 937, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014).

473 *CVS Pharmac*y, 70 F. Supp. 3d at 940-941.

474 *Id.*

475 *EEOC v. CVS Pharmacy, Inc*., No. 14-3653 (7th Cir. Dec. 17, 2015), slip op. at 14.

476 *EEOC v. Doherty Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 116189 (S.D. Fla. Sept. 1, 2015).

477 *Doherty Enterprises, Inc.*, 2015 U.S. Dist. LEXIS 116189, at **2-4.

478 *Id.* at *4.

479 *Id.* at *11.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Attacking Complaint Based on Lack of Specificity

As in preceding years, employers continued to be unsuccessful in FY 2015 in challenging EEOC complaints based on lack of specificity. In a disability discrimination case in the Western District of Virginia, the court denied defendant's motion to dismiss under Rule 12(b)(6), following Fourth Circuit precedent that plaintiff was not required to plead sufficient facts to support a *prima facie* case of wrongful discharge.[480] Instead, under *Twombly* and *Iqbal*, the requirement is for the complaint to contain sufficient factual matter to "state a claim for relief that is plausible on its face."[481]

The Middle District of Georgia similarly held that the EEOC's disparate treatment and pattern-or-practice claims of national origin and race discrimination on behalf of American and African American workers (as distinguished from foreign-born workers) survived a motion to dismiss under *Twombly* and *Iqbal*[482] because the EEOC was not required to allege specific events or dates of alleged discrimination or the identities of the individuals who took the adverse action in order to state a claim. Instead, the complaint was sufficient because it met "the essential requirements of explaining whose rights were violated; that those individuals fall into a class of persons protected by federal law; that Defendants allegedly violated the rights of those individuals, and that the violations were motivated by a discriminatory purpose."

2. Key Issues in Class-Related Allegations

In *EEOC v. Sterling Jewelers, Inc*.[483] the Second Circuit reversed a district court holding that the EEOC could not proceed with a nationwide pattern-or-practice claim because it did not conduct a pre-suit investigation with a nationwide scope. The Second Circuit ruled that under Title VII courts may only review *whether* the EEOC conducted an investigation, not the sufficiency of the investigation. The Second Circuit was guided by the Supreme Court's *Mach Mining* decision that courts may review whether the EEOC satisfied its administrative obligation to conciliate, but the scope of review is narrow.[484] Applying this standard, the circuit court found that the EEOC presented sufficient proof that its investigation was nationwide.

The issue of the EEOC's authority to bring lawsuits on behalf of individual claimants under Section 706 and to file pattern-or-practice actions under Section 707 continued to be the subject of judicial opinion. In 2012, the Sixth Circuit, still the only appellate court to address the issue, held in *Serrano v. Cintas Corp*. that the EEOC may bring a civil action on a pattern-or-practice theory under Section 706.[485] This holding was significant because it permitted the EEOC two avenues to pursue claims under Section 706: (a) present circumstantial evidence under *McDonnell Douglas*'s[486] familiar burden-shifting analysis; or (b) meeting a heightened *prima facie* case standard to establish pattern or practice of discrimination under *International Brotherhood of Teamsters v. United States*.[487] While under *McDonnell Douglas* the burden of proof always remains on the EEOC, under the *Teamsters* framework, once the EEOC establishes a pattern or practice of discrimination, the burden of proof shifts to the defendant on the question of individual liability. In addition, permitting a pattern-or-practice claim under Section 706 allows the EEOC potentially to recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

The same issue is now pending before the Fifth Circuit, which will decide an interlocutory appeal of the Southern District of Texas's ruling in the *Bass Pro* case, which allowed the EEOC to proceed with the *Teamsters* method of proof in a Section 706 case.[488] The Southern District of Texas originally ruled that pattern-or-practice claims must be brought under Section 707, not Section 706, but reversed itself in light of *Serrano*.

480 *EEOC v. Young and Associates, Inc., d/b/a Shoney's Restaurant*, 2015 U.S. Dist. LEXIS 1236 (W.D. Va. Jan. 7, 2015).

481 *Id.* (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009)).

482 *EEOC v. J & R Baker Farms, LLC*, 2015 U.S. Dist. LEXIS 104821 (M.D. Ga. Aug. 11, 2015).

483 801 F.3d 96 (2d Cir. 2015).

484 *J & R Baker Farms, LLC*, 2015 U.S. Dist. LEXIS 104821 at **9-10 (*citing Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649-50, 191 L. Ed. 2d 607 (2015)).

485 *Serrano v. Cintas Corp*., 699 F.3d 884 (6th Cir. 2012), *reh'g en banc denied*, *Serrano v. Cintas Corp.,* 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied by Cintas Corp. v. EEOC,* 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013).

486 *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

487 431 U.S. 324 (1977).

488 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 103552 (S.D. Tex. July 30, 2014), *overruling EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 75597, at **29-30, 39-41 (S.D. Tex. May 31, 2012); *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014) (allowing interlocutory appeal); *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 15-20078 (5th Cir.).

In *EEOC v. Rosebud Restaurants, Inc.*[489] the Northern District of Illinois held that the EEOC can proceed under Section 706 without naming a specific individual aggrieved by the claimed discrimination (in this case, any African American applicant who was denied a position because of his or her race). Citing *Serrano*, the court found that claims of widespread discrimination are permissible under Section 706, noting that the Supreme Court has confirmed the EEOC's right to bring actions under Section 706 in its own name "to vindicate the public interest in preventing employment discrimination."[490]

EEOC v. JBS USA, Inc.[491] is an example of the unique pleadings issues that may arise when class-wide claims are brought under Section 706 and/or 707. In *JBS*, the EEOC brought a pattern-or-practice claim in federal court in Nebraska against a meatpacking company, alleging failure to accommodate Muslim employees' requests for prayer breaks. The case was bifurcated, with Phase I to determine the EEOC's pattern-or-practice claim and Phase II to determine individual claims. After a bench trial on Phase I, the court found the employer had established the affirmative defense that providing the requested accommodations would present an undue hardship, and entered judgment in Phase I for the employer.[492] In Phase II JBS filed motions to dismiss for failure to state a claim and for judgment on the pleadings on the grounds that: 1) the EEOC failed to identify the individuals for which it seeks relief; and 2) the intervenors' complaints improperly alleged pattern-or-practice claims that were precluded by the Phase I judgment.[493] The court agreed that the EEOC's complaint must provide adequate indication of the size and scope of the class of individuals for whom it seeks relief and on which claims, and that the intervenors could only assert individual claims under Section 706. Rather than dismissing the complaints or granting judgment to JBS, however, the court allowed the EEOC and intervenors to amend their complaints.

The EEOC has continued to litigate parallel pattern-or-practice claims against the same employer in federal court in Colorado, arising out of the company's plant in Colorado, instead of Nebraska.[494] These sister proceedings present a situation where the EEOC chose not to combine all class claims against an employer in one lawsuit, but instead filed two lawsuits, requiring the employer to defend simultaneously on two fronts, with the potential for inconsistent outcomes.

3. Who is the Employer?

In 2015 employers unsuccessfully challenged EEOC efforts to hold them liable when they were not named in the charge and as successors when they were not in existence at the time of the alleged discrimination.

In *EEOC v. GGNSC Holdings,* LLC[495] a district court in Wisconsin allowed the EEOC to amend its complaint to add another company as an employer, even though the company was not named by the former employee in his charge. Generally, the EEOC may not sue a party not named in a charge under the ADA, but there are two exceptions: (1) the "actual notice" exception – when the unnamed party has been provided adequate notice of the proceedings aimed at voluntary compliance; and (2) the "identity-of-interest exception" – when the named party sufficiently represented the unnamed party's interests when negotiating possible conciliation. In this case, the court did not determine whether one of these exceptions applied, but allowed the amendment, reasoning that it would not be futile.

Regarding successor liability, the Seventh Circuit noted in *EEOC v. Northern Star Hospitality, Inc.*[496] that successor liability is the "default rule….to enforce federal labor or employment laws" and that, where the successor has notice of a predecessor's liability, a presumption favors finding successor liability. The circuit court indicated that a five-factor test applies to determine successor liability: (1) whether the successor had notice of the pending lawsuit; (2) whether the predecessor could have provided the relief sought before the sale or dissolution; (3) whether the predecessor could have provided relief after the sale or dissolution; (4) whether the successor can provide the relief sought; and (5) whether there is continuity between the operations and work force of the predecessor and successor. The court upheld a decision holding two entities—not in existence at the time of the discrimination —liable for the actions of a dissolved entity, based on successor liability theory.

489 2015 U.S. Dist. LEXIS 45468 (N.D. Ill. Apr. 7, 2015).

490 *Id.* (*citing Serrano v. Cintas Corp*., 699 F.3d 884 (6th Cir. 2012) and *Gen. Tel. of the NW, Inc. v. EEOC*, 446 U.S. 318, 324-25 (1980)).

491 *EEOC v. JBS USA, LLC*, Case No. 10-cv-318 (D. Neb.) (filed Aug. 30, 2010).

492 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 176963 (D. Neb. Oct. 11, 2013).

493 *EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 96946 (D. Neb. July 24, 2015).

494 *See, e.g., EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 93244 (D. Colo. July 17, 2015) (denying JBS's motion for summary judgment on Phase I pattern-or-practice claims).

495 *EEOC v. GGNSC Holdings, LLC*, 2015 U.S.Dist. LEXIS 96806 (E.D. Wis. July 24, 2015).

496 *EEOC v. Northern Star Hospitality, Inc*., 2015 U.S.App. LEXIS 1465 (7th Cir. Jan. 29, 2015).

4. EEOC Motions – Challenges to Affirmative Defenses

The EEOC continued in 2015 to challenge employers' affirmative defenses, but with mixed success. In *EEOC v. Amstead Rail Co.*,[497] an ADA case related to an employer's medical screening, the Southern District of Illinois denied the EEOC's motion to strike affirmative defenses for: failure to state a claim; acts taken for legitimate-non-discriminatory reasons; good-faith effort to comply with the law; lack of subject-matter jurisdiction because of failure to conciliate; damages not recoverable under statute; laches; after-acquired evidence; and a reservation of rights to add defenses. The court recognized it had the power to strike defenses that are redundant, immaterial or impertinent, but declined to do so, opining that affirmative defenses should not be struck unless they have no possible relation or logical connection to the subject matter and may cause some form of significant prejudice – which was not the case with the defenses pled.

In contrast, in *EEOC v. Cummins Power Generation Inc.*,[498] a Minnesota federal district court granted the EEOC's motion for judgment on the pleadings on the employer's affirmative defense of failure to join indispensable parties in a suit alleging ADA and GINA violations. The allegations were that the employer sent an employee for a fitness-for-duty assessment, which was administered by a third party that required the employee to disclose a broad range of medical information and records. The employee objected to providing the information, arguing it was unnecessary to assess his fitness for duty, and refused to sign the release. As a result, he was discharged. The court analyzed under Rule 19 whether the third-party provider was indispensable and found it was not because 1) complete relief was possible among the present parties without joining the non-party; 2) the provider did not have an interest relating to the claims against the company that would be impaired or impeded by the provider's absence from the suit; and 3) the employer did not face a substantial risk of multiple or inconsistent obligations without joinder. The court found the employer could be liable for violating the ADA or GINA regardless of who created the release and regardless of whether the provider may have violated those statutes as well.

5. Venue

One employer succeeded in 2015 on a motion to transfer venue in a case brought by the EEOC. In a classwide ADA case filed in federal court in Maryland, FedEx Ground moved under 28 U.S.C. § 1404(a) to change venue to the district court where it was headquartered, the U.S. District Court for the Western District of Pennsylvania.[499] In ruling on the motion, the court considered (1) the weight accorded to the plaintiff's choice of forum; (2) witness convenience and access; (3) convenience of the parties; and (4) the interests of justice. The court found the first, third and fourth factors did not weigh in favor of either the original or proposed venue, but the second factor weighed decisively in favor of transfer. Specifically, the employees responsible for developing and implementing the training and orientation that the EEOC alleged violated the ADA (by not sufficiently accommodating deaf or hard-of-hearing individuals) worked at the company's headquarters in Pittsburgh and lived in that area. Therefore, the motion to transfer was granted.

6. Miscellaneous

In an age discrimination suit brought by the EEOC against the Pennsylvania Court of Common Pleas, the federal district court denied a motion to dismiss based on sovereign immunity, finding that although individuals could not bring an ADEA suit against an instrumentality of the state, the Eleventh Amendment specifically permits states to be sued by the federal government, including a federal government agency like the EEOC.[500]

In *EEOC v. BNSF Railway Co.*,[501] after an applicant passed a pre-employment physical by a company doctor, the railroad required the applicant to obtain a follow-up MRI at his own expense. Due to the cost, the applicant did not do so and as a result was not hired. The EEOC filed suit under the ADA, alleging that the MRI was an improper additional inquiry not required of all entering employees and that forcing certain applicants to pay medical expenses discriminated on the basis of disability in a manner that was not job-related and consistent with business necessity. The railroad moved to dismiss on the ground that the ADA allows an employer to request more medical information from an entering employee if medically related to the previously-obtained medical information. The district court denied the motion, finding that requiring the applicant to pay for an additional medical procedure screened out an applicant with a disability by imposing an extensive additional requirement not imposed on other applicants.

497 *EEOC v. Amstead Rail Co.,* 2015 U.S. Dist. LEXIS 94897 (S.D. Ill. July 21, 2015).

498 *EEOC v. Cummins Power Generation Inc.*, 2015 U.S. Dist. LEXIS 131462 (D. Minn. Sept. 28, 2015).

499 *EEOC v. FedEx Ground Package System, Inc.*, 2015 U.S. Dist. LEXIS 21801 (D. Md. Feb. 24, 2015).

500 *EEOC v. Court of Common Pleas of Allegheny County*, 2015 U.S. Dist. LEXIS 117796 (W.D. Pa. Oct. 15, 2014).

501 *EEOC v. BNSF Railway Co.,* 2015 U.S. Dist. LEXIS 110830 (W.D. Wash. Jan. 29, 2015).

B. Statute of Limitations for Pattern-or-Practice Lawsuit

In FY 2015, the EEOC continued its focus on litigating higher-impact class claims pursuant to Section 707, which allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in section 706.[502] Section 707 incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.[503] There has yet to be a court of appeals decision on whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge.[504] In the past few years, most district courts have held that the 300-day period applies.[505] However, a minority of district courts persist in holding that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day period.[506]

In *EEOC v. New Prime*, a district court in Missouri observed that a "few" district courts have applied the 300-day period to pattern-or-practice cases and then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[507] In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc*., a 1998 district court case, that held, "After careful consideration, this Court has concluded that the limitations period applicable to Section 706 actions does not apply to Section 707 cases, despite the language of Section 707(e), which mandates adherence to the other procedural requirements of Section 706."[508] The *Mitsubishi* court noted that, when the EEOC files a pattern-or-practice charge, it is usually unable to articulate any specific acts of discrimination until the investigation begins. Therefore, it would be impossible to determine at that point if the charge was timely filed within 300 days of the discriminatory conduct and it would be arbitrary to bar liability for all conduct occurring more than 300 days before the filing of the charge.[509] Acknowledging that such an interpretation would leave pattern-or-practice claims without a limitations period and "might place an impossible burden on defendants in other cases to preserve stale evidence," the *Mitsubishi* court proposed allowing the "evidence [of discrimination to] determine when the provable pattern or practice began."[510] Of course, as described above, other courts have disagreed, finding that the statute's plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC's charge.[511]

More recently, in the background check case *EEOC v. Freeman*, the EEOC included last-minute submissions in support of its view that the 300-day limitations period did not apply to pattern or practice litigation initiated by the EEOC.[512] The Fourth Circuit, however, declined to address this issue, focusing solely on the exclusion of the EEOC's expert reports.

Therefore, to the extent courts continue to cite *Mitsubishi*, this case poses a continuing risk to employers since it leaves no temporal protection for stale claims so long as the EEOC can find evidence of discrimination outside the 300-day period. Thus, employers must still be prepared to persuasively argue the 300-day period *does* apply to pattern-or-practice claims.

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502 Section 706 claims are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action.

503 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the charge-filing requirement is 180 days.

504 The Fourth Circuit recently entertained an appeal from a district court decision granting summary judgment based, in part, on the application of the 300-day limitation to a Section 707 claim, but the Fourth Circuit ultimately issued its decision on other grounds. *See EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

505 *See EEOC v. FAPS,* 2014 U.S. Dist. LEXIS 136006, at *69 (D.N.J. Sept. 26, 2014) ("Like the majority of the courts that have reviewed this issue, the Court is convinced that Section 706 applies to claims brought by the EEOC"); *EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at **13-16 (W.D. Pa. July 23, 2012) (noting lack of circuit court decisions on point and citing cases evidencing the split of authority in federal district courts); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012) ("spate" of recent decisions applying 300-day limitations period).

506 *EEOC v. New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014); *see also EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at **8-9, fn. 4 (D. Md. Oct. 15, 2013) (refusing to apply 300-day period to pattern-or-practice case).

507 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014).

508 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1085 (C.D. Ill. Jan. 20, 1998).

509 *Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059 at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

510 *Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. at 1087.

511 *EEOC v. Optical Cable Corp.,* 169 F. Supp. 2d 539, 547 (W.D. Va. 2001) (while limitations period is not particularly well-adapted to pattern-or-practice cases, problems are not insurmountable); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1093 (D. Haw. Nov. 8, 2012) (court will not disregard the statute's text or ignore its plain meaning in order to accommodate policy concerns).

512 *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015), *citing EEOC v. New Prime, Inc*. 2014 WL 4060305 (W.D. Mo. Aug. 14, 2014), and *EEOC v. PMT Corp*., 2014 WL 4321401 (D. Minn. Aug. 27, 2014). *See also* Barry A. Hartstein, Rod M. Fliegel, Jennifer Mora and Carly Zuba, *Update on Criminal Background Checks: Impact of EEOC v. Freeman and Ongoing Challenges in a Continuously Changing Legal Environment*, Litter Insight (Feb. 23, 2015).

Generally, the 300-day limitations period is triggered by the filing of a charge (the court will count back 300 days from the date of filing and require that the discriminatory act occur within that timeframe).[513] Although by no means settled law, some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.[514] This is helpful to employers because it shortens the time period during which the EEOC can reach back to draw in additional claimants.

In an effort to resurrect cases barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, and also the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.[515] This argument was successful in *EEOC v. PMT Corp.*, where the district court held that the 300-day limit does not apply to pattern-or-practice cases where a "continuing violation" is alleged.[516] To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on some district court decisions holding that the continuing violation doctrine does not apply to discrete acts of discrimination, such as terminations of employment.[517] Moreover, some courts have held that even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the "300-day window."[518] In other words, where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims would otherwise be outside the 300-day window based on the continuing violations doctrine and, before district courts at least, an even stronger argument that the statute of limitations set forth in Section 706 must be applied to Section 707 claims. However, employers can expect the EEOC to increase its reliance on equitable defenses, such as the continuing violation doctrine.

C. Intervention

This section examines intervention by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys intervention-related issues decided by the courts during FY 2015, including allowing intervention by individuals who have not exhausted their administrative remedies, adding pendent state and federal claims, and reducing individual attorneys' fees petitions to account for co-prosecution by the EEOC.[519]

1. EEOC Permissive Intervention in Private Litigation

As the primary federal agency charged with enforcing antidiscrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits—even in instances in which the EEOC has previously investigated the matter at issue and decided not to initiate litigation. Private discrimination class actions are more common targets for EEOC intervention. Given the agency's resource allocation concerns, however, there may be a natural reticence to intervene in private actions unless the agency seeks to raise issues or arguments that the private plaintiffs may not be pursuing or emphasizing.

513 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 (D. Md. Aug. 4, 2014).

514 *EEOC v. Princeton Healthcare Sys.,* 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012).

515 *Princeton Healthcare Sys.,* 2012 U.S. Dist. LEXIS 150267, at *10 (Where the employer's conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1093, n.5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.,* 2012 U.S. Dist. LEXIS 169006, at *8 (E.D. Wash. Nov. 12, 2012); *EEOC v. Pitre, Inc.,* 2012 U.S. Dist. LEXIS 179145, at *3 (D.N.M. Nov. 30, 2012).

516 *EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **5-6 (D. Minn. Aug. 27, 2014).

517 *EEOC v. Princeton Healthcare Sys.,* 2012 U.S. Dist. LEXIS 150267, at **12-13 (D.N.J. Oct. 18, 2012); *see also Evans Fruit Co.,* 2012 U.S. Dist. LEXIS 169006, at *13 (the court dismissed some of the various plaintiffs' claims after analyzing the individual claims to determine the applicability of the continuing violation doctrine as to each plaintiff).

518 *EEOC v. Swissport Fueling, Inc.,* 916 F. Supp. 2d 1005, 1033-1034 (D. Ariz. Jan. 7, 2013); *see also Evans Fruit Co.,* 2012 U.S. Dist. LEXIS 169006, at *8 (holding that some individual claims were barred even under the continuing violation doctrine because the alleged unlawful acts were separated by up to 6-8 years).

519 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, et. al., *Annual Report on EEOC Developments: Fiscal Year 2013*.

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[520] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[521] The same approach is followed in dealing with intervention in ADA actions.[522]

Federal Rule of Civil Procedure 24(b) generally addresses "permissive intervention" in civil cases, and provides that anyone may intervene who "(A) is given a conditional right to intervene by a federal statute [such as Title VII's grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or fact in common."[523] Rule 24(b) instructs courts to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights in determining whether to grant motions to intervene.[524]

In determining whether to exercise their discretion and permit intervention by the EEOC under Rule 24(b), courts looks to:

1. whether the EEOC has certified that the action is of "general importance;" and
2. whether the request is timely.[525]

2. Charging Party's Right to Intervene in EEOC Litigation

A charging party may want to intervene in a lawsuit filed by the EEOC to preserve his or her opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC's and the charging party's interests diverge.

Title VII and the ADA expressly permit a charging party to intervene in an action brought by the EEOC against the charging party's employer.[526] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA or EPA, the charging party's right to intervene or commence his/her own lawsuit terminates.[527]

With respect to intervention in a Title VII or ADA lawsuit filed by the EEOC, Rule 24 sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene. Under Rule 24, intervention is either *a matter of right* (Rule 24(a)) or *permissive* (Rule 24(b), discussed above).

Rule 24(a) provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). If, however, pendent clams are involved (*e.g.*, tort claims or claims arising out of state statutes), those claims are analyzed under Rule 24(b).[528] Rule

520 42 U.S.C. § 2000e-5(f)(1).

521 *See Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at *6 n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).

522 42 U.S.C. § 12117.

523 Fed. R. Civ. P. 24(b) (as amended Dec. 1, 2007).

524 *Id.*

525 *See Ramirez v. Cintas Corp.*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005) (Order Granting EEOC's Motion for Leave to Intervene) (*citing EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975)); *see also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 1958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exits; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties."

526 *See* 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

527 *See* 29 U.S.C. § 626(c)(1); *see also EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014) (explaining the differences between Title VII and the ADEA and specifically noting that the right of any person to bring suit under the ADEA is terminated when suit is brought by the EEOC).

528 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).

24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[529] or the movant is a governmental entity other than the EEOC.[530]

This year, courts were permissive in granting charging parties' requests to intervene, even in the face of argument that the charging party had failed to exhaust administrative remedies with respect to claims the charging party sought to pursue following intervention.

For example, in *EEOC v. Dolgencorp, LLC*,[531] after the charging party filed a charge of discrimination alleging only disability discrimination, the EEOC filed suit on the charging party's ADA claims. The charging party sought to intervene in the lawsuit to protect her interests with respect to her disability discrimination claim and also to assert an allegedly unexhausted retaliation claim. The court granted the charging party's motion to intervene over the defendant's objection that the retaliation claim exceeded the scope of the EEOC's litigation. The court found that the scope of the charge did not affect the charging party's unconditional right to intervene under the ADA, and that such arguments on failure to exhaust administrative remedies were more properly made on a motion to dismiss.

Similarly, in *EEOC v. Smokin' Spuds, Inc.*,[532] the court granted the charging parties' motions to intervene over a defendant's argument that the charging parties had failed to exhaust their administrative remedies. The EEOC brought a pattern-or-practice suit against Smokin' Spuds, Inc. and Farming Technology, Inc. ("FTI"), related entities, alleging that they had created a hostile work environment based on sex and retaliated against women who complained or otherwise opposed alleged discrimination or otherwise participated in investigations. Three women sought to intervene in the EEOC's suit and FTI argued that the women should not be permitted to intervene because they failed to exhaust their administrative remedies as against FTI, because they had not named FTI in their charges of discrimination. As a general proposition, the court noted that it may deny intervention even under Rule 24(a) and 42 U.S.C. § 2000e-5(f)(1) where the proposed intervenor has not exhausted his/her administrative remedies. The court, however, granted the charging parties' motions to intervene because it held that there was a clear identity of interest between the respondent named in the charge, "MountainKing Potatoes,"—and FTI had actual notice of the charges and an opportunity to conciliate, given that the EEOC had alleged that FTI and MountainKing Potatoes operated as an integrated or joint employer and both did business as "MountainKing Potatoes."

One court granted a motion to intervene on behalf of individuals who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. J & R Baker Farms, LLC*,[533] the EEOC initiated a pattern-or-practice lawsuit alleging the defendants discriminated against employees on the basis of national origin and/or race. Twenty-six individuals sought to intervene in the action, including nine who never filed charges of discrimination, but argued they were entitled to intervene as "persons aggrieved" by the defendants' alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1). The court rejected the defendants' argument that the intervention motions of the individuals who failed to timely file charges of discrimination should be denied, instead holding that the plaintiff-intervenors either (1) were protected by the "single-filing" or "piggybacking rule" because other plaintiff-intervenors had timely filed charges and the claims of the non-filing plaintiffs allegedly arose out of similar discriminatory treatment within the same timeframe; or (2) had "a claim or defense that shares with the main action a common question of law or fact" sufficient for permissive joinder under Rule 24(b)(1)(B).

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b).

As stated above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims.

529 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).

530 *EEOC v. Global Horizons*, 2012 U.S. Dist. LEXIS 33346 (D. Haw. Mar. 13, 2012) (granting motion to intervene filed by the U.S. Government (Department of Justice) under Rule 24(b)).

531 *EEOC v. Dolgencorp, LLC*, 2014 U.S. Dist. LEXIS 174124 (E.D. Tenn. Dec. 17, 2014).

532 *EEOC v. Smokin' Spuds, Inc.*, 2015 U.S. Dist. LEXIS 48805 (D. Colo. Apr. 14, 2015).

533 *EEOC v. J & R Baker Farms, LLC*, 2015 U.S. Dist. LEXIS 97306 (M.D. Ga. July 27, 2015).

For example, in *EEOC v. J & R Baker Farms, LLC*,[534] discussed above, the court allowed the plaintiff-intervenors to assert their Agricultural Worker Protection Act (AWPA) claims because it found that the factual bases for the AWPA claims and Title VII claims were closely related and held it was in the interest of judicial economy to litigate them in a single action.

4. Pattern-or-Practice Claims by Intervenors

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert Section 707 claims.[535] Thus, where intervenor-plaintiffs' complaints appeared to allege pattern-or-practice allegations, a court required the intervenor-plaintiffs to amend their complaint to strike the pattern-or-practice allegations.

In *EEOC v. JBS USA, LLC*,[536] the EEOC sued a meatpacking company alleging it discriminated against Somali Muslim and African American employees and asserted several pattern-or-practice claims. At the outset of the case, the EEOC and JBS entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in JBS's favor, and the action proceeded to Phase II. The intervenor-plaintiffs' Phase II pleadings purported to assert class claims under Section 706, but failed to provide individual allegations with respect to each named plaintiff and relied on language from previous filings related to pattern-or-practice claims. The court referenced its prior ruling that individuals could not assert Section 707 pattern-or-practice claims, and dismissed the plaintiff-intervenors' complaint with an opportunity to amend to remove the pattern-or-practice allegations, clarify how each intervenor had exhausted his/her administrative remedies, and allege facts regarding each individual named plaintiff's discrimination claims.

5. Attorneys' Fees

When an individual charging party intervenes in an EEOC lawsuit filed based on his/her charge and prevails on his/her claims, courts will examine the extent to which the individual's attorney sought fees for work duplicated by the EEOC's co-prosecution of the matter.

Thus, in *EEOC v. Emcare, Inc.*,[537] after an intervenor-plaintiff prevailed at trial on her sexual harassment claim and submitted her fee petition for her individual attorney, the defendant argued the attorney should not be awarded fees for time spent on work that was duplicative and excessive based on the EEOC's involvement in the case. The court reduced the individual's attorneys' requested fees by one third, in part, to account for the co-prosecution by the EEOC attorneys, among other factors.

D. Class Discovery Issues in EEOC Litigation

As the EEOC increasingly favors systemic ("class") pattern-or-practice actions over individual litigation, employers should be aware of not only the tactics used by the EEOC to pursue these cases, but also which tools employers have to fight back against potentially expensive, overbroad, and time-consuming discovery. Close examination of the EEOC's tactics, especially the scope and timing thereof, can provide employers with important tools in handling these cases.

1. Bifurcation in EEOC Litigation

Bifurcation is becoming much more common in EEOC cases due to its recent application to proceedings brought under Section 706. Historically, bifurcation was confined to Section 707 cases using the *Teamsters* burden of proof framework.[538] The *Teamsters* framework requires the EEOC to first prove that unlawful discrimination was a regular procedure or policy followed by an employer.[539] If the EEOC can do so, then it is presumed that any particular employment decision in the class of decisions at issue (such as hiring decisions) was made pursuant to that policy and the burden shifts to the employer to prove the decision was taken for lawful reasons. The *Teamsters* framework contemplates bifurcation because "a district court must usually conduct additional proceedings after the liability phase

534 *Id.*

535 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).

536 *EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 96946 (D. Neb. July 24, 2015).

537 *EEOC v. Emcare, Inc.*, 2015 U.S. Dist. LEXIS 102868 (N.D. Tex. Aug. 5, 2015).

538 *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

539 *Serrano v. Cintas Corp.*, 699 F.3d 884, 893 (6th Cir. 2012).

of the trial to determine the scope of individual relief."[540] In 2012, the Sixth Circuit reversed a district court's holding that the *Teamsters* framework was applicable only in Section 707 pattern-or-practice lawsuits and found that the framework and, hence, bifurcation, is applicable to Section 706 cases as well.[541] Thus, more cases are being bifurcated as a result.

The EEOC's standard practice is to seek bifurcation of liability and damages both with respect to discovery and trial in pattern-or-practice cases. As discussed below, while bifurcation may have surface appeal for a number of reasons, it can severely prejudice the employer in appropriately defending itself in pattern-or-practice cases. The following is a brief review of the advantages and disadvantages of bifurcation, and one of the most recent cases in which an employer was successful in challenging bifurcation at the discovery stage.

In theory, bifurcation can benefit both parties since discovery of individual circumstances, class-wide, is costly and time-consuming. Further, discovery should occur only if the EEOC can establish the discriminatory policy. This approach is also beneficial where the employer can move for summary judgment at the close of the liability phase, thereby limiting exposure and costs for the second phase, if not eliminating the second phase entirely.

On the other hand, bifurcation may harm the employer if a court's discovery order does not require the EEOC to identify each person on whose behalf it intends to seek individual relief until the second phase, or does not permit sufficient discovery regarding those individuals in the first phase. In such circumstances, the employer could wind up litigating the first phase without knowing the full scope of potential exposure that would only become clear in the second phase. This was an issue litigated on remand from the Sixth Circuit's decision in *Cintas*, where the EEOC argued it should not be required to disclose the list of class claimants until the second phase.[542] There, the Eastern District of Michigan found that the EEOC was required to provide in the first phase a list of individuals on whose behalf it was seeking relief.[543] The EEOC provided a list of 800 people (previously it had stated there were only 50) and then proceeded to argue the first phase was ready for trial without further discovery.[544] The court disagreed, reopening discovery for one year to allow depositions of any persons on the parties' amended witness lists.[545] The court also found that the EEOC could establish general entitlement to punitive damages in the first phase but must reserve the amount of punitive damages for the second phase.[546]

Further, employers frequently argue that even entitlement to punitive damages should be reserved for the second phase, and only proceed where there has been a finding of liability.[547] Employers will need to be vigilant about this issue to ensure they have the information they need concerning the scope of the EEOC's claims even in the first phase of litigation.

One of the most recent court decisions to reject the EEOC's approach of bifurcation and limited discovery in Phase I is *EEOC v. Darden Restaurants, Inc*.,[548] in which the EEOC filed its standard motion to bifurcate for discovery and trial, which the employer opposed.[549] In denying the EEOC's motion to bifurcate discovery, the court stated:

> Defendant's most convincing arguments against bifurcation are that: (1) the EEOC's speculative statement that bifurcation would put off "hundreds" or "thousands" of "mini trials" is unsupported by any factual basis; and (2) that the bifurcation scheme unduly prejudices defendants because it allows the EEOC to limit discovery to only a small number of individuals selected by the EEOC.[550]

The court thus permitted the full range of discovery regarding the EEOC's claims and also denied the bifurcation motion regarding trial, but without prejudice stated that the motion may be re-filed at the close of discovery.

2. Identification of Class Members

Unlike in private civil suits, only the EEOC is a "party" in class actions brought by the EEOC. Thus, an issue that frequently arises in EEOC-led class actions relates to the identification of class members. In *Cintas*, discussed above,

540 *Id.; See also EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61426 (D. Md. Mar. 11, 2014).

541 *Cintas Corp.*, 699 F.3d 884.

542 See *e.g.*, *EEOC v. Cintas Corp.*, 2015 U.S. Dist. LEXIS 49205 (E.D. Mich. Apr. 15, 2015) (EEOC argued it should not have to disclose the names of women for whom it intended to seek relief since the employer could derive the names of class members itself); *EEOC v. Cintas Corp.*, 2015 U.S. Dist. LEXIS 55889, at *6 (E.D. Mich. Apr. 29, 2015).

543 *Cintas Corp.*, 2015 U.S. Dist. LEXIS 49205.

544 *EEOC v. Cintas Corp.*, 2015 U.S. Dist. LEXIS 55889, at *6-8 (E.D. Mich. Apr. 29, 2015); *Cintas Corp.*, 2015 U.S. Dist. LEXIS 49205, at **3-4.

545 *Cintas Corp.*, 2015 U.S. Dist. LEXIS 55889, at *8.

546 *Id.* at *13.

547 *See EEOC v. Performance Food Group, Inc.*, Case No. 13-cv-01712, Docket No.27 (D. Md. Dec. 26, 2013).

548 *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 151742 (S.D. Fla. Nov. 9, 2015).

549 *Id.*, Docket No. 27 (June 3, 2015); Docket No. 29 (June 22, 2015); and Docket No. 32 (July 16, 2015).

550 *Darden Restaurants*, 2015 U.S. Dist. LEXIS 151742 at *6.

the EEOC refused to list the women it represented in the gender discrimination case, claiming that it should not have to identify the potential claimants until Phase II of the litigation when monetary damages are decided. The court disagreed and ordered that, before the Phase I trial, the EEOC had to identify the 50 or so individuals on whose behalf it intended to seek damages in the Phase II trial.[551] In its motion for reconsideration, the EEOC argued that it identified the potential class members in a written interrogatory response. The court was not persuaded and emphasized that the EEOC's interrogatory response only cited back to the open-ended class alleged in its complaint. The court chastised the EEOC for its ongoing failure to identify the women on whose behalf the EEOC was pursuing damages and denied its motion for reconsideration.

3. Communication with Class

One issue that frequently arises in EEOC systemic actions is whether, and to what extent, an employer can communicate with alleged victims of purported pattern-or-practice discrimination. When the EEOC brings a pattern-or-practice, or class case, against an employer, the agency often reaches potential victims through in-person interviews and mass mailings. Whether those communications between EEOC attorneys and claimants or potential claimants are privileged depends on many factors. Courts differ regarding the parameters of the attorney-client relationship between the EEOC and claimants or potential claimants.[552]

The issue of whether and to what extent an employer can communicate with members of the proposed class was reconsidered by a New Jersey district court in FY 2015. In 2013 in the case of *EEOC v. FAPS, Inc*., the court examined whether *ex parte* interviews conducted by a private investigator hired by the defendant were improper.[553] In its 2013 opinion, the court determined that such *ex parte* communications were permissible if they occur before an attorney-client relationship exists between the EEOC and the individuals. Analyzing the facts at issue in this case, the court found that the employer's attorneys' conduct was improper because neither they nor their investigators exercised "sufficient diligence in determining whether the claimants were represented [and] the private investigators may have concealed the fact that they were working for [the employer]."[554] Sanctioning the employer, the court prohibited the defendant from using the information gleaned from the interviews. In its motion for reconsideration, the defendant argued that the court overlooked four key arguments. The court denied the defendant's motion, holding that the defendant failed to identify any controlling law or fact not previously considered by the court in reaching its conclusion in 2013.

In *EEOC v. SVT, LLC* (a failure-to-hire putative systemic action), an Indiana federal court rejected the EEOC's motion for a protective order to preclude the employer's *ex parte* communications with applicants who had not indicated they wanted to participate in the lawsuit.[555] Specifically, the EEOC sought to limit the employer's communication with the charging party and any other person for whom the EEOC sought relief, except those who had indicated to the EEOC that they did not wish to participate in the lawsuit.[556] The court determined that, in Title VII cases, the EEOC does not have an inherent representative relationship to prospective claimants and so an employer could not be prohibited from engaging in *ex parte* discussions with those prospective claimants.[557] The court distinguished ADEA cases because the right of an individual to bring a case under the ADEA is terminated when the EEOC initiates suit. Therefore, the EEOC becomes the *de facto* representative for each claimant.[558] The court also rejected the EEOC's request that the court compel the employer to make certain representations to prospective claimants during the *ex parte* communication, finding the EEOC had not shown any heightened need for such restraints, such as prior misconduct by the employer.[559]

Another issue in *SVT* was whether the EEOC could contact the employer's current and non-managerial employees. The employer requested the EEOC be required to inform it in advance of any former employee the EEOC intended to approach, so that the employer could raise any necessary objections.[560] However, the court approved the EEOC's request to contact former employees and denied the employer's request for prior disclosure.[561] With respect to current

551 *EEOC v. Cintas Corp.*, 2015 U.S. Dist. LEXIS 49205, at **5-6 (E.D. Mich. Apr. 15, 2015).
552 *EEOC v. FAPS, Inc*., 2015 U.S. Dist. LEXIS 28274, at *8 (D.N.J. Mar. 9, 2015).
553 *EEOC v. FAPS, Inc.*, 2013 U.S. Dist. LEXIS 128717, at **6-7 (D.N.J. Sept. 9, 2013).
554 *EEOC v. FAPS, Inc.*, 2015 U.S. Dist. LEXIS 28274, at **8-9 (D.N.J. Mar. 9, 2015).
555 *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014).
556 *SVT, LLC*, 2014 U.S. Dist. LEXIS 2391, at **3-4.
557 *Id.* at **17-18.
558 *Id.* at *12.
559 *Id.* at *21.
560 *Id.* at *26.
561 *Id.* at *27.

employees, the court granted the EEOC's request, provided the EEOC could not inquire into communication between employees and the employer's counsel regarding the subject matter of the litigation.[562]

4. Scope of Discovery Regarding the EEOC's Communications with Potential "Class" Members

Employers have had mixed success in obtaining formal discovery from claimants for whom the EEOC seeks relief. In *EEOC v. SVT*, the court permitted depositions but not written discovery, reasoning that class members who have agreed to the EEOC's representation are not *parties*; therefore, the rules allowing written discovery do not apply and the employer must rely on the subpoena process.[563] The court distinguished *EEOC v. DHL Express*, which noted that claimants who had agreed to representation by the EEOC were not "non-parties" when it granted the employer's motion to compel depositions, on the basis that the court in *DHL Express* was ruling on the availability of depositions but not written discovery.[564]

Moreover, employers seeking discovery regarding the EEOC's communications with potential claimants may encounter resistance through the EEOC's assertion of the attorney-client privilege and the work-product doctrine. In *EEOC v. Pioneer Hotel, Inc.*, the court addressed the scope of the protection provided by the work-product doctrine and attorney-client privilege where the communications are between the EEOC and a "class" of individuals "similarly situated" to the charging party. The employer sought discovery of three documents related to the EEOC's post-conciliation communications with potential class members: (1) a solicitation letter sent to the employer's staff regarding "Entitlement to Monetary Relief," (2) the EEOC's notes from its interviews with the employer's staff, and (3) emails between the EEOC's attorney and one of the claimants.[565]

In its work-product analysis, the court made a distinction between "opinion work product" containing the mental impressions of the EEOC's legal team and "ordinary work product" consisting of all other work product. Opinion work product is entitled to "absolute immunity" and is only discoverable in extraordinary circumstances of demonstrated fraud while ordinary work product is discoverable where the requesting party has a substantial need for the information and cannot obtain it elsewhere. The court held that the interview notes and attorney-claimant emails constituted "opinion" work product and were immune from discovery and further commented that, even if these documents consisted of merely ordinary work product, they would not be discoverable since the defendant had not demonstrated a need for them. Although the court found that the solicitation letter qualified as "ordinary" work product, it held that the work-product doctrine did not preclude the discovery of the letter due to the employer's substantial need for it for impeachment purposes.[566] The court also considered whether the letter fell within the scope of the attorney-client privilege. In doing so, the court recognized that although EEOC counsel is in an attorney-client relationship with the claimants whose interests it seeks to protect, the potential "class members" must have taken some affirmative step to enter into a relationship with the EEOC before the privilege can apply. As the recipients of the letter had not taken such an affirmative step and the letter itself did not explicitly offer the EEOC's legal representation, the letter fell outside the scope of the attorney-client privilege and was discoverable.[567]

E. Other Critical Issues in EEOC Pattern-or-Practice and Class-Type Cases

1. ESI: Electronic Discovery-Related Issues

Electronic discovery has become an increasingly important issue, especially in large-scale litigation. In some instances, courts have begun requiring that documents be produced in electronic format and ordering production of electronic data possessed by third parties, such as payroll service providers, finding that the employer has "control" over such data since the employer has a right to obtain copies.[568]

In a case where the electronic data contained personal information, the Northern District of Illinois in *EEOC v. Dolgencorp, LLC*[569] addressed the EEOC's ability to obtain discovery of conditional hires' personal information to

562 *Id.* at *21.
563 *Id.* at **36-38.
564 *EEOC v. DHL Express (USA) Inc.*, 2012 U.S. Dist. LEXIS 155722, at *5 (N.D. Ill. Oct. 31, 2012).
565 *EEOC v. Pioneer Hotel, Inc.*, 2014 U.S. Dist. LEXIS 142735, at *5 (D. Nev. Oct. 6, 2014).
566 *Pioneer Hotel, Inc.*, 2014 U.S. Dist. LEXIS 142735, at **8-14.
567 *Id.* at **14-20.
568 *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 50114, at **11, 14 (N.D. Ind. Apr. 10, 2014).
569 *EEOC v. Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 58994, at **1-2 (N.D. Ill. May 5, 2015).

establish a pattern or practice of discrimination. The EEOC argued the information was necessary to show that a company's background check policy had a disparate impact on African-American job applicants. The EEOC claimed that it needed the information to link separate databases the employer and two of its vendors maintained, conduct statistical analysis, and contact potential class members and witnesses. The company had provided some of the information that the EEOC requested but refused to provide the names, complete Social Security numbers, addresses, phone numbers, and complete dates of birth of its conditional hires.[570] While recognizing the employer's privacy interest in the personal information of its conditional hires, the court granted the EEOC's motion to compel, finding that the relevance of the information, in allowing the linking of the databases so that statistical analysis could be performed and in permitting further analysis of whether non-racial factors may have caused a statistical impact, outweighed the employer's privacy interests, especially since there was a confidentiality order in place.[571]

2. Reliance on Experts in Systemic Cases

Expert testimony is a frequent topic of law and motion in disparate impact cases, which often rely on statistical evidence to establish a pattern of conduct toward a protected class.[572] A proponent of expert testimony must prove it is scientifically reliable using the standard articulated in *Daubert v. Merrell*.[573] This year, in the background check case of *EEOC v. Freeman*, the Fourth Circuit rejected expert testimony from the same EEOC expert that the Sixth Circuit found to be unreliable in other background check cases, including last year's *EEOC v. Kaplan Higher Education Corp.*[574] In *Freeman*, the EEOC alleged that the defendant's policy requiring applicants to undergo criminal and credit checks had a disparate impact on African American and male job seekers.[575] The Fourth Circuit affirmed the district court's decision to exclude the EEOC's expert testimony and grant summary judgment to the employer, concluding that the expert's analysis was "utterly unreliable."[576] Specifically, the Fourth Circuit agreed with the district court's determination that the expert's report failed the *Daubert* test because he (1) omitted data from half of the defendant's branch offices and did not use a sample from the relevant time period, (2) included a "mind-boggling" number of errors and discrepancies (29 of 41 records of applicants contained errors, such as recording no criminal record where one existed), and (3) failed to make certain corrections in supplemental reports and actually introduced new errors in those reports.[577] One judge wrote separately in a concurring opinion to admonish the EEOC for "disappointing litigation conduct" in continuing to rely upon an expert "whose work has been roundly rejected in our sister circuits for similar deficiencies to those we observe here . . . [d]espite his record of slipshod work, faulty analysis, and statistical sleight of hand."[578]

In another case, a federal court in South Carolina denied both the EEOC's and the defendant's motions (filed in connection with their summary judgment motions) to exclude their respective experts' testimony in a Title VII disparate impact case, but stated the motions could be renewed at trial.[579] In another case, a federal court in Tennessee refused to exclude expert testimony in a disparate treatment case under the ADEA, where the EEOC alleged the defendant engaged in a discriminatory workforce reduction.[580] In that case, the court rejected the defendant's argument that the EEOC's statistical analysis was irrelevant to its disparate *treatment* claim because it was the type of analysis usually performed in disparate *impact* cases, pointing out that the same analysis can be useful in both contexts.[581] The court also rejected the defendant's challenge to the expert testimony's reliability, finding that the defendant's argument did not pertain to any of the *Daubert* factors but instead was rooted in the fact that the expert's opinion did not account for the defendant's theory of the case.[582] Underscoring the importance of expert witness designations, the court granted the EEOC's motion

570 *Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 58994, at **1-3.

571 *Id.* at **3-6.

572 *EEOC v. Tepro, Inc.*, 2015 U.S. Dist. LEXIS 134901, at *4 (E.D. Tenn. Sept. 28, 2015).

573 Fed. R. Evid. § 702; *Daubert v. Merrell Dow Pharms*., 509 U.S. 579 (1993).

574 *EEOC v. Freeman*, 778 F.3d 463, 465 (4th Cir. 2015); *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014).

575 *Freeman*, 778 F.3d 463, 465.

576 *Id.* at 467.

577 *Id.* at 466-67.

578 *Id.* at 468-71 (Agee, J., concurring).

579 *EEOC v. BMW Mfg. Co.*, 2015 U.S. Dist. LEXIS 125367, at **9-10 (D.S.C. July 30, 2015).

580 *EEOC v. Tepro, Inc.*, 2015 U.S. Dist. LEXIS 134901, at **2-3, 21-22 (E.D. Tenn. Sept. 28, 2015) ("[S]uch arguments go to the weight and significance of those [expert] opinions, which is a factual matter for the jury to decide.").

581 *Tepro, Inc.*, 2015 U.S. Dist. LEXIS 134901, at **13-15.

582 *Id.* at **15-22.

to exclude the portion of the defense expert testimony that was outside the scope of rebuttal because the employer had designated its expert as a rebuttal expert only.[583]

3. The EEOC's Effort to Establish Judicial Estoppel

In other FY 2015 litigation, the EEOC maintained the position that an employer cannot change a factual position that it took in administrative proceedings before the EEOC when the case proceeds to court. The District of Maryland considered such a judicial estoppel argument in *EEOC v. Performance Food Group Co.*[584] In that case, the EEOC contended that the employer was judicially estopped from asserting that its Vice President of Operations and Regional Vice President of Operations did not have hiring oversight over the division where the employer allegedly maintained a pattern or practice of gender-based discrimination. The employer had represented—both in the course of the EEOC's investigation and during a summons enforcement action—that these two employees did in fact have ultimate hiring authority at the division in question.[585] The court entertained the EEOC's argument but held that the EEOC could not satisfy the Fourth Circuit's test for judicial estoppel because the employer had not taken its prior position to gain an unfair advantage.[586] The court emphasized, however, that the employer's prior statements could be admitted during the trial, although the employer would have the opportunity to present evidence clarifying and explaining its earlier position.[587]

F. General Discovery By Employer

The EEOC tends to take an expansive view of its entitlement to discovery from the employer, while arguing that employer requests for discovery should be limited. Courts, however, have frequently taken the position that the EEOC has many of the same obligations as other plaintiffs' counsel in providing requested information. The primary dispute in these discovery battles continues to focus on the scope the "deliberative process privilege," which the EEOC frequently asserts.

1. Depositions of EEOC Personnel

Courts have applied the deliberative process privilege in the context of depositions of EEOC personnel where the deposition intrudes upon the agency's decision-making process. While the privilege is applied to those matters relating to the EEOC's internal analysis and basis for legal conclusions, it does not apply to factual and administrative matters.

In *EEOC v. Bank of America*,[588] the court allowed an employer to take a Rule 30(b)(6) deposition of the EEOC on the agency's conciliation efforts and the "facts supporting the EEOC's allegations in the Complaint." In doing so, the court deemed the EEOC's assertion of the deliberative process privilege, attorney-client privilege, and work product doctrine "premature" because the employer had not yet attempted to elicit privileged information and because "facts are never privileged." Further, in *EEOC v. Court of Common Pleas*,[589] the court allowed the deposition of the EEOC investigator, noting that there is no categorical bar to deposing such investigators and that, as long as the employer refrained from asking questions about the EEOC's decision-making process, "difficult deliberative process privilege objections should be avoidable."

2. General Conduct at Depositions

At least one court has admonished parties that attorneys should conduct depositions "as they would at trial" without judicial assistance, oversight or intervention. In *EEOC v. Mattress Firm, Inc.*,[590] the court criticized the parties for involving the court in a "mundane" dispute that arose in re-scheduling the deposition of one of the charging parties. The court declined to make any order on the re-scheduling and left the issue to the parties to resolve.

3. Discovery of EEOC-Related Documents

Courts often face employer requests for the EEOC's investigative material, to which the EEOC routinely asserts the deliberative process privilege, the attorney-client privilege, or work product doctrine.

583 *Id.* at **27, 32.

584 *EEOC v. Performance Food Group Co.*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014).

585 *Performance Food Group Co.*, 2014 U.S. Dist. LEXIS 143194, at **4-5.

586 *Id.* at **6-7.

587 *Id.* at *7.

588 *EEOC v. Bank of America*, 2014 U.S. Dist. LEXIS 175704 (D. Nev. Dec. 18, 2014).

589 *EEOC v. Court of Common Pleas Allegheny County*, 2015 U.S. Dist. LEXIS 117796 (W.D. Pa. Sept. 3, 2015).

590 *EEOC v. Mattress Firm, Inc.*, 2014 U.S. Dist. LEXIS 152842 (D. Nev. Oct. 27, 2014).

Courts have considered how these privileges apply to the EEOC's investigative communications with employees. For example, in *EEOC v. Texas Roadhouse, Inc.*,[591] a court distinguished between pre-litigation investigative communications with employees and post-litigation communications. The court held that the pre-litigation communications are discoverable and the post-litigation communications are not because they are protected under the attorney-client privilege and work-product doctrine. Later, the employer in this case filed Freedom of Information Act ("FOIA") requests with the EEOC seeking information on the agency's prosecution of this case, and then filed a declaratory judgment action with another court[592] alleging that the EEOC failed to timely produce documents responsive to those FOIA requests. The court dismissed the declaratory judgment action, holding that the employer did not exhaust its administrative remedies because, before it filed the action, it should have appealed to the EEOC the agency's decision to withhold certain information requested in the FOIA requests.

Where courts have been unable to determine whether the privilege applies, they have compelled production of the agency documents for *in camera* review. For example, in *EEOC v. Dolgencorp, LLC*,[593] when the agency asserted the privilege in response to a request for documents revealing the statistical analysis used to determine whether a reasonable cause determination of discrimination should be issued, the court held that it could not conclude the legitimacy of the privilege claimed by the agency without reviewing the documents in question, and ordered *in camera* review.

In *EEOC v. Parker Drilling Co.*,[594] the employer sought an order compelling the production of three documents originally withheld by the EEOC under the "conciliation" privilege. Later, in a revised privilege log, the EEOC added the attorney-client and government deliberative process privileges as reasons for the agency's withholding the documents. The employer asserted that the conciliation privilege was inapplicable and that the EEOC waived the newly asserted privileges by failing to identify them in its initial privilege log. The court ordered the *in camera* submission of the documents, and upon review, found that two of the three documents were conciliation materials privileged from discovery under § 2000e-5(b) because they consisted of "proposals" and counter-proposals of compromise by the parties. The court held that the remaining documents did not contain such materials, and therefore were not material to which the § 2000e-5(b) conciliation privilege applied. The court also found that the EEOC waived the attorney-client and government deliberative process privileges by failing to raise the privileges when its discovery response was due. The court awarded the employer reasonable fees and costs associated with obtaining the materials because the court determined that the materials were unequivocally purely factual matters.

4. Discovery of the EEOC's Own Practices and Policies

Employers have increasingly sought to discover the EEOC's *own* practices and policies where the EEOC has challenged similar policies and practices of the employers. For example, in *EEOC v. BMW Mfg. Co.*, the court allowed an employer alleged to have discriminatorily used its criminal conviction background check policy to seek the EEOC's *own* policy on criminal conviction background checks. The court rejected the EEOC's argument that its own background check policy was not relevant because the positions at the EEOC to which the policy applied were not similar to the positions to which the employer in question applied its policy. The court made no finding on the admissibility of the EEOC's policy and conceded that it may not be relevant, but the court found no undue burden or harm in compelling the EEOC to produce its policies.

However, in *EEOC v. Dolgencorp, LLC*,[595] the court held that information on the EEOC's background check policy was not relevant because, whereas the employer in question was a retail operation, there was no indication that the functions performed by its employees "are in any way comparable to those undertaken by the EEOC's employees." Also, in *EEOC v. OhioHealth Corp.*,[596] the court held that the EEOC's internal policies on reasonable accommodation were not relevant to a complaint of disability discrimination against the employer because the complaint against the employer did not turn on any disparate impact of the employer's policy and the employer had not argued that the EEOC's policies were relevant to any affirmative defense.

591 *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125865 (D. Mass. Sept. 9, 2014).

592 *Texas Roadhouse, Inc. v. EEOC*, 2015 U.S. Dist. LEXIS 25468 (W.D. Ky. Mar. 3, 2015).

593 *EEOC v. Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 58994 (N.D. Ill. May 5, 2015).

594 *EEOC v. Parker Drilling Co.*, 2014 U.S. Dist. LEXIS 151053 (D. Alaska Oct. 22, 2014).

595 *Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 58994.

596 *EEOC v. OhioHealth Corp.*, 2014 Dist. LEXIS 148135 (S.D. Ohio Oct. 17, 2014).

5. Medical Authorizations

In *EEOC v. OhioHealth Corp.*,[597] the employer moved to compel the charging party to sign medical authorizations for records. Even though the court held that those records would be relevant to determine back pay, it noted the employer may not compel the charging party to sign those documents. However, the court emphasized that the employer is not without a remedy, and that the underlying medical documents are subject to production upon request.

6. Confidentiality Orders

At least one court has held that the EEOC may not refuse to stipulate to a confidentiality order on the grounds that it is a "public enforcement agency" that cannot agree to file relevant evidence under court seal. In *EEOC v. Mattress Firm, Inc.*,[598] the court held that there simply is no rule barring the EEOC from entering stipulated confidentiality orders. Accordingly, the court entered a confidentiality order proposed by the employer protecting as "confidential" information on the employer's practices, sales information, and commission structure.

However, another court was unwilling to enter a stipulated confidentiality order proposed by both the employer and the EEOC. In *EEOC v. Office Concepts, Inc.*,[599] the parties submitted that a non-party former employee of the employer was unwilling to discuss information regarding the case at issue because of a settlement agreement entered between her and the employer. Therefore, the parties proposed a confidentiality order stating that the employer will not exercise its rights under the settlement agreement. However, the court refused to enter the proposed order because issues relating to the third-party compulsory disclosure are likely to be fact-specific and should be determined as they arise. The court suggested that the employer could give the non-party former employee a limited waiver of the confidentiality provision without need for court involvement.

G. General Discovery by EEOC/Intervenor

EEOC-initiated lawsuits continue to present unique challenges for employers. As the cases below demonstrate, the EEOC often asks for information employers deem burdensome and costly during the discovery phase of litigation.

1. Section 30(b)(6) Depositions

Section 30(b)(6) depositions often play a critical role in the discovery process, even in EEOC-initiated lawsuits. In FY 2015, several district court opinions addressed motions concerning 30(b)(6) deposition designations and the reasonableness of the EEOC's 30(b)(6) deposition notice.

In *EEOC v. Placer Advocacy Resources & Choices*,[600] the EEOC sought to extend the discovery deadline to conduct a Rule 30(b)(6) deposition. The EEOC claimed the deposition was necessary because it believed the employer had not given adequate discovery responses regarding its finances, affirmative defenses, or anti-discrimination policies and procedures. In denying the motion, the court reasoned that the EEOC lacked diligence in complying with the court's discovery deadline. The court explained that when the employer communicated its dates of availability, the EEOC allowed nearly four months to pass before it pursued the Rule 30(b)(6) deposition. The court explained further that the EEOC noticed the deposition to occur a few days before the discovery deadline, leaving little time to resolve the employer's subsequent objections. The court commented that in noticing depositions at the end of the discovery period, the EEOC assumed the risk that the court would not intervene to resolve the deposition dispute.

2. Scope of Permitted Discovery

As one case illustrates, the scope of discovery determines the parameters of the information the EEOC may seek from employers.

In *EEOC v. SVT, LLC*, the EEOC sought to expand discovery beyond the single store in which the employer's alleged discriminatory hiring practices occurred. The EEOC moved to compel the employer to provide information on the hiring practices of all of the stores the employer operated in a particular region. The court denied the motion. The court noted that while Rule 26 of the Federal Rules of Civil Procedure governs the scope of discovery, the law affords it broad

597 *Id.*

598 *EEOC v. Mattress Firm, Inc.*, 2014 U.S. Dist. LEXIS 177123 (D. Nev. Dec. 22, 2014).

599 *EEOC v. Office Concepts, Inc.*, 2015 U.S. Dist. LEXIS 53174 (N.D. Ind. Apr. 23, 2015).

600 *EEOC v. Placer Arc*, 2014 U.S. Dist. LEXIS 176115 (E.D. Cal. Oct. 22, 2014).

discretion when deciding whether to compel discovery. The court explained that the EEOC had not offered any evidence suggesting that the alleged discriminatory practices permeated in the additional stores. Further, the court noted that the EEOC had merely assumed a connection among the employer's stores. The court concluded that the EEOC had not demonstrated that its requested expansion of discovery was relevant or would otherwise produce relevant evidence.

The *SVT* decision teaches that while courts acknowledge their broad discretion regarding compelling discovery in EEOC-initiated litigation, they will not expand the scope of discovery where doing so would not produce relevant evidence.

3. EEOC Communications *Ex Parte* with Former or Current Employees

The EEOC and the employer may encounter issues regarding *ex parte* communications.

In *EEOC v. SVT, LLC*,[601] the EEOC sought the court's permission to interview former employees and current, non-managerial employees outside the presence of defendant's counsel. The EEOC sought a protective order to prevent the employer from having *ex parte* communications with potential employee class members who had not indicated whether they wanted the EEOC to represent them. The court held that the employer could have such *ex parte* communications.

The court distinguished Title VII claims from ADEA claims because the ADEA provides that the EEOC acts as *de facto* counsel for employees because the individual's right to bring an ADEA suit terminates when a suit is brought by the EEOC. In contrast, under Title VII, the right "to bring a private action does not terminate with an EEOC lawsuit, and, thus, the relationship between the EEOC and potential class members is not the same as in an ADEA case."[602] The court held further that while the EEOC could contact current and non-managerial employees of the employer, the agency could not inquire into communications between the employees and the employer's counsel about the subject matter of the litigation.

4. Spoliation Issues

Recent cases clarify the importance of preserving evidence associated with EEO claims.

In *EEOC v. Chipotle Mexican Grill*,[603] the EEOC sought sanctions against the employer after the company failed to preserve video footage of an incident that led to an employee's termination. The EEOC contended that the video surveillance footage was a "personnel or employment record" under 29 C.F.R. § 1602.14, and the employer had a duty to preserve it. The court denied the EEOC's motion for sanctions.

The court explained that the video footage was not a "personnel or employment record." Further, the court emphasized that the employer had not erased the surveillance footage intentionally. Additionally, the court found no basis to conclude that the surveillance video's destruction resulted from the employer's "knowing or negligent dereliction"[604] of its regulatory obligations.

Although the court found no spoliation, the court warned that an "employer who intentionally destroys evidence that is relevant to a known claim does so at its peril."[605]

5. Financial Information

When the EEOC seeks punitive damages, it often seeks discovery on the financial status of an employer.[606] In *EEOC v. Pioneer Hotel Inc.*,[607] the EEOC asked the employer to identify and produce all documents that reflected, described or related to the company's financial condition (including all assets and liabilities) for the period beginning January 1, 2006 to the present. The EEOC claimed the company's financial information was relevant to the issue of punitive damages.

At a hearing, the court initially declined to require the employer to produce the documents. The court reasoned that the employer's pending summary judgment motion could dispose of the EEOC's punitive damages claim. However,

601 *EEOC v. SVT, LLC d/b/a Ultra Foods*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014).

602 *SVT,* 2014 U.S. Dist. LEXIS 2391, at **12-13.

603 *EEOC v. Chipotle Mexican Grill*, 2015 U.S. Dist. LEXIS 42187 (D. Mass. Mar. 30, 2015).

604 *Chipotle Mexican Grill*, 2015 U.S. Dist. LEXIS 42187 at *27.

605 *Id.* at *28.

606 While some courts in years past have leaned in favor of the EEOC when seeking financial information based on a claim for punitive damages, other courts have been split in their treatment of this issue, with some courts refusing to order defendants to disclose such information until the EEOC demonstrated potential entitlement to punitive damages. *See, e.g.*, Littler's 2013 Annual Report on EEOC Developments at 65.

607 *EEOC v. Pioneer Hotel Inc.*, 2014 U.S. Dist. LEXIS 143894 (D. Nev. Oct. 9, 2014).

the court ordered the employer to produce the requested documents. The court explained that the company's financial information could be useful to both parties during settlement negotiations. The court added that the parties did not need to defer settlement efforts until the court rules on dispositive motions.

6. General Discovery Concerns

In *EEOC v. Vicksburg Healthcare, LLC*,[608] the EEOC moved to compel the employer to permit the agency to conduct an on-site inspection of its facility, and interview its employees. The EEOC wished to gather background information so that it could determine the essential functions of a Licensed Practical Nurse and whether an employee could perform those functions with or without a reasonable accommodation. The court denied the EEOC's motion. The court explained that the EEOC had not shown that an inspection would allow it to observe a representative sample of patients or duties. The court explained further that the EEOC's inspection would disrupt patient care, and potentially risk patients' rights to confidentiality. The court concluded that the EEOC could obtain the desired information through other reasonable means, such as asking the charging party about the essential functions of her job.

The court in *EEOC v. OhioHealth Corporation*[609] had to determine the appropriateness of the EEOC's discovery requests. In *OhioHealth*, the EEOC alleged the defendant discriminated against a former employee when it denied the employee's request for reassignment to a vacant day shift position for which she was qualified. The EEOC's discovery requests sought information and documents related to all day-shift positions that were, or became, vacant after the employee requested to be reassigned to a day-shift position. The employer produced information and documents related to the positions for which the employee actually applied.

The EEOC argued that information related to all vacant day-shift positions for which the employee met the educational requirements was relevant because the defendant had a duty to identify job vacancies as a reasonable accommodation. The court agreed. The court noted that the employer had a duty to locate a suitable position for the employee once she requested a transfer as an accommodation. The court noted that the EEOC would bear the burden to show that a vacant position existed and that the employee met the position's qualifications.

7. Miscellaneous

In *EEOC v. Mattress Firm, Inc.*,[610] the EEOC moved to compel the employer to produce documents that related to employee allegations of age discrimination. The employer resisted on grounds that the EEOC sought privileged, private and irrelevant information, including information on non-similarly situated employees. The court disagreed, granting, in part, the EEOC's motion. First, the court concluded that the employer's privilege log was inadequate because it did not identify (1) the attorney and client involved; (2) all persons or entities that received the privileged document or knew of its substance; or (3) the date of the document's creation. Next, the court concluded that the employer could not resist discovery simply because it did not think employees were similarly situated. Finally, the court stated that the EEOC sought relevant information and the employer could avoid its privacy concerns with proper redaction.

In *EEOC v. Bakery*,[611] the EEOC moved to disqualify defense counsel. The EEOC contended that defense counsel had a conflict of interest because the charging party had consulted him while she sought legal advice regarding her action. The employer argued that there was no contact between defense counsel and the charging party. The employer argued that even if the charging party consulted defense counsel, such contact was too preliminary to warrant disqualification.

The court, however, rejected these arguments and granted the EEOC's motion, finding that the charging party had indeed consulted with defense counsel. It found further that the consultation related directly to the present action, and defense counsel had a direct professional relationship with the charging party. Accordingly, the court granted the employer 30 days to retain new counsel.

In *EEOC v. OhioHealth Corp.*,[612] the EEOC moved to compel the employer to produce information that distinguished the date it posted vacancies from the date it authorized hiring for the vacancy. The court denied the motion, reasoning that the EEOC failed to articulate the significance of the two types of dates, and even acknowledged the burden the

608 *EEOC v. Vicksburg Healthcare, LLC*, 2015 U.S. Dist. LEXIS 52812 (S.D. Miss. April 22, 2015).
609 *EEOC v. OhioHealth*, 2014 U.S. Dist. LEXIS 148980 (S.D. Ohio Oct. 20, 2014).
610 *EEOC v. Mattress Firm, Inc.*, 2014 U.S. Dist. LEXIS 177123 (D. Nev. Dec. 22, 2014).
611 *EEOC v. Bakery*, 2014 U.S. Dist. LEXIS 176392 (N.D. Cal. Dec. 22, 2014).
612 *EEOC v. OhioHealth*, 2014 U.S. Dist. LEXIS 175503 (S.D. Ohio Dec. 10, 2014).

employer faced to furnish such information. The court concluded that the employer substantially complied with its discovery obligations when it supplied the EEOC with information about the date it authorized a vacancy.

H. Summary Judgment

Courts during FY 2015 sided with both employers and employees in major decisions affecting religious accommodation, an employee's essential job functions, reasonable accommodations, and releases. At the outset, the Supreme Court issued a significant decision regarding religious accommodation and Title VII, ruling for the employee in the case. Courts in general tended to side with employers this year on the issue of whether an employee could perform the essential functions of a job with or without accommodation. On the other hand, courts sided with employees more often than not in denying summary judgment to employers that could have reasonably accommodated the employees. Finally, in a decision likely to affect the EEOC's strategy of challenging releases in settlement agreements and other documents, the Third Circuit ruled for the employer in a case allowing terminated at-will employees to sign releases in exchange for continuing as independent contractors.

The following discusses a sampling of the significant summary judgments decisions issued in FY 2015.[613]

1. The Supreme Court Weighs in on Religious Accommodation

In *EEOC v. Abercrombie & Fitch Stores, Inc.*,[614] the Supreme Court addressed the question of whether an employer must have "actual knowledge" of an individual's need for a religious accommodation in order to be liable under a Title VII disparate treatment theory. Abercrombie & Fitch operates retail clothing stores throughout the United States, and consistent with the image the company wants to project, it imposes a "Look Policy" that governs employees' dress. The policy prohibited "caps" as a look that is too informal for the company's desired image.[615] A practicing Muslim who wears a headscarf applied for employment at the company, but her application was ultimately rejected because the company believed that her headscarf would violate the "Look Policy."[616]

The EEOC sued on behalf of the applicant and obtained summary judgment on the issue of liability at the trial court level.[617] The Tenth Circuit reversed and granted the store's motion for summary judgment, concluding that an employer cannot be held liable under Title VII for failing to accommodate a religious practice until the applicant provides the employer with "actual knowledge" of his or her need for an accommodation.[618]

In an 8-1 decision, the Supreme Court reversed the Tenth Circuit's holding and ruled in the EEOC's favor. The store defended its decision not to hire the applicant by arguing that she did not ask for a religious accommodation, and thus under Title VII, the company could not be liable for religious accommodation because it had no knowledge of the need for an accommodation.[619] The Supreme Court rejected this argument and concluded that an applicant for employment need only show that his or her need for accommodation was a *motivating factor* in the employer's decision.[620] In other words, the Court found that the manager's belief alone that the headscarf may have been associated with a religious practice was enough to implicate Title VII. The Court found it significant that Title VII did not specifically impose a requirement that an employer must have knowledge of an applicant's need for accommodation, while other antidiscrimination statutes, like the Americans with Disabilities Act, specifically carve out language making clear that employers are liable only where there is express knowledge of the applicant's need for accommodation.[621]

Ultimately, the Court found that an employer may not make an applicant's religious practice, confirmed or otherwise, a factor in an employment decision: "Motive and knowledge are separate concepts.... [A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."[622] Based on this ruling, an applicant or employee is not obligated to notify an employer about a need for an accommodation and can assert a disparate treatment claim based on evidence showing

613 For more information on FY 2015 summary judgment decisions, see Appendix D to this Report.

614 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028 (2015).

615 *Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. at 2031.

616 *Id.*

617 *Id.*

618 *Id.*

619 *Id.* at 2032.

620 *Id.*

621 *Id.* at 2032-33.

622 *Id.* at 2033.

the need for an accommodation was a motivating factor in the employer's decision. Employers will not be able to raise a defense to these types of claims by arguing they had no actual knowledge of an applicant or employee's religion. A suspicion or belief on the part of the employer is now probably enough to invoke the protections of Title VII. Therefore, employers should take precautions when implementing company policies that may appear neutral on their face, but in practice, may conflict with the religious practices of applicants or employees.

2. Trend of Deferring to Employers' Judgment as to Essential Job Functions

In the last year, employers have been successful in defending their decisions regarding whether an employee could perform the essential functions of a job with or without accommodation. A number of cases have upheld summary judgment in favor of employers on this issue. For example, in FY 2014, in *EEOC v. Ford Motor Co.*,[623] the Sixth Circuit addressed whether physical presence at the office should be treated as an essential job function for a disabled employee, or whether telecommuting could be a reasonable accommodation. The case involved a former employee who was discharged from a position that required troubleshooting, interacting with suppliers, and group problem-solving with other members of her team, after asking if she could telecommute up to four days per week due to Irritable Bowel Syndrome. Based on the claimant's job functions, the employer determined that telecommuting was not a reasonable accommodation and offered the alternative accommodations of a cubicle closer to a restroom or a transfer to another position better suited to telecommuting. The plaintiff refused these alternative accommodations and developed absenteeism and performance problems leading to her discharge. The EEOC alleged in relevant part that the employer discriminated against the plaintiff on the basis of her disability by failing to grant her request to telecommute.[624] The district court ruled in favor of the employer.

On appeal last year, the Sixth Circuit ruled in the EEOC's favor and reversed the district court's grant of summary judgment for the employer, holding that there were genuine issue of fact as to whether physical presence at the office was one of the plaintiff's essential job functions, and whether recent improvements in telecommuting technology made it more difficult for employers to establish that physical presence in the office was an essential job function.[625] However, the Sixth Circuit granted the employer's petition for rehearing *en banc*.

On April 10, 2015, the Sixth Circuit changed course and affirmed the district court's order granting summary judgment in favor of the employer, concluding that the employer's decision to deny the plaintiff's request to telecommute should be upheld because regular and predictable on-site attendance was essential to the plaintiff's highly interactive job.[626] The Sixth Circuit rejected the EEOC's argument that the plaintiff's testimony, other resale buyers' telecommuting practices, and advanced technology all created genuine issues of material fact as to whether on-site attendance was an essential function of the job.[627] Instead, the Sixth Circuit ruled that summary judgment was warranted where an employer's judgment reasonably established the essential functions of the job: "Our ruling does not, in other words, require blind deference to the employer's stated judgment. But it *does* require granting summary judgment where an employer's judgment as to essential job functions—evidenced by the employer's words, policies, and practices and taking into account all relevant factors—is 'job related, uniformly-enforced, and consistent with business necessity.'"[628]

Similarly, in *EEOC v. Womble Carlyle*,[629] the Fourth Circuit upheld the district court's grant of summary judgment for the employer, where the district court held, in part, that the judgment of the employer was evidence of what constituted the essential functions of the job. The case involved an employee in an administrative support role for a law firm who could no longer perform tasks entailing heavy lifting.[630] The Fourth Circuit rejected the EEOC's position that despite the plaintiff's inability to lift heavy items, the plaintiff could nevertheless perform the essential functions of the position because the plaintiff had found ways to work around the necessity to perform heavy lifting. Significantly, the court held that in determining whether a certain job responsibility is an essential function of a job, "[W]e look to the general components of the job rather than to the employee's particular experience."[631] Therefore, even if the plaintiff found ways

623 *EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014), *reh'g granted, EEOC v. Ford Motor Co.*, No. 12-2484, 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

624 *Id.*

625 *EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502, at *17 (6th Cir. Apr. 22, 2014).

626 *EEOC v. Ford Motor Co.*, 782 F.3d 753 (6th Cir. 2015).

627 *Ford Motor Co.*, 782 F.3d at 764-65.

628 *Id.* at 765-66.

629 *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2015 U.S. App. Lexis 10887 (4th Cir. June 26, 2015).

630 *Womble Carlyle Sandridge & Rice, LLP*, 2015 U.S. App. Lexis 10887, at **7-8.

631 *Id.* at *14.

to work around heavy lifting, that did not necessarily mean that heavy lifting was not an essential function of the job. Further, the Fourth Circuit found that it would be inappropriate to order the employer to reallocate all tasks involving heavy lifting because the ADA does not require it.[632]

In *EEOC v. St. Joseph's Hospital*,[633] the Middle District of Florida sided with the employer in a case involving a nurse who required the use of a cane who was terminated because the employer contended that the essential functions of her job entailed being ready to restrain a patient who is acting violently, and inject medication immediately into patients who are ill or acting dangerously.[634] While the court agreed that plaintiff was disabled and may have been entitled to a reasonable accommodation, the court found that restraining and injecting dangerous patients with medications was an essential function of the job that the plaintiff could not perform: "The EEOC has not demonstrated that [the plaintiff] could use the cane safely . . . The Hospital does not have an obligation to eliminate or reallocate an essential job function to accommodate a disabled employee."[635] Thus, the court agreed the use of a cane would not be a reasonable accommodation, but found that it was up to a jury to determine whether it could have placed her in one of the positions for which she applied as a reasonable accommodation.

Finally, in *EEOC v. LHC Group, Inc.*,[636] the Fifth Circuit agreed with the employer's assessment that driving was an essential function of a Field Nurse position. In this case, the plaintiff suffered a seizure, and returned to work after obtaining a release from her physician that restricted her from driving for one year.[637] While the Fifth Circuit remanded the case to the district court to resolve conflicts in the record as to which position the plaintiff held, the court held that to the extent the plaintiff was employed primarily as a Field Nurse, summary judgment was appropriate because based on both employer's job description and the plaintiff's testimony, driving was an essential function of that position.[638] In addition, the court reasoned that no accommodation was available that would have permitted plaintiff "to complete an essential function that occupied 'a couple hours' of a Field Nurse's typical day."[639]

3. Courts Have Been Critical of Employers' Failures to Provide Reasonable Accommodations

In the last year, courts have been inclined to deny summary judgment where the facts tend to show that an employer could have reasonably accommodated an employee. For example, in *EEOC v. St. Alexius Medical Center*,[640] the court denied the employer's summary judgment motion, finding that a reasonable fact-finder could conclude that the plaintiff's disability could have been accommodated. In this case, the plaintiff was hired by St. Alexius Medical Center in August 2009 as a part-time greeter.[641] The plaintiff was required to direct patients and guests to the appropriate locations in relation to scheduled surgeries, and to interact with physicians and nursing staff.[642] The plaintiff was also required to answer inquiries, direct foot traffic, ensure that volunteers were appropriately staffed, and call codes during emergencies.[643] It was quickly determined that the plaintiff had difficulty with some aspects of her job, and that she required additional training.[644] In November 2009, the plaintiff's vocational counselor spoke to the employer's Director of Volunteers and Guest Relations about the plaintiff's disability, moyamoya disease, a progressive cerebrovascular disorder that affected the plaintiff's neurological functions and limited her learning and thinking.[645] The plaintiff's vocational counselor requested that the employer provide written instructions to the plaintiff regarding her responsibilities and inquired if the employer had any other positions to which the plaintiff could transfer.[646] The employer's Director of

632 *Id.* at *18.
633 *EEOC v. St. Joseph's Hosp., Inc.*, 2015 U.S. Dist. Lexis 19272 (M.D. Fla. Feb. 18, 2015).
634 *St. Joseph's Hosp., Inc.*, 2015 U.S. Dist. Lexis 19272, at *13.
635 *Id.* at *17.
636 *EEOC v. LHC Grp., Inc.*, 773 F.3d 688 (5th Cir. 2014).
637 *LHC Grp., Inc.*, 773 F.3d at 693.
638 *Id.* at 698.
639 *Id.*
640 *EEOC v. St. Alexius Med. Ctr.*, 2014 U.S. Dist. LEXIS 142138 (N.D. Ill. Oct. 6, 2015).
641 *St. Alexius Med. Ctr.*, 2014 U.S. Dist. LEXIS 142138, at *3.
642 *Id.*
643 *Id.* at **3-4.
644 *Id.*
645 *Id.* at **1, 4.
646 *Id.* at *4.

Volunteers and Guest Relations told the plaintiff's vocational counselor that she felt "tricked" because she was unaware of plaintiff's disability when she hired her.[647] The employer agreed to provide the plaintiff with written instructions, but did so only on one occasion.[648]

The employer terminated the plaintiff at her sixth-month review, never having considered whether there were possible accommodations or whether there were other appropriate positions for the plaintiff.[649] The court held that summary judgment could not be granted on the failure-to-accommodate claim where the EEOC provided evidence that would allow a reasonable fact-finder to conclude that written instructions would have enabled the plaintiff to perform those job duties.[650] Moreover, there was evidence to support that written instructions had assisted the plaintiff in adequately performing in her employment for other employers.[651] Additionally, the court disagreed with the employer's argument that it did not need to consider transferring the plaintiff to the vacant Food Services Technician I position.[652] The court reasoned that such a transfer is a reasonable accommodation if "the employee is otherwise qualified for that position."[653] The EEOC provided sufficient evidence to allow a reasonable fact-finder to conclude that the plaintiff was qualified for the Food Services Technician I position.[654]

Similarly, in *EEOC v. Orion Energy Systems, Inc.*,[655] the court denied the employer's motion for partial summary judgment regarding the plaintiff's failure-to-accommodate claim.[656] In this case, the EEOC alleged that the employer failed to provide a reasonable accommodation for the plaintiff, who had predominantly used a wheelchair for mobility since October 2009.[657] After the plaintiff's medical condition became known, he was transferred from the IT bullpen (where employees were required to use stairs) to the Tech Center (where two elevators were accessible).[658] In addition, the plaintiff requested the ability to work from home part-time and requested power-assisted doors to be installed in the building and bathrooms.[659] At the time of the request, there was limited information known about the plaintiff's condition (even by the plaintiff), and so the employer decided to approve the flexible schedule but took a "wait-and-see approach" with the automated door request to see if the plaintiff's medical condition improved.[660] In denying the employer's motion for summary judgment, the court held that whether the employer's delay in providing an accommodation was reasonable is a jury question.[661]

In defeating an employer's motion for summary judgment, the EEOC has been successful in discovering facts that tend to show employers have not properly evaluated whether reasonable accommodations were available to employees. These cases are significant to illustrate that employers must undergo a thorough analysis of whether a reasonable accommodation can be provided and be prepared to articulate reasons why none could be made.

4. Long-Running Lawsuit Resolved

After nearly a decade of litigation, the Third Circuit ruled in a long-running case that an employer's requirement that terminated at-will employees sign a release of potential legal claims in exchange for continued employment as independent contractors is not a form of unlawful discrimination or retaliation. In *EEOC v. Allstate Ins. Co.*,[662] the employer, as part of a reorganization, terminated approximately 6,200 at-will sales agents.[663] These agents were offered the opportunity to work as independent contractors, conditioned upon their signing a release waiving existing

647 *Id.*
648 *Id.*
649 *Id.* at **4-5.
650 *Id.* at *8.
651 *Id.*
652 *Id.* at **9-10.
653 *Id.* at *9, *citing Jackson v. City of Chicago*, 414 F.3d 806, 812-13 (7th Cir. 2005) (internal quotations omitted).
654 *Id.* at *10.
655 *EEOC v. Orion Energy Sys., Inc.*, 2015 U.S. Dist. LEXIS 86428 (E.D. Wis. July 2, 2015).
656 *Orion Energy Sys., Inc.*, 2015 U.S. Dist. LEXIS 86428, at *2.
657 *Id.* at **1-2.
658 *Id.* at **3-4.
659 *Id.* at *4.
660 *Id.* at **5-6.
661 *Id.* at *10.
662 *EEOC v. Allstate Ins. Co.*, 778 F.3d 444 (3d Cir. 2015).
663 *Allstate Ins. Co.*, 778 F.3d at 446.

legal claims against the company.[664] The EEOC sued, alleging the waiver violated federal anti-retaliation laws.[665] The district court ruled in favor of the employer, holding that the requirement that agents choosing to return as independent contractors must waive their claims was not facially retaliatory because the policy did not discriminate on the basis of any protected trait, and that the company had not specifically retaliated against agents who rejected this option, as refusing to sign a release does not constitute "protected activity" under the anti-retaliation statutes.[666]

The EEOC appealed, but the Third Circuit affirmed the lower court's grant of summary judgment, noting "it is hornbook law that employers can require terminated employees to release claims in exchange for benefits to which they would not otherwise be entitled."[667] The court determined that the releases were knowingly and voluntarily signed, and that adequate consideration was offered in exchange for the release of claims.[668] The EEOC argued that the employer could have complied with the anti-retaliation statutes by simply firing the at-will employees without providing them with options for continued work.[669] The court reasoned that "federal laws designed to protect employees do not require such a harmful result."[670] As for consideration offered, the court explained that while employees had the opportunity to become independent contractors before the reorganization, the offer at issue (1) guaranteed conversion, whereas the employer had previously retained discretion to deny conversion; (2) came with a bonus; (3) excused repayment of any outstanding office-expense advances; and (4) gave the converting agent a transferable interest in his or her business after two years, rather than five.[671] "[T]he EEOC fail[ed] to explain why this financial pressure is more offensive to the antiretaliation statutes than the pressure one is bound to feel when required to sign a release in exchange for severance pay."[672] The court was not persuaded that forms of consideration exchangeable for a release of claims by a terminated employee ought to be arbitrarily limited.[673]

With respect to protected activity, the court disagreed with the EEOC's argument that refusing to sign a release constitutes opposition to unlawful discrimination.[674] The court reasoned that "such inaction does not communicate opposition sufficiently specific to qualify as protected employee activity."[675] Moreover, because the waiver precluded bringing any claims against the employer regarding employment or termination, "employee agents who refused to sign it might have done so for any number of reasons unrelated to discrimination."[676] Even if the refusal to sign constituted protected activity, the EEOC was unable to prove the employer took any adverse employment actions.[677]

This ruling is significant in light of the EEOC's recent challenges regarding releases in separation agreements and other employment documents.

For summaries of key FY 2015 summary judgment decisions, see Appendix D to this Report.

I. Default Judgment

Although relatively uncommon, courts have granted motions for default judgment this past fiscal year. Notably, in *EEOC v. Global Horizons*,[678] a default judgment resulted in an award of more than $2.4 million in monetary damages.

The EEOC filed the initial lawsuit in 2011, alleging that farm labor contractor Global Horizons, Inc., and eight farms engaged in a pattern or practice of national origin and race discrimination, harassment, and retaliation against more than 200 male Thai workers hired to work on farms in Washington State and Hawaii. This complaint alleged the workers were falsely promised lucrative and steady jobs and temporary work visas, but were instead charged high recruitment

664 *Id.*
665 *Id.*
666 *Id.* at 445-46, 448.
667 *Id.* at 449.
668 *Id.* at 450.
669 *Id.*
670 *Id.*
671 *Id.* at 450-51.
672 *Id.* at 451.
673 *Id.*
674 *Id.* at 452.
675 *Id.*
676 *Id.*
677 *Id.*
678 *EEOC v. Global Horizons*, 2014 U.S. Dist. LEXIS 175851 (D. Haw. Dec. 19, 2014).

fees, had their passports confiscated, given poor living and working conditions, and threatened with deportation if they complained. Various farms settled with the EEOC over time.

On March 19, 2014, the federal district court in Hawaii had granted the EEOC's motion for partial summary judgment against Global Horizons, finding that the company engaged in a pattern or practice of (1) hostile work environment, (2) disparate treatment, and (3) retaliation against the claimants.[679] A month before, the court similarly granted the EEOC's motion for partial summary judgment as to defendant farm Maui Pineapple. On June 30 and August 22, 2014, the court approved the stipulated default judgment as to farm Maui Pineapple and Global Horizons, respectively. The EEOC then sought an award of damages and injunctive relief based on the documents it submitted to the court to support its motions for default judgment.

Because default judgment was entered resolving liability, the only issue before the court was the amount of monetary damages and injunctive relief to award to the claimants. At the outset, the court noted that the EEOC's burden in "proving up" damages on a motion for default was "relatively lenient."[680] "With respect to the determination of liability and the default judgment itself, the general rule is that well-pled allegations in the complaint regarding liability are true and upon a finding of liability of a pattern or practice of discrimination as exists here for discrimination, hostile work environment, and retaliation, each Claimant's pain and suffering is uncontested."[681] Moreover, in addition to the allegations in the complaint, the court emphasized that it is permitted to take into consideration later-provided evidence in the form of affidavits and exhibits.[682] "The district court is not required to make detailed findings of fact."[683]

Therefore, the court adopted its prior 180-paragraph findings of fact derived from the parties' numerous motions to dismiss and motions for summary judgment, and found that the racial animus, pattern or practice of discriminatory conduct, hostile environment, and retaliation by Global Horizons' top management warranted substantial monetary damages for each claimant. The court held that Global Horizons and Maui Pineapple were subject to the $300,000 statutory cap for compensatory and punitive damages because each employed over 500 employees during the relevant timeframe and were jointly liable for monetary damages. The court ultimately awarded each claimant $50,000 in compensatory damages. In making this award, the court expressly rejected a Fourth Circuit holding that emotional distress damages must be supported by substantial evidence finding that such a requirement did not exist in the Ninth Circuit and instead found that the claimants' declarations were sufficient for the award "due to the egregious and pervasive nature of the discrimination."[684]

In addition, the court awarded each claimant $100,000 in punitive damages, finding that Global Horizons engaged in reprehensible acts included but not limited to threats of violence and actual violence and Maui Pineapple was recklessly indifferent to these violations.

In sum, the court concluded that an award of $50,000 in compensatory damages and $100,000 in punitive damages, for a total award of $150,000, to each claimant was sufficient to reflect the seriousness of injuries inflicted upon the class of claimants as a whole.

Failure to retain counsel was the undoing of another company subject to an entry of default judgment in FY 2015. The EEOC initially filed suit against AJ 3860, LLC on July 2, 2014, alleging the company engaged in race and/or color discrimination in hiring. A second amended complaint added Southeast Showclubs, LLC as a defendant on March 5, 2015.

The first defendant, AJ 3860, had filed, with the assistance of counsel, a Motion to Dismiss the Complaint, which was denied as moot based on the EEOC's filing of a first amended complaint.

Following the EEOC's filing of a Second Amended Complaint, AJ 3860's counsel, in their motion for an extension of time to respond, indicated its intent to withdraw from the case. The court extended the response deadline, to April 2, 2015 and then April 22, 2015. Meanwhile, the defendant's counsel moved to withdraw on March 23, 2015, which was granted on April 10, 2015. The court emphasized, however, that "a corporation must be represented by counsel and

679 *EEOC v. Global Horizons, Inc*., 7 F. Supp. 3d 1053 (D. Haw. 2014).

680 *Global Horizons*, 2014 U.S. Dist. LEXIS 175851, at *66, *citing Philip Morris USA, Inc. v. Castworld Products, Inc*., 219 F.R.D. 494, 498 (C.D. Cal. 2003) (*citing Greyhound Exhibitgroup, Inc. v. E.L.U.L Realty Corp*., 973 F.2d 155, 159 (2d Cir. 1992)).

681 *Global Horizons*, 2014 U.S. Dist. LEXIS 175851, at **66-67, *citing Fair Housing of Marin v. Combs*, 285 F.3d 899, 906 (9th Cir 2002).

682 *Global Horizons*, 2014 U.S. Dist. LEXIS 175851, at *66, *citing TeleVideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917-18 (9th Cir. 1987).

683 *Id*., *citing Adriana Int'l Corp. v. Thoeren*, 913 F.2d 1406, 1414 (9th Cir. 1990).

684 *Global Horizons*, 2014 U.S. Dist. LEXIS 175851, at *68.

cannot appear pro se. In this regard, the defendant shall have until April 22, 2015, to file a notice of appearance of new counsel, or it will be subject to default for failure to respond to the second amended complaint."[685]

AJ 3860 neither secured new counsel nor responded to the Second Amended Complaint. The court therefore issued an order finding the defendant in default, and warned that it would be subject to an entry of default judgment. "In an abundance of fairness,"[686] the defendant was given additional time to respond and retain new counsel, which it failed to do. Therefore, the court struck the defendant's pleadings based on this failure to abide by the court's "clear and repeated directive to retain counsel."[687]

Soon thereafter, the EEOC moved for an entry of final default judgment, which was granted on August 10, 2015.[688] Notably, the company was ordered to pay the two plaintiffs in this matter a total of $383,024 in compensatory and punitive damages, and was subject to a number of injunctive relief measures. Specifically, for a five-year period, the company was ordered to adopt and distribute a non-discrimination, no-retaliation policy, and provide quarterly updates to the EEOC on its compliance efforts.[689]

J. Bankruptcy

Filing for bankruptcy does not necessarily stay an EEOC lawsuit. In *EEOC v. Stone Pony Pizza, Inc*.,[690] the defendant filed a Suggestion of Bankruptcy after cross motions for summary judgment were filed but before the court could rule on them. In the underlying action, the EEOC alleged the company failed to hire qualified applicants based on race and maintained a racially segregated workforce.

Following the employer's bankruptcy filing, the court dismissed the case, but retained jurisdiction over the matter in the event further litigation was necessary. The EEOC then filed a Motion to Vacate the dismissal on the grounds that the automatic stay prescribed by the Bankruptcy Code did not apply in this case, as the EEOC was exercising its governmental police power enforcement authority.

Generally, upon filing of a voluntary petition in bankruptcy, Section 362(a) of the Bankruptcy Code provides an automatic stay of the continuation of judicial proceedings against the debtor except for "an action or proceeding by a governmental unit to enforce such governmental unit's . . . police or regulatory power."[691] The district court noted that other circuits have held that "where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay."[692]

In a 1987 Fourth Circuit decision,[693] for example, the appellate court determined that the EEOC was a governmental unit attempting to enjoin and fix damages for violations of Title VII of the Civil Rights Act of 1964, as amended, and that by bringing the action, the agency was enforcing its regulatory power. Thus, the underlying action was not subject to the automatic-stay provision of the Bankruptcy Code until the prayer for relief, including monetary relief, was reduced to judgment.[694]

Taking this into account, the district court in *Stone Pony Pizza* reasoned that based on the language of the Bankruptcy Code and the relevant Title VII cases in which the EEOC was a party, and the fact that the defendant offered no authority to the contrary, the automatic stay did not apply. In making this assessment, the court acknowledged the employer's "predicament" that its prior counsel was classified as an unsecured debtor, and the company had no funds to hire new counsel. Nonetheless, the court vacated the order of dismissal and reopened the EEOC's motion for summary judgment.

685 *EEOC v. AJ 3860, LLC and Southeast Showclubs, LLC*, 2015 U.S. Dist. LEXIS 62099, at **2-3 (M.D. Fla. May 12, 2015).

686 *AJ 3860, LLC and Southeast Showclubs, LLC*, 2015 U.S. Dist. LEXIS 62099, at *3.

687 *Id.* at *4.

688 *EEOC v. AJ 3860, LLC and Southeast Showclubs, LLC*, Case No. 8:14-cv-1621-T-33TGW (M.D. Fla. Aug. 10, 2015).

689 *AJ 3860, LLC and Southeast Showclubs, LLC*, slip op. at **4-7.

690 *EEOC v. Stone Pony Pizza, Inc*., 2015 U.S. Dist. LEXIS 40312 (N.D. Miss. Mar. 30, 2015).

691 *Stone Pony Pizza, Inc*., 2015 U.S. Dist. LEXIS 40312, at **2-3, *citing* 11 U.S.C. § 362(b)(4).

692 *Stone Pony Pizza, Inc*., 2015 U.S. Dist. LEXIS 40312, at *3, *citing EEOC v. McLean Trucking Co*., 834 F.2d 398, 401 (4th Cir. 1987) (*quoting* S. Rep. 989, 95th Cong. 2d Sess. 52, reprinted in, 1978 U.S. Code Cong. & Admin. News 5787, 5838).

693 *McLean Trucking Co*., 834 F.2d 398.

694 *Id* at 402.

A claimant's failure to disclose his claims in a personal bankruptcy proceeding does not necessarily preclude the EEOC from pursuing those claims. In *EEOC v. Celadon Trucking Services, Inc.*,[695] the agency alleged a trucking company violated the ADA by asking disability-related questions during the job application process. Four members of the affected class of applicants, however, did not disclose their claims against the company in their personal bankruptcy proceedings. The company alleged that the EEOC should therefore be precluded from pursing claims on their behalf.

Generally, under the Bankruptcy Code, a debtor must schedule as assets "all legal or equitable interests of the debtor in property as of the commencement of the case."[696] Causes of action that arise during the court of the bankruptcy are also deemed property of the bankruptcy estate.[697] The bankruptcy estate owns the claim, so the debtor lacks standing to pursue an undisclosed claim on the estate's behalf during the pendency of the bankruptcy.[698]

Once the bankruptcy has closed, the doctrine of judicial estoppel would normally preclude a claimant from pursuing a previously undisclosed claim. "A debtor who fails to disclose 'an asset, including a chose in action or other legal claim, cannot realize on that concealed asset after the bankruptcy ends.'"[699]

The court, however, emphasized that in this case, the EEOC—not the claimants—was the entity filing suit. The question the court had to consider, therefore, was "whether judicial estoppel applies when the EEOC sues on a claim previously undisclosed by individual charging parties in bankruptcy proceedings."[700] The court responded in the negative, concluding that judicial estoppel did not apply in this instance "because the agency, in fulfilling its enforcement role, does not merely stand in the shoes of individual claimants; in other words, it is not the same 'party' that earlier took an inconsistent position before a court. The EEOC is not 'merely a proxy for the victims of discrimination,' . . . nor does it sue 'as the representative of the discriminated-against employee.'"[701] The ADA in particular "makes the EEOC the 'master of its own case,' and confers upon the agency independent authority to evaluate the strength of the public interests at stake in enforcing the statute."[702]

Therefore, the individual claimant's failure to disclose their claims in their bankruptcy proceedings did not prevent the EEOC from recovering damages on their behalf. The court reasoned that because the EEOC was not a party to the bankruptcy proceedings, nor were the claimants parties to the EEOC's lawsuit, "judicial estoppel does not bar the EEOC from recovering damages predicated on harms they may have suffered."[703]

K. Trial

1. ADA Trials

A number of cases brought by the EEOC went to trial in FY 2015. In *EEOC v. Beverage Distributors Co., LLC*, the EEOC alleged that the defendant discriminated against the claimant when it withdrew its conditional offer of employment for a night warehouse loader position upon learning that the claimant was legally blind. In April 2013, the case was tried before a jury.

As part of its affirmative defense, the employer argued that hiring the claimant would create a significant risk of harm to himself and others, and that no reasonable accommodations could reduce or eliminate that risk. With respect to the direct threat issue, the jury was instructed that the employer must prove, by a preponderance of the evidence, that the claimant's employment in the position requested would pose a significant risk of harm to the health or safety of himself or others, and that such a risk could not have been eliminated or reduced by reasonable accommodation.

695 *EEOC v. Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015).

696 *Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639, at *50, *citing* 11 U.S.C. § 541(a)(1).

697 *Id., citing* 11 U.S.C. § 1306(a)(1).

698 *Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639, at *50, *citing Cowling v. Rolls Royce Corp.*, 2012 U.S. Dist. LEXIS 144273, at *5 (S.D. Ind. Oct. 5, 2012).

699 *Id.*, *citing Becker v. Verizon North, Inc.*, 2007 U.S. App. LEXIS 9879 (7th Cir. Apr. 25, 2007) (*quoting Cannon-Stokes v. Potter*, 453 F.3d 446, 448 (7th Cir. 2006); *accord Biesek v. Soo Line R.R. Co.*, 440 F.3d 410, 412-414 (7th Cir. 2006).

700 *Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639, at *51.

701 *Id.*, *citing In re Bemis,* 279 F.3d 419, 421-422 (7th Cir. 2002) ("The EEOC's primary role is that of a law enforcement agency and it is merely a detail that it pays over any monetary relief obtained to the victims of the defendant's violation rather than pocketing the money itself.") (internal citation omitted).

702 *Celadon Trucking Servs.*, 2015 U.S. Dist. LEXIS 84639, at *52, *citing in EEOC v. Waffle House, Inc.,* 534 U.S. 279, 122 S. Ct. 754 (2002).

703 *Id.* at *55.

The jury returned a verdict in favor of the claimant finding that the defendant violated the ADA.[704] The jury awarded back pay in the amount of $132,347.00 but reduced that award to $102,803.75 based on its finding that the claimant did not mitigate his damages.[705] After hearing post-trial motions, the district court reinstated the full jury award, finding that defendant failed to meet its burden to support the jury's reduction in back pay.[706] The court also awarded injunctive relief including requiring that the defendant reinstate the claimant to the position of night warehouse loader and hire an outside consultant to provide employee training and assistance in revising the defendant's policies, job postings, and reporting and compliance review.[707]

The employer appealed to the Tenth Circuit. A key issue on appeal was whether the direct threat jury instruction constituted reversible error.[708] The appellate court agreed with the employer's assertion that it was, as the first part of the instruction required the defendant to prove that the claimant posed a direct threat to himself or others. This, however, was not required under the district's case law. Rather, the defendant should have avoided liability if it reasonably believed the job would entail a direct threat to the claimant or others; proof of an actual threat was not necessary.[709] The court further found that the second part of the instruction did not cure the error – that the jury was to consider the reasonableness of the defendant's belief regarding the existence of a direct threat because the jury was never told *why* it was to consider the reasonableness of defendant's belief.[710]

Another trial was set for 2016, but on December 7, 2015, the EEOC announced that the parties settled the case for $160,000.[711]

In *EEOC v. Old Dominion Freight Line, Inc.*, the EEOC alleged that the defendant violated the ADA by denying a truck driver a reasonable accommodation and terminating the driver. After the claimant self-reported an alcohol problem, the defendant did not allow the claimant to return to a driving position but instead provided the claimant with a part-time dock position at half the pay and no health benefits. The claimant was later terminated for job abandonment. On these facts, a jury found that the defendant violated the ADA and awarded the claimant $119,612.97 in back pay.

The EEOC filed post-trial motions asking the court to determine whether the defendant's self-reporting policies violated the ADA as a matter of law, enjoin the defendant from continuing to enforce those policies, and order the defendant to reinstate the claimant and pay him prejudgment interest on his back pay award.[712] The defendant opposed the EEOC's requests and instead asked the court to vacate the jury award and enter judgment as a matter of law or order a new trial.[713]

In analyzing the defendant's policy, the court found that the defendant had a written policy that precluded drivers who self-reported alcohol abuse from ever returning to a driving position regardless of the circumstances and without regard to any potential ADA accommodations.[714] The policy allowed drivers to be considered instead for non-safety-sensitive, non-driving positions after the driver provided proof that he or she had entered into a rehabilitation or treatment program for alcohol abuse.[715] The defendant believed its policy complied with and was mandated by Department of Transportation regulations.[716] The policy was not widely disseminated throughout the company and never provided or explained to drivers.[717]

704 *EEOC v. Beverage Distributors Co., LLC*, 2014 U.S. Dist. LEXIS 155791, at *1 (D. Colo. Nov. 1, 2014).

705 *Beverage Distributors Co., LLC*, 2014 U.S. Dist. LEXIS 155791, at *2.

706 *Id.*

707 *Id.*

708 *EEOC v. Beverage Distributors Co.*, 780 F.3d 1018 (10th Cir. 2015).

709 *Beverage Distributors,* 780 F.3d at 1021.

710 *Id.* at 1022.

711 Press Release, EEOC, *Beverage Distributors Company to Pay $160,000 to Settle EEOC Disability Lawsuit* (Dec. 7, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-7-15a.cfm.

712 *EEOC v. Old Dominion Freight Line, Inc.*, 2015 U.S. LEXIS 81977, at *1 (W.D. Ark. June 24, 2015).

713 *Old Dominion Freight Line, Inc.*, 2015 U.S. LEXIS 81977, at *2.

714 *Id.* at *4.

715 *Id.*

716 *Id.* at *5.

717 *Id.* at *4.

The DOT regulations require a driver who engages in certain prohibited conduct concerning the misuse of alcohol to be ineligible to return to a safety-sensitive position unless he or she first completes an evaluation, referral, and education/treatment process as directed by the DOT.[718] This is the DOT general rule.[719] However, employers can implement written policies concerning the self-reporting of alcohol misuse and if the policy meets the DOT regulations and the employee is not subject to the consequences of violating the DOT's alcohol regulations.[720] The defendant did not have a DOT-compliant written policy.[721]

Here, the claimant did not engage in any prohibited conduct violating the DOT regulations.[722] The court found that the defendant's policy was intended to allow it to take adverse action against employees who voluntarily disclosed alcohol abuse.[723] The court added that the policy contravened public policy and erroneously conflated the DOT's allowance of a temporary suspension resulting from a current clinical diagnosis of alcoholism with complete discretion to terminate all self-reporting drivers without regard to the ADA.[724] Further, the court noted that after the claimant reported alcohol misuse, the defendant should have determined whether the claimant violated the DOT's alcohol regulations and then considered whether he was disabled by alcoholism, and could have driven again if provided a reasonable accommodation.[725]

The court also held that the defendant's requirement that the claimant participate in a treatment plan was not a reasonable accommodation for the claimant's disability because it failed to contemplate at least the potential return to driving.[726] For these reasons, the court found as a matter of law that the defendant's policy violated the ADA because it failed to consider a driver for a reasonable accommodation, did not provide for proposed reasonable accommodations that allowed for the possibility of returning the employees to their former job or comparable job, and failed to qualify as a DOT written policy. Therefore, the defendant was not legally required to send a self-reporting driver for referral or treatment.[727] The court issued a permanent injunction prohibiting the defendant from enforcing its policy against drivers.[728]

Additionally, the court denied the defendant's motion for judgment as a matter of law, finding that there was sufficient evidence at trial for a reasonable jury to conclude that the claimant had a disability and suffered an adverse employment action due to disability discrimination.[729] The court based its decision on the claimant's testimony that he drank one half-gallon plus one pint of liquor every weekend and was unable to walk, talk, or communicate with his family when he was drinking.[730] The claimant further testified that he was unable to control his drinking, would be heavily intoxicated for long periods of time, would stumble, fall down, unknowingly urinate on himself, and fail to take care of his personal hygiene while drinking.[731] Based on this testimony, the court found the claimant "easily" met the ADA definition of disability.[732] The court further found that the defendant did not determine if the claimant was disabled by alcoholism or perform an individualized inquiry to determine if it could reasonably accommodate the claimant.[733] For this reason, the jury had a reasonable basis for finding that the claimant could have performed the essential functions of his job with a reasonable accommodation at the time the defendant refused to consider the claimant for a driving job and terminated him.[734]

718 *Id.* at *5.
719 *Id.* at *6.
720 *Id.* at **6-7.
721 *Id.* at *8.
722 *Id.* at *7.
723 *Id.* at *8.
724 *Id.* at *8.
725 *Id.* at *10.
726 *Id.*
727 *Id.* at *14.
728 *Id.* at *15.
729 *Id.* at *17.
730 *Id.* at *18.
731 *Id.*
732 *Id.*
733 *Id.* at *19.
734 *Id.* at *20.

With regard to reinstatement, the defendant argued that the claimant was not entitled to reinstatement as a driver because he had a July 2009 clinical diagnosis of alcoholism.[735] The court found "it is patently absurd to suggest that this six-year old diagnosis renders [claimant] medically disqualified from driving a truck for [the defendant] at present."[736] The court found that the defendant had to consider if the claimant was qualified in 2015, not 2009, to drive a commercial vehicle and that the uncontroverted evidence established that claimant maintained his sobriety since August 2009, had a Medical Examiner's certificate to drive a commercial vehicle, and had been employed as a licensed commercial driver from mid-2011 to the present.[737] The court also noted that the defendant did not argue that reinstatement would be impossible due to underlying hostilities between the parties.[738] On these facts, the court ordered reinstatement with full salary and benefits within 30 days.[739]

In *EEOC v. Florida Commercial Security Services*, the EEOC filed suit for a licensed security guard with one arm, arguing he was unlawfully discriminated against based on his limb loss when his employer removed him from his post after a customer complained about his disability.[740] The EEOC further alleged that the defendant failed to reassign the security guard—effectively terminating his employment. At trial, the jury awarded claimant $35,922.00 and the EEOC indicted it would seek an injunction prohibiting future discrimination by the defendant as well as equitable relief including training and anti-discrimination employment polices to be determined by the court.

In the first EEOC case ever to go to trial in Alaska, a federal jury awarded an Alaskan oil rig worker $15,000.00 in compensatory damages for emotional pain and distress when it established that the defendant violated the ADA when it withdrew its initial job offer to hire the claimant because he had no vision in his left eye.[741] The claimant lost his eye sight as a child but had a successful 37-year career working in various positions on the oil rig floor. After the jury verdict was rendered, the judge awarded the claimant $230,619.00 in back pay.

2. Workplace Harassment and Retaliation

In *EEOC v. New Breed Logistics*, the EEOC alleged that the defendant's supervisor sexually harassed three female temporary employees after the women rejected his sexual advances. The EEOC also alleged that the supervisor retaliated against a male employee who verbally opposed the harassment. After a seven-day trial, the jury found in favor of the claimants on both the harassment and retaliation claims and awarded the four employees compensatory and punitive damages totaling over $1.5 million dollars.[742] The defendant filed post-trial motions for a new trial and for judgment as a matter of law; it further challenged the sufficiency of the evidence as to liability and punitive damages.[743] The district court denied the motions, finding that the evidence supported the jury verdict and that the defendant's challenges to the jury instructions were waived or without merit. The Sixth Circuit affirmed the district's court's judgment.[744]

To support its argument for judgment as a matter of law and a new trial on the retaliation claim, the defendant argued that the evidence did not support the jury's verdict because none of the female claimants engaged in protected activity constituting opposition while employed with the defendant; the relevant decision-makers did not know of any protected activity; and any protected activity was not the "but-for" cause of the adverse employment action.[745] The court held that a demand by an employee that a supervisor cease his or her harassing conduct constitutes protected activity covered by Title VII.[746] Using this premise, the court found that all three female claimants requested that the male supervisor stop his sexually harassing behavior prior to their terminations, and that these pleas constituted protected activity.[747] Further, the court found that the jury could reasonably conclude from the evidence that the defendant

735 *Id.* at *22.

736 *Id.*

737 *Id.* at **21-22.

738 *Id.* at *23.

739 *Id.* at *34.

740 *EEOC v. Florida Commercial Security Services, Corp.*, 2014 U.S. Dist. LEXIS 183675 (S.D. Fla. Dec. 8, 2014); Press Release, EEOC, *Jury Finds in Favor of EEOC that One-Armed Security Guard was Fired Because of His Disability* (Oct. 23, 2014), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-23-14.cfm.

741 Press Release, EEOC, *Jury Find Parker Drilling Liable in EEOC Disability Discrimination Lawsuit* (June 4, 2015), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/6-4-15.cfm.

742 *EEOC v. New Breed Logistics*, 783 F.3d 1057; 2015 U.S. App. LEXIS 6650, *2 (6th Cir. 2015).

743 *New Breed Logistics*, 2015 U.S. App. LEXIS 6650, at *2.

744 *Id.*

745 *New Breed Logistics*, 2015 U.S. App. LEXIS 6650, at **8-9.

746 *Id.* at *10.

747 *Id.* at **11-12.

had knowledge of the protected activity because the claimants complained directly to the harassing supervisor.[748] Additionally, it was reasonable for the jury to conclude that the harassing supervisor influenced the claimants' terminations when he terminated one claimant himself and the other two claimants were terminated within one week of being transferred to a new department and the supervisor was observed talking to the claimants' new supervisor the day of their terminations.[749] Under these facts, the new supervisor could be considered the conduit to the retaliatory animus.[750] The Sixth Circuit also affirmed the district court's finding that it was permissible for the jury to infer causation due to the close temporal proximity between the protected activity and terminations and because the district court found the reasons for terminations (attendance, performance, and time-clock improprieties) were pretextual.[751]

Similarly, the court found that the defendant was not entitled to a new trial on the sexual harassment verdict because the supervisor's harassment resulted in tangible employment actions.[752] The court found that the EEOC presented sufficient evidence that the harassing supervisor terminated the claimants pursuant to his authority to terminate temporary employees unilaterally, and used his supervisory authority to influence the termination of the claimants not within his direct control.[753] This evidence was sufficient to hold the defendant vicariously liable.[754]

The appellate court also upheld the district court's finding that the defendant was not entitled to judgment as a matter of law or a new trial as to the punitive damages award because the evidence was sufficient to show that the supervisor acted with malice or reckless indifference to federally protected rights in retaliating against the claimants.[755] In support of this conclusion, the court found that there was sufficient evidence to show that the supervisor subjected the female claimants to sexual harassment and either directly or indirectly engineered the claimants' terminations after each complained about the harassment.[756] The court rejected the defendant's argument that the jury had to find malice or reckless indifference on behalf of the other decision-makers.[757] With regard to the defendant's good-faith argument, the court found that the defendant did not make good-faith efforts to prevent sexual harassment and retaliation because it only distributed its anti-harassment and anti-discrimination policies to permanent, not temporary, employees. After an anonymous call was made to the compliance line to report the alleged harassment, the defendant interviewed only the alleged harasser and no other witnesses.[758]

Finally, the court held that the defendant was not entitled to a new trial based on the punitive damages and retaliation jury instructions because the defendant did not challenge the substance of the punitive damages instructions at the court's charge conference and there was no merit to its argument on the retaliation instructions.[759]

In another case, a federal jury awarded $500,000.00 in damages to four former employees who alleged they were subject to sexual harassment and fired in retaliation for reporting the harassment in violation of Title VII.[760] The EEOC filed suit alleging that the defendant's CEO subjected the employees to comments about female body parts, derogatory references to women, sexual jokes, and lewd sexual comments. Two of the claimants alleged they were directly subject to the harassment and were terminated after reporting it. The other two claimants alleged that they were terminated within one hour of each other after they jointly reported sexual harassment to human resources. At trial, the defendant argued that even if discriminatory employment practices were found, it would have made the same employment decisions absent any discriminatory motive. The defendant also argued that it exercised reasonable care to prevent and correct any discrimination or retaliation but that the claimants failed to take advantage of those preventative or corrective opportunities. The jury rejected both arguments.

748 *Id.* at *12.
749 *Id.* at **12-13.
750 *Id.* at *13.
751 *New Breed Logistics*, 2015 U.S. App. LEXIS 6650, at **14-15.
752 *Id.* at *16.
753 *Id.*
754 *Id.*
755 *Id.* at **16-17.
756 *Id.* at *18.
757 *Id.*
758 *Id.* at *19.
759 *Id.* at **21-23.
760 Aaron Vehling, *Jury Hits Healthy Care Co. With $500K Verdict In Bias Suit*, Law360 (Oct. 28, 2014).

3. Trials on Religious Discrimination

In *EEOC v. Consol Energy, Inc.*, the EEOC sought a permanent injunction and monetary relief for the claimant, alleging that the defendant violated Title VII by instituting practices that denied the claimant a religious accommodation. Specifically, the claimant alleged his religious beliefs did not allow him to use the defendant's biometric hand scanner, used for tracking employee time and attendance, because such scanning would make claimant take on the Mark of the Beast.[761] According to the lawsuit, the defendant refused to consider alternative means of tracking the claimant's time and attendance and informed him he would be disciplined or terminated if he refused to scan his hand. Based on this information, the claimant alleged he had no choice but to retire.

Both the EEOC and the defendant filed motions for summary judgment. The court denied both motions but granted the defendant's motion *in limine* regarding bifurcation of the EEOC's claim for punitive damages.[762] The defendant argued that bifurcation was required because it would be unfairly prejudiced if the jury were to consider its finances and corporate wealth at the same time it considered liability or compensatory damages. It further contended that such evidence had no relevance at the liability stage.[763] The EEOC responded that the defendant did not prove that a limiting instruction to the jury would be insufficient; the agency added that defendant's wealth would be relevant if the defendant argued that other methods of tracking claimant's time and attendance would be too costly.[764]

In granting the defendant's motion, the court determined that the trial should be held in phases. In Phase I on liability, compensatory damages would be determined without evidence of the defendant's wealth or financial condition.[765] Further, during its opening statement, the EEOC could mention, but not elaborate on, the fact it was seeking punitive damages and the court would determine whether the EEOC met its burden for punitive damages.[766] A special verdict form would be used to determine if the defendant was liable for compensatory damages only or also for punitive damages.[767] If the jury determined that punitive damages should be awarded, the second trial phase would allow the introduction of evidence on the financial condition or wealth of the defendant in determining the amount of punitive damages.[768]

A federal jury returned a verdict in favor of the EEOC and awarded the claimant $150,000.00 in compensatory damages. The judge subsequently awarded $436,860.74 in back pay and front pay for the Title VII violations. The court also ordered a permanent injunction for a three-year period preventing the defendant from denying reasonable religious accommodations in connection with the use of the hand screening device. It further required training on religious accommodations under Title VII.[769]

4. Key Evidentiary Rulings and Motions In Limine

In *EEOC v. Bank of America*, both the EEOC and the defendant filed motions *in limine*. The EEOC first argued that, under the ADA, the issue of back pay should be submitted to the court and not the jury.[770] The court held that such issues are determined by the court and rejected the defendant's argument that the EEOC's jury trial demand in its Complaint constituted a waiver or forfeiture of this issue.

Second, the EEOC moved to exclude evidence of the claimant's prior and unsuccessful disability action against a different employer involving a different disability.[771] The defendant opposed the motion, arguing that the claimant's Complaint alleged emotional distress and evidence of the lawsuit would negate the causal nexus between the defendant's alleged discriminatory conduct and the claimant's emotional distress.[772] The court ultimately found the issue was more appropriate for Federal Rule of Evidence 403 balancing during trial, rather than through a motion *in limine*, and deferred

761 *EEOC v. Consol Energy, Inc.*, 2015 U.S. Dist. LEXIS 1326, at *3 (N.D.W.VA. Jan. 7, 2015).

762 *Consol Energy, Inc.*, 2015 U.S. Dist. LEXIS 1326, at *2.

763 *Id.* at *10.

764 *Id.* at *11.

765 *Id.* at *25.

766 *Id.*

767 *Id.*

768 *Id.*

769 Press Release, EEOC, *Court Awards Over Half Million Dollars Against Consol Energy/Consolidation Coal In EEOC Religious Discrimination Lawsuit* (Aug. 27, 2015), *available at* http://www.eeoc.gov/eeoc/newsroom/release/8-27-15a.cfm.

770 *EEOC v. Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 147979, at *1 (N.D. Ill. Oct. 17, 2014).

771 *Bank of Am., N.A.*, 2014 U.S. Dist. LEXIS 147979, at *1.

772 *Id.* at **2-3.

the motion.[773] Although the court recognized the "egg-shell" plaintiff concept in which the wrongdoer takes the victim as it finds him, it expressed concern that the jury would view claimant as a persistent complainer viewing every adverse action as disability discrimination.[774]

Finally, the defendant moved to limit an EEOC expert witness's testimony to specific facts contained in her assessment and preclude her from offering opinions not included in the assessment.[775] The court disagreed, noting that the defendant was aware of the witness's status as an opinion witness and the presence of her assessment for over a year and a half. It determined that the witness would be able to testify based on the content of her report and its recommendations, but that "the notion that those recommendations somehow fail to meet the task of presenting proposed 'reasonable accommodation' for consideration by the jury just makes no sense at all."[776]

In *EEOC v. Consol Energy, Inc.*, discussed above, the claimant alleged that he was denied a religious accommodation when he asked not to use the defendant's biometric hand scanner, used for tracking employee time and attendance, because using such a scanner violated his religious beliefs. Both the EEOC and the defendant filed multiple motions *in limine*. Prior to the start of trial, the court granted defendant's motion for bifurcation on the claim for punitive damages.[777] During trial, the court denied the defendant's motion *in limine* to exclude any evidence of accommodation to other employees, finding that evidence that others were provided accommodations "would be a fact that would be of consequence in determining whether the defendant provided [claimant] with a reasonable accommodation."[778]

Also during trial, the court granted the EEOC's motion *in limine* to exclude argument and evidence concerning a "hypothetical rationale" for defendant's actions.[779] Specifically, the EEOC argued that the supervisor's state of mind regarding whether or not the claimant would use the type-in method with the scanner was irrelevant and misleading because the defendant never discussed the type-in method with the claimant or offered him that alternative.[780] The defendant argued that it was relevant to the defendant's decision-making process on possible accommodations for the claimant.[781] The court ruled that the suggested testimony was speculative and not actual proof as to the supervisor's state of mind.[782]

Finally, the court granted the EEOC's motion to exclude evidence concerning whether the claimant should have accepted disciplinary action and then filed a union grievance, instead of retiring because he would have likely prevailed in a union arbitration.[783] The court found that the evidence of the union grievance was irrelevant, "as federal labor law cannot trump [the claimant's] rights under Title VII."[784] The court also found that the evidence was irrelevant as to the defendant's constructive discharge claim, and would constitute unfair prejudice pursuant to Federal Rule of Evidence 403.[785] Finally, the court noted that this testimony was provided the first day of trial, and the court denied defendant's motion for a mistrial. Instead, the court gave a limiting instruction to the jury.[786]

L. Remedies

1. Punitive Damages

Title VII allows an award of punitive damages when the plaintiff "demonstrates the defendant engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[787] The Supreme Court has established a three-part framework for determining whether an award of punitive damages is proper

773 *Id.* at *4.
774 *Id.* at *3.
775 *Id.* at *1.
776 *Id.* at *4.
777 *Id.* at *1.
778 *Id.* at *6.
779 *Id.* at **1-2.
780 *Id.* at *3.
781 *Id.*
782 *Id.*
783 *Id.* at *4.
784 *Id.*
785 *Id.* at *5.
786 *Id.*
787 *EEOC v. U.S. Dry Cleaning Services Corp.*, 2014 U.S. Dist. LEXIS 75898, at *14 (S.D. Ind. June 4, 2014) (internal quotation omitted).

under Title VII.[788] First, the plaintiff must show that the employer acted with knowledge that its actions may have violated federal law.[789] Second, the plaintiff must impute liability to the employer.[790] Third, even if the first two requirements are met, the employer may not be vicariously liable for the discriminatory actions of its managerial agents if the employer can show that those actions are contrary to the employer's "good-faith efforts to comply with Title VII."[791]

2. Additional Remedies

a) Injunctive Actions During EEOC Investigation Process

In *EEOC v. Peters' Bakery*,[792] the district court granted the EEOC a preliminary injunction preventing the employer from terminating a sales clerk.[793] After allegedly experiencing derogatory jokes and comments regarding her race and ethnicity, the claimant filed charges with the EEOC.[794] The claimant alleged that she was harassed on the basis of her ethnicity and race and retaliated against because of the lawsuit brought by the EEOC.[795] After the claimant filed her charge, the defendant gave her notice that her employment would be terminated.[796] Prior to any lawsuit even being filed and during the course of the EEOC's investigation, the EEOC then sought a preliminary injunction and temporary restraining order to preclude the termination.[797] To obtain such equitable relief, the EEOC must establish (1) that it is likely to succeed on the merits; (2) that the claimant would suffer irreparable harm without the relief; (3) that the equities are in the claimant's favor; and (4) that an injunction is in the public interest.[798] The court found that the EEOC was likely to prevail on the merits because the defendant had previously terminated the claimant without cause and initially refused to comply with an arbitrator's decision directing reinstatement. Moreover, the defendant used language – including a direct reference to the cost of lawyers – that gave rise to an inference of improper motive, and provided no legitimate business reason for the termination.[799] The court also found the other elements were met due to the claimant's reliance on her wages to pay her mortgage and children's education, and that protecting rights guaranteed by Title VII tipped the equities in favor of the EEOC and represented a public interest.[800] Thus, the court granted the injunction.[801]

In contrast, a federal district court denied the EEOC's petition for a temporary restraining order and preliminary injunction that would have prevented an employer from implementing its employee wellness program that the Commission claimed violated the ADA by penalizing those who did not participate. Employees who participate in the program undergo a biometric screening. Those who declined to participate were assessed a $500 surcharge on their medical plan costs, among other "penalties." The EEOC claimed it would be subject to "irreparable harm" if the injunction were not issued, as it would be unable to prevent imminent violation of antidiscrimination laws. Further, the Commission claimed employees would face such harm because they would be "forced to go through an unlawful test without knowing whether their rights will be remedied in the future."[802] The court denied the EEOC's petition, claiming "Recent lawsuits filed by the EEOC highlight the tension between the ACA and the ADA and signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law."[803]

788 *U.S. Dry Cleaning Services Corp.*, 2014 U.S. Dist. LEXIS 75898, at *14 (*citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999).
789 *U.S. Dry Cleaning Services Corp.*, 2014 U.S. Dist. LEXIS 75898, at *14 (*citing Kolstad*, 527 U.S. at 535).
790 *Id.* at *14.
791 *Id.* (internal quotation omitted).
792 *EEOC v. Peters' Bakery*, 2015 U.S. Dist. LEXIS 96432 (N.D. Cal. July 22, 2015).
793 *Peters' Bakery*, 2015 U.S. Dist. LEXIS 96432, at *2.
794 *Id.*
795 *Id.*
796 *Id.* at **2-3.
797 *Id.* at *4.
798 *Id.* at *5.
799 *Id.* at **8-9.
800 *Id.* at **9-10.
801 *Id.* at **13-14.
802 *EEOC v. Honeywell Int'l Inc.*, Case No. 14-cv-04517 (D. Minn.) (filed Oct. 27, 2014).
803 *EEOC v. Honeywell Int'l Inc.*, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 9, 2014).

b) Permanent Injunctions and Remediation Against Future Discrimination

In *EEOC v. EmCare, Inc.*,[804] the district court ordered an injunction and award of attorneys' fees against the defendant, in addition to a $499,000 award payable to three former employees.[805] At trial, a jury found that an employee was sexually harassed and that the defendant acted with malice or reckless indifference to her federally protected rights.[806] The court also found that two other employees were retaliated against for supporting the claims.[807] The court awarded $183,000 in attorneys' fees to the harassed employee's counsel.[808] Furthermore, to remedy an environment "rife with constant lewd sexual comments and behavior" by the CEO and other management-level employees, the court ordered injunctive relief. The defendant was ordered to cease discriminating against employees based on sex; stop retaliating against employees who complain about or oppose sexual harassment or sex-based discrimination; provide and post notice of the trial, judgment, and anti-harassment policies to employees; provide training to management and non-management employees; maintain records pertaining to sex harassment complaints; and investigate the complaints raised and report such information to the EEOC.[809]

In *EEOC v. Parker Drilling Co.*,[810] the claimant alleged disability discrimination under the ADA after a job offer was rescinded due to the fact that he had monocular vision.[811] The court upheld a jury verdict awarding back pay to the claimant because remedies under the ADA are intended to make individuals whole.[812] The court found that "back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination."[813] The court also stated that awarding prejudgment interest on a back pay award is appropriate.[814] The court, however, rejected the EEOC's request for front pay, instead determining that, "[b]ecause of the potential for windfall," the use of front pay "must be tempered."[815] The court acknowledged that front pay is appropriate where it is necessary in the interim period prior to reinstatement or until a plaintiff is reasonably likely to obtain other employment.[816] Finally, the EEOC has the right, independent of the claimant, to "vindicate the public interest" to prevent discrimination by seeking injunctive relief.[817] This injunctive relief is designed to deter future unlawful discrimination and protect aggrieved employees and others from the fear of retaliation for filing Title VII charges.[818] Permanent injunctions may be appropriate where "there exists some cognizable danger of a recurrent violation … based on appropriate findings supported by the record."[819] In this case, injunctive relief was denied because the EEOC failed to present any evidence of other instances of disability discrimination to demonstrate a risk of future disability-based discrimination by the defendant.[820]

In *EEOC v. Beverage Distributors Company, LLC*,[821] the EEOC alleged that the defendant discriminated against an applicant under the ADA by withdrawing a conditional offer of employment after learning the applicant was legally blind.[822] In addition to a jury award for back pay in the amount of $132,347, the court also ordered various forms of injunctive relief.[823] The defendant was required to reinstate the applicant to the position that was unlawfully withdrawn

804 *EEOC v. EmCare, Inc.*, 2015 U.S. Dist. LEXIS 102868 (N.D. Tex. Aug. 5, 2015).

805 Press Release, EEOC, *Injunction, Attorney Fees Ordered Against EmCare in EEOC Sexual Harassment and Retaliation Case* (Aug. 7, 2015), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/8-7-15.cfm.

806 *EmCare, Inc.*, 2015 U.S. Dist. LEXIS 102868, at *2.

807 *Attorney Fees Ordered Against EmCare in EEOC Sexual Harassment and Retaliation Case*, *supra* note 805.

808 *EmCare, Inc.*, 2015 U.S. Dist. LEXIS 102868, at **1-2.

809 *Id.*

810 *EEOC v. Parker Drilling Co.*, 2015 U.S. Dist. LEXIS 69608 (D. Alaska May 29, 2015).

811 *Parker Drilling*, 2015 U.S. Dist. LEXIS 69608, at **1-2.

812 *Id.* at ** 12-13.

813 *Id.* at *13 (*citing Abermarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)).

814 *Id.* at *14 (*citing Domingo v. New England Fish Co.*, 727 F.2d 1429, 1446 (9th Cir. 1984)).

815 *Id.* at *15.

816 *Id.*

817 *Parker Drilling*, 2015 U.S. Dist. LEXIS 69608, at *16.

818 *Id.* at *16.

819 *Id.*

820 *Parker Drilling*, 2015 U.S. Dist. LEXIS 69608, at **11-12

821 *EEOC v. Beverage Distributors Company, LLC*, 2014 U.S. Dist. LEXIS 155791 (D. Colo. Nov. 1, 2015).

822 *Beverage Distributors Company, LLC*, 2014 U.S. Dist. LEXIS 155791, at *2.

823 *Id.* at **2-3.

and required to hire an outside consultant to provide employee training and assistance in revising its policies, updates to its job postings, its notice posting, and reporting and compliance review.[824]

In *EEOC v. Florida Commercial Security Services, Corp.*,[825] a jury found that the defendant discriminated against the claimant when it removed him from his position and refused to reassign him on the basis of his disability in violation of the ADA.[826] The jury awarded back pay, compensatory damages, and punitive damages totaling $35,922.[827] The court also ordered extensive injunctive relief. First, the court ordered a general injunction preventing the defendant from terminating, refusing to hire, or refusing to reassign an individual who was able to perform the essential functions of his or her job based on a disability in violation of the ADA.[828] Also, during the court-mandated three-year compliance period, the defendant had to: (1) implement a written disability discrimination policy within 90 days of entry of the judgment; (2) provide a copy of the policy to the EEOC within 30 days for review, distribute the policy to employees within 90 days, and give all new employees a copy of the policy within five business days of employment; (3) conduct one live training session per year for the three-year compliance period for all managers and supervisors with the first session occurring within 90 days of the judgment; (4) provide training to all current employees regarding disability discrimination and requests for accommodations within 90 days and to all new employees during the three-year compliance period within the first five days of employment with documentation confirming the training occurred; and (5) within 14 days, mail a copy of the remedial notice to all employees and send the notice out annually for the three-year compliance period.[829] Moreover, the defendant was required to submit a semi-annual report that included certifications that the policy remained in effect, training was completed, and required notices were mailed, as well as descriptions of any complaints of discrimination and the actions taken to cure the complaints.[830] The judgment was binding on the defendant's successors and assigns.

c) Front Pay versus Reinstatement

In *EEOC v. Old Dominion Freight Line, Inc.*,[831] the claimant prevailed at a jury trial on his claims that the defendant discriminated against him in violation of the ADA.[832] The jury awarded the claimant $119,612.97 in back pay.[833] The court also rejected awarding front pay and instead ordered the defendant to reinstate the claimant to his former position as a driver.[834] Front pay is an "exceptional remedy that should only be granted when reinstatement is 'impractical or impossible.'"[835] Here, there were no barriers to reinstatement, so the exception remedy of front pay was unnecessary.[836]

d) Prejudgment Interest

The court in *Old Dominion Freight Line* also awarded prejudgment interest in the amount of $1,834.24.[837] Based on the standard outlined in 28 U.S.C. § 1961, prejudgment interest is calculated "at a rate equal to the coupon issue yield equivalent ... of the average accepted auction price for the last auction of fifty-two week United States Treasury bills."[838] In this case, the resulting rate over the five-and-a-half year period was 0.28%.[839] Finally, the court taxed defendant certain expenses as a bill of costs.[840] Fees associated with the use of private process servers were not taxable because such

824 *Id.* It bears noting, however, that on appeal, the Tenth Circuit held that an erroneous jury instruction constituted reversible error. *EEOC v. Beverage Distributors*, 780 F.3d 1018 (10th Cir. 2015).

825 *EEOC v. Florida Commercial Security Services, Corp.*, 2014 U.S. Dist. LEXIS 183675 (S.D. Fla. Dec. 8, 2014).

826 *Florida Commercial Security Services, Corp.*, 2014 U.S. Dist. LEXIS 183675, at *2.

827 *Id.*

828 *Florida Commercial Security Services, Corp.*, 2014 U.S. Dist. LEXIS 183675, at **2-3.

829 *Id.* at **3-6.

830 *Id.* at **7-8.

831 *EEOC v. Old Dominion Freight Line, Inc.*, 2015 U.S. Dist. LEXIS 81977 (W.D. Ark. June 24, 2015).

832 *Old Dominion*, 2015 U.S. Dist. LEXIS 81977, at *1.

833 *Id.* at *2.

834 *Id.* at *34.

835 *Id.* (*citing Mathieu v. Gopher News Co.*, 273 F.3d 769, 778 (8th Cir. 2001)).

836 *Id.* at *35.

837 *Id.* at *40.

838 *Id.*

839 *Id.*

840 *Id.* at *41.

fees are not included in the statute (28 U.S.C. § 1920).[841] However, deposition costs that were "necessarily obtained for use in the case," printing costs associated with a demonstrative exhibit used in closing arguments, travel and attendance costs for trial witnesses, and reimbursement of expert witness fees incurred during a deposition were all necessary to the litigation and taxable.[842]

3. Offsetting Taxes

The remedial scheme enforced by the EEOC is designed to make claimants whole for any damages they suffer as a result of any wrongdoing. In addition to evaluating more obvious damages such as back pay, apparent indirect damages, such as increased tax liability, can also be remedied.

In *EEOC v. Northern Star Hospitality, Inc.*,[843] the EEOC alleged the defendants (three related businesses that owned a restaurant) harassed a restaurant employee because of his race and retaliated against him by firing him after he complained about racially offensive pictures posted in the workplace.[844] At trial, the jury found the defendants had engaged in retaliatory termination and awarded the plaintiff $15,000 in compensatory damages.[845] The EEOC then sought front pay, back pay, and a tax-component award to offset the claimant's impending tax liability on the back pay award.[846] The claimant was award $43,300.50 in back pay and $6,495 to offset his additional taxes (front pay was denied).[847]

On appeal, the Seventh Circuit joined the Third and Tenth Circuits in permitting a tax-component award under Title VII.[848] The court found that the claimant would suffer a higher tax burden because of the lump-sum nature of the back pay award.[849] This increase prevented the claimant from receiving the full remedy that was awarded, which prevented him from being made whole and offended Title VII's statutory scheme.[850] Thus, the offset was necessary as a full remedy for the defendants' retaliation.

As previously discussed, in *EEOC v. Beverage Distributors Company, LLC*,[851] the EEOC alleged that the defendant discriminated against an applicant under the ADA by withdrawing a conditional offer of employment after learning the applicant was legally blind.[852] The jury found that the defendant was liable for discrimination and awarded back pay to the applicant.[853] The Tenth Circuit—while finding an erroneous jury instruction constituted reversible error—upheld the lower court's decision to award a tax offset to account for the increased tax burden of the back-pay award.[854] The court upheld the offset because it would restore the applicant "to the position he would have been but for his wrongful separation."[855]

4. Employer Recovery of Costs

"Under Federal Rule of Civil Procedure 54(d)(1), costs other than attorneys' fees are to be awarded to the prevailing party unless the court directs otherwise."[856] A party is the "prevailing party" for purposes of Rule 54 if the party has "received at least some relief on the merits."[857] "The losing party bears the burden of overcoming the presumption that the prevailing party is entitled to costs."[858]

841 *Id.* at *43.
842 *Id.* at **43-46.
843 *EEOC v. Northern Star Hospitality, Inc.*, 777 F.3d 898 (7th Cir. 2015).
844 *Northern Star Hospitality*, 777 F.3d at 899.
845 *Id.* at 901.
846 *Id.*
847 *Id.*
848 *Id.* at 904.
849 *Id.*
850 *Id.*
851 *EEOC v. Beverage Distributors Company,* 780 F.3d 1018 (10th Cir. 2015).
852 *Beverage Distributors Company, LLC*, 780 F.3d at 1019.
853 *Id.* at 1020.
854 *Id.* at 1023.
855 *Id.* at 1023-1024.
856 *EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 61368, *5 (D. Neb. May 11, 2015) (*citing Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005)).
857 *JBS USA,* 2015 U.S. Dist. LEXIS 61368, at *7 (*citing Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010)).
858 *Id.* at *5 (*citing 168th an Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 958 (8th Cir. 2007)).

Under 28 U.S.C. § 1920, a judge or clerk of the court may tax:

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;
4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under section 1923 of this title;
6. Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.[859]

In *EEOC v. JBS USA, LLC*,[860] the court bifurcated into two phases a trial addressing alleged discrimination on the basis of religion, national origin, and race.[861] Phase I addressed the defendant's alleged pattern or practice of religious discrimination and Phase II contained individual claims for relief.[862] The district court found in favor of the defendant at Phase I.[863] The defendant then filed a Bill of Costs seeking to recover taxable costs under 28 U.S.C. § 1920.[864] Given the defendant prevailed under Rule 54 at Phase I, the court taxed costs against the EEOC—including fees for transcripts, witnesses, and exemplification; docket fees; and the costs of video depositions and interpreter fees for the depositions of Somali-speaking witnesses.[865]

M. Settlements

The EEOC employed an aggressive tactic in a FY 2015 pattern-or-practice case.[866] The court imposed sanctions on an employer for violating the terms of a consent decree. In the underlying litigation, the EEOC alleged that the employer prohibited disabled employees from returning to work after disability leave unless they could return without any accommodation, and that the employer terminated such employees at the end of the one-year leave period. The parties entered into a consent decree that fully resolved the claims in the lawsuit. Among other things, the consent decree prohibited the employer from "discriminating on the basis of disability by not providing reasonable accommodation(s) to persons desiring to return to work from a disability leave."

The EEOC filed a motion for civil contempt sanctions against the employer alleging it violated this provision of the consent decree with respect to three individuals. After limited discovery and an evidentiary hearing, the court determined the employer had violated the consent decree and that an award of sanctions was warranted. Specifically, the court awarded pay damages for the employees and also a monetary fine of $10,000 per day until the employer complied with various terms of the consent decree.

A more detailed breakdown of settlements involving the EEOC can be found in Appendix A to this Report.

N. Appeal

In *EEOC v. Beverage Distributors Co., LLC*,[867] the court declined to allow postponement of the court-ordered hiring of a consultant to provide training to the defendant's employees and to assist with revisions of the defendant's policies pending the appeal before the Tenth Circuit. The court reasoned that "[t]o constitute irreparable harm, an injury must be certain, real, actual, and not theoretical" and "simple economic loss usually does not, in and of itself, constitute irreparable

859 *Id.* at **5-6.

860 *EEOC v. JBS USA, LLC* , 2015 U.S. Dist. LEXIS 61368 (D. Neb. May 11, 2015).

861 *Id.* at **4-5.

862 *Id.* at *5.

863 *Id.*

864 *Id.*

865 *Id.* at **7, 11, 16-17.

866 *EEOC v. Supervalu, Inc.,* 2014 U.S. Dist. LEXIS 169215 (N.D. Ill. Dec. 2, 2014).

867 *EEOC v. Beverage Distributors Co.*, LLC, 2014 U.S. Dist. LEXIS 155791 (D. Colo. Nov. 1, 2014). This issue arose after the EEOC prevailed in a jury trial and the court ordered the employment of a consultant to conduct training and to revise the employer's policies. The Tenth Circuit ultimately reversed the verdict based on an erroneous jury instruction. *EEOC v. Beverage Distributors Co.,* 780 F.3d 1018 (10th Cir. 2015). A settlement was announced on December 7, 2015.

harm."[868] In applying this standard, the court found that the defendant failed to state, or even estimate, the costs it anticipated incurring from hiring a consultant, nor did it address how that cost would impact the company financially as to establish that it would suffer a certain, great harm.[869] The court further found that the defendant failed to address whether the opposing parties would be harmed if the court were to stay the requirement that the defendant hire a consultant to conduct training.[870] Moreover, the court noted that at trial, the defendant's managers and human resources professionals demonstrated a lack of sufficient knowledge of the ADA, and could benefit greatly from the training.[871] Finally, the court found that even if the defendant prevailed on appeal, it could not affect the court's award of injunctive relief.[872] Accordingly, the court found that the defendant did not meet its burden warranting a stay from injunctive relief.[873]

O. Misconduct by the EEOC

Courts will sanction the EEOC when either the agency itself, or the claimants on whose behalf the agency sues, violates a court order, the Federal Rules of Civil Procedure, or local rules, or otherwise engages in misconduct. However, although sanctions are available, dismissal of the case is an extreme penalty that is generally the sanction of last resort.

In *EEOC v. Pines of Clarkston, Inc*.,[874] the defendant filed a motion for Rule 11 sanctions, alleging the disability claims asserted under the ADA lacked merit because the defendant employed fewer than 15 employees, and the defendant terminated the charging party plaintiff for marijuana use, not for his seizure condition.[875] The EEOC responded that the defendant employed more than 50 employees because it is an integrated enterprise, and that the defendant's rationale for the termination was pretext for unlawful discrimination. Specifically, the EEOC claimed the defendant's questioning the complainant about his medical condition at a pre-offer interview and discussing his seizures prior to firing him were evidence of discrimination.[876]

The court found that the defendant met the requisite 15-employee minimum to be covered by the ADA.[877] The court also rejected the sanctions motion, finding that a Rule 11 motion was not appropriate in this context. Even if the defendant could show that the plaintiff's discharge was not discriminatory at trial or at the summary judgment stage, such a holding would not entitle it to any Rule 11 sanction unless it could be shown that the EEOC brought and pursued claims that were wholly without any basis or were brought with an improper purpose.[878] Accordingly, the court denied the defendant's motion for Rule 11 sanctions, denied the charging-party plaintiff's request for fees and costs, and granted the defendant's motion to modify the scheduling order to allow for the filing of dispositive motions.[879]

P. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[880] By its terms, this provision allows either a prevailing plaintiff or a prevailing defendant to recover attorneys' fees. However, the award of attorneys' fees to a prevailing plaintiff involves different considerations than an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[881]

868 *Beverage Distributors Co., LLC,* 2015 U.S. Dist. LEXIS 155791, at **5-6.
869 *Id.* at *6.
870 *Id.*
871 *Id.* at *7.
872 *Id.*
873 *Id.* at *8.
874 *EEOC v. Pines of Clarkston, Inc*., 2014 U.S. Dist. LEXIS 162638 (E.D. Mich. Nov. 20, 2014).
875 *Pines of Clarkston, Inc*., 2014 U.S. Dist. LEXIS 162638, at *6.
876 *Id.*
877 *Id.* at *8.
878 *Id.*
879 *Id.* at *9.
880 42 U.S.C. § 2000e-5(k).
881 *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978).

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorney generals" to bring claims.[882] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[883] Importantly, however, this standard does not require a plaintiff to have acted in bad faith.[884] A decision to award fees is committed to the discretion of the court, which is in the best position to assess the considerations relevant to the conduct of litigation.[885]

In FY 2015, there were some significant cases regarding attorneys' fees. Notably, the U.S. Supreme Court has agreed to determine whether a dismissal of a Title VII case, based on the Commission's failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k).[886]

The Court's decision to consider this issue is the latest in the continuing saga of *EEOC v. CRST Van Expedited, Inc*.[887] In FY 2015, the EEOC appealed the district court's award of $4,694,442.14 in attorneys' fees, expenses, and costs to the defendant following the parties' $50,000 settlement of the one remaining claim, out of 154 individual claims originally asserted by the EEOC. The district court had awarded fees after granting summary judgment as to a significant number of the claims. On appeal, the Eighth Circuit reversed the attorneys' fee award and remanded the case for further proceedings.[888] While the court applied the *Christianburg*[889] standard, it noted it was faced with a scenario not addressed by *Christianburg* in which "[s]ome charges are frivolous; [and] others (even if not ultimately successful) have a reasonable basis," explaining, "litigation is messy, and courts must deal with this untidiness in awarding fees."[890] The court instead looked to a more recent Supreme Court decision, *Fox v. Vice*, which involved a "multiple-claim scenario," and relied on the holding in *Fox* that a court may grant reasonable fees to the defendant [where the plaintiff asserts both frivolous and non-frivolous claims], but only for the costs that the defendant would not have incurred but for the frivolous claims."[891] According to *Fox*, "[a] defendant need not show that every claim in a complaint is frivolous to qualify for fees," but a defendant may not obtain compensation for work unrelated to a frivolous claim."[892] The Eighth Circuit reversed and remanded the fee award for the district court to make "particularized findings of frivolousness, unreasonableness, or groundlessness as to each claim upon which it granted summary judgment on the merits to the defendant."[893] As noted, on December 4, 2015, the U.S. Supreme Court agreed to review this decision in its 2016 term, so the matter is far from resolved.

Another notable case this fiscal year was *EEOC v. Freeman*.[894] Following a summary judgment ruling, appeal and remand, the district court awarded over $900,000 in attorneys' fees to the defendant after it determined the EEOC continued to litigate after it became apparent that the claims made were groundless.[895] The defendant, as a regular part of its hiring process, conducted criminal background checks on all applicants who were offered a position, and conducted credit background checks on applicants who were offered financially-sensitive positions.[896] Applicants were not turned away for any negative information.[897] Rather, the defendant limited in scope the type of negative information that would disqualify an applicant. For example, the defendant considered *convictions* that occurred within the past seven years,

882 *Christianburg Garment Co.*, 434 U.S. at 422.

883 *Id.* at 412, 422.

884 *Id.* at 412, 421.

885 *EEOC v. Propak Logistics, Inc*., 746 F.3d 145, 151 (4th Cir. 2014).

886 *CRST Van Expedited, Inc. v. EEOC*, *cert. granted*, No. 14-1375 (Dec. 4, 2015).

887 *EEOC v. CRST Van Expedited, Inc*., 774 F. 3d 1169 (8th Cir. 2014), *rehearing en banc denied*, 2015 U.S. App. LEXIS 2652 (8th Cir. Feb. 20, 2015), *CRST Van Expedited, Inc. v. EEOC,* No. 14-1375, *cert. granted* (Dec. 4, 2015).

888 *CRST Van Expedited*, 774 F. 3d at 1185.

889 *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978).

890 *CRST Van Expedited, Inc*., 774 F. 3d at 1182 (*citing Fox v. Vice*, 131 S. Ct. 2205, 2213-14, 180 L. Ed. 2d 45 (2011)).

891 *CRST Van Expedited, Inc*., 774 F. 3d at 1175.

892 *Id.* at 1182.

893 *Id.* at 1185.

894 *EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. Sept. 3, 2015).

895 *Freeman*, 2015 U.S. Dist. LEXIS 118307, at *28.

896 *EEOC v. Freeman*, 961 F. Supp. 2d 783, 787 (D. Md. 2013).

897 *Id.* at 788.

but not arrests.[898] The defendant also did not consider all convictions, but only those for certain crimes.[899] Similarly, with regard to credit checks, only certain negative items would exclude an applicant from being hired.[900] Nevertheless, the EEOC alleged that the defendant's use of background checks had a discriminatory impact on a protected minority class.[901]

After excluding the EEOC's expert proof, the district court granted summary judgment in favor of the employer.[902] The defendant then filed a motion for attorneys' fees, which was stayed pending appeal.[903] The Fourth Circuit affirmed the judgment in favor of the defendant,[904] and the case returned to the district court for resolution of the attorneys' fees issue. In granting the attorneys' fee motion, the court found that the EEOC did not present reliable statistical evidence that the defendant's policies had a disparate impact to make out a *prima facie* case of discrimination.[905] The court further determined that it was unreasonable for the EEOC to continue to litigate on the basis of flawed expert reports.[906] The court concluded that once the defendant filed its motion to exclude the expert's report, it should have been obvious to the EEOC that the case was without merit.[907] As the EEOC continued to litigate the case, the defendant was entitled to its reasonable attorneys' fees.[908] The court approved attorneys' fees for the motions related to the experts, summary judgment, and fees; the summary judgment briefing; and the appeal. The district court also approved an award of fees for the defendant's experts. The court awarded defendant $938,771.50 in attorneys' and expert's fees, and entered judgment against the EEOC for this amount.[909]

Another case demonstrating that a party must also know when to throw in the towel or face the possibility of being accountable for the prevailing party's attorneys' fees is *EEOC v. West Customer Mgmt. Group, LLC.*[910] In this case, the defendant employer sought an award of attorneys' fees under *Christianburg* after a favorable jury verdict. The district court concluded that fees should be awarded from the date of the pretrial conference through the conclusion of trial, finding that by that time of the pretrial conference, the EEOC knew or should have known that it lacked comparator evidence or other admissible evidence giving rise to an inference of discrimination.[911] The fee issue was referred to the federal magistrate who recommended an award of $90,541.50 in attorneys' fees plus $7,319.67 in expenses.[912] The EEOC objected to the magistrate judge's report and recommendation, arguing that the 141.4 hours for the award of attorneys' fees were excessive, duplicative, unproductive or unnecessary work.[913] The court carefully examined the objectionable time entries and overruled the EEOC's objections.[914] Additionally, the district court approved a supplemental award of fees and costs for the defendant to compensate for litigating the fees and costs issues in an amount to be determined.[915] On October 23, 2015, the magistrate recommended that the employer be awarded an additional $70,673.50 in attorneys' fees and $1,873.48 in nontaxable expenses incurred in litigating post-trial issues.[916]

898 *Id.*

899 *Id.*

900 *Id.* at 789.

901 *Id.*

902 *Id*. at 803.

903 *Freeman*, 2015 U.S. Dist. LEXIS 118307, at *5-6.

904 *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).

905 *Freeman*, 2015 U.S. Dist. LEXIS 118307, at **11-19.

906 *Id.* at **28-29.

907 *Id.* at **54-55.

908 *Id.* at *55.

909 *Id.*

910 *EEOC v. West Customer Mgmt. Group, LLC*, 2014 U.S. LEXIS 125126 (N.D. Fla. Sept. 8, 2014).

911 *West Customer Mgmt. Group*, 2014 U.S. LEXIS 125126, at *1. The court reached this conclusion even though the EEOC case had survived a motion for summary judgment by the defendant.

912 *EEOC v. West Customer Mgmt. Group, LLC*, 2015 U.S. LEXIS 76948 (N.D. Fla. Mar. 24, 2015).

913 *EEOC v. West Customer Mgmt. Group, LLC*, 2015 U.S. LEXIS 76943 (N.D. Fla. June 15, 2015), at **3-4.

914 *Id.* at **4-8.

915 *Id* at **8-9.

916 *EEOC v. West Customer Mgmt. Group, LLC*, Case No. 3:10cv378 (N.D. Fla. Oct. 23, 2015) (Magistrate Judge Recommendation).

A defendant may also recover attorneys' fees and costs when a plaintiff imposes unreasonable objections to discovery. For example, in *EEOC v. Parker Drilling Co.*,[917] the court awarded the employer fees and costs after determining that the EEOC was not substantially justified in relying on the attorney-client and deliberative process privilege in withholding certain documents in discovery.[918] In this case, the defendant filed a motion to compel the EEOC's production of documents withheld in discovery. The defendant also requested fees and costs under Rule 37 of the Federal Rules of Civil Procedure for having to file the motion.[919] While the court found that two documents were privileged conciliation materials under 42 U.S.C. § 2000e-5(b), it held that any privilege with respect to the third document had been waived because the EEOC failed to timely assert them in a privilege log. Accordingly, reasonable fees and costs associated with obtaining the non-privileged materials were appropriate.[920]

Finally, in *EEOC v. Global Horizons, Inc.*,[921] the court held that the EEOC filed baseless Title VII claims against two of the defendants, Green Acre Farms, Inc. and Valley Fruit Orchards, LLC ("the defendants"), and awarded them, as prevailing parties in the "baseless" lawsuit, reasonable attorneys' fees and costs.[922] Although the court found that the case presented challenges to the EEOC, such as numerous non-English speaking Thai individuals who worked at the defendants' farms in the United States, it determined that the challenges were not an excuse for the EEOC to forego a reasonable and diligent investigation of the allegations of discrimination as to each business before filing a Title VII lawsuit.[923] The court highlighted the EEOC's unpreparedness with the ever-changing number of Thai claimants throughout the lawsuit, which it attributed to the EEOC's lack of knowledge of which Thai claimants worked at the defendants' farms and when. In particular, the court noted that there was no indication that the EEOC took steps to identify and clarify at which farm a worker experienced the claimed discriminatory treatment.[924] The court held that the EEOC "failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the defendants."[925] The court characterized its ruling as exercising "'caution' when finding that an award of attorney's fees to the prevailing defendants was appropriate."[926] The defendants were ultimately awarded more than $980,000 in this case.[927]

917 *EEOC v. Parker Drilling Co.*, 2014 U.S. Dist. LEXIS 151053 (D. Alaska Oct. 22, 2014).

918 *Id.* at *23.

919 *Parker Drilling Co.*, 2014 U.S. Dist. LEXIS 151053, at *2.

920 The company was ultimately awarded $4,160 for its costs.

921 *EEOC v. Global Horizons*, *Inc.,* 2015 U.S. Dist. LEXIS 37674 (D. Haw. Mar. 18, 2015).

922 *Global Horizons*, 2015 U.S. Dist. LEXIS 37674, at *3.

923 *Id.* at *35.

924 *Id.* at **36-37.

925 *Id.* at *44.

926 *Id.*

927 *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 148410 (E.D. Wash. Nov. 2, 2015).

Appendix A - EEOC Consent Decrees, Conciliation Agreements and Judgments[1]
Select EEOC Settlements in FY 2015

Settlement Amount	Claim	Description	Court	EEOC Press Release
$14.5 million[2]	Race and National Origin Discrimination, Harassment, Retaliation	According to the EEOC, the company maintained a nationwide pattern or practice of discrimination based on race and national origin on its drilling rigs. Among the allegations were that the employer assigned minorities to the lowest-level jobs, failed to train and promote minorities, and disciplined and demoted minority employees disproportionately. The EEOC also alleged the company tolerated a hostile work environment on its rigs. Among other things, the EEOC claims employees endured frequent and pervasive barrages of racial and ethnic slurs, jokes, and comments, as well as verbal and physical harassment and intimidation of minority employees. The agency further alleged that employees who opposed or complained about discriminatory practices suffered retaliation, including discriminatory discipline and discharge. The agency estimates 1,000 or more people were affected. According to the terms of the consent decree, which will remain in effect for four years, the employer has agreed to create a new position to monitor compliance with the terms of the consent decree and report necessary information to the EEOC. The company has also agreed to provide anti-discrimination training, conduct random interviews of employees and exit interviews of minority employees to ensure that the discrimination is not continuing, sponsor outreach activities to recruit minority candidates, establish a process for receiving, investigating, and responding to employee complaints of race and national origin discrimination, harassment, and retaliation, report to the EEOC on a semi-annual basis for the duration of the decree, and hiring and compensate a claims administrator to distribute the compensation to the complainants.	U.S.D.C. of Colorado	4/20/15

1 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2015. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $1 million or more. Notable conciliation agreements are included in the shaded boxes. Appendix A also includes significant jury verdicts and judgments awarding more than $500,000 to plaintiffs and more than $900,000 to defendants.

2 The FY 2015 PAR indicates this settlement amounted to $12.3 million. However, related charges filed with the EEOC resulted in separate out-of-court conciliation agreements that, when combined with the nearly $12.3 million settlement, provide for total monetary relief of $14.5 million.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$12.7 million	Race and National Origin Discrimination	According to the EEOC, over a 44-year period, the court issued several rulings that the Sheet Metal Workers' International Association, the trade union for sheet metal journeypersons in New York City, discriminated against non-white journeypersons on the basis of race. The union agreed to settle claims covering work-hour disparities based on race for the 15-year period between April 1, 1991 and June 30, 2006. This agreement supplements a 2008 settlement of $6.2 million that covered back pay claims from January 1, 1984 through March 31, 1991. As part of the agreement, the union will create a back-pay fund. The EEOC estimates the union will pay approximately $12.7 million over the next five years if work levels remain at or near recent levels. Specifically, the union will initially pay $4,192,221.85, plus 50 cents/hour for each hour worked for a period of 5 years. The union has also agreed to certain non-monetary measures, including the imposition of comprehensive reforms to equalize work opportunities for non-white and white union members. The union will improve its monitoring and investigation of discrimination complaints, expand the use of the union's referral hall to guarantee non-discriminatory hiring decisions, increase education and training opportunities for members, and increase monitoring, analysis, and reporting of potential work-hours disparities by the union to EEOC and other plaintiffs.	U.S.D.C. Southern District of New York	4/2/15
$5 million	Race and National Origin Discrimination	According to the EEOC, the defendant company recruited workers from India through the federal H-2B guest worker program to work at its facilities in Texas and Mississippi in the aftermath of hurricanes Katrina and Rita. The EEOC alleged the company subjected these workers to a pattern or practice of race and national origin discrimination, "including unfavorable working conditions and forcing the men to pay $1,050 a month to live in overcrowded, unsanitary, guarded camps. As many as 24 men were forced to live in containers the size of a double-wide trailer, while non-Indian workers were not required to live in these camps." Based on the settlement, the company will pay an estimated $5 million to 476 Indian guest workers to settle the race and national origin discrimination lawsuit. Although the company filed a "notice of filing bankruptcy" in the matter on July 13, 2015, the EEOC has announced that the "settlement establishes a claims process and ensures that all aggrieved individuals included in the litigation may receive relief in spite of the bankruptcy proceedings."	U.S.D.C. Eastern District of Louisiana[3]	12/18/15

3 Although not included in the court docket as of the date of publication of this Report, the EEOC announced this settlement in a Press Release issued on December 18, 2015, *Signal International, LLC to Pay $5 Million to Settle EEOC Race, National Origin Discrimination Lawsuit*, available at http://eeoc.gov/eeoc/newsroom/release/12-18-15.cfm.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$4 million	Race Discrimination and Harassment	According to the EEOC, the company subjected 74 African American former bakery employees to a racially hostile work environment by, among other things, exposing them to racist graffiti and slurs, and by failing to address complaints of such harassment. Under the terms of the two-year consent decree, the company will pay the group $4 million, and engage in a number of remedial measures, including anti-discrimination training and periodic reporting of incidents or investigations to the EEOC.	U.S.D.C. Eastern District of Texas	12/22/2015

Settlement Amount	Claim	Description	Court	EEOC Press Release
$3.8 million	Sex Discrimination, Harassment, Retaliation	According to the EEOC, a joint settlement agreement between the EEOC, the N.Y. Attorney General and a utility company resolves allegations of ongoing sexual harassment and discrimination against women in field positions between 2006 and 2014. The workers alleged they faced widespread harassment by male co-workers and a hostile work environment based on gender and that the company failed to address this discrimination. The EEOC also received complaints from women that they had been delayed or denied promotions from the entry-level general utility worker position to various next-level positions because of gender. The women alleged they were: 1) denied, delayed, and given subpar on-the-job training as compared to their male peers; 2) assigned menial, "make-work" tasks and isolated by male co-workers in group work settings; 3) refused or stonewalled when seeking admission to classes necessary for promotions; 4) not provided tools or safety gear in situations where male co-workers were supplied both; 5) denied adequate sanitary and private restroom, shower, and changing facilities; 6) subjected to disparate and excessive discipline as compared to male co-workers who engaged in comparable conduct; 7) given less positive performance evaluations than their male counterparts for doing comparable work; and 8) denied overtime assignments despite eligibility under collective bargaining agreements. The women further alleged that the company failed to take effective action to improve or prevent such discriminatory working conditions and failed to meaningfully enforce its internal equal employment opportunity policies concerning gender-based discrimination, sexual harassment and non-retaliation. Indeed, the women in field positions stated that they faced retaliation when they complained to supervisors or to the company's Office of Diversity & Inclusion about their work conditions. As part of the consent decree, the company has agreed to reserve up to $3.8 million to be distributed among eligible settlement group members through a claims process to be administered by EEOC and the attorney general's office. According to the EEOC, the affected group includes as many as 300 blue-collar female workers employed in field positions between 2006 and 2014. Pursuant to the settlement terms, the company will also retain an independent consultant to evaluate the company's compliance with the agreement, retain an independent equal employment opportunity specialist to develop and conduct employee training, institute improved policies and protocols concerning the investigation of discrimination and harassment complaints, and provide sexual harassment and anti-discrimination training.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits	9/9/15

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2.8 million	Race, Sex, and Disability Discrimination Based on Pre-Employment Medical Exam	According to the EEOC, three employment assessments formerly used by the company disproportionately screened out applicants for exempt-level positions based on race and sex. The EEOC alleged also that the tests were not sufficiently job-related and consistent with business necessity. Additionally, EEOC found that one psychological assessment constituted a pre-employment medical exam in violation of the ADA. The EEOC also found the company committed recordkeeping violations by failing to keep records sufficient to assess impact of hiring procedures. The agency's investigation revealed thousands were adversely affected by assessments. As part of the settlement, the company agreed not to use the assessments as part of its exempt-level employment selection procedures, and altered its applicant tracking systems to ensure the collection of data is sufficient to assess adverse impact. The company further agreed to perform a predictive validity study for all exempt assessments in use or expected to be used. The company will monitor the assessments for adverse impact, and provide the EEOC with a detailed summary of its findings. In addition, the company will retain an outside consultant to provide a minimum of two hours of training at least once per year to all personnel responsible for the development and implementation of exempt assessments on the topics of record keeping, the ADA and pre-employment medical exams, and disparate impact in employment selection procedures.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	8/24/15
$2.5 million	Race Discrimination	According to the EEOC, a national retailer will pay $2.5 million and provide targeted equitable relief and agreed to provide targeted equitable relief and $2.5 million in monetary relief to individuals who allegedly were not recruited and hired due to their race.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	No press release was issued. The EEOC references this settlement on page 36 of the EEOC 2015 Annual Report.

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.7 million	Disability Discrimination	According to the EEOC, the company discriminated against individuals with disabilities by disciplining and discharging them according to its nationwide attendance policy that awards points for medical-related absences. In addition, the EEOC claims the company violated the ADA by not allowing employees to take intermittent or extend existing leave as a reasonable accommodation. Under the terms of the settlement, the employer will pay $1.7 million to affected employees; conduct ADA training at each of its locations nationwide; revise and distribute its ADA policy and procedures; and revise and distribute a new attendance policy. The company also agreed to provide the EEOC with period reports on accommodation requests, and notify all employees of the conciliation agreement.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	11/5/15
$1.6 million	Race Discrimination	According to the EEOC, the company excluded African-American logistics workers from employment at a disproportionate rate when the company's new logistics contractor applied the company's criminal conviction records guidelines to incumbent logistics employees. Specifically, EEOC alleged that when the company switched contractors handling its logistics at a production facility, it required the new contractor to perform background screening on all existing logistics employees who re-applied to continue working in their positions. At that time, the company's criminal conviction records guidelines excluded from employment all persons with convictions in certain categories of crimes, regardless of how long ago the conviction was or whether the conviction was a misdemeanor or a felony. Per the EEOC, the company learned approximately 100 incumbent workers, including some who had worked there for several years, did not pass the screen. The EEOC alleged 80% of those workers disqualified from employment were African American. The EEOC sought relief on behalf of 56 African Americans who were discharged as a result. Under the terms of the settlement, the company will offer employment opportunities to the discharged workers in the suit and up to 90 African-American applicants who the company's contractor refused to hire based on the company's previous conviction records guidelines. The company has also agreed to provide training on the use of criminal history screening in employment, and be subject to reporting and monitoring requirements for the duration of the consent decree.	U.S.D.C. of South Carolina	9/8/15

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.5 million	Sex Discrimination	This 11-year-old case involves a pattern-or-practice claim of sex discrimination dating back to 2004. The EEOC contended the uniform supply company failed to hire females as route sales drivers/service sales representatives at the company's Michigan facilities. Over the past fiscal year, the dispute focused on the EEOC's failure to identify by name the purported class members for whom the EEOC would be seeking monetary relief. This information was ultimately produced following a court order, although the court denied a request for sanctions against the EEOC for its delay. The matter was finally settled on November 11, 2015, in which the company admits no wrongdoing, but agreed to pay $1.5 million to a class of potentially 800 women. In addition, the employer will provide yearly diversity, harassment and anti-discriminatory training to its staff; maintain records of applications received and employment data; and provide annual reports to the EEOC for the next two years.	U.S.D.C. for the Eastern District of Michigan	*none available*
$1.2 million	Disability Discrimination	According to the EEOC, an employer will provide $1.2 million and provide targeted equitable to a group of over 5,000 applicants who were given a pre-employment medical exam and subjected to medical inquiries the EEOC alleges were prohibited by the ADA. The employer will no longer use the policies and practices related to the provision of medical exams and questions, and will train its management.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	No press release was issued. The EEOC references this settlement on page 36 of the EEOC 2015 Annual Report.
$1.2 million	Race and National Origin Harassment, Retaliation	According to the EEOC, a several employees of well services companies regularly used derogatory terms to refer to Hispanic, Native American, and African American employees, and made other insensitive remarks. The EEOC alleged several individuals complained to management, but the complaints were minimized or ignored entirely. The EEOC also contended several employees were demoted or fired after taking their complaints to state labor department. Under the terms of the three-year consent decree, the defendant companies agreed to pay $1.2 million to the affected employees, undergo extensive employment discrimination law training, create a toll-free anonymous complaint line, and provide annual surveys to the EEOC.	U.S.D.C. of Wyoming	12/2/14

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.08 million	Disability Discrimination	According to the EEOC, the company's competitive transfer policy violated the ADA by requiring workers with disabilities to compete for vacant positions for which they were qualified and needed in order to continue employment. Under the terms of the consent decree, the airline will pay $1,080,000 to a small class of former employees with disabilities. The company agreed to make additional changes to its policies, including revising its ADA reassignment policy, training employees with supervisory or human resource responsibilities regarding the policy changes, and providing reports to the EEOC regarding disabled employees who were denied a position as part of the ADA reassignment process.	U.S.D.C. Northern District of Illinois	6/11/15

SELECT EEOC JURY AWARDS OR JUDGMENTS IN FY 2015[4]

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$17.4 million[5]	Sexual Harassment and Retaliation	According to the EEOC, five female employees were subjected to repeated sexual harassment by male supervisors. The allegations included groping, propositions, and rape, leading to terminations. The jury issued a unanimous verdict in favor of the EEOC with an award of $2,425,000 in compensatory damages and $15,000,000 in punitive damages.	*EEOC v. Moreno Farms Inc.*, No. 14-cv-23181 (S.D. Fla., Sept. 23, 2015)	9/10/15
$1.5 million	Sexual Harassment and Retaliation	The Sixth Circuit refused to grant an employer's petition for rehearing of a decision in which a jury awarded three temporary female employees $1.5 million in their sexual harassment and retaliation lawsuit. The employees had alleged they were sexually harassed by a supervisor and subsequently retaliated against for objecting to his advances. According to the EEOC, the opinion was on an issue of first impression in the Sixth Circuit, clarifying scope of protected activity under the opposition clause of Title VII's retaliation provision. "The opposition clause of Title VII has an 'expansive definition' and courts should give 'great deference' to EEOC's interpretation of opposing conduct."	*EEOC v. New Breed Logistics*, No. 13-6250 (6th Cir., Apr. 22, 2015)	7/10/15
$986,033	Race and National Origin Discrimination	The EEOC alleged the farm defendants had discriminated against Thai workers under the H-2A guest worker program. The court determined the allegations were baseless and frivolous. In granting the motion for attorneys' fees, the court explained that the EEOC "failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants." *EEOC v. Global Horizons Inc.*, No. 2:11-cv-03045 (E.D. Wash. Mar. 18, 2015). The defendants filed a motion seeking $1.1 million, but were awarded more than $980,000 under the lodestar method.	*EEOC v. Global Horizons, Inc.,* 2015 U.S. Dist. LEXIS 148410 (E.D. Wash., Nov. 2, 2015)	*None available*

4 Fees and costs awarded to defendants are shaded.
5 This amount was reduced to $8.9 million in light of Title VII's statutory caps.

JURY OR JUDGMENT AMOUNT	CLAIM	DESCRIPTION	CASE CITATION	EEOC PRESS RELEASE
$940,000	Race and Sex Disparate Impact	A federal district court judge in Maryland awarded employer Freeman nearly $1 million in attorneys' fees after the Fourth Circuit upheld a lower court's award of summary judgment in its favor. In this case, the EEOC had alleged Freeman's background check policy had an unlawful disparate impact on African American and male job applicants. The expert witness reports to support this contention were excluded, but the EEOC continued to pursue the case despite the lack of evidence to support its claims. The district court granted Freeman's motion for summary judgment, which the Fourth Circuit affirmed. Reasonable attorneys' fees were warranted, the district court, as it was unreasonable for the EEOC to continue pursuing its claims after all evidence indicated otherwise.	*EEOC v. Freeman*, No. RWT 09cv2573; 2015 U.S. Dist. LEXIS 118307 (D. Md. Sept. 3, 2015)	*None available*
$586,860	Religious Discrimination	According to the EEOC, the company violated an employee's religious rights when it required use of a biometric hand scanner to track employee time and attendance. The employee had requested an exemption from hand scanning due to his sincerely held religious beliefs. The jury unanimously held the company refused to accommodate the employee, forcing him to retire. In June, the federal court conducted a two-day, non-jury evidentiary hearing to determine lost wages and benefits and injunctive relief. On August 21, 2015, the court issued an order awarding a total of $586,860 in lost wages and benefits and compensatory damages.	*EEOC v. Consol Energy, Inc.*, No. 1:13-cv-00215 (D. W. Va. Aug. 21, 2015)	8/27/15

Appendix B – FY 2015 EEOC Amicus and Appellant Activity[6]

FY 2015 – Appellate Cases Where the EEOC Filed an Amicus Brief

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Daniel v. T&M Protection Resources, LLC	U.S. Court of Appeals for the 2d Circuit No. 15-560	5/21/15	Title VII	Race Discrimination Hostile Work Environment Discriminatory Termination **Result**: Pending	**Background:** Pro se plaintiff was hired as the defendant's fire safety director. His supervisor told him others preferred white security personnel be hired, that the plaintiff was being paid too much, and he called the plaintiff a gorilla, told him to "go back to England," frequently called him a "homo" and other race-laced obscenities. After being called a n*****, the plaintiff took the next day off (falsely claiming to be sick) and he was discharged one week later. Plaintiff sued and the district court granted summary judgment to the defendant, finding the plaintiff was not subjected to severe or pervasive harassment, and that the supervisor's conduct did not sufficiently interfere with the plaintiff's work performance. Plaintiff appealed and moved for leave to proceed in forma pauperis. The Second Circuit denied the motion without briefing or oral argument. **Issue EEOC is Addressing as Amicus:** (1) Is a supervisor's statement "you f****** n*****" to a subordinate sufficiently severe, by itself, to create a hostile work environment under Title VII? (2) Could a reasonable jury find that the plaintiff endured severe or pervasive harassment on the basis of his race, perceived national origin, and perceived sexual orientation where his immediate supervisor called him the phrase above, likened him to a gorilla, frequently told him to "go back to England," and called him "homo" two or three times a week? **EEOC's Amicus Brief:** The EEOC argued that a supervisor calling a subordinate a "n*****" was evidence of actionable Title VII hostile work environment, as the Second Circuit already recognized that when a supervisor uses that term it may be enough to establish a hostile work environment. The EEOC also argued when taking into account all of the supervisor's conduct, a jury could conclude that the plaintiff was discriminated against based on race, perceived sexual orientation, and/or national origin. **Court's Decision:** This case is pending.

6 The information included in Appendix B, including the *"FY 2015 Appellate Cases Where the EEOC Filed an Amicus Brief"* and *"FY 2015– Appellate Cases Where the EEOC Filed as the Appellant"* were pulled from the EEOC's publicly available database of appellate activity available at http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by Circuit.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Connelly v. Lane Construction Corp.	U.S. Court of Appeals for the 3d Circuit No. 14-3792	2/24/15	Title VII	Retaliation Sex **Result:** Pending	**Background:** The plaintiff filed a lawsuit alleging sex discrimination and retaliation based on the company's failure to rehire her when it had rehired male co-workers with less seniority. The district court dismissed the plaintiff's complaint, holding she "failed to plead facts sufficient to raise an inference of gender discrimination" and did not plead a "plausible causal connection between her gender and [the company's] decision not to rehire her." The district court also dismissed the plaintiff's retaliation claim because she failed to plead a causal connection between her protected activity and the company's decision not to rehire her because there was no temporal proximity. The district court also determined that further amendment of the complaint would be "inequitable and likely futile." **Issue EEOC is Addressing as Amicus:** Whether the plaintiff's complaint was sufficient to state a plausible Title VII claim of sex discrimination and retaliation. **EEOC's Amicus Brief:** The EEOC contends the district court erred in dismissing the plaintiff's Title VII claims. Specifically, the EEOC argues the plaintiff's complaint contained plausible claims of sex discrimination and retaliation. With regard to sex discrimination, the EEOC claims the plaintiff's assertion that the company rehired all of her male co-workers was sufficient to state a claim that she was not rehired because of her sex. Additionally, the EEOC argues the fact that the company had rehired the plaintiff in the past but did not rehire after she made a complaint of sexual advances was sufficient to plead a plausible claim of retaliation. **Court's Decision:** The Third Circuit heard argument on the case on September 15, 2015. The case is still pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Guessous v. Fairview Property Investments	U.S. Court of Appeals for the 4th Circuit No. 15-1055	6/10/15	42 U.S.C. § 1981, Title VII	Race Discrimination, Hostile Work Environment, Retaliation Discrimination Based On Religion, National Origin and Pregnancy **Result:** Pending	**Background:** Plaintiff is an Arab-American Muslim woman who was hired as a Bookkeeper/Assistant Property Manager for the defendant ("FPI"). She claimed her supervisor made disparaging, discriminatory and racist remarks about her race, religion, and national origin. She also alleged unfair treatment regarding health insurance coverage, taking maternity leave, and having her duties taken away from her due to her pregnancy. She was ultimately discharged, allegedly because FPI had financial difficulties. The district court granted summary judgment to FPI, holding that (1) her Title VII hostile work environment claim was time-barred; (2) her § 1981 hostile work environment claim did not allege sufficiently severe or pervasive conduct; and (3) no reasonably jury could find that FPI's stated reason for termination (lack of work) was a pretext for illegal discrimination. **Issue EEOC is Addressing as Amicus:** (1) Did the plaintiff state a timely hostile work environment claim where her supervisor hovered over her desk in an intimidating manner both before and after the start of the statutory limitations period? (2) Could a reasonably jury find that the plaintiff endured a hostile work environment because of her race, religion, and national origin? (3) Could a reasonable jury find that FPI discharge the plaintiff because of illegal discrimination and/or retaliation where her harasser fired her, and so shortly after she complained about his harassing conduct? **EEOC's Amicus Brief:** The EEOC argued the district court failed to view the facts in the plaintiff's favor and failed to consider the totality of the circumstances as required by binding precedent. Concerning the Title VII claim, the district court failed to consider that a jury could find conduct by her supervisor within the statutory time period amounted to hostile work environment. With regard to the §1981 claims, a reasonable jury could find that multiple questions and references, including references to terrorism, were proof of hostility to the plaintiff's race, religion and national origin. Finally, a reasonable jury could find that the lack of work explanation was a pretext for discrimination and/or retaliation, because the plaintiff was discharged after she complained about discriminatory treatment. **Court's Decision:** This case is pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Lewis v. High Point Regional	U.S. District Court for the Eastern District of North Carolina (in the 4th Cir.) No. 5:13-cv-838-BO	10/2/14	Title VII	Sex Discrimination (Transgender Status) **Result:** Mixed. Both Employer's Motion to Dismiss and Plaintiff's Motion for Summary Judgment were Denied	**Background**: Plaintiff is transgender who identifies as female. She applied for three positions with the defendant, interviewed four times, but was not chosen for any position. In response to High Point's motion to dismiss, the EEOC filed a brief as *amicus curiae*. **Issue EEOC is Addressing as Amicus:** Whether failing to hire an individual because she is transgender is sex discrimination under Title VII? **EEOC's Amicus Brief:** The EEOC argued many courts have decided that transgender discrimination is cognizable under Title VII. Plaintiff alleged enough facts in her complaint to withstand dismissal, *i.e.*, that she was ridiculed and harassed by the defendant's employees. The EEOC also argued that the plaintiff does not allege sexual orientation discrimination in her complaint. **Court's Decision**: The court denied the defendant's motion to dismiss because the plaintiff did not allege discrimination on the basis of her sexual orientation, like the defendant argued, but on her transgender status. The court did not reach the issue of whether disparate treatment of an employee because she is transgender is discrimination because of sex under Title VII.
Stephenson v. Pfizer, Inc.	U.S. Court of Appeals for the 4th Circuit No. 14-2079	3/9/15	ADA	Failure to Accommodate **Result:** Pending	**Background:** The plaintiff was a pharmaceutical sales representative who drove throughout her area to meet with physicians to sell drugs in her portfolio. The plaintiff was a successful sales rep. However, she developed an eye disease that made her legally blind. The plaintiff requested a driver as an accommodation. The plaintiff brought suit when her employer refused her request for a reasonable accommodation when she became legally blind and unable to drive. The district court granted summary judgment to the employer and decided driving was an essential function of the sales representative position. **Issue EEOC is Addressing as Amicus:** The EEOC's brief addressed three issues: (1) Did the district court err in holding that driving herself is an essential function of the plaintiff's job; (2) Could a fact-finder decide that providing a driver to plaintiff was a reasonable accommodation? and (3) Should summary judgment be granted on the issue of undue hardship where this was not argued or decided upon below? **EEOC's Amicus Brief:** First, the EEOC argued that the employer had a duty to provide a reasonable accommodation to the plaintiff. Indeed, the EEOC argued that driving was not an essential function of the position (but rather a method of travel from meeting to meeting). Second, the EEOC argued that a reasonable fact-finder could determine that providing a driver is a reasonable accommodation. Third, the EEOC argued that it would be inappropriate for the circuit court to consider arguments relating to the undue hardship of providing a driver as a reasonable accommodation because the employer did not develop this argument in the district court. **Court's Decision:** Oral argument was set for October 27, 2105. The case is still pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Brandon v. Sage Corp.	U.S. Court of Appeals for the 5th Circuit No. 14-51320	4/22/15	Title VII 42 U.S.C. § 1981	Sex Discrimination (Transgender Status) Wrongful Termination Retaliation **Result:** Pro Employer	**Background:** Sage Corporation ("Sage") owns and operates truck-driving schools. The plaintiff was a school director at one of Sage's schools in San Antonio, Texas. The plaintiff hired a transgender instructor. After a Sage manager discovered that the plaintiff had hired a transgender instructor, she allegedly removed the instructor from the work schedule and threatened to cut the plaintiff's salary in half as punishment for hiring the instructor. The plaintiff and the instructor subsequently resigned. The plaintiff, who is Hispanic, sued Sage in the United States District Court, Western District of Texas for racial discrimination under Title VII and § 1981, wrongful termination and retaliation under Title VII and § 1981, and negligent hiring, supervision, training, and retention. The district court granted summary judgment for Sage. **Issue EEOC is Addressing as Amicus:** Whether a reasonable jury could determine that Sage retaliated against the plaintiff based on her opposition to discrimination based on transgender status. **EEOC's Amicus Brief:** The EEOC argued that: (1) discrimination against transgender individuals is a cognizable claim of sex discrimination under Title VII; (2) an individual who opposes discrimination against transgendered persons may bring a claim for retaliation under Title VII; and (3) a jury could conclude that Sage retaliated against the plaintiff because she opposed conduct she reasonably believed violated Title VII. **Court's Decision:** On December 10, 2015, the Fifth Circuit held that the supervisor had no viable retaliation claim under Title VII, as the supervisor who allegedly told the claimant her pay would be cut for hiring the transgender employee had no authority to affect the claimant's terms or conditions of employment.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Eure v. Sage Corp.	U.S. Court of Appeals for the 5th Circuit No. 14-51311	4/22/15	Title VII	Sex Discrimination (Transgender Status) **Result:** Claimant's Appeal Withdrawn	**Background:** Plaintiff is transgender who identifies as male. He was hired as an instructor for the defendant's ("Sage") school by another Sage employee. The hiring employee was told by management that her salary would be cut in half for hiring the plaintiff, and the plaintiff's hours were subsequently drastically reduced (he was not on the schedule at all). Both the plaintiff and the hiring employee resigned. The district court granted summary judgment to Sage on the plaintiff's sex discrimination claim because he was required to provide additional evidence of gender stereotyping. **Issue EEOC is Addressing as Amicus:** Whether a reasonable jury could determine Sage discriminated against the plaintiff because he is transgender. **EEOC's Amicus Brief:** The EEOC argued courts have held that discrimination against individuals on the basis of transgender is sex discrimination under Title VII. The district court erred in requiring specific evidence of gender stereotyping because gender stereotypes inherently drive discrimination against transgender individuals. Also, in *Oncale v. Sundowner*, 523 U.S. 75 (1998), the Supreme Court rejected the notion that Title VII only encompasses types of discrimination specified by Congress. The EEOC next argued that a jury could conclude that the plaintiff was discriminated against because he is transgender, or because he was perceived as non-conforming with the female gender because he presented himself as male. Either way, the facts demonstrate that the plaintiff has direct and circumstantial evidence of sex discrimination, and a jury could determine that any legitimate reason Sage had for reducing the plaintiff's hours was pretextual. **Court's Decision:** On September 23, 2015, the court granted the appellant's unopposed motion to dismiss the appeal.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Jamal v. Saks & Company	U.S. District Court for the Southern District of Texas (in the 5th Cir.) No. 4:14-cv-2782	1/22/15	Title VII	Sex Discrimination (Transgender Status) Retaliation **Result:** Settled	**Background:** Plaintiff (former saleswoman) alleged a pattern and practice of discrimination from management and colleagues, claiming (among other incidents) she could not use the women's bathroom and was told to dress and act more masculine while on the job. Plaintiff was fired 10 days after filing an EEOC charge. Plaintiff sued for harassment based on her transgender status. Saks moved to dismiss the complaint on the ground that Title VII does not protect transsexuals. **Issue EEOC is Addressing as Amicus: (1)** Whether discrimination based on transgender status is cognizable as sex discrimination under Title VII? (2) Whether the plaintiff's EEOC charge satisfied the administrative prerequisite to a suit alleging transgender discrimination? (3) Whether the plaintiff engaged in protected activity for purposes of a retaliation claim when she filed an EEOC charge and opposed conduct a reasonable person would believe is unlawful? **EEOC's Amicus Brief:** (1) EEOC argued binding precedent supports transgender discrimination as cognizable under Title VII; (2) EEOC argued the plaintiff alleged transgender discrimination in her EEOC charge and court complaint, thus exhausting her administrative remedies. The fact that the plaintiff used "male" in the charge and "her" in the complaint is irrelevant; (3) The plaintiff alleged she was discharged in part due to filing an EEOC charge and in part due to her complaints at the workplace, both of which are protected activities and support a retaliation claim. Plaintiff could reasonably have believed she was opposing unlawful conduct under Title VII. **Court's Decision:** The parties settled the case.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Bates, et al. v. Dura Automotive Systems	U.S. Court of Appeals for the 6th Circuit No. 11-6088	10/14/14	ADA	Disability Unlawful Medical Examination **Result:** Pro Employer	**Background**: Dura Automotive Systems, Inc. ("Dura") designs and manufactures automotive components. In 2007, Dura started drug testing employees for illegal drugs and prescription medications packaged with warnings about operating machinery. The plaintiffs were employees at Dura who took prescribed medications for various conditions. After they initially tested positive for machine-restricted drugs, Dura directed them to disclose their medications to a third-party company hired to administer the drug tests. Dura subsequently directed the plaintiffs to stop taking the medications. Dura terminated the plaintiffs' employment after they tested positive a second time for machine-restricted drugs. The plaintiffs sued Dura in the United States District Court for the Middle District of Tennessee. The plaintiffs alleged, *inter alia*, that Dura violated the ADA. The two issues at trial were: (1) whether Dura performed or authorized a medical examination or disability inquiry; and (2) if so, whether the examination or inquiry was job-related and consistent with business necessity. During trial, the district court *sua sponte* ruled in the plaintiffs' favor as a matter of law on the first issue, and submitted the second issue to the jury. The jury found for all but one of the plaintiffs and awarded compensatory and punitive damages. Dura moved for judgment as a matter of law or a new trial. The district court denied relief and Dura appealed. The Sixth Circuit: (1) reversed the district court's conclusion that Dura's drug-testing was a medical examination or disability inquiry as a matter of law; (2) vacated the jury's punitive damages award; and (3) ordered that on remand, the jury must decide whether Dura's drug testing constituted a medical examination or disability inquiry, and if so, then the jury must decide whether punitive damages are appropriate under the ADA. **Issue EEOC is Addressing as Amicus:** Whether *en banc* review is warranted because the Sixth Circuit panel's holding conflicts with Sixth Circuit precedent and Supreme Court precedent. **EEOC's Amicus Brief:** The ADA prohibits covered employers from requiring employees to undergo a medical examination or making inquiries of an employee as to: (1) whether an employee is an individual with a disability; or (2) regarding the nature and severity of the disability. The ADA creates an exception for examinations that are job-related and consistent with business necessity. The EEOC contends the Sixth Circuit erred by adding an element of intent in assessing whether a test is a medical examination. **Court's Decision**: On November 17, 2014, the Sixth Circuit denied rehearing *en banc*.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Gleed v. AT&T Mobility Services	U.S. Court of Appeals for the 6th Circuit No. 14-2088	11/12/14	ADA, Title VII	Reasonable Accommodation Sex Discrimination **Result:** Mixed	**Background**: Plaintiff (former salesman) has a leg condition he claimed causes great pain when he stands for long periods of time. He asked his supervisor for permission to use a chair and AT&T denied the request (although a pregnant female was permitted to use a chair). When he asked for a four-to-six-week schedule adjustment to receive treatment (for a leg infection), the company refused. He later resigned. He sued the company for refusing the sitting accommodation, refusing to adjust his schedule to accommodate treatment for an infection, and sex discrimination. **Issue EEOC is Addressing as Amicus:** Whether the district court erred in ruling that the company did not need to consider a reasonable accommodation for the plaintiff to sit periodically, where performing the essential functions of his job without accommodation caused him pain, and where he asked his supervisor for a sitting accommodation? Whether the district court erred in ruling that the company's offer of unpaid leave was a sufficient alternative reasonable accommodation to the plaintiff's request for a schedule adjustment, and erred in ruling that he needed to make a formal request for such an accommodation. **EEOC's Amicus Brief:** The EEOC argued that an employer must make a reasonable accommodation where one needs it to continue to perform essential job functions without exacerbation of pain or other symptoms of his or her impairment. Plaintiff needed a sitting accommodation to perform his job without pain, as his legs became swollen (and painful and increased his risk of infection) when he engaged in excessive standing and walking. There was no evidence that sitting was unreasonable, nor was there any evidence that it would have caused the employer an undue hardship. Moreover, the plaintiff properly requested a sitting accommodation when he asked his supervisor if he could sit when needed, and he was not informed of any additional steps he could take in requesting an accommodation. Finally, the EEOC argued an unpaid leave of absence was not an alternative reasonable accommodation (instead of a 4-6 week schedule adjustment), because it can reasonably accommodate the plaintiff with a schedule modification absent undue hardship. **Court's Decision**: The court reversed the district court in part and held there were issues of fact concerning whether the company could have accommodated the plaintiff with a chair that he reasonably requested. The court affirmed the district court's opinion with regard to not accommodating the plaintiff's treatments (schedule modification), as the plaintiff was offered unpaid leave with possibility of applying for back pay, but he denied it, and quit the next day. Thus, the plaintiff caused the breakdown in the interactive process. The court held that the plaintiff did not suffer an adverse employment action with respect to his sex discrimination claim. With respect to the constructive discharge claim, the court held that a denial of an accommodation, by itself, is not sufficient to prove that an employer constructively discharged an employee.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Hurtt v. International Services, Inc.	U.S. Court of Appeals for the 6th Circuit No. 14-1824	12/10/14	ADA	Disability Discrimination; Failure to Accommodate **Result:** Pro Employee	**Background**: Plaintiff was a travelling salesman who travelled extensively with little time for sleep. The plaintiff suffered from acute anxiety and depression, and submitted an FMLA request for his anxiety. Eventually, the plaintiff sent a letter stating that he would not be returning to work. The district court granted the employer's motion for summary judgment, stating "[the plaintiff] failed to show that he suffered an adverse employment action or engaged in protected activity." **Issues on Appeal**: (1) whether the plaintiff's anxiety and major depression rendered him disabled under the ADA; (2) whether the district court erred in granting summary judgment on plaintiff's failure-to-accommodate claim; (3) whether the district court erred in holding that constructive discharge is not an adverse discriminatory action; and (4) whether the plaintiff engaged in protective activity when he requested a reasonable accommodation and submitted an FMLA leave request. **EEOC's Amicus Brief:** The EEOC argued that the district court erred in granting the employer's summary judgment. The EEOC made four principal arguments. First, the EEOC argued that a jury could find the plaintiff was disabled. The EEOC argued that the record reflects that he suffered from depression and anxiety and that this evidence could support a finding that the plaintiff was disabled. Second, the EEOC argued that the plaintiff established a *prima facie* case in support of his failure to accommodate claim. The EEOC argued that the employer had notice of the plaintiff's disability and request for accommodation. Further, the EEOC alleged that the employer failed to engage in the interactive process required by the ADA. Third, the EEOC argued that the plaintiff established a *prima facie* case of discriminatory discharge. The EEOC argued that a constructive discharge is an adverse action and that the plaintiff satisfied the constructive discharge standard. Fourth and finally, the EEOC argued that the plaintiff established a *prima facie* case of retaliation. The EEOC argued that the plaintiff engaged in protected activity by requesting a reasonable accommodation, and that he suffered an adverse action when it constructively discharged him. **Court's Decision**: The Sixth Circuit Court reversed the district court's decision and remanded the case for further proceedings. In remanding the action, the district court was held to have erred in articulating the correct standards for disability discrimination and FMLA interference claims. Additionally, the Sixth Circuit Court held the plaintiff showed the existence of genuine issues of material fact, as required to withstand summary judgment. The court held the district court improperly determined that "a plaintiff cannot use a claim of constructive discharge to establish an adverse employment action" and clearly stated that a constructive discharge can establish an adverse action. The court further held that "a complete failure to accommodate, in the face of repeated requests, might suffice as evidence to show the deliberateness necessary for constructive discharge." Additionally, the employer failed to engage in the interactive process.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Woods v. Facility Source LLC	U.S. Court of Appeals for the 6th Circuit No. 15-3138	4/6/15	Title VII	Charge Processing **Result:** Pending	**Background:** Two complainants submitted intake forms to the EEOC, and were sent charge forms to be signed by the EEOC. The complainants did not sign these forms, but eventually requested right-to-sue letters. They subsequently filed suit. The employer alleged that the plaintiffs failed to exhaust their administrative remedies. The district court rejected the employees' arguments, and granted summary judgment on the merits. The plaintiffs appealed. **Issue EEOC is Addressing as Amicus:** Whether a submission to the EEOC constitutes a charge where it manifests an intent that the EEOC take remedial action. The EEOC claimed that the district court erred by holding that whether a submission constitutes a charge depends in part upon the EEOC's treatment of the submission and whether the employer received notice of the filing. **EEOC's Amicus Brief:** The EEOC argued that *Federal Express Corp. v. Holowecki*, which involved the ADEA, should govern whether a submission to the EEOC under Title VII is a charge, and that the test is not whether the EEOC treats the submission as a charge. The EEOC argued also that the plaintiff's submissions were charges under the EEOC because the intake forms were verified (*i.e.*, submitted under oath or penalty of perjury); contained information sufficiently precise to identify the parties, and the actions complained of; and were sufficient such that an objective observer would determine the employee requests the agency to activate its remedial processes. **Court's Decision:** Oral argument was held on October 8, 2015. The case is still pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Muhammad v. Caterpillar Inc.	U.S. Court of Appeals for the 7th Circuit No. 12-1723	10/4/14	Title VII	Sexual Orientation; Retaliation **Result:** Pro Employer	**Background:** The plaintiff alleged that his coworkers created a hostile work environment by subjecting him to sexual and racial harassment and that his supervisor retaliated by suspending him after he complained about it. The district court ruled that the employer reasonably responded to the plaintiff's complaints and granted summary judgment to the employer. **Issue EEOC is Addressing as Amicus:** The EEOC supported the plaintiff's petition for a rehearing of this matter. **EEOC's Amicus Brief:** The EEOC argued that the rehearing should be granted because the panel's decision should be set aside. The EEOC argued that an increasing number of courts have been protecting employees from discrimination on the basis of sexual orientation through the sex-based norms, preferences, expectations, and/or stereotypes. The EEOC also argued that sexual orientation discrimination will often be motivated by some sort of gender-based preference or stereotype and that this can meet the Supreme Court's *Price Waterhouse* test for proving whether discrimination is sex-based. The EEOC also requested that the panel's decision that sexual orientation complaints are not protected activity should be rescinded. **Court's Decision**: The court affirmed the district court's judgment because the employer reasonably responded to the harassment complaint. The court denied the plaintiff's motion for rehearing.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Tate v. SCR Medical Transportation Inc.	U.S. Court of Appeals for the 7th Circuit No. 15-1447	8/10/2015	ADA Title VII	Disability Discrimination Retaliation Sex Discrimination **Result:** Pro Employee	**Background:** The plaintiff filed a *pro se* complaint in December 2014 in federal district court alleging sex discrimination, disability discrimination, and retaliation. The plaintiff used the form complaint given to him by the district court. Question 13 of the form required the plaintiff to state the facts supporting his claims. The plaintiff wrote: "I was hired by the defendant on or about August 4, 2014. My most recent position was Driver Trainee. The defendant was aware of my disability. During my employment, I was subjected to sexual harassment. I complained to no avail. On September 5, 2014, I was discharged. I believe I was discriminated against because of my disability, in violation of the Americans with Disabilities Act, my sex, male, and in retaliation for engaging in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended." The district court dismissed the complaint under 28 U.S.C. § 1915(e)(2), which requires a court to dismiss a case if the complaint "fails to state a claim on which relief may be granted." **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred by applying the wrong legal standard in assessing the sufficiency of the plaintiff's complaint; and (2) Whether the district court erred by dismissing the action *sua sponte* and by not giving the plaintiff an opportunity to amend his complaint. **EEOC's Amicus Brief:** The EEOC argued that in *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013), the Seventh Circuit held that in employment discrimination cases, "the complaint merely needs to give the defendant sufficient notice to enable him to begin to investigate and prepare a defense." As such, the EEOC contended the district court applied the wrong standard, the district court should have applied the standard in *Luevano*, and the district court should not have dismissed the plaintiff's complaint for failure to state a claim. The EEOC also contended the district court erred by dismissing the action *sua sponte* because: (1) the plaintiff had a right to amend his complaint as a matter of course under FRCP 15(a); (2) Seventh Circuit decisions prohibit district courts from dismissing a complaint with prejudice without first giving the plaintiff an opportunity to amend it; and (3) the district court should have dismissed the complaint only, and not the action. **Court's Decision:** On December 28, 2015, the Seventh Circuit reversed and remanded, agreeing with the EEOC that the judge "was mistaken to think that the plaintiff was required to plead more elaborately than he had done." The appellate court further held that the district erred in dismissing the pro se plaintiff's complaint without informing him of the deficiencies in his complaint and allowing him to correct such deficiencies.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Dawson v. H&H Electric	U.S. District Court for the Eastern District of Arkansas (in the 8th Cir.) No. 14-583	6/26/15	Title VII	Sex Discrimination (Transgender Status) **Result:** Dismissed	**Background:** When the plaintiff began working for H&H Electrical, Inc. ("H&H") in 2008, she presented as a man using her birth name, Steven. She subsequently began transitioning from male to female, and legally changed her name to Patricia in 2012. The Vice President of H&H refused to allow the plaintiff to use the name Patricia, which was her legal name. In September 2012, the Vice President of H&H fired the plaintiff. He told her, "I'm sorry, Steve, you do great work, but you are too much of a distraction and I am going to have to let you go." He also said he was worried about losing a contract. The plaintiff sued H&H in federal district court under Title VII. H&H moved for summary judgment on the ground that Title VII does not protect "transsexuals." **Issue EEOC is Addressing as Amicus:** Whether discrimination against an individual because he or she is transgender is cognizable as sex discrimination under Title VII. **EEOC's Amicus Brief:** The EEOC argued that in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), the Supreme Court held Title VII barred not just discrimination because the plaintiff was a woman, but also discrimination based on the employer's belief that the plaintiff was not acting like a woman. After *Price Waterhouse*, courts of appeal and district courts started recognizing that discrimination against transgender individuals is cognizable as sex discrimination under Title VII. In *Oncale v. Sundowner*, 523 U.S. 75 (1998), the Supreme Court ruled that same-sex harassment is actionable under Title VII. Third, the logic of *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982)—in which the court of appeals relied on Congress' refusal to amend the Civil Rights Act to expand the definition of sex as a basis for finding that "transsexualism" is not protected by Title VII—is flawed because the Supreme Court has warned that "subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress." **Court's Decision:** Although the district court denied H&H's motion for summary judgment, on October 2, 2015, the court entered a stipulation of dismissal.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
McLeod v. General Mills	U.S. District Court for the District of Minnesota (in the 8th Cir.) No. 15-cv-00494	4/22/15	ADEA	Age Discrimination Release Agreements **Result:** Pending	**Background:** In 2012, the employer conducted a layoff of over 800 employees, which allegedly disproportionately affected older workers, including the plaintiffs. To obtain severance, affected employees had to sign release agreements, which included waivers of potential age claims and also for arbitration of any disputes of the validity or enforceability of the release. Plaintiffs alleged they were terminated because of their age and contended that the releases did not comply with the Older Workers Benefit Protection Act ("OWPBA"). The employer moved to dismiss and force individual arbitration. **Issue EEOC is Addressing as Amicus:** Whether an employer can satisfy the requirements of the OWBPA relating to releases of age claims by including an age provision in the purported release agreement. **EEOC's Amicus Brief:** The EEOC filed its brief in opposition to the motion to dismiss filed by the employer. It alleged that the employer had not yet convinced the court that it met the stringent requirements of the OWBPA. The EEOC argued that the arbitration provisions of the challenged releases did not satisfy the OWBPA because that statute requires that an employer prove the enforceability of the releases "in a court of competent jurisdiction." The EEOC argues that, until the employer proves the releases are effective, the plaintiff's class action should be allowed to proceed. **Court's Decision:** No oral argument was set and the court's decision relating to the employer's motion to dismiss is forthcoming.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Morriss v. BNSF Railway Co.	U.S. Court of Appeals for the 8th Circuit No. 14-3858	3/23/15	ADA	Disability Discrimination: Failure to Hire and Regarded-As Discrimination **Result:** Pending	**Background:** Plaintiff-Appellant ("plaintiff") applied for several diesel mechanic positions at the defendant-appellee's ("BNSF") business. Plaintiff interviewed and passed a skills test, and was conditionally offered employment, contingent upon a medical history questionnaire and a physical examination, among other things. He was not hired "due to significant health and safety risks associated with Class 3 obesity." Plaintiff sued alleging disability discrimination and that BNSF regarded him as disabled. The trial court granted summary judgment to BNSF on the discrimination claim but denied summary judgment to the plaintiff on his regarded-as claim. **Issue EEOC is Addressing as Amicus:** Whether the district court erroneously dismissed the plaintiff's regarded-as claim although BNSF admittedly declined to hire him because of his morbid obesity and its assumption, based on his morbid obesity, that he had a high risk for developing a health condition that could lead to sudden incapacitation? **EEOC's Amicus Brief:** The EEOC argued a reasonable jury could conclude that the plaintiff was not hired because there was a dispute whether he was regarded as having an actual impairment (whether morbid obesity itself is a disability), and whether he was regarded as having a perceived impairment (morbid obesity linked to a supposedly high risk of sudden incapacitation). The EEOC also argued that discrimination based on effects or manifestations of an underlying condition is equivalent to discrimination based on the underlying condition. **Court's Decision:** This case is pending. Oral argument was scheduled for December 17, 2015.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Cooper v. United Air Lines, Inc.	U.S. Court of Appeals for the 9th Circuit No. 15-15623	8/17/15	EPA	Sex Discrimination **Result:** Pending	**Background:** The plaintiff worked as a Supervisor of Security Officers for the employer for a longer period of time than her two male colleagues (nine years), but was paid substantially less than both of the men for the entire time. Eventually, after a merger, the company replaced her with a man whose starting salary was substantially more than what she earned. The plaintiff sued under the Equal Pay Act ("EPA"), and the district court granted summary judgment to the employer, stating the plaintiff had no evidence that creates a dispute of fact. **Issue EEOC is Addressing as Amicus:** (1) Whether the district erred in concluding that the employer established as a matter of law its affirmative defense to the plaintiff's EPA claim? (2) Whether the district court applied an incorrect analytical approach to the plaintiff's EPA claim when it permitted the employer to satisfy its burden of proof as to the affirmative defense only by producing an explanation for the pay disparity, and then shifted the burden of proof to the plaintiff to establish that the company's asserted reason was pretextual. **EEOC's Amicus Brief:** The district court did not hold the employer to the correct evidentiary standard. Under the EPA, once a plaintiff establishes a *prima facie* case, the burden of proof (not mere production) shifts to the defendant to establish that the pay disparity was in fact the result of a differential based on any other factor other than sex. The district court used the Title VII framework instead, requiring the plaintiff to prove pretext. Also, the company claimed that the disparity was due to pre-hire criteria. The employer failed to explain why it did not equalize their pay over time, and thus did not meet its burden of proof. **Court's Decision:** This case is pending.
Guido v. Mount Lemmon Fire District	U.S. Court of Appeals for the 9th Circuit No. 15-15030	5/27/15	ADEA	Age Discrimination **Result:** Pending	**Background:** The plaintiffs worked for an Arizona fire department and alleged they were laid off as a result of age discrimination. When the plaintiffs brought suit, the fire department filed a motion for summary judgment alleging that it is not an employer under the ADEA because it is a political subdivision. The district court granted the fire department's motion for summary judgment. **Issue EEOC is Addressing as Amicus:** Whether the ADA's definition of employer in 29 U.S.C. §630(b) includes political subdivisions of any size. **EEOC's Amicus Brief:** The EEOC argued that the ADEA applies to political subdivisions of any size and that the 20-person requirement set forth in 29 U.S.C. §630(b) does not apply to these subdivisions. **Court's Decision:** No oral argument has been scheduled. The matter is still pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Rosenfield v. GlobalTranz Enterprises	U.S. Court of Appeals for the 9th Circuit No. 13-15292	6/15/15	ADEA	Retaliation **Result:** Pro Employee	**Background:** GlobalTranz Enterprises, Inc. ("GlobalTranz") hired the plaintiff in April 2010 for the position of human resource manager. The company terminated the plaintiff in May 2011. During her brief tenure at the company, the plaintiff reported to her superiors that she believed GlobalTranz was misclassifying approximately 40-50 non-exempt employees as exempt. In October 2011, the plaintiff sued GlobalTranz in federal district court for violating an Arizona whistleblowing law and retaliation under the FLSA. GlobalTranz moved for partial summary judgment on the plaintiff's FLSA retaliation claim on the ground that the plaintiff failed to demonstrate that she engaged in statutorily-protected activity. The district court granted GlobalTranz's motion for partial summary judgment because all the alleged protected activity "fell within the ambit of her managerial duties." **Issue EEOC is Addressing as Amicus:** Whether the phrase "filed any complaint," as used in the anti-retaliation provision of the FLSA, encompasses reports by a managerial employee to other managers and company executives that the company is not in compliance with the minimum wage and overtime compensation requirements of the Act. **EEOC's Amicus Brief:** The plain language of the FLSA's anti-retaliation provision protects "any employee" who has filed "any complaint." As such, any complaint that meets the requirements set forth by the U.S. Supreme Court in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) is actionable, regardless of whether the employee is a manager. The manager rule—which sets forth additional requirements managerial employees must meet to qualify for anti-retaliation protection under the FLSA—is not supported by the plain text or purpose of the FLSA anti-retaliation provision. Limiting the ability of managerial employees to bring retaliation claims under the FLSA undermines the purpose of the FLSA and Equal Pay Act. Finally, the U.S. Department of Labor and the EEOC's interpretation of the FLSA anti-retaliation provision supports protecting complaints made by managerial employees. **Court's Decision:** On December 14, 2015, a Ninth Circuit panel reversed the district court's summary judgment in favor of the employer and remanded for further proceedings. The panel, citing *Kasten*, noted that "[t]o fall within the scope of the antiretaliation provision, a complaint must be sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." *Kasten*, 131 S. Ct. at 1335. Whether the employee is a manager forms "an important part of that 'context.'" However, the panel declined to adopt a manager-specific legal standard for determining whether a complainant has "filed any complaint." "Because *Kasten* requires consideration of the content and context of an alleged FLSA complaint, the question of fair notice must be resolved on a case-by-case basis. An employee's managerial position is only one consideration." In this case, the panel held that a reasonable jury could find the employee had filed a complaint.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Saling v. Royal	U.S. District Court for the Eastern District of California (in the 9th Cir.) No. 2:13-cv-1039	5/11/15	Title VII	Charge Processing **Result:** Mixed. The court agreed with the EEOC with respect to the charge processing issue, but ultimately sided with the employer on the substantive discrimination claim.	**Background:** The defendants moved to dismiss the plaintiff's Title VII claims on the ground that her EEOC charge was untimely because she did not file her charge of discrimination within 180 days from her discharge. **Issue EEOC is Addressing as Amicus:** Whether a charge filed with the EEOC is initially instituted with the relevant Fair Employment Practices ("FEP") agency giving the charging party a 300-day time limit to file the charge. **EEOC's Amicus Brief:** The EEOC argues that it has established a process through its regulations and worksharing agreements where all charges are "initially instituted" with the FEP, which extends the charge-filing time limit for the charging party to 300 days. **Court's Decision:** The court held that in light of the worksharing agreement between the EEOC and FEP agency, the plaintiff had 300 days to file her charge of discrimination. However, the court dismissed the plaintiff's retaliation and sex discrimination claims because the plaintiff failed to state a claim.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
DeWitt v. Southwestern Bell Telephone Co.	U.S. Court of Appeals for the 10th Circuit No. 14-3192	1/21/15	ADA, FMLA	Disability Discrimination Failure to Accommodate FMLA Retaliation **Result:** Pending	**Background:** The plaintiff worked as a customer service representative at a call center for Southwestern Bell Telephone Co. ("SWBTC"). She has Type I diabetes, which SWBT accommodated by allowing her to take frequent breaks and keep candy, juice, and other food at her desk. After nearly 13 years of working at SWBTC, the plaintiff failed to delete a service plan from a customer's account after the customer declined the service plan. The plaintiff received a last-chance agreement for violating SWBTC's Code of Business Conduct that prohibited "cramming," the practice of deliberately adding services to a customer's account without the customer's knowledge. Under the last-chance agreement, the plaintiff agreed to maintain satisfactory performance in all aspects of her job. Less than two months later, the plaintiff hung up on at least two customers in a single day. At the disciplinary hearing a week later, the plaintiff blamed the hang-ups on her diabetes. SWBTC terminated the plaintiff because she was on a last-chance agreement and had mistreated customers. The plaintiff sued SWBT in U.S. district court, alleging SWBTC terminated her employment on the basis of her disability in violation of the ADA, failed to reasonably accommodate her in violation of the ADA, and retaliated against her for using FMLA leave. The district court granted SWBTC's motion for summary judgment because: (1) SWBTC demonstrated a legitimate, non-retaliatory reason for the plaintiff's termination; and (2) overlooking misconduct warranting termination is not a reasonable accommodation. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding the business judgment rule protected SWBTC from liability under the ADA; and (2) Whether the district court erred in granting summary judgment for SWBTC as to the plaintiff's reasonable accommodation claim because it misinterpreted the EEOC's guidance. **EEOC's Amicus Brief:** As to the first issue, the EEOC argued the Tenth Circuit has recognized that a plaintiff can demonstrate the legitimate business reasons offered by a defendant were a pretext for discrimination by revealing "weakness, implausibilities, inconsistences, incoherencies, or contradictions in the employer's proffered reasons[]." The EEOC contended that in this case, a reasonable jury could find the "cramming" and "hang-up" incidents were pretexts for firing the plaintiff because of her disability. Further, the EEOC contended the district court erred in requiring the plaintiff to make an explicit "cat's paw" argument because the plaintiff made this argument, although it did not actually use the term "cat's paw." As to the second issue, the EEOC argued the district court erred in treating the hang-up incidents as terminable misconduct under the EEOC guidelines because the plaintiff did not know beforehand that she required further accommodation for her diabetes, which the hang-up incidents brought to her attention and SWBTC's attention. Even though the ADA did not require SWBTC to excuse the hang-up incidents, SWBTC should instead have treated the incidents as initiating the interactive process. **Court's Decision:** Oral argument was heard on October 1, 2015. The case is currently pending with the court.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Nesbitt v. FCNH, Inc.	U.S. Court of Appeals for the 10th Circuit No. 14-1502	4/22/15	FLSA	Arbitration **Result:** Pro Employee	**Background:** The plaintiff signed an arbitration agreement with the defendant that stated, in relevant part: "Each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs." The plaintiff filed a collective and class action against the defendant asserting claims under the FLSA. The defendant responded with a motion to compel arbitration and to stay the district court proceedings. The plaintiff responded, arguing the arbitration agreement was unenforceable because it was procedurally unconscionable and was substantively unenforceable because it imposed significant costs on her she would not have to bear if she pursued litigation, and was contrary to the FLSA's mandate that a prevailing plaintiff shall recover her reasonable attorneys' fees. The district court denied the defendant's motion to compel arbitration and agreed the arbitration agreement was unenforceable. Specifically, the district court held the agreement prevented the plaintiff from effectively vindicating her statutory rights under the FLSA. **Issue EEOC is Addressing as Amicus:** Whether the district court correctly concluded that an arbitration agreement that requires a claimant to pay her own attorneys' fees even if she prevails is an impermissible waiver of the claimant's substantive rights under the Fair Labor Standards Act. **EEOC's Amicus Brief:** The EEOC filed an amicus brief requesting that the appellate court uphold the district court's decision. Specifically, the EEOC argued the district court correctly held that an arbitration agreement cannot waive the statutory right of attorneys' fees because it is a substantive right that cannot be waived in arbitration. The EEOC was interested in the appellate court's interpretation of the attorneys' fees provision of the FLSA because the ADEA and the EPA incorporate identical statutory language. **Court's Decision:** Oral arguments were heard on November 18, 2015. On January 5, 2016, the Tenth Circuit affirmed the district court's order denying the defendants' motion to stay the proceedings and compel arbitration.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Bralo v. Spirit Airlines, Inc.	U.S. Court of Appeals for the 11th Circuit No. 14-12770	10/22/14	ADA	Disability **Result:** Mixed; Court Affirmed Denial of Employer's Motion for a New Trial and Plaintiff's Motion for Front Pay	**Background**: Plaintiff worked in a supervisory position. He developed back issues and returned to work with restrictions. Defendant stated it did not have light duty, did not offer any other accommodation, and ultimately terminated his employment. At trial, the defendant argued the plaintiff never requested a reasonable accommodation, and had he done so, he would have been given a fit- for-duty form immediately for his doctor to complete. The jury awarded the plaintiff compensatory damages ($10,000), punitive damages ($375,000) and back pay ($150,000). The defendant moved for a new trial and remitter. The district court denied the motion for a new trial and reduced the compensatory and punitive damages (to $300,000) and back pay award ($136,773). The court denied the plaintiff's motion for front pay. **Issue EEOC is Addressing as Amicus:** Did the district court correctly instruct the jury that the plaintiff had to prove "that he requested an accommodation" and not that he requested "the specific accommodation which he now claims [the company] should have provided him"? Did the district court erroneously refuse to award front pay based on the size of the punitive damages award? **EEOC's Amicus Brief:** The district court properly instructed the jury that the plaintiff had to prove he requested an accommodation (not a specific one), pursuant to case law. It also argued the district court erroneously considered the size of the punitive damages award in deciding front pay was not owed. Punitive damages are punitive and front pay is an equitable remedy, used when reinstatement is inappropriate. **Court's Decision**: In its one-paragraph opinion, the court affirmed the district court on both issues and awarded $143,201 in back pay and prejudgment interest; $10,000 in compensatory damages; and $300,000 in punitive damages.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Kilgore v. Trussville Development, LLC	U.S. Court of Appeals for the 11th Circuit No. 15-11850	6/22/15	ADEA	Age Discrimination **Result:** Pending	**Background:** The plaintiff was a 65-year old front desk agent for a hotel. Her supervisor made multiple comments relating to the plaintiff's age, and his treatment of her further deteriorated over time. Following a series of confrontations with her supervisor, the plaintiff was eventually discharged, allegedly due to guest complaints of her poor service (though the evidence determined that the plaintiff was not at work the day the guest complained). **Issue EEOC is Addressing as Amicus:** Whether the district court improperly granted summary judgment for a failure to demonstrate a *prima facie* case where the plaintiff provided evidence of the decision-makers' discriminatory remarks and where the district court required that the plaintiff produce evidence that similarly-situated persons were treated differently. **EEOC's Amicus Brief:** The EEOC's brief argues that the district court improperly analyzed the evidence in determining that plaintiff failed to prove a *prima facie* case. First, the EEOC alleged that the employer's age-related comments established a *prima facie* case. Indeed, the EEOC argues that, while evidence of disparate treatment of employees is one of the "most obvious" ways to raise an inference of discrimination, it is not the only way to do so. The EEOC argued that the manager's continued comments were sufficient to infer a discriminatory motive. **Court's Decision:** No oral argument has been scheduled. The case is still pending.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
Villarreal v. R. J. Reynolds Co, et al.	U.S. Court of Appeals for the 11th Circuit No. 15-10602	3/30/2015	ADEA	Age Discrimination Disparate Impact Disparate Treatment **Result:** Pro Employee	**Background:** The plaintiff applied for the position of Territory Manager at R.J. Reynolds ("RJR") in November 2010 (through a website maintained by CareerBuilder), June 2010, May 2011, September 2011, and March 2012. When the plaintiff first applied in November 2010, he was 49 years old. Each time, RJR hired individuals under the age of 40 to fill the position. RJR contracted with Pinstripe, Inc. ("Pinstripe"), which reviewed applications based on the applicant's resume and determined which applicants would be interviewed. RJR and Pinstripe developed a profile of the ideal candidate, who had no more than 1-2 years of work experience. On May 17, 2010, the plaintiff filed a charge of discrimination with the EEOC alleging RJR discriminated against him on the basis of age by rejecting his November 2007 application. In July 2010, the plaintiff filed an amended charge with the EEOC that included his November 2007 and June 2010 rejection. In December 2011, the plaintiff filed a second amended charge that included his rejections in December 2010, May 2011, September 2011, and added Pinstripe and CareerBuilder as Respondents. On April 2, 2012, the EEOC issued Notices of Right to sue letters. The plaintiff filed a collective lawsuit against RJR, CareerBuilder, and Pinstripe in federal district court. The plaintiff alleged age discrimination under disparate treatment and disparate impact theories under the ADEA. RJR and Pinstripe moved for partial dismissal of the complaint because the ADEA does not allow applicants to challenge employment policies and practices that have a disparate impact on age. RJR and Pinstripe also moved to dismiss all claims involving hiring decisions that occurred before November 19, 2009 on the ground those claims were time-barred since the discrimination in question occurred more than 180 days before the plaintiff's May 2010 EEOC charge. The district court granted both motions. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in ruling that applicants for employment may not pursue disparate impact claims under section 4(a)(2) of the ADEA; and (2) whether the district court erred in ruling that equitable tolling of the charge-filing limitation period did not apply where the plaintiff lacked any reason to suspect he was a victim of age discrimination until well after his non-selection. **EEOC's Amicus Brief:** The EEOC contended that the language of section 4(a)(2) of the ADEA, the Supreme Court's interpretation in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) that identical statutory language in Title VII encompasses disparate impact claims by applicants, and the ADEA's underlying purposes all lead to the conclusion that the ADEA authorizes disparate impact claims by job applicants. The EEOC also contended the district court should have allowed equitable tolling because the plaintiff had no knowledge that RJR refused to hire him in November 2007 due to his age until less than a month before he filed his charge in May 2010. **Court's Decision:** On November 30, 2015, a divided court agreed (2-1) with the EEOC, holding that job applicants—not just employees—can bring disparate impact claims under the ADEA. The court also held that the district court applied the wrong standard regarding the equitable tolling issue. According to the court, the proper standard for determining whether equitable tolling applies is "reasonable prudence."

FY 2015 – Select Appellate Cases in Which the EEOC was a Party

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Abercrombie & Fitch Stores, Inc.	U.S. Supreme Court No. 14-86	6/1/15	Title VII	135 S.Ct. 2028 (2015) **Result:** Pro EEOC	**Background:** The charging party was denied employment based on the employer's appearance policy, but she never specifically requested an accommodation based on her religion. In reversing the district court, the Tenth Circuit ruled, "Abercrombie is entitled to summary judgment as a matter of law because there is no genuine dispute of material fact that [the claimant] never informed Abercrombie prior to its hiring decision that she wore her headscarf or 'hijab' for religious reasons and that she needed an accommodation for that practice, due to a conflict between the practice and Abercrombie's clothing policy." **Issues on Appeal:** Whether an employer must have "actual knowledge" of an individual's need for a religious accommodation in order to be liable under a disparate treatment theory under Title VII, or does the individual need to show only that his or her need for an accommodation was a motivating factor in the employer's decision? **EEOC's Position on Appeal:** The EEOC argued "the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual's religious practice or belief and a requirement for applying for or performing the job." **Court's Decision:** The U.S. Supreme Court reversed the Tenth Circuit's holding, and explained that to prevail on a failure to make a religious accommodation claim, the employer does not need to have "actual knowledge" of a job applicant's need for an accommodation. Rather, an applicant need only show that his need for an accommodation was a motivating factor in the employer's decision. The Supreme Court held that, unlike the ADA, the statutory text of Title VII does not impose a knowledge requirement on the employer; rather Title VII prohibits actions taken with discriminatory motive. "[A]n employer who acts with the motive of avoiding accommodation may violate Title VII even if he has no more than an unsubstantiated suspicion that accommodation would be needed."

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
Mach Mining, LLC v. EEOC	U.S. Supreme Court No. 13-1019	4/29/2015	Title VII	135 S. Ct. 1645 (2015) **Result:** Pro EEOC	**Background:** The EEOC challenged the employer's affirmative defense of "failure to conciliate" and moved for partial summary judgment on the issue. Although the district court relied upon decisions from other circuits that allowed challenges to the EEOC's conciliation efforts in denying the EEOC's partial motion for summary judgment, the Seventh Circuit reversed the lower court decision, stating that it was "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate" and holding that "[t]he language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." **Issues on Appeal:** Whether and to what extent may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit? **EEOC's Position on Appeal:** The EEOC argued that Title VII requires only that the EEOC "endeavor" to reach an agreement through "informal" means, and that the Commission may sue if it is unable to obtain a "conciliation agreement acceptable to the Commission." The statute "leaves it up to the Commission to decide whether the substance of a settlement proposal is satisfactory; it does not show that Congress intended to preclude judicial review of the procedural adequacy of the Commission's conciliation efforts." **Court's Decision:** The Supreme Court vacated the Seventh Circuit's decision, and held the EEOC's conciliation effort during the administrative charge process was not judicially reviewable and not an affirmative defense to be used against the agency. Although Title VII provides the EEOC with "wide latitude" to choose which informal conciliation methods to employ, the Supreme Court found the statute also provides "concrete standards" for what the conciliation process must entail. Specifically, to comply with its statutory conciliation obligations, the EEOC must inform the employer about the specific discrimination allegation(s) and such notice must describe what the employer has done and which employees (or class of employees) have suffered. The Court further held the EEOC must try to engage the employer in a discussion in order to give the employer a chance to remedy the allegedly discriminatory practice. However, while the Court held that judicial review of these requirements is appropriate, the scope of that judicial review is "narrow." A court will merely conduct a "barebones review" of the conciliation process and the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Kohl's Dept. Store	U.S. Court of Appeals for the First Circuit No. 14-1268	12/19/14	ADA	2014 U.S. App. LEXIS 24130 **Result:** Pro Employer	**Background:** The charging party worked as a sales associate for Kohl's and has diabetes. Due to a nationwide restructuring, the charging party worked varying shifts in order to work the required number of hours to maintain her full-time status. The charging party claimed that the differing shifts impacted her disability and requested an accommodation of working a predictable shift. During discussions about the shift, the charging party resigned her employment. Kohl's made multiple efforts to encourage the charging party to continue discussions about an accommodation. The EEOC filed a lawsuit on the charging party's behalf, alleging Kohl's failed to reasonably accommodate the charging party. The district court granted Kohl's motion for summary judgment, holding the charging party failed to engage in an interactive process in good faith and a reasonable person in her position would not have resigned. **Issues on Appeal:** Whether the district court erred in granting summary judgment for Kohl's on the EEOC's claim that it refused to provide the charging party with reasonable accommodations in violation of the ADA and whether it constructively discharged the charging party. **EEOC's Position on Appeal:** The EEOC argued that Kohl's, not the charging party, failed to engage in the interactive process. Additionally, the EEOC contends the charging party was constructively discharged due to Kohl's conduct. **Court's Decision:** The First Circuit affirmed the district court's decision. The appellate court held "it is imperative that both the employer and the employee have a duty to engage in good faith." Here, the appellate court found that because the charging party did not cooperate in the interactive process, the employer cannot be held liable under the ADA for a failure to provide reasonable accommodations. Additionally, the appellate court held the EEOC fails to meet the objective "reasonable person" standard on the constructive discharge claim because a reasonable person in the charging party's situation would not have felt compelled to resign.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Sterling Jewelers, Inc.	U.S. Court of Appeals for the Second Circuit No. 14-1782	5/15/14	Title VII	2015 U.S. App. LEXIS 15986 **Result:** Pro EEOC	**Background**: The EEOC brought an enforcement action under Title VII alleging that the company engaged in a nationwide practice of sex-based pay and promotion discrimination. The district court granted the employer summary judgment, holding that the EEOC failed to prove that it satisfied its statutory obligation to conduct a pre-suit investigation. The EEOC appealed. **Issues on Appeal**: Whether the district court erred in granting summary judgment because the district court reviewed the sufficiency of the EEOC's investigation into the charge of discrimination. **EEOC's Position on Appeal**: The EEOC argues the district court is not permitted to review the sufficiency of its investigation into a charge of discrimination but can only review whether there was an investigation. **Court's Decision**: The Second Circuit reversed the district court's decision granting summary judgment for the employer. Specifically, the appellate court held that courts may review whether the EEOC conducted an investigation, but not the sufficiency of an investigation. Because the EEOC had conducted an investigation in this case, the appellate court held it met its pre-suit requirements, so the district court erred in granting summary judgment. The appellate court relied on the U.S. Supreme Court's decision in *Mach Mining* in reaching its conclusion. The Second Circuit denied the company's petition for a rehearing on December 1, 2015.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Allstate Insurance Co.	U.S. Court of Appeals for the Third Circuit No. 14-2700	2/13/15	Title VII, ADA, ADEA	2015 U.S. App. LEXIS 2330 **Result:** Pro Employer	**Background:** Allstate Insurance Company ("Allstate") terminated the at-will employment contracts of approximately 6,200 sales agents. Allstate offered the sales agents the opportunity to work as independent contractors if the sales agents signed a release waiving any existing legal claims against Allstate related to their employment or termination, including claims arising under Title VII, the ADA, and the ADEA. The release did not cover future claims and it did not bar the sales agents from filing charges with the EEOC. The EEOC sued Allstate in the Eastern District of Pennsylvania. The EEOC sought a declaratory judgment invalidating the release on the theory that Allstate had retaliated against the sales agents by making their careers contingent upon waiving any claims of discrimination they may have against Allstate. The district court consolidated the EEOC's lawsuit with those of several former Allstate sales agents. The district court granted summary judgment in favor of Allstate as to the EEOC's retaliation lawsuit. The district court granted partial summary judgment in favor of Allstate as to the claims brought by the sales agents. The EEOC appealed. **Issues on Appeal:** Whether Allstate unlawfully retaliated against the employee sales agents the company terminated. **EEOC's Position on Appeal:** The EEOC argued: (1) The release did not fall under the well-established rule allowing employers to require releases in exchange for post-termination benefits; (2) Allstate retaliated against sales agents by withholding a privilege of their employment—the offer to continue their careers as independent contractors—if they refused to release all their claims against Allstate; and (3) Alternatively, Allstate retaliated against the employee sales agents who refused to sign the release by denying them the opportunity to continue their careers as independent contractors. **Court's Decision:** The Third Circuit affirmed the judgment of the district court. The Third Circuit held: (1) Allstate's release fell under the well-established rule allowing employers to require releases of existing legal claims in exchange for unearned post-termination benefits; and (2) Allstate did not violate the anti-retaliation laws of Title VII, the ADA, and the ADEA by requiring employees to sign releases of their legal claims as a condition of becoming independent contractors.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Freeman	U.S. Court of Appeals for the Fourth Circuit No. 13-2365	2/20/15	Title VII	2015 U.S. App. LEXIS 2592 **Result:** Pro Employer	**Background:** Freeman conducted background checks for applicants. The EEOC alleges this had an unlawful disparate impact on African American and male job applicants. To support its assertion, the EEOC used an expert witness. Freeman moved to exclude the expert's testimony. The district court granted Freeman's motion to exclude the expert witness on the basis that it was "rife with analytical errors" and "completely unreliable." Additionally, the district court granted Freeman's motion for summary judgment that the EEOC had failed to demonstrate its background checks had a disparate impact. **Issues on Appeal:** Whether the district court erred in excluding the expert testimony and in granting Freeman summary judgment on the EEOC's claims. **EEOC's Position on Appeal:** The EEOC contends the expert provided admissible evidence and this evidence precluded an award of summary judgment in favor of Freeman. **Court's Decision:** The Fourth Circuit affirmed the district court's decision. The Fourth Circuit noted the district court did not abuse its discretion in excluding the expert testimony because it identified an alarming number of errors and analytical falsities making it impossible to rely on any of his conclusions. The Fourth Circuit declined to rule on any other issue.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Womble Carlyle Sandridge & Rice	U.S. Court of Appeals for the Fourth Circuit No. 14-1958	6/26/15	ADA	2015 U.S. App. LEXIS 10874 **Result:** Pro Employer	**Background**: The charging party, worked at the law firm Womble Carlyle Sandridge & Rice, LLP ("Womble Carlyle") as a support services assistant, a job that required heavy lifting. Following treatment for breast cancer, charging party was unable to lift heavy objects. Womble Carlyle accommodated charging party for approximately six months by assigning her to light-duty work. After charging party's heavy-lifting restriction became permanent, the firm terminated her employment because the only positions for which she was qualified—receptionist and message center operator—were already filled. Charging party filed charges of discrimination with the EEOC, alleging that Womble Carlyle terminated her in violation of the ADA. The district court granted summary judgment in favor of Womble Carlyle because, at the time the firm terminated the charging party, she could not perform the essential functions of her job with or without reasonable accommodation. **Issues on Appeal**: (1) Whether charging party could perform the essential functions of the support services assistant job; and (2) if she could, whether the EEOC identified a reasonable accommodation that would have enabled charging party to perform the essential functions of the support services assistant job. **EEOC's Position on Appeal**: The EEOC argued that the district court erred in granting summary judgment because charging party could perform the essential functions of the support services assistant position even without reasonable accommodation. Alternatively, the EEOC argued Womble Carlyle could have offered charging party a reasonable accommodation by requiring other support services assistants to assist her in tasks requiring heavy lifting. **Court's Decision**: The Fourth Circuit affirmed the judgment of the district court. The Fourth Circuit held that: (1) the charging party could not perform the essential functions of the support services assistant job; and (2) the EEOC failed to meet its burden of identifying a reasonable accommodation that would allow her to do so.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. LHC Group	U.S. Court of Appeals for the Fifth Circuit No. 13-60703	12/11/14	ADA	2014 U.S. App. LEXIS 23295 **Results:** Mixed	**Background:** The charging party alleges the employer failed to accommodate her disability. The charging party was a Field Nurse for LHC, then was allegedly promoted to Team Leader. She had a seizure at work, returned to work, but began suffering performance issues. Her employment was terminated just over a month afterward, but it was unclear whether she was a Field Nurse or Team Leader when she was discharged. The district court granted summary judgment for LHC. **Issues on Appeal:** Whether LHC failed to accommodate the charging party and whether LHC discriminatorily discharged her on the basis of her disability. **EEOC's Position on Appeal:** The EEOC argued LHC failed to reasonably accommodate the charging party and alleged she was able to perform the essential functions of her job. **Court's Decision:** The court affirmed in part and reversed in part. Regarding disability discrimination, the court clarified the proper *prima facie* test—a plaintiff must prove (1) that she has a disability; (2) that she was qualified for the job; and (3) that she was subject to an adverse employment decision on account of his disability. The EEOC failed to prove that the charging party was qualified for the job as a Field Nurse, because after her seizure she could no longer drive. Driving was an essential function of the Field Nurse position, and the district court opinion was affirmed as to the Field Nurse position. However, the court concluded that as a Team Leader, it was not clear whether driving was an essential function, and even if it was, she could not be reasonably accommodated. The disputed question of which position the charging party actually held was material, and there was a genuine dispute whether her disability was a motivating factor in her discharge. The court reversed and remanded the district court decision regarding the Team Leader position. Concerning EEOC's accommodation claim, the court held it abandoned this claim on appeal and affirmed the decision of the district court.

Case Name	Court and Case Number	Date Filed	Statutes	Basis/Issue/ Result	Commentary
EEOC v. Rite Way Service, Inc.	U.S. Court of Appeals for the 5th Circuit No. 15-60380	8/25/15	Title VII	Retaliation **Result:** Pending	**Background:** The employee worked for Rite Way as a general cleaner at a high school. While there, she allegedly witnessed sexual harassing behavior between her female colleague and former male supervisor. The employee reported it to management as part of Rite Way's investigation. The former supervisor was replaced, than the employee began receiving discipline for alleged performance issues. She was discharged within weeks. EEOC filed suit on the employee's behalf and the district court entered summary judgment on the retaliation claim. **Issues on Appeal:** Whether employee's report to Rite Way is protected opposition under Title VII's anti-retaliation provision. (2) Whether an employee who corroborates allegations of harassment in her employer's investigation must also show that she had an objectively reasonable basis to believe the harassment was unlawful for that report to constitute protected opposition. (3) Whether the record evidence would allow a reasonable jury to conclude that Rite Way's stated reason for firing employee was pretextual. **EEOC's Position on Appeal:** EEOC argues the employee's report to management about sexual harassment between her colleague and former supervisor is protected activity under Title VII's anti-retaliation provision. The district court erred in concluding that the employee would only be protected under Title VII if she can separately demonstrate she had an objectively reasonable belief that the harassing conduct was unlawful, because the Fifth Circuit has not addressed the proper standard for this situation. The EEOC then gave reasons why the court should not adopt the district court's test as the standard. Even if that is the standard, the EEOC claimed the district court erred in holding that the evidence was insufficient to make that showing. Finally, the fact that the employee began receiving discipline only after she reported to management supports her contention that her discharge was due to retaliation for her protected activity, and that the company's reasoning is pretextual. **Court's Decision:** The case is pending.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Ford Motor Co.	U.S. Court of Appeals for the Sixth Circuit No. 12-2484	4/10/15	ADA	2015 U.S. App. LEXIS 5813 **Result:** Pro Employer	**Background**: The EEOC brought suit on behalf of the charging party alleging Ford failed to reasonably accommodate her based on her disability, irritable bowel syndrome. Specifically, the employee requested to work from home on an as-needed basis, up to four days per week. Ford denied her request, deeming regular and predictable on-site attendance essential to her job. The EEOC brought claims alleging Ford failed to reasonably accommodate the charging party by denying her telecommuting request and retaliated against her for bringing the claim to the EEOC. The district court granted summary judgment in favor of Ford on both claims. **Issues on Appeal**: Whether regular and predictable on-site job attendance was an essential function of the position and whether Ford retaliated against the charging party for raising her claim. **EEOC's Position on Appeal**: The EEOC alleged that telecommuting was a reasonable accommodation for charging party. **Court's Decision**: The appellate court affirmed the district court's order and held that regular and predictable on-site job attendance is an essential function of charging party's position. The appellate court further held that this is true of most jobs, especially the interactive ones. The charging party's proposed accommodation removed the essential functions of her job and was unreasonable. The appellate court also affirmed the district court's holding that Ford did not retaliate against the charging party because there was no evidence of pretext.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. New Breed Logistics	U.S. Court of Appeals for the Sixth Circuit No. 13-6250	4/22/15	Title VII	2015 U.S. App. LEXIS 6650 **Result:** Pro EEOC	**Background:** The EEOC brought a sexual harassment and retaliation lawsuit based upon allegations that a supervisor sexually harassed multiple women and retaliated against them when each rejected his advances. A jury found the employer liable and awarded the victims $1.5 million in compensatory and punitive damages. **Issues on Appeal:** (1) Whether the district court properly denied the employer's motions for a new trial on the jury's sexual harassment and retaliation verdicts and the punitive damages award; and (2) Whether the permanent injunction should remain. **EEOC's Position on Appeal:** The EEOC argued that the district court correctly denied each of the employer's motions. It also argued that the permanent injunction granted by the district court should remain intact. **Court's Decision:** In affirming the judgment of the district court, the Sixth Circuit held that the evidence was sufficient to support the jury's verdict and the district court's denial of the employer's post-trial motions. The employer argued that the evidence could not support the retaliation verdict because: (1) none of the employees engaged in protected activity constituting opposition to discrimination or harassment; (2) the relevant decision-makers did not know of any protected activity; and (3) any protected activity was not the but-for cause of the adverse employment action. The court rejected the employer's contention that a complaint to the harassing supervisor is not opposition activity (and Fifth Circuit precedent on this point) and held a demand that a supervisor cease his/her harassing conduct constitutes protected activity covered by Title VII. The court also held that the cat's paw theory of liability applied here because, after being rejected, the harasser disparaged the claimants' work which led to their termination. This was sufficient to establish knowledge and the employer's liability. Additionally, the court determined that the district court did not err when it found evidence sufficient to support causation in this matter. The court also held that the evidence was sufficient to support the jury's punitive damage award and that the employer acted with malice or reckless indifference to whether the claimants were retaliated against. Finally, the court held that the district court did not abuse its discretion in its jury instructions.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. AutoZone, Inc.	U.S. Court of Appeals for the 7th Circuit No. 15-1753	1/4/2016	ADA	2016 U.S. App. LEXIS 13 **Result:** Pro Employer	**Background:** The employee was a parts sales manager at an AutoZone store in Wisconsin. As part of her duties, she was required to help unload merchandise, place merchandise on shelves, and carry merchandise. AutoZone accommodated her lifting restrictions during the employee's two-year recovery period following her injury. At the end of her recovery period, the employee's doctor permanently restricted her from lifting more than 15 pounds with her right arm. AutoZone terminated her one month later because it could not accommodate the employee's permanent restriction. The EEOC sued the employer in the Eastern District of Wisconsin, alleging that the company violated the ADA by failing to make a reasonable accommodation for the employee's disability and illegally terminating her. At trial, the EEOC requested the district court instruct the jury that in a team working environment, "[w]here there is no required manner in which employees are to divide the labor, the fact that one team member may not be able to do all the tasks assigned to the team does not mean that person is unable to perform his or her essential functions." The district court refused to give the proposed instruction. After a five-day jury trial, the jury returned a verdict for AutoZone. The jury found the EEOC did not prove that the employee was a qualified individual with a disability or had a record of disability at the time her employment was terminated. The EEOC moved for a new trial and for judgment as a matter of law on the issue of disability. The district court denied both motions. **Issues on Appeal:** Whether the case should be remanded for a new trial because: (1) the jury instructions did not adequately convey the law and prejudiced the EEOC; and (2) the jury's verdict is against the manifest weight of the evidence. Whether the Seventh Circuit should reverse the district court's denial of judgment was a matter of law on the issue of disability. **EEOC's Position on Appeal:** The EEOC contends the Seventh Circuit should remand the case for a new trial because the district court's failure to give the EEOC's requested jury instruction confused the jury and prejudiced the EEOC. The EEOC argues that in light of evidence showing that AutoZone employees routinely helped each other with heavy lifting, the jury should have been instructed that heavy lifting was not an essential job function for each individual employee. By refusing to give the requested instruction, the EEOC contends the district court provided the jury with an incomplete and misleading statement of the law. The EEOC also argues that even when viewed in the light most favorable to AutoZone, no rational jury could have concluded the employee was not a qualified individual with a disability because another employee, who had a paralyzed arm, was qualified for his job. Finally, the EEOC argues the Seventh Circuit should reverse the denial of judgment as a matter of law on the issue of disability because the company relied on speculation to argue that the employee was not disabled. **Court's Decision:** On January 4, 2016, the Seventh Circuit affirmed the lower court's denial of the EEOC's motion for a new trial. The appellate court agreed that the employee could not perform the essential functions of the job.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. CVS Pharmacy, Inc.	U.S. Court of Appeals for the 7th Circuit No. 14-3653	12/17/2015	Title VII	2015 U.S. Dist. LEXIS 21963 **Result:** Pro Employer	**Background**: The employee was a CVS Pharmacy Manager who was fired in July 2011. She signed a separation agreement, then filed an EEOC charge alleging her discharge was based on her sex and race. The EEOC dismissed her charge, but found that the severance agreement was evidence of a "pattern or practice of resistance to the full enjoyment of rights secured by Title VII." EEOC and CVS engaged in settlement negotiations but no conciliation procedure commenced. EEOC filed a lawsuit. The district court granted summary judgment to the company because it failed to secure a conciliation agreement, a prerequisite to filing suit. The court said "[w]hen there is a reasonable belief that a person or persons has engaged in an unlawful employment practice, the EEOC 'shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, *conciliation*, and persuasion.' 42 U.S.C. § 2000e-5(b) (emphasis added)." **Issues on Appeal**: (1) Whether the district court erred in granting summary judgment and dismissing the case because the EEOC failed to engage in conciliation prior to bringing suit? (2) Whether a reasonable fact-finder could find that CVS's use of a separation agreement that deters or forbids the filing of charges and/or cooperation with the EEOC constitutes a "pattern or practice of resistance to the full enjoyment of … rights secured by" Title VII in violation of Section 707(a)? **EEOC's Position on Appeal**: The EEOC argued that Section 707 of Title VII authorizes it to bring suit without a charge and without following the procedures of Section 706. Section 706 concerns unlawful employment practices and Section 707 concerns pattern or practice charges of discrimination. EEOC argued the Seventh Circuit and other courts recognize that conciliation *must* occur with Section 706 enforcement actions, but *may* occur with Section 707 actions. The EEOC also stated that at least three other federal civil rights laws contain similar provisions that are structured similarly to Title VII—Title II of the Civil Rights Act, 42 U.S.C. §§ 2000a *et seq.*; the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 *et seq.*; and the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997 *et seq.* In all of those statutes, one provision applies to both the government and aggrieved persons, and another solely to the government. The former restricts the plaintiffs to more specific and narrowly drawn claims, but provides for greater and more personalized remedies tailored to the injuries of individual victims. The latter allows only the government greater freedom to protect the statutory rights at issue by targeting broader patterns or practices of resistance, but provides only for such relief as may be necessary to safeguard those rights. **Court's Decision:** On December 17, 2015, the three-judge panel rejected the EEOC's claim that Section 707(a) allows the agency to sue without engaging in conciliation or even alleging that the employer engaged in discrimination. "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII…in one consolidated proceeding." The court held further: "because there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e), we agree with the district court that the EEOC was required to comply with all of the pre-suit procedures contained in Section 706, including conciliation." The court also emphasized that under Section 707(e), the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues "pattern or practice" violations. As significantly, the appellate court on its own elected to clarify a prior Seventh Circuit decision to underscore that the EEOC also cannot proceed in any matter in the absence of a charge, explaining, "The 1972 Amendments [to Title VII] gave the EEOC the power to file pattern or practice suits on its own, but Congress intended the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge."

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Northern Star Hospitality, Inc.	U.S. Court of Appeals for the Seventh Circuit No. 14-1660	1/29/15	Title VII	2015 U.S. App. LEXIS 1465 777 F.3d 898 **Result:** Pro EEOC	**Background:** In this Title VII racial harassment and retaliation action, the EEOC won a jury verdict and obtained monetary and injunctive relief. The defendants appealed the judgment and the determination that they were liable for the relief obtained. **Issues on Appeal:** (1) Whether the district court correctly found that two employer defendants were liable, and that one was properly deemed a successor employer; and (2) Whether the district court acted within its discretion to provide a make-whole relief when it awarded the claimant additional damages to offset the tax consequences of the jury award. **EEOC's Position on Appeal:** On appeal, the EEOC argued the court should affirm the district court's decision and find successor liability in this matter. Additionally, the EEOC argued that the district court has wide discretion to fashion equitable remedies and it did not abuse this discretion in compensating the claimant to offset the tax burden as a result of the lump-sum award. **Court's Decision:** In affirming the district court's entry of judgment on a jury verdict, the Seventh Circuit held that the employer's putative successor was liable as a successor and that the district court did not abuse its discretion by awarding the aggrieved employee an additional sum as a "gross up" to compensate her for the tax burden resulting from a lump-sum award of damages. In its ruling on successor liability, the court of appeals focused on a five-factor test announced by this circuit "for successor liability in the federal employment-law context: (1) whether the successor had notice of the pending lawsuit; (2) whether the predecessor could have provided the relief sought before the sale or dissolution; (3) whether the predecessor could have provided relief after the sale or dissolution; (4) whether the successor can provide the relief sought; and (5) whether there is continuity between the operations and work force of the predecessor and successor." Each of these factors pointed toward a finding of successorship. It held that "[s]uccessor liability is meant for this very scenario …." With respect to the tax component award, the court joined the Third and Tenth Circuits in affirming a "tax component award in the Title VII context…Put simply, without the tax-component award, he will not be made whole, a result that offends Title VII's remedial scheme." The court did note its frustration with the district court's failure to demonstrate how it came to the 15% figure for the tax component award. The court opined that "it would be wise for district courts to show their work if and when they adjudge similar tax-component awards in the future."

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. CRST Van Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 13-3159	12/22/14	Title VII	2014 U.S. App. LEXIS 24130 **Result:** Pro EEOC *However,* on Dec. 4, 2015, the U.S. Supreme Court granted CRST's *writ of certiorari*	**Background:** The EEOC appealed the district court's award of $4,694,442.14 in attorneys' fees, expenses, and costs to CRST following the parties' $50,000 settlement of the only remaining claim, out of 154 individual claims, against CRST. The EEOC had filed a lawsuit on behalf of numerous aggrieved women, but had not investigated the claims of these women prior to filing suit, and instead used the lawsuit to discover these claims. In granting CRST fees and expenses, the district court concluded CRST was the prevailing party on the EEOC's pattern or practice claim, and the claims on which CRST prevailed were frivolous, unreasonable, or groundless. **Issues on Appeal:** Whether the district court properly awarded attorneys' fees, expenses, and costs to CRST. **EEOC's Issue on Appeal:** The EEOC argues it was the prevailing party and the district court erred in concluding that CRST was the prevailing party. The EEOC also claims that dismissal based on failure to satisfy presuit obligations does not equate to a merits-based decision necessary for the court to find CRST to be a prevailing party. Finally, the EEOC also contends that the district court erred in awarding fees because its case was reasonable and grounded in sound legal precedent. **Court's Decision:** The appellate court concluded the EEOC brought claims on behalf of multiple aggrieved women. However, the appellate court held that the EEOC did not bring a pattern or practice claim. Therefore, the appellate court remanded the case to the extent that the district court awarded fees to CRST based on a purported pattern or practice claim. With regard to the claims that were dismissed due to the EEOC's failure to meet its presuit obligations, the appellate court determined that these dismissals were not based on the elements of the underlying claim, so CRST was not the prevailing party as to these claims and not entitled to an award of attorneys' fees. With regard to the district court's holding that the EEOC brought frivolous claims, the appellate court held that the district court did not make particularized findings as to which claims were frivolous and which claims were not frivolous. As a result, the appellate court remanded the case to the district court to identify those claims dismissed because they were frivolous, unreasonable, or groundless. **NOTE:** On December 4, 2015, the U.S. Supreme Court granted CRST's *writ of certiorari*, and will consider whether a dismissal of a Title VII case, based on the EEOC's total failure to satisfy its pre-suit investigation, reasonable cause, and conciliation obligations, can form the basis of an attorney's fee award to the defendant under 42 U.S.C. § 2000e-5(k).

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Bashas' Inc.	U.S. Court of Appeals for the Ninth Circuit No. 12-15238	10/7/14	Title VII	2014 U.S. App. LEXIS 19132 **Result:** Pro Employer Appellate Court Vacated the Appeal	**Background:** This is a subpoena enforcement action stemming from the EEOC's investigation into a charge of discrimination. The district court had ordered the parties to enter a confidentiality order. After the parties had failed to agree on the terms, the district court issued its own confidentiality order. The EEOC argues the district court does not have authority to require a confidentiality order and that the confidentiality order was overly broad. During oral argument, the EEOC took a position that was contrary to its previous position about its ability to disclose information regarding its investigation. Specifically, at oral argument, the EEOC made clear that the EEOC is not permitted to disclose any information during the pendency of a charge of discrimination, including to the charging parties. **Issues on Appeal:** Whether the district court's confidentiality order is warranted, or alternatively, overly broad. **EEOC's Position on Appeal:** The EEOC argues the district court does not have authority to require a confidentiality order and that the confidentiality order was overly broad. **Court's Decision:** As a result of the EEOC's changed position at oral argument, the appellate court vacated the case and remanded it to the district court for reconsideration. The appellate court noted that the EEOC should be bound by its concession in this case, but noted the EEOC would not necessarily be bound to its concession in any other case.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. McLane Co.	U.S. Court of Appeals for the Ninth Circuit No. 13-15126	10/27/2015	Sex Discrimination (Pregnancy)	U.S. App. LEXIS 18702 **Result:** Pro EEOC	**Background:** All new employees and employees returning from leave exceeding 30 days had to take an isokinetic strength test. The charging party in this case was terminated after she took the test three times and failed to receive the minimum score required for her position. During the investigation, the employer disclosed that it used the resistance test at its facilities nationwide for all positions classified as physically demanding. The EEOC ultimately expanded its investigation nationwide for the division in which the charging party was employed and required the pedigree information for all those who had taken the test. For all those who were terminated after taking the test, the EEOC requested the reason for termination. The EEOC issued a request for "pedigree information" (i.e., name, Social Security number, last known address, and telephone number) from multiple company locations. The employer failed or refused to provide such information. The district court concluded that the EEOC did not need to know the pedigree and related information to determine whether the company used the test to discriminate on the basis of sex and refused to enforce the subpoena. The EEOC appealed. **Issues on Appeal:** Whether the EEOC has jurisdiction, when a single charge of discrimination is filed, to obtain company-wide personal contact information as part of its systemic investigation? **EEOC's Position on Appeal:** The lower court committed reversible error in concluding that contact information and other personally identifying information for test takers was irrelevant to the Commission's systemic investigation, and that the Commission does not need to first provide systemic discrimination before being able to obtain such information. **Court's Decision:** The Ninth Circuit reversed and relied on the Supreme Court's decision in *EEOC v. Shell Oil*, 466 U.S. 54 (1968), which upheld the EEOC's right to information as part of a systemic investigation based on the view that the "relevance standard....encompasses 'virtually any material that might cast light on the allegation against the employer.'" Based on requiring the information, "the EEOC will be better able to assess whether use of the test has resulted in a 'pattern or practice' of disparate treatment."

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Peabody Western Group	U.S. Court of Appeals for the Ninth Circuit 12-17780	11/19/14	Title VII, Indian Mineral Leasing Act of 1938	2014 U.S. App. LEXIS 21943 **Result:** Pro Employer	**Background:** The Peabody Western Coal Co. ("Peabody") mines coal on Navajo reservations in Arizona under leases with the Navajo Nation that require Peabody to give preference in employment to Navajo Indians. The Department of the Interior drafted and approved the two leases at issue under the Indian Mineral Leasing Act of 1938. In 2001, the EEOC sued Peabody in the District of Arizona, alleging the hiring preferences constituted national origin discrimination in violation of Title VII. The EEOC further alleged that Peabody violated the record-keeping requirements of Title VII. The EEOC subsequently joined the Navajo Nation, and Peabody impleaded the Secretary and Assistant Secretary of the Department of the Interior. The district court granted summary judgment against the EEOC. The EEOC appealed. **Issues on Appeal:** Whether Title VII's specific prohibition on national origin discrimination extends to political classification. **EEOC's Position on Appeal:** On appeal, the EEOC contends that Title VII prohibits hiring preferences based on tribal affiliation because is impermissible national origin discrimination. **Court's Decision:** The Ninth Circuit affirmed the judgment of the district court. The Ninth Circuit held: (1) the tribal hiring preferences are based on tribal affiliation, which is a political classification; (2) Title VII does not prohibit differential treatment based on this political classification; and (3) the EEOC waived on appeal its record-keeping claim.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Beverage Distributors	U.S. Court of Appeals for the Tenth Circuit No. 14-1012	3/16/15	ADA, 29 C.F.R. § 1630.15(b)(2)	2015 U.S. App. LEXIS 4067; 780 F.3d 1018 **Result:** Pro Employer	**Background:** EEOC sued alleging disability discrimination on behalf of a charging party who was legally blind. His position was eliminated, and he was offered a promotion. He passed the physical exam to attain the promotion, then the employer ("BD") rescinded the offer, stating that it could not accommodate him in the new position. At trial, the jury found that BD was liable for discrimination, the charging party was not a direct threat, and that the charging party failed to mitigate his damages. The jury reduced the back-pay award based on the failure to mitigate damages. Post-trial, EEOC argued BD did not prove that the charging party failed to mitigate his damages, and the court agreed and reinstated the full damages award. EEOC then filed another motion seeking a tax-penalty offset for the lump sum award, and the court granted it. BD appealed. **Issues on Appeal:** Whether the direct threat jury instruction constitutes reversible error, and whether the district court abused its discretion in awarding the tax offset. **EEOC's Position on Appeal:** EEOC argued the direct threat jury instruction accurately reflected the law and the district court did not err in awarding the tax offset. **Court's Decision:** The court held that the direct threat jury instruction was erroneous. The jury instruction required BD to prove that the charging party posed a direct threat. The court determined that BD "should have avoided liability if it had reasonably believed the job would entail a direct threat; proof of an actual threat should have been unnecessary." The second part of the jury instruction did not cure the defect, as it instructed the jury to consider the reasonableness of BD's belief that the charging party posed a direct threat. The court reversed the district court on this issue. The court affirmed the tax offset award, concluding it was within the district court's discretion to compensate the charging party for the added burden of the increase in tax liability. The court declined to reach the mitigation of damages issue, as it was fact-intensive and may change on remand.

Case Name	Court	Date of Court Decision	Statutes	Citation and Result	Commentary
EEOC v. Royal Caribbean Cruises	U.S. Court of Appeals for the Eleventh Circuit No. 13-13519	11/6/14	ADA	2014 U.S. App. LEXIS 21228 771 F.3d 757 **Result:** Pro Employer	**Background:** In June 2010, an individual filed an ADA charge with the EEOC claiming that the employer discriminated against him when it refused to renew his employment contract after he was diagnosed with HIV, even though he was deemed fit for duty. The employer argued that the ADA did not apply to the claimant, a foreign national, who worked on a ship registered under the law of the Bahamas. The employer refused to respond to the EEOC's subpoena and the EEOC sought enforcement with the district court. **Issues on Appeal:** (1) Whether the district court properly denied the EEOC's petition for subpoena enforcement; and (2) Whether the district court properly determined that the employer's compliance with the subpoena would be unduly burdensome. **EEOC's Position on Appeal:** The EEOC argued that the district court should have enforced the subpoena because "[a]n individual charge that challenges a termination is sufficient to justify the expansion of the [EEOC] investigation to determine whether other potential victims and potential statutory violations exist." The EEOC also argued that the employer failed to demonstrate that production of the subpoenaed documentation would threaten to disrupt its business. **Court's Decision:** In affirming the district court's denial of the EEOC's application for the enforcement of an administrative subpoena, the Eleventh Circuit held that the information sought in the subpoena was not relevant to the charge and, even if relevant, that the district court's determination that compliance with the subpoena would be unduly burdensome was not error. In considering whether the information subpoenaed was relevant and whether the subpoena should be enforced, the court noted the EEOC is entitled to evidence which is "relevant to the charge under investigation." The disputed portions of the subpoena were "aimed at discovering members of a potential class of employees or applicants who suffered from a pattern or practice of discrimination, rather than fleshing out [the claimant's] charge." The court held that the EEOC was required to make some showing that the requested information bears on the subject matter of the complaint. The EEOC also held the relevancy standard does not allow the EEOC to expand the investigation to search for discrimination of the same type. "The relevance that is necessary to support a subpoena for the investigation of an individual charge is relevance to the contested issues that must be decided to resolve that charge, not relevance to issues that may be contested when and if future charges are brought by others." With respect to the burdensomeness analysis, the court rejected the EEOC's argument that a party seeking to avoid enforcement of an EEOC administrative subpoena must show that compliance would interfere with its normal business operations. Rather, the court weighed such equitable criteria as reasonableness and oppressiveness and noted that this rubric implies a balancing of hardships and benefits.

Appendix C – Subpoena Enforcement Actions Filed by EEOC in FY 2015[7]

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
10/1/2014	IL	USDC Northern District of Illinois 1:14-cv-7654 Hon. Charles P. Kocoras Magistrate Michael T. Mason Order for Compliance Issued	Help at Home, Inc.	Individual Charging Party	The EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of sexual harassment claims. On April 10, 2014, the EEOC issued a subpoena seeking employee numbers, dates of hire, and last known telephone information for nine employees. On April 21, the employer timely objected and filed a petition to revoke or modify the subpoena, but also provided all the information requested save the employee identification numbers and last known telephone numbers. On July 22, 2014, the EEOC denied the petition to revoke and ordered the employer to produce the above-mentioned employee information. On November 25, 2014, the court ordered employer to supply the EEOC with information necessary to locate the nine employees who were the subject of the subpoena.
10/17/2014	TX	USDC Southern District of Texas 4:14-mc-2461 Hon. Gray H. Miller Order for Compliance Issued with Respect to Six of Eight Subpoenas	Lone Star College System	Individual Charging Party	The EEOC filed an application to show cause why eight administrative subpoenas should not be enforced arising from six investigations alleging sex discrimination and retaliation, disability discrimination, race and national origin discrimination, and age and disability discrimination. On February 2, 2014, the EEOC issued six subpoenas seeking eight witnesses to give testimony and produce documents related to the six charges. On February 20, 2014, the employer timely filed its petitions to review, modify, and/or revoke the subpoenas. Following an October 23, 2014 application for an order to show cause by the EEOC, the employer argued that the EEOC was pursuing its subpoenas in bad faith. Following a hearing on November 17, 2014, the court ordered the employer to comply with six subpoenas and make available the requested witnesses. The court denied the application with respect to two subpoenas.

7 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2015. According to the FY 2015 PAR, the EEOC filed 32 subpoena enforcement actions during this period. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to issuance of a court opinion.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
10/22/2014	IL	USDC Central District of Illinois 4:14:cv-4095 Hon. Sara Darrow Order for Compliance Issued, but Limited Scope of Subpoena	Farmland Foods, Inc.	Individual Charging Party	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of disability discrimination claims alleging improper discharge following a pre-placement medical exam. On August 21, 2013, the EEOC issued a subpoena seeking four years' worth of records identifying all individuals whom, following a pre-placement medical exam, the employer either accepted or rejected for medical reasons, including each individual's: (1) name; (2) address; (3) telephone number(s); (4) position applied for; (5) dates of application; (6) dates of medical examination; (7) reasons for rejection; (8) name and job title for decision-maker. The EEOC further requested all "notes or communications" related to the applications of such individuals. On September 3, 2013, the employer timely objected and filed a motion to revoke the subpoena. On May 9, 2014, the EEOC denied the employer's motion. On December 12, 2014, the court granted the application to show cause, but limited the scope of the production to a six-month period.
10/25/2014	TX	USDC Southern District of Texas 4:14-mc-2522 Hon. Gray H. Miller Order for Compliance Issued	Vitran Express	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena should not be enforced from an investigation of wrongful discharge claims. On January 17, 2014, the EEOC issued a subpoena seeking documents related to employee's discharge following a vehicular accident. The employer timely objected to the subpoena, and in response, the EEOC modified the subpoena request. On November 13, 2014, the court ordered the employer to respond to the EEOC's application. On December 8, 2014, the employer provided the documents requested by the EEOC.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
12/17/2014	AZ	USDC Arizona – Phoenix 2:14-mc-93 Hon. Neil V Wake Court Denied EEOC's Application to Show Cause	Cleveland Estes Avellone, PLLC	Individual Charging Party	EEOC filed an application to show cause why two administrative subpoenas should not be enforced arising from investigations of sexual harassment claims and race-based discrimination. On April 18, 2014, the EEOC issued two subpoenas. The EEOC reissued the second subpoena on May 12, 2014. In one subpoena, the EEOC sought: (1) an employee list with biographical information from June 2011 – December 2013; (2) employer's organizational structure; (3) employer's legal status; (4) all written policies re: discrimination and harassment, including discipline; (5) complaint procedures; (6) survey forms conducted re: harassment; and (7) employee complaints of sexual harassment. The EEOC further sought: (1) personnel files for all accountant employees from August 2009 through December 2013, including pay records; (2) personnel files for all the employer's managers from August 2009 through December 2013, including pay records; (3) personnel files for three specific employees; (4) information re: employee expense reimbursement; (5) the employer's criteria for determining employee wages/salary; and (6) any records, including payroll records, that would support pay differentials between employees. The employer requested the EEOC withdraw the subpoenas and on May 28, 2014 objected to the subpoenas. On February 26, 2015, the court ordered the EEOC to conduct on-site interviews, which the employer had offered to do, as an appropriate means for obtaining the information requested in the subpoenas. The court ordered the employer to provide contact information for an employee identified as similarly situated to the Claimants in the EEOC complaint, but otherwise denied the application as either mooted by the non-existence of requested documents or over overbroad.
1/12/2015	AZ	USDC Arizona - Phoenix 2:15-mc-3 Hon. Douglas L Rayes Court Granted Motion to Dismiss Based on Substantial Compliance	Arizona Discount Movers, LLC	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of race-based discrimination. On June 30, 2014, the EEOC issued a subpoena. However, it subsequently rescinded the subpoena based on administrative errors. On October 1, 2014, the EEOC issued a new subpoena wherein it sought: (1) video recordings taken by the employer of employee meetings between May 10 and May 30, 2014; (2) sign-in sheets for these meetings; (3) the employer's employee handbook; (4) anti-harassment policy; (5) attendance policy and process for requesting leave; (6) all formal/informal complaints lodged against a specific manager; (7) sign-in sheet for any training on Title VII issues from January 2012 to the present; (8) employee assignment sheets; (9) employee time-off requests; and (10) an employee list identifying name, race/ethnicity, job title, hire/fire date, date of birth, phone number and address. On March 4, 2015, the court granted the EEOC's motion to dismiss the matter based on the employer's substantial compliance with the subpoena.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/13/2015	IL	USDC Northern District of Illinois 1:15-cv-275 Hon. Milton I. Shadur Magistrate Susan E. Cox Order for Compliance Issued	Aerotek, Inc.	Systemic Investigation	EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of age-based discrimination. On October 15, 2014, the EEOC issued a subpoena seeking data from January 1, 2009 through March 4, 2014, regarding individuals assigned by the employer to its clients in 62 nationwide facilities, including: (1) names; (2) dates of birth; (3) contact information; and (4) client contact information. The employer refused to produce names, ages, or contact information of employees or client contact information; rather it produced the information using unique identifying codes and employee numbers. At a hearing on February 18, 2015, the court granted the EEOC's petition and directed the employer to comply fully with the EEOC's subpoena.
1/14/2015	OH	USDC Northern District of Ohio 1:15-mc-6 Patricia A. Gaughan Stipulated Dismissal (Voluntary Compliance by Employer)	Mercy Health – Regional Medical Center, LLC	Individual Charging Party	EEOC filed an application to show cause why the administrative subpoena in an EEOC investigation of an individual's charges of disability discrimination and violation of the ADA should not be enforced. On February 26, 2013, the EEOC issued a subpoena seeking: (1) information relating to all employees who had been terminated pursuant to the employer's maximum leave policy; (2) documents relating to deviations from the maximum leave policy; and (3) documents relating to exceptions provided to employees who exhausted the employer's maximum leave policy. The employer did not provide complete records and redacted substantial information in the documents. On January 14, 2015, the EEOC submitted an Application for an Order to Show Cause. On February 4, 2015, the court issued an Order to Show Cause, ordering the employer to appear on March 9, 2015 and show why it should not be compelled to comply. On March 4, 2015, before the hearing on the OSC, the EEOC and the employer filed a Joint Proposed Stipulation in which the employer agreed to comply with the investigative subpoena.
2/12/2015	IL	USDC Northern District of Illinois 1:15-cv-1356 Ronald A. Guzman (Magistrate: Jeffrey Cole) The Parties Agreed to Limit the Subpoena and the Court Issued an Ordered Memorializing the Agreement	The Agency Staffing; PeopleLink, LLC	Systemic Investigation	EEOC filed an application to show cause why the administrative subpoena in an EEOC investigation of claims of sex and race discrimination—specifically, the employer's alleged failure to hire females for certain positions, males for certain positions, and African American applicants for certain positions—should not be enforced. On June 13, 2013, the EEOC issued a subpoena seeking, among other things: (1) job placement data, (2) applicant notes to other applicants placed within a specific company, and (3) customer notes. The employer refused to provide the information. On February 12, 2015, the EEOC submitted an application for order to show cause. On June 25, 2015, the parties agreed to, and the court ordered, the following: (1) the request for job placement data would be withdrawn, (2) the request for applicant notes would be limited, and (3) the customer notes would be produced.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
2/26/2015	WI	USDC Eastern District of Wisconsin 2:15-mc-7 Rudolph T Randa Order for Compliance Issued	V&J Foods Inc. dba Burger King	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena seeking documents relating to an EEOC investigation of a charging party's claim of disability discrimination under the ADA should not be enforced. On July 9, 2014, the EEOC served a subpoena seeking a variety of files, including, most prominently, the charging party's complete personnel file. It also sought all communications, of any kind, including telephone records, personnel records, performance reviews, leave records, attendance records, return-to-work records, work assignment records, calendars or schedules, kept by the charging party's supervisors, the Human Resources Department, or any other managers. On August 8 and 15, 2014, the employer produced some of the documents and did not provide a complete statement of compliance. Unsatisfied, on February 26, 2015, the EEOC filed an Application for an Order to Show Cause Why Subpoena Should Not Be Enforced. On July 7, 2015, the court granted the application, requiring the employer to produce all the requested information, including valid and unambiguous statements of compliance.
3/4/2015	IL	USDC Northern District of Illinois 1:15-cv-01924 James B. Zagel Pending	Rich Township High School District 227	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena seeking documents relating to an EEOC investigation of a charging party's claim of discriminatory hiring based upon national origin should not be enforced. The charging party alleged she had applied for five different jobs and was passed over for each job in favor of non-Hispanic candidates. On October 7, 2014, the EEOC issued a subpoena seeking hiring information between August 1, 2012 and August 1, 2014. The employer complied with the subpoena except as to the following requests, to which it objected: (1) description of its selection process, (2) provision of an electronic database of all positions the charging party applied to at any time during the relevant period, (3) provision of an electronic database identifying all vacancies at the employer during the time period, (4) provision of job postings for any vacancies during the time period, and (5) provision of an electronic database identifying all of the employer's employees during the relevant time period. On March 4, 2015, the EEOC filed an application for order to show cause. The court has not yet ruled.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/10/2015	CA	USDC Central District of California 2:15-mc-55 John F. Walter (Magistrate: Alka Sagar) Voluntarily Dismissed upon Employer Compliance	Western Express, Inc.	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena seeking documents relating to an EEOC investigation of a charging party's claim of discrimination and retaliation in violation of the ADA should not be enforced. Specifically, the charging party alleges that he was mocked and ridiculed by coworkers because of his disability and the employer failed to take any action when notified of the mistreatment. The charging party further alleges that he was terminated for filing a discrimination charge with the EEOC. On August 7, 2014, the EEOC served the employer with a subpoena seeking information and various documents relating to the charging party's claims. In October, 2014, the employer untimely produced some responsive documents and provided objections to various requests. The EEOC alleges that the employer failed to provide the following information: (1) documents relating to the charging party's workers' compensation claim and reasons for termination, (2) documents of all investigations conducted of charging party's complaints, (3) all complaints alleging discrimination, harassment, or denial of accommodation filed by the employer's employees at the same job site as the charging party, (4) documents relating to job-related and contact information pertaining to all of the employer's employees at the same job site as charging party, and (5) personnel files for managers involved in the charging party's claims. The employer complied substantially with the subpoena when the EEOC initiated action in federal court. On May 29, 2015, the court held a hearing and ordered the respondent employer to further comply by submitting an additional declaration. The employer complied, and the EEOC voluntarily dismissed the action.
3/25/2015	MD	USDC Maryland 1:15-cv-869 George Levi Russell, III Court Denied EEOC's Application to Show Cause	Maritime Autowash Inc.	Individual Charging Party	EEOC filed an application to show cause why an administrative subpoena seeking documents relating to an EEOC investigation of a charging party's claim of national origin discrimination and retaliation for complaining about a supervisor's behavior should not be enforced. On July 10, 2014, the EEOC served the employer with a subpoena seeking the following information/documents relating to the charging party's complaint: (1) a complete list of employees employed during the relevant time period, (2) personnel file for each individual who held the same position as the charging party, (3) wage records for each individual who held the same position as the charging party, and (4) time records for each individual who held the same position as the charging party. The employer did not provide the subpoenaed information; therefore, on March 26, 2015, the EEOC filed an Application for an Order to Show Cause Why Administrative Subpoena Should Not Be Enforced. On April 9, 2015, the employer responded that the charging party lacks standing to pursue his claims under Title VII, because he was not legally authorized to work in the United States at the time of the alleged discrimination. As a result, the employer argued, the EEOC's application must be dismissed. On June 23, 2015, the court denied the EEOC's application on the grounds that the charging party lacks recourse through Title VII because of his undocumented status.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/30/2015	CA	USDC Central District of California 2:15-mc-105 Dolly M. Gee (Magistrate: Michael R. Wilner) The Parties Agreed to Limit/ Modify the Subpoena and the Court Issued an Ordered Memorializing the Agreement	Intercoast Colleges	Individual Charging Parties	EEOC filed an application to show cause why the administrative subpoena seeking documents relating to charging parties' charge of sexual harassment and retaliation should be not be enforced. On February 10, 2015, the EEOC served the employer with an administrative subpoena seeking information and documents relating to the charging parties' claims, including personnel records, payroll records, records of similarly situated employees, benefits records, sexual harassment training records, and other similar records. The EEOC was not satisfied with the employer's "incomplete" response; therefore, it filed an Application to Show Cause on March 30, 2015. After filing of the application, the employer provided a further response and production, which left the following remaining categories in dispute: (1) documentation reflecting all training provided to management and non-management employees on sexual harassment during the relevant time period and (2) all health insurance benefit information for all employees who held positions similar to those of the charging parties during the relevant time period. On May 15, 2015, during the Order to Show Cause hearing, the court provided the parties time to discuss resolution over the remaining areas of dispute. During a brief recess, the parties came to an agreement on the remaining areas as follows: (1) the employer would provide documents relating to the sexual harassment training, information identifying the locations at which the alleged harasser worked, and documents reflecting attendance at the sexual harassment trainings; and (2) the employer would provide its policy related to the provision of health benefits to individuals holding the same position as the charging parties, identify all such individuals who did and did not receive benefits, and explain why charging parties were not offered benefits. On May 19, 2015, the court signed an order consistent with the parties' agreement. On June 10, 2015, the EEOC certified that the employer complied with the court's May 19, 2015 order.
6/16/2015	FL	USDC Southern District of Florida 1:15cv22267 Jose E. Martinez Pending	Subway 5998 Corporation	Systemic Investigation	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of sex discrimination and harassment claims. On January 13, 2015, the EEOC issued a document request seeking the identity of all stores where any of the charged employer/owners have an ownership interest or management responsibilities, documents demonstrating organizational and corporate structure for such stores, operating agreements for each store, purchase orders for food supplies, contracts/ agreements for food supplies, any third-party payroll service providers, employee handbooks and employee policies, accounting procedures/policies, evidence of workers' compensation insurance, employee histories/ promotions/resignations/movement, and franchise agreement. On February 9, 2015, the employer refused to provide the requested documents. On April 22, 2015, the EEOC issued an administrative subpoena seeking the aforementioned documents. The employer objected to the subpoena. On June 16, 2015, the EEOC filed an application for order to show cause. On November 3, 2015, the employer filed a motion seeking an extension of time to file its response to the application.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
7/20/2015	IL	USDC Northern District of Illinois 1:15cv6304 John J. Tharp Order for Compliance Issued	Ulta Salon, Cosmetics & Fragrance, Inc.	Individual Charging Party	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of disability discrimination. On June 10, 2014, the EEOC issued a subpoena seeking job descriptions and information relating to reasonable accommodations and leaves of absences taken by other employees. The employer objected to the subpoena, and the EEOC denied the employer's petition to revoke. On July 20, 2015, the EEOC filed an application for an order to show cause. The employer responded that it had substantially complied with the subpoenas, and that the EEOC sought information not relevant to its investigation. On October 29, 2015, the court granted the EEOC's application and ordered the employer to comply fully with the subpoena within 14 days.
8/3/2015	IL	USDC Northern District of Illinois 1:15cv6761 John J. Tharp Order for Compliance Issued	CRGE Illinois dba Toby Keith's I Love This Bar & Grill	Individual Charging Party	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of race discrimination. On May 21, 2015, the EEOC issued three subpoenas requiring the production of documents and testimony pertaining to the employer's corporate structures, hiring and personnel policies and practices, and certain data related to applicants and employees. The requested testimony and information was to be provided by June 5, 2015, but the employer failed to comply. On September 17, 2015, the court granted the EEOC's application and ordered the employer to comply fully with the document subpoena within two weeks and the subpoenas requesting testimony within approximately 30 days.
8/4/2015	KY	USDC Eastern District of Kentucky 3:15cv53 Gregory Van Tatenhove Pending	Nucor Steel Gallatin Inc.	Individual Charging Party	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of disability discrimination. On April 27, 2015, the EEOC issued a subpoena returnable May 7, 2015 to require it to have access to the employer's site to conduct witness interviews, examine the facility, and examine documents pertaining to the occupation relevant to the EEOC charge. The employer submitted a petition to revoke or modify the subpoena, which the EEOC denied. On August 4, 2015, the EEOC filed its application to show cause why the subpoena should not be enforced, and the court scheduled the show cause hearing for January 6, 2016.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
8/17/2015	AZ	USDC Arizona 2:15mc56 Steven P. Logan Order for Compliance Issued	Francisco's Fine Foods	Individual Charging Parties	EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from investigations of sex discrimination/harassment. On May 8, 2015, the EEOC issued a subpoena asking an employee to testify under oath as part of the EEOC's investigation of four charges of unlawful employment practices. Neither the employee nor the employer filed a petition to revoke or modify the subpoena, but neither complied with the subpoena. The employer filed a "Notice of Non-Opposition," and claimed that the subpoena applied only to the employee, not the employer. On October 7, 2015, the court ordered employer and employee to appear at the Show Cause Hearing. The court held a conference on October 14, 2015, attended by the employer, the employee whose testimony was sought, and a representative for the EEOC. The court found the respondents failed to exhaust their administrative remedies and, thereby, waived the right to object to the administrative subpoenas. Thus, the court ordered the respondents to comply with the subpoenas.

Appendix D - FY 2015 Select EEOC-Related Dispositive Decisions by Claim Type(s)[8]

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Americans with Disabilities Act (ADA) Failure to Accommodate	Audrain Health Care, Inc., d/b/a Audrain Medical Center	U.S. District Court for the Eastern District of Missouri Case No. 2:12-cv-73 (HEA)	2015 U.S. Dist. LEXIS 71582 (E.D. Mo. June 3, 2015)	Cross Motions for Summary Judgment **Result:** Cross motions were denied	Could the employee perform the essential functions of her job with or without an accommodation?	Both cross motions for summary judgment were denied. The parties disagreed on whether the employee could perform the essential functions of her job with or without an accommodation. The court stated that in order to set forth a claim that one could not perform the essential functions of the job without an accommodation, the claimant need only make a facial showing that a reasonable accommodation is possible. The burden then falls to the employer to produce evidence showing that it is unable to accommodate the employee. Then the plaintiff can rebut with evidence demonstrating individual capabilities. The court determined that issues of fact remained as to whether the employee requested reasonable accommodation, whether the proposed accommodations were reasonable, and whether the employer participated in the interactive process.

8 The summary contained in Appendix D reviews select reported court opinions ruling on dispositive motions in litigation where the EEOC is a party. For purposes of this appendix, opinions are organized alphabetically by claim type(s).

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
ADA Disability Discrimination	Aurora Health Care, Inc.	U.S. District Court for the Eastern District of Wisconsin Case No. 12-cv-984-JPS	2015 U.S. Dist. LEXIS 63321 (E.D. Wis. May 14, 2015)	Cross Motions for Summary Judgment **Result:** The court denied the employer's motion for summary judgment on three of the four claims of discrimination asserted by the EEOC, but granted one motion.	Whether the employer is entitled to summary judgment against the complainant's claim of disability discrimination under the ADA?	The EEOC filed a lawsuit on behalf of the complainant, a nurse who was seeking employment from the defendant, an operator of home care and hospice services. The claimant alleged the defendant unlawfully withdrew its job offer on account of the complainant's medical condition (multiple sclerosis, or MS). The EEOC and the defendant cross moved for summary judgment on the EEOC's four claims of (1) discrimination in violation of the ADA; (2) violation of complainant's confidentiality in violation of the ADA; (3) violation of the ADA for making an additional medical inquiry; and (4) violation of the ADA based on the defendant's qualification standard. The court denied the defendant's motion for summary judgment on the discrimination claim, finding a causal nexus could be inferred based on the temporal proximity between the adverse employment action and when the defendant learned of the complainant's disability. The court also denied summary judgment to both parties on the confidentiality claim, finding there existed a triable issue of material fact. The court denied the defendant summary judgment on the qualification standard claim, finding the defendant did not meet its burden to show that a standard was consistent with business necessity. Lastly, the court granted summary judgment in favor of the defendant for the additional medical inquiry claim because the EEOC had not produced enough evidence for a jury to reasonably find for the EEOC.

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ADA Disability Discrimination	BNSF Railway Company	U.S. District Court for the District of Kansas No. 12-2634	2015 U.S. Dist. LEXIS 110830 (D. Kan. Aug. 21, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted	Did a job applicant's hand impairment constitute a disability that substantially limited one or more major life activities? Did the employer regard a job applicant who had a major impairment to his hand as disabled? Did the employer fail to engage in the interactive process by not giving a job applicant a list of the essential functions of the job during the application process?	The court ruled that despite a major impairment to a job applicant's right hand, he did not suffer an actual disability under the ADA because the applicant had learned to work around his impairment and was not substantially limited from performing major life activities. The EEOC was unable to show that the defendant regarded the applicant as disabled because the defendant's perception that the applicant could not grip with one hand did not translate to a perception that the applicant could not perform tasks that are central to most people's lives. Also, the court rejected the EEOC's argument that the defendant's perception that the applicant could not firmly grip tools or climb ladders within a three-point safety rule constituted a belief that the applicant would be precluded from a class of jobs and a broad range of jobs in various classes. The court held that summary judgment for the defendant was warranted on the failure to engage in the interactive process claim because the applicant was not disabled under the ADA. Even if he was disabled, the applicant's request for a list of essential job functions is not an accommodation. "Nothing in the ADA or its implementing regulations requires an employer, at the applicant's request, to permit the applicant to demonstrate how he or she will be able to perform job-related functions."

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ADA Disability Discrimination	Celadon Trucking Services	U.S. District Court for the Southern District of Indiana No. 1:12-cv-275	2015 U.S. Dist. LEXIS 84639 (S.D. Ind. June 30, 2015)	Cross Motions for Summary Judgment **Result:** Both parties' motions were granted in part and denied in part.	Did the medically related questions on the employer's employment application violate the ADA's prohibition on pre-employment disability-related inquiries? Do medical examinations conducted prior to a conditional offer of employment violate the ADA? Does an individual have to be "qualified" for the job to enjoy the ADA's prohibition on pre-employment disability-related inquiries? Are the EEOC's failure-to-hire claims precluded by the fact that the job applicants did not exhaust the Department of Transportation's process for contesting medical certifications?	The court rejected the defendant's contention that the medical questions on its employment application were job-related. While the court noted that the defendant employed long-haul truck drivers who must pass a Department of Transportation ("DOT") physical, it held that one of the questions on the defendant's employment application was so broad that it inquired into medical conditions outside the scope of conditions identified by the DOT as inappropriate for long-haul truck drivers. This broad question ran afoul of the ADA's prohibition on using pre-hire inquiries as a broad-based device for screening potential disabilities. The court held that the ADA prohibits pre-offer medical examinations entirely. The court cited to cases holding that even where an employer is required to ensure that long-haul truck drivers meet certain DOT medical requirements, the law is clear that such medical examinations are to be conducted only after a conditional offer of employment is made. The court rejected the defendant's argument that in order to be a qualified individual under the ADA in the context of a pattern or practice claim, the individual would have to be medically eligible to receive a DOT-approved certification. The court held that employers may not require any job applicants, qualified or not, to submit to medical inquiries or examinations prior to extending at least a conditional offer of employment. In contrast, outside the context of a pattern or practice claim, the EEOC has to prove that an individual is qualified under the ADA for purposes of a failure to hire claim. Here, that meant proving that the individual must be DOT certified or able to obtain DOT certification. The process for contesting DOT certifications applies only where there are multiple certifications involved. Here, the applicants were not given the opportunity to get certified in the first place, therefore, the DOT exhaustion requirement is not applicable.

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ADA Disability Discrimination	Chipotle Mexican Grill	U.S. District Court for the District of Massachusetts Case No. 13-11503-FDS	2015 U.S. Dist. LEXIS 42187 (D. Mass. Mar. 30, 2015)	Employer's motion for Summary Judgment **Result:** Employer's motion denied	Whether the employer is entitled to summary judgment against the complainant's claim of disability discrimination?	This was an action brought by the EEOC on behalf of a former employee of the defendant, in which the EEOC alleged that the defendant terminated the complainant due to her disability (cystic fibrosis) in violation of the ADA. The defendant contended the claimant was fired for a legitimate, nondiscriminatory reason, *i.e.*, that she was seen on video treating a customer disrespectfully. Defendant moved for summary judgment on the ground that the EEOC had presented no direct or indirect evidence of discrimination. The EEOC cross-moved for sanctions, contending that the defendant's failure to preserve the video footage constitutes spoliation of evidence. The court denied both motions. As to the defendant's motion, the court found that the EEOC has "'adduced minimally sufficient evidence to permit a reasonable factfinder to conclude' that [Complainant] was terminated due to her disability." The EEOC pointed to (1) evidence of an allegedly "disgusted" facial expression in response to seeing the complainant's bandage; (2) the timing of events that led to the complainant's termination; and (3) the "shifting explanations" for the termination decision. As for the spoliation issue, the court found that "the EEOC has not met its burden to demonstrate that the destruction occurred 'at a time when the party was on notice that the evidence might be relevant to potential litigation.'"

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ADA Failure to Accommodate	Detroit Community Health	U.S. District Court for the Eastern District of Michigan 13-12801	2014 U.S. Dist. LEXIS 165904 (E.D. Mich. Nov. 26, 2014)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted	Whether the employer is entitled to summary judgment?	The claimant, a medical biller, took time off throughout her three years of employment to tend to her rheumatoid arthritis but did not tell leadership what she was taking time off for. Due to financial problems, the employer decided to lay off the claimant on the morning of March 19, 2012. Later that day (before she received notice of her termination), the claimant sent a letter to a non-decision-maker that included a letter from her doctor stating the claimant had been examined and needed to be off work until April 1, 2012. The decision-makers sent the claimant a letter dated March 20, 2012 terminating her employment. The court granted summary judgment on the failure-to-accommodate claim because there was no evidence that the employer was aware of the claimant's disability or need for an accommodation. The court also granted summary judgment on the disability discrimination claim because the EEOC failed to establish pretext to rebut the employer's legitimate, non-discriminatory business reason for terminating the claimant (*i.e.*, a layoff for financial reasons). The EEOC failed to establish pretext because there was no evidence that the termination decision-maker was aware of the claimant's disability or need for leave. Given that the court had previously granted the employer's summary judgment motion with respect to the constructive discharge claim, the court found there was no issue of material fact with respect to whether the claimant failed to mitigate her damages by voluntarily resigning from her employment. Drawing all inferences in favor of the claimant, the court found that no reasonable jury could conclude that the claimant faced circumstances that absolved her of her duty to mitigate damages by continuing to work for the employer. Thus, the court granted the employer's motion for summary judgment on the EEOC's claims of post-resignation back pay.

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ADA Disability Discrimination Reasonable Accommodation	Kyklos Bearings International, LLC	U.S. District Court for the Northern District of Ohio, Western Division	2015 U.S. Dist. LEXIS 30037 (N.D. Ohio, Mar. 11, 2015)	Employer's Motion for Summary Judgment Related to the Merits of Claimant's Perceived Disability Claim Third-Party Defendant UAW Local 913's Motion For Summary Judgment **Result:** Both motions denied	Whether the employer is entitled to summary judgment, in which employer contends that claimant was unable to perform essential functions of her job, and that the employer tried in good faith to accommodate claimant's disability, but was unable to do so? Whether third-party defendant UAW Local 913's is entitled to summary judgment?	The EEOC filed suit against the employer alleging it wrongly perceived claimant to be disabled in violation of the ADA. Claimant was told to see the company doctor after she was unable to manually move overloaded carts. The company doctor diagnosed claimant with lymphedema and imposed a permanent seven-pound limit on lifting, although claimant denied any symptoms of lymphedema. Claimant's personal oncologist examined her and cleared her for work without restriction. The employer did not accept this clearance and terminated claimant's employment after being unable to accommodate her with the seven-pound lifting restriction. The court held that a rational jury could find that the company doctor's imposed restriction for claimant was unsupported by concrete medical findings and at odds with objective evidence. The court noted that the employer missed the mark when framing the legal issue as an inability to accommodate a disability. The court denied both motions for summary judgment.

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ADA Failure to Accommodate Retaliation	Orion Energy Systems, Inc.	U.S. District Court for the Eastern District of Wisconsin Case No. 14-CV-619	2015 U.S. Dist. LEXIS 86428 (E.D. Wis. July 2, 2015)	Employer's Motion for Partial Summary Judgment of the Failure-to-Accommodate Claim **Result:** Employer's motion denied	Whether the employer is entitled to summary judgment on the failure to accommodate claim?	The EEOC sued the employer alleging discrimination based on a disability. Specifically, the EEOC alleged the employer failed to provide a reasonable accommodation for the claimant, who had predominantly used a wheelchair for mobility since October 2009. The EEOC also alleged the claimant was discharged in January 2010 because of his disability, in retaliation for his accommodation request. After claimant's medical condition became known, claimant was transferred from the IT bullpen (where employees were required to use stairs) to the Tech Center (where two elevators were accessible). In addition, the claimant requested the ability to work from home part-time and requested power-assisted doors to be installed in the building and bathrooms. At the time of the request, there was limited information known about claimant's condition (even by claimant), and so the employer decided to approve the flexible schedule but took a "wait-and-see approach" with the automated door request to see if claimant's medical condition improved. Claimant was instead expected to have whoever drove him to work open the building door for him, or he was supposed to use his company cell phone to call another employee to open the door for him. Claimant testified that he never called anyone for assistance because he "figured everyone was busy." The claimant filed a failure-to-accommodate claim. Such a claim under the ADA requires a *prima facie* showing that (1) the individual is a qualified individual with a disability; (2) the employer was aware of the disability; and (3) the employer failed to reasonably accommodate the disability. *Cloe v. City of Indianapolis,* 712 F.3d 1171, 1176 (7th Cir. 2013).

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						The company sought dismissal of the failure-to-accommodate claim, but not the claims arising out of the alleged discharge because of disability or retaliation. The court, however, denied the employer's motion for partial summary judgment. First, the court reasoned that the fact the employer did not know whether claimant's disability was permanent or temporary did not mean the employer was unaware of the disability. Second, it was immaterial that the employer did not know the precise nature of claimant's disability. Finally, the court held that whether the employer's delay in providing an accommodation was reasonable is a jury question. EEOC's motion to seal (ECF No. 23) was granted because the materials contain personal, confidential information regarding claimant's medical condition.
ADA Failure to Accommodate Disparate Treatment	St. Alexius Medical Center	U.S. District Court for the Northern District of Illinois Case No. 12 C 7646	2014 U.S. Dist. LEXIS 142138 (N.D. Ill. Oct. 6, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion denied	Whether the employer is entitled to summary judgment against the complainant's claim of disability discrimination?	The EEOC filed suit against the defendant, a medical center, alleging it violated the ADA by failing to accommodate the complainant's disability and also by terminating her from her greeter position because of her disability (moyamoya disease). The court denied the defendant's motion for summary judgment. The court found that a reasonable fact-finder could conclude that the complainant's disability could have been accommodated by transferring her to another open position. The court further concluded that the EEOC had "adduced barely enough evidence to satisfy its burden under the direct method" of proving discrimination. The EEOC presented evidence that the complainant was not provided with written instructions that were provided to all other greeters and "more significantly" the defendant's employee said "she felt that she had been tricked because nobody had told her that the complainant had a disability before [she] hired [Complainant]."

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ADA Reasonable Accommodation	St. Joseph's Hospital, Inc.	U.S. District Court for the Middle District of Florida, Tampa Division Case No: 8:13-cv-2723-T-30TGW	2015 U.S. Dist. LEXIS 19272 (M.D. Fla., Feb. 18, 2015)	Cross Motions for Summary Judgment **Result:** Both parties' motions granted in part, denied in part	Whether a nurse who used a cane in a psychiatric unit was a qualified individual with a disability entitled to a reasonable accommodation; if so, would the continued use of a cane or transfer to another position be a reasonable accommodation?	Nineteen years after being hired, a clinical care nurse underwent hip replacement surgery. After surgery, the nurse needed a cane to walk. Two years after surgery, she was demoted for allowing patients to sleep in the hallway during staff shortages. The position to which she was demoted required her to move around and interact with patients more often. Because of the emotionally unstable nature of the patients, the hospital determined it was not safe for the nurse to work around them with a cane, as it could be used as a weapon. She was told to find another position, or be terminated. She applied for seven positions, but was not hired for any of them, and was ultimately fired. The EEOC sued on her behalf, alleging her "gait dysfunction" or "stenosis" and obesity rendered her disabled under the Americans with Disabilities Act, and that the hospital should have permitted her to continue using her cane. The EEOC claimed she was able to perform all of her work duties while using the cane and never had an incident where a patient attempted to grab her cane. The hospital contended she never informed the hospital of any disability; she did not have a disability because her gait dysfunction did not qualify as a physical impairment that substantially limits one or more of her major life activities; she never requested an accommodation; and even if disabled, she failed to show how the use of a can is reasonable given the safety risk it posted. The court granted both parties' motions in part. The court held that the nurse was disabled for purposes of the ADA, and may have been entitled to a reasonable accommodation. The claimant's doctor's identification of a "gait dysfunction" "is sufficient to establish that [the claimant] was a disabled person at the time of her termination." Citing *Harty v. City of Sanford*, 26 A.D. Cases 1207 (M.D. Fla. 2012), the court noted "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis."

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						The court sided with the hospital, however, on the issue of whether she was qualified to perform her job functions as a nurse in the hospital's behavioral health unit. " The EEOC has not demonstrated that [the claimant] could use the cane safely . . . The Hospital does not have an obligation to eliminate or reallocate an essential job function to accommodate a disabled employee." Thus, the court agreed the use of a cane would not be a reasonable accommodation, but found that it was up to a jury to determine whether it could have placed her in one of the positions for which she applied as a reasonable accommodation.

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ADA Disability Discrimination	The Pines of Clarkston	U.S. District Court for the Eastern District of Michigan No. 13-CV-14076	2015 U.S. Dist. LEXIS 55926 (E.D. Mich. April 29, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion denied	Is the defendant an employer under the ADA where it admitted in its answer that it employed at least 15 employees, but later stated in discovery responses that it employed less than 15 employees? Was there a fact issue with respect to the defendant's defense that its reason for terminating an employee who disclosed her epilepsy upon failing a new hire drug test for medical marijuana use was legitimate and non-discriminatory?	The court found that the defendant was bound by the judicial admissions it made in its responsive pleadings that it employed at least 15 employees and was an employer within the meaning of the ADA. Even though the defendant took a different position in discovery, the court held that judicial admissions are meant to streamline discovery and plaintiff relied on the defendant's admissions and did not conduct discovery on this point as a result. To allow the defendant to escape its admissions or amend its Answer so late in the litigation would not be fair to the plaintiff. Summary judgment was denied as to the defendant's legitimate non-discriminatory reason because the plaintiff introduced evidence to create a fact issue as to pretext. Specifically, the defendant took the position at trial that it terminated the plaintiff because she failed her new-hire drug test. However, during the EEOC investigation stage, the company took the position that the plaintiff was dismissed for failing to disclose medications that she took to control her epilepsy. Plaintiff also introduced evidence that the defendant never informed her that she was being dismissed for illegal drug use. Accordingly, the court found that a fact issue existed as to whether the defendant's stated reason was a pretext for discrimination, and rejected the defendant's argument that it honestly believed in the reason for taking the employment action, even if that reason was later shown to be mistaken.

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Age Discrimination in Employment Act (ADEA)	DuneCraft, Inc.	U.S. District Court, Northern District of Ohio No. 1:14-cv-02011	2015 U.S. Dist. LEXIS 58263 (N.D. Ohio, May 4, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion denied	Did the employer create a hostile work environment, terminate the claimant for age, and retaliate against him because of his age?	The court denied the defendant's motion for summary judgment. The court declined to grant summary judgment on any of the EEOC's three counts of (1) hostile work environment; (2) termination due to age; and (3) retaliation due to complaints of age-related harassment because it found that the claimant had advanced sufficient claims that credibility was at issue, which only a jury could decide. The claimant alleged that the owner and CEO of the defendant-employer frequently and publicly ridiculed him with age-based criticism. For purposes of a motion for summary judgment, the court found unavailing defendant's arguments that the claimant was not subject to age-based harassment, the alleged comments were too isolated, and those comments had a negative effect on the claimant's ability to work. The court further determined that credibility issues existed as to the claimant's allegation of age-based termination. First, the court found that the claimant had established a *prima facie* case of age discrimination. The jury had to decide if the claimant was qualified for the job, since affidavits contradicted themselves. The court found that a jury could find that the alleged discriminator was involved in the decision to terminate the claimant and that the reasons for firing the claimant were pretext. Finally, regarding the retaliation claim, the court stated that a jury could find credible the claimant's allegations that he engaged in protected activity by complaining about unwelcome age-related comments during a performance review and that he renewed his complaints a few times a month before he was fired. The court found that the EEOC could also show a causal connection between the protected activity and the termination the alleged discriminator was involved with the firing.

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ADEA Age Discrimination	Memphis, Light, Gas & Water Division, a division of the City of Memphis	U.S. District Court for the Western District of Tennessee, Western Division	2015 U.S. Dist. LEXIS 100810 (W.D. Tenn. July 31, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion denied	Whether the employer is entitled to summary judgment as to the claimant's ADEA claim? The EEOC alleges claimant was discriminated against on the basis of his age when he was not hired for an internal Computer Operator Specialist 1 ("COS 1") position. Whether the employer is entitled to summary judgment as to economic damages and liquidated damages?	The 57-year-old claimant was an internal candidate for the Computer Operator Specialist position. He was one of three applicants who were interviewed, and he received the highest rating (2.6 out of 3). One of the interview panelists (Price) testified that claimant was the most qualified candidate. Price also testified that interview panelist Morgan "kept talking about [claimant's] age," health, plans for retirement, etc. Most of the facts surrounding the events post-interviews are in dispute. The EEOC contends that Morgan had shifting explanations for his preference for a 37-year-old candidate (who was ultimately hired). Price testified that she felt coerced by Morgan into hiring the younger candidate. Morgan claims that it was Price's decision and that Morgan did not tell the interview panel to select the younger candidate. Morgan testified that Price expressed that the selection between the two candidates was a tough decision. The court found that Morgan's questions about claimant's age, health and retirement plans did not constitute direct evidence of age discrimination because they would require a juror to make inferences in order to conclude the decision was based on age discrimination. The court also found that Morgan's statement: "[w]er're looking for young blood with new ideas," does not rise to the level of direct evidence. The court, however, found that circumstantial evidence taken as a whole and viewed in the light most favorable to the EEOC was sufficient to permit a reasonable jury to conclude that claimant's age was the but-for cause for the employment decision. The court denied the employer's summary judgment motion as to the ADEA claim.

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						Employer also moved for summary judgment on the EEOC's claims for back pay and liquidated damages, arguing that there was insufficient evidence of what claimant's salary would have been had he been hired. The EEOC presented evidence regarding what claimant was making in his 2011 position with the employer, as well as evidence regarding the salary range for the COS 1 position for which claimant applied. The court found that the EEOC has presented sufficient evidence to create a triable issue on the EEOC's claim for damages. Employer's motion for summary judgment was denied.
Title VII Race Discrimination	Autozone, Inc.	U.S. District Court for the Northern District of Illinois, Eastern Division Case No. 14 C 5579	2015 U.S. Dist. LEXIS 101347 (N.D. Ill. Aug. 4, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted	Whether the employer is entitled to summary judgment against the complainant's claim of race discrimination?	The EEOC filed this lawsuit on behalf of the complainant, an African American and former sales manager for the defendant, an auto parts retailer, alleging the defendant transferred the complainant to another store location based on his race. The EEOC alleged the defendant's conduct was unlawful because it transferred the complainant as part of a plan to "limit, segregate, or classify his employees" on the basis of race. The defendant filed an amended motion for summary judgment arguing the complainant did not suffer an adverse employment action. The court agreed and granted the defendant's motion. The court explained it is undisputed that the complainant's pay and position remained the same after his transfer. The court also noted that it is undisputed that the claimant voluntarily resigned and was not involuntarily terminated. The court also found that the complainant's transfer did not result in an objectively humiliating or degrading change in work conditions. The court concluded that the complainant failed to present sufficient evidence creating a triable issue of fact that he suffered any material adversity in relation to his transfer.

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Title VII Race Discrimination Failure to Promote Retaliation	Dolgencorp, LLC, d/b/a Dollar General	U.S. District Court for the Southern District of Mississippi 13CV383-LG-JCG	2015 U.S. Dist. LEXIS 12571 (S.D. Miss. Feb. 3, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted in part, denied in part	Whether the employer was entitled to summary judgment?	The claimant worked for the employer as a lead sales associate. She applied for an assistant store manager position in 2009 and 2010, but she was not promoted. When she was not promoted, she filed an EEOC charge. Thereafter, the EEOC claimed the claimant was subjected to a progression of unwarranted disciplinary actions and increasingly demeaning and cruel statements from management. The court denied summary judgment on the failure to promote claim. While the EEOC presented evidence that the store manager and decision-maker used the word "N" word and had called the claimant a "lazy black n*****" and commented that she "was not going to make [the claimant] her assistant because she did not want a 'n*****' working for her", these comments were not direct evidence of race discrimination, but instead stray remarks. As for the remark that she "was not going to make [the claimant] her assistant because she did not want a 'n*****' working for her," it was found to be made too far after the promotion decision (two months after) to be temporally related. The court, however, found that the comments were enough to establish a genuine issue of material fact on pretext via the circumstantial evidence method, and thus, summary judgment was denied. The court granted summary judgment on the retaliation claim because, although the claimant was disciplined after filing her charge, there was no evidence of a materially adverse action.

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Title VII Race Harassment Retaliation	Skanska USA Building, Inc.	United States District Court for the Western District of Tennessee No. 2:10-cv-0217-SHL-tmp	2015 U.S. Dist. LEXIS 8281 (W.D. Tenn. Jan. 23, 2015)	Employer's Motion for Summary Judgment EEOC's Motion for Partial Summary Judgment **Result:** Both parties' motions granted in part and denied in part	Was the hostile work environment sufficiently severe to create an abusive working environment and was the employer's reaction inadequate? Did the employer retaliate against the individuals?	The court granted in part and denied in part the employer's motion for summary judgment and granted in part and denied in part the EEOC's motion for partial summary judgment. The EEOC brought this case on behalf of three individuals who worked for the employer's subcontractor and alleged that they faced racial harassment and retaliation, including racial slurs and graffiti on a regular basis. The court noted that "an abundance of racial epithets and racially offensive graffiti may constitute severe and pervasive harassment," including the use of the "N" word. Thus, the court found that a jury could reasonably conclude that a racially discriminatory hostile work environment existed. The court further found that a jury could find that the employer did not adequately respond since it should have known about the hostile work environment. It had notice of the racial slurs and graffiti before the individuals arrived, and the employer allegedly failed to respond to complaints in any way. The court also found that the EEOC had established genuine issues of material fact as to the retaliation claims for two out of the three claimants. One claimant had made multiple complaints about harassment and his termination two weeks later creates an issue. In another claimant's case, the employer failed to meet its burden of production. However, the court granted summary judgment on a third claimant's claim because his protected activity occurred after he no longer worked for the employer. The court also disagreed with the employer that the EEOC failed to conciliate in good faith. The court also denied summary judgment on the EEOC's claim that the employer had failed to comply with Title VII's posting requirement because an EEOC investigator found these notices illegible on a visit. The EEOC's partial summary judgment motion sought to strike certain of the employer's affirmative defenses.

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						The court granted the motion as to the subject matter jurisdiction, exhaustion of administrative remedies, timeliness of the charge, and equitable defenses. The court denied summary judgment on the injunctive relief defense because it was not clear at this stage if injunctive relief was appropriate.
Title VII Race Discrimination Hostile Work Environment	Wedco, Inc.	U.S. District Court for the District of Nevada No. 3:12-cv-00523	2014 U.S. App. LEXIS 168067 (D. Nev. Dec. 4, 2014)	Employer's Motion for Summary Judgment and Motion to Seal EEOC's Motions for Summary Judgment on the Employer's Equitable Affirmative Defenses and Procedural Affirmative Defenses **Result:** Both parties' motions granted in part and denied in part	Whether the employer created a hostile work environment? Whether the employer constructively discharged the individual plaintiff? Whether the employer discriminated against the individual plaintiff based on race?	The court denied summary judgment to the employer on the hostile work environment claim, but granted summary judgment on the constructive discharge and disparate treatment claims. The court further granted in part and denied in part the EEOC's motion for summary judgment on the employer's affirmative defenses. The claimant, an African-American man, worked for the employer, an electrical parts distributor, as a temporary stocker in the warehouse and then as a full-time deliveryman. The claimant noticed a noose at work, which he never reported. Further, he alleged that a co-worker made racial remarks and reported this behavior to HR several times. The court found that the claimant's allegations that there was a hangman's noose, that he was called the "N" word at least once, and that he was told the noose was for him was sufficient to create a genuine issue of material fact. The court further found that there was a genuine issue of material fact as to the employer's knowledge of the alleged harassment. As the claimant alleged that a co-worker made racial remarks, the standard for employer liability is negligence in controlling working conditions. The court agreed with the EEOC that a jury could reasonably conclude that the employer should have known about the harassment because of the co-worker's reputation, the claimant's complaints, and because HR was in the warehouse frequently. The court granted summary judgment on the constructive discharge claim because the evidence he presented was the same as the racial harassment evidence and because the claimant did not allow the employer to remedy the alleged harassment. Finally, the court did not find disparate treatment because EEOC could not prove an adverse employment action.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Race and Sex Discrimination Hostile Environment Retaliation	GNLV Corp., d/b/a Golden Nugget Hotel and Casino, and Does 1-10	U.S. District Court for District of Nevada Case No.: 2:06-cv-01225-RCJ-PAL	2014 U.S. Dist. LEXIS 177439 (D. Nev. Dec. 18, 2014)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted in part, denied in part	Whether the employer was entitled to summary judgment on each of the claimants' claims of race or sex discrimination.	The EEOC sued the employer on behalf of a class of similarly situated employees on the basis of racial and sexual harassment and retaliation under Title VII, alleging that the employer engaged in a pattern or practice of condoning and tolerating racial and sexual harassment and retaliation directed at its employees by both fellow employees and customers. The district court granted summary judgment in favor of the employer on the pattern-or-practice allegations, concluding that the EEOC provided insufficient evidence that the claimants were subjected to a general pattern or practice of harassment or discrimination, rendering the claimants' claims moot. The Ninth Circuit agreed with the pattern-or-practice ruling but not that the individual employees' claims were moot and remanded the case on the issue of whether to grant summary judgment as to the individual employees' claims. The district court granted the employer's motion for summary judgment as to claimants Robert Royal, Eddie Mae Hunter, and Dorothy Blake. As to claimant Susie Fein's claims, the motion was granted as to the retaliation claim. The court denied the employer's motion as to the hostile work environment claim, finding "a genuine issue of fact as to whether Fein suffered severe or pervasive sexual harassment as a result of constant offensive comments by customers and a genuine issue of fact whether [the employer] knew or should have known about the comments." As to claimant Ervin Nixon Jr., the motion was granted as to the hostile work environment and disparate treatment claims. The court denied the employer's motion as to the retaliation claim finding that the short amount of time between complaining of harassment and getting suspended, paired with what seemed like a potentially lengthy suspension, provided enough evidence such that a reasonable

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						jury could find that the proffered reasons for discipline were pretextual and that retaliation was the true motivation. As to claimant Tequella Candice Smith, the motion was granted as to the hostile work environment claim, but the motion was denied as to the retaliation claim in finding that a reasonable jury could conclude that Smith's suspension for violating the cell phone policy was disproportionately severe and pretext for retaliation against Smith, considering that the reason Smith claimed she left her workstation was to use her phone to call her brother to tell him she was groped by her co-worker.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Race Discrimination Sex Discrimination Hostile Work Environment Retaliation	GNLV Corp. d/b/a Golden Nugget Hotel and Casino and Does 1-10	U.S. District Court for the District of Nevada No. 2:06-cv-01225 RCJ-PAL	2015 U.S. Dist. LEXIS 71186 (D. Nev. June 1, 2015)	EEOC's Motion for Summary Judgment Related to a Number of the Employer's Affirmative Defenses **Result:** EEOC's motions granted in part, denied in part	The EEOC challenges the employer's 1st, 2nd, 3rd, 4th, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, and 21st affirmative defenses. Whether the above defenses are factually unsupported and must therefore be disposed of?	The EEOC sued the employer on behalf of a class of similarly situated employees on the basis of racial and sexual harassment and retaliation under Title VII, alleging that the employer engaged in a pattern or practice of condoning and tolerating racial and sexual harassment and retaliation directed at its employees by both fellow employees and customers. The court denies in part and grants in part the motion as to the first affirmative defense – failure to state a claim. The court states that the defense fails to the extent it is a Rule 12(b)(6) motion. The court finds that the substantive issues raised by the first affirmative defense should be left for trial. The court denies the motion as to the second and seventh affirmative defenses – non-discriminatory reasons – finding that these may be defenses to the retaliation claims that have survived the employer's prior motion for summary judgment. The court denies the motion as to the third affirmative defense – privilege of an employer – finding that it relates to the employer's claim that it exercised reasonable care in preventing harassment. The court denies in part and grants in part the motion as to the fourth affirmative defense – punitive damages. The court grants the motion to the extent that this affirmative defense is a Rule 12(b)(6) challenge. The court denies the motion as to the extent that the EEOC is seeking summary judgment on whether punitive damages should be awarded, finding that this issue should be left for trial. The court denies the motion as to the ninth affirmative defense – failure to mitigate – finding this defense applicable to claims remaining in this case, i.e. the back pay being sought by claimants Fein and Nixon. The court denies the motion as to the tenth affirmative defense – proximate cause – finding it relevant to whether the employer can be held liable for claimant Fein's hostile work environment claims.

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						The court denies in part and grants in part the motion as to the eleventh and twelfth affirmative defenses – failure to exhaust administrative remedies. Because the EEOC discovered allegations of retaliation and harassment by Fein and Nixon during the EEOC's investigation of another Claimant's claims, the motion is granted in that respect. The court denies the motion as to claimant Smith's claims, as there is a genuine dispute regarding the EEOC's compliance with administrative procedure as to Smith and her claims. The court denied the motion as to the thirteenth affirmative defense – laches – finding that a reasonable jury could conclude that prejudice arose from the 41-month delay in filing suit. The court denied in part and granted in part the motion as to the fourteenth affirmative defense – statute of limitations. It is granted as to the EEOC's Title VII claims because the Supreme Court has held that a statute of limitations does not apply to Title VII claims brought by the EEOC. The motion is denied as to emotional distress and any other claim for damages arising from state law. The court denies the motion as to the sixteenth affirmative defense – Nevada Industrial Insurance Act – finding that the state law scheme for recovery is relevant and could potentially bar recovery. As to the twentieth affirmative defense – lack of jurisdiction – the court grants the motion as to Fein's and Nixon's claims, finding that conciliation occurred. However, the court denies the motion as to Smith's claims, because the evidence indicates a possibility that the EEOC did not provide the Employer requisite information about claimant Smith's charge.

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						The court grants the motion as to the twenty-first affirmative defense – unnamed defendants – holding that it offers no specific defense and fails the pleading requirement, noting that the employer has had "sufficient discovery opportunities to make this vague defense inappropriate [sic]." The motion was granted in part and denied in part.
Title VII Religious Discrimination Failure to Accommodate	Consol Energy, Inc. and Consolidated Coal Company	U.S. District Court for the Northern District of West Virginia Civil Action No. 1:13CV215	2015 U.S. Dist. LEXIS 1326 (N.D.W.V. Jan. 7, 2015)	EEOC's Motion for Summary Judgment Regarding Liability; Employer's Motion for Summary Judgment **Result:** Both parties' motions denied	Whether the EEOC was entitled to summary judgment as to liability? Whether the employer is entitled to summary judgment on the religious accommodation claim?	The EEOC filed a complaint against the employer seeking a permanent injunction and monetary relief for claimant Beverly Butcher, Jr., alleging that the employer violated Title VII by instituting practices that denied the claimant a religious accommodation where he held a religious belief that he was not permitted to submit his hands to a biometric hand scanner for tracking employee time and attendance because such scanning would make him take on the Mark of the Beast. Both the EEOC and the employer filed motions for summary judgment. The court denied both motions, finding that there were material issues of fact regarding the third requirement for a *prima facie* religious accommodation claim, namely whether or not the claimant was disciplined for his failure to comply with the employer's hand scanning policy. The court also found a genuine issue of material fact as to whether the employer's failure to offer the claimant a "punch-in method" on the hand scanner amounted to a constructive discharge and whether the implementation of the hand scanning disciplinary policy and the employer's actions forced the claimant to retire.

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Title VII Religious Discrimination Failure to Accommodate	JBS USA, LLC, f/k/a JBS Swift & CO., a/k/a Swift Beef Company	U.S. District Court for the District of Nebraska CASE NO. 8:10CV318	2015 U.S. Dist. LEXIS 11478 (D. Neb. Jan. 28, 2015)	Employer's Motion for Partial Summary Judgment, Arguing that some of the EEOC's Claims are Barred by Issue Preclusion and that the EEOC Failed to Meet Preconditions for Bringing its Phase II Claims (i.e., Conciliation) **Result:** Employer's motion denied	Whether the EEOC's claims in Phase II of the litigation are barred by issue preclusion and whether the EEOC made adequate conciliation efforts?	The EEOC alleged failure to accommodate religious discrimination based on failure to provide unscheduled prayer breaks and/or mass meal breaks. The court found issue preclusion regarding whether the requested religious accommodations imposed an undue hardship on the employer because these issues were fully litigated and essential to Phase I of the litigation and so would not be re-litigated in Phase II, which related to whether the EEOC failed to conciliate. The court did not find that the employer had proven that collateral estoppel applied to the other issues identified (employee discipline and reasons for termination), because the court's conclusions on those issues were not essential to the Phase I judgment. The court denied without prejudice the employer's Motion for Partial Summary Judgment on the EEOC's failure to conciliate, because the "[U.S.] Supreme Court's pending decision in *Mach Mining, LLC v. EEOC* may address the standard for reviewing conciliation efforts, as well as the effect of the EEOC's alleged failure to conciliate."

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Title VII Religious Discrimination Failure to Accommodate	JBS USA, LLC, f/k/a JBS Swift & CO., a/k/a Swift Beef Company	United States District Court, District of Colorado Case No. 10-cv-2013 (PAB) (KLM)	2015 U.S. Dist. Lexis 93244 (D. Colo. July 17, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion denied	Was the employer required to accommodate the religious beliefs of its employees?	The court denied JBS's motion for summary judgment. The EEOC claimed that JBS discriminated against and unlawfully terminated Somali Muslim employees for requesting prayer breaks during Ramadan in 2008. The Muslim employees requested that JBS accommodate their need to pray and break their fast at sundown by moving their evening break. As JBS and the employees could not come to an agreement, a large number of Muslim employees were suspended and terminated for job abandonment. At issue was whether JBS engaged in a pattern or practice of denying religious accommodation, of retaliation, and of discriminatory discipline and discharge. In a similar case filed in Nebraska, the court ruled against the EEOC, holding that discrimination was unproven and the requested religious accommodation would impose an undue burden on the defendant. JBS argued that this decision should estop the claim in the Colorado court. The court ruled that the EEOC was not estopped in challenging the undue burden defense. The court focused on several differences between the plants in Colorado and Nebraska, including the proportion of Muslim employees. The court also denied summary judgment on the undue burden defense, retaliation, and discrimination claims. The court pointed out that the differences between the two plants in Colorado and Nebraska meant that genuine issues of material fact existed as to the feasibility, effectiveness, and facial reasonableness of the EEOC's proposed accommodations. The EEOC also raised a genuine issue of material fact as to whether those accommodations were an undue burden on JBS.

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Title VII Religious Discrimination Reasonable Accommodation Retaliation	JetStream Ground Services, Inc.	U.S. District Court for the District of Colorado Case No. 13-cv-02340-CMA-KMT	2015 U.S. Dist. LEXIS 131386 (D. Colo. Sept. 29, 2015)	Employer's Motion for Summary Judgment EEOC's Partial Motion for Summary Judgment EEOC's Motion to Strike **Result:** Both parties' motions were granted in part, denied in part	Whether the employer is entitled to summary judgment on all claims due to the EEOC's failure to satisfy its conciliation requirements? Whether the employer is entitled to summary judgment on two employees' religious accommodation, disparate treatment, and retaliation claims? Whether the employer is entitled to summary judgment on some of claimants' damages, because the job offers made to them limit their recovery of both back and front pay? Whether the EEOC is entitled to partial summary judgment on several of the employer's defenses, including (1) exhaustion of remedies and administrative prerequisites; (2) the viability of plaintiffs' claims based on statute of limitations, waiver, estoppel, and laches; and (3) defenses alleging that the religious accommodations are an undue burden?	In this matter, five female Muslim claimants alleged that the employer failed to hire them after they requested to cover their heads and wear long skirts for religious purposes. The EEOC also alleged that two additional "aggrieved individuals" were laid off or selected for part-time work by the employer for the same discriminatory reasons. In December 2008, the employer took over a daytime cabin-cleaning contract from United Airline's prior cabin-cleaning service at Denver International Airport ("DIA"), AirServ Corporation. The employer interviewed AirServ's prior employees in October 2008. The claimants were prior employees of AirServ and were not hired by the employer. The claimants allege they were not hired because their religious beliefs require them to wear a hijab and full-length skirts. The five claimants filed charges of discrimination. In August 2012, the EEOC issued a letter notifying the employer that the EEOC found reasonable cause. In August 2012, the Colorado Civil Rights Division issued cause determinations. Between late August and October of 2012, the EEOC and the employer exchanged 5 written conciliation proposals, but could not come to an agreement. The EEOC filed its Complaint on August 30, 2013. The court found the conciliation efforts were sufficient to fulfill Title VII's conciliation requirements, noting that the court may not examine the details of the offers.

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						Regarding the employer's Motion related to one claimant, the court found that there was sufficient evidence to create a disputed issue of fact as to whether the employer's decision-makers knew (or suspected) that the claimant desired an accommodation and laid her off to avoid giving her one. The court found there was evidence of pretext where the claimant's name was not included in an initial layoff list, there was no explanation (unlike at least some other employees) in the claimant's personnel file for the reason for her layoff, and no one had spoken with her about the speed of her work even though that was the alleged reason for her layoff. Therefore, the court found that a material factual dispute existed as to the claimant's religious discrimination and disparate treatment claims. The court found that the claimant did not engage in protected activity because she did not convey anything to the employer about its failure to accommodate her hijab, thus her retaliation claim failed. The employer's Motion was granted in part, dismissing the retaliation claim. Regarding the employer's Motion related to a second claimant, the court reasoned that the claimant's start date was unclear and her *de minimis* reduction in hours did not qualify as an adverse action, thus finding that she failed to allege that she suffered a materially adverse action; therefore, her accommodation, discrimination and retaliation claims failed. The court granted the employer's Motion in part, dismissing the claimant's disparate treatment, religious accommodation, and retaliation claims. In October 2014, the employer had offered the claimants employment as cabin cleaners but required that they wear pants, complete employment applications, and take drug tests The court denied the employer's Motion as to damages because the offers of reemployment were conditioned on the claimants wearing pants.

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						Regarding administrative exhaustion, the court found that because one claimant was an aggrieved individual identified in the EEOC's investigation, the EEOC could bring claims on her behalf without filing a formal charge because a finding of reasonable cause was made and conciliation was attempted as to her claims; therefore, administrative prerequisites were met as to the first claimant and summary judgment was granted in the EEOC's favor for defendant's third, fourth and fifth defenses. For the same reasoning, summary judgment was entered on defendant's sixth and eighth defenses. The court entered summary judgment in the EEOC's defense on the laches argument [seventh defense] because the employer failed to show that it was prejudiced by the EEOC's delay in filing suit. Regarding the ninth and tenth defenses, summary judgment was granted for the EEOC with regard to the hijab accommodation but denied with respect to the skirt accommodation. The court found that the employer's rebuttal evidence failed to create a genuine factual dispute as to whether an accommodation allowing cabin cleaners to wear a hijab tucked into their shirts and secured to their heads is an undue hardship. However, the employer presented some evidence that there were additional safety risks to employees wearing long skirts, and therefore, the court denied summary judgment regarding the undue hardship defense as it relates to the skirt accommodation. Employer's Motion for Summary Judgment was granted in part. The EEOC's Motion for Partial Summary Judgment was granted in part.

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Title VII Retaliation	Rite Way Services, Inc.	U.S. District Court for the Southern District of Mississippi No. 1:13-cv-464 (HSO) (RHW)	2015 U.S. Dist. LEXIS 42113 (S.D. Miss., Mar. 31, 2015)	Employer's Motion for Summary Judgment **Result:** Employer's motion granted	Did claimant engage in a protected activity under Title VII? Did the claimant's claim for unemployment benefits and subsequent denial of benefits constitute a discrete act of retaliation?	The court held that the EEOC could not establish a *prima facie* case of retaliation under Title VII. The claimant had reported an incident between her supervisor and another employee to the Chief of Police at the high school where she worked. Thereafter, her supervisor was replaced with an individual who the claimant contended retaliated against her by ultimately terminating her employment. The court found that the EEOC failed to prove that the claimant had engaged in either of the two types of protected activity under the participation clause and opposition clause. First, the court dispensed with the EEOC's claim that the claimant had "participated in any manner in an investigation, proceeding, or hearing under Title VII," by citing Fifth Circuit case law holding that the participation clause was irrelevant where the claimant did not file a charge with the EEOC until after the alleged retaliatory discharge took place. Since the claimant had not filed her EEOC charge until after her termination, she could not claim protected activity under the participation clause. Further, the claimant could not claim protected activity under the opposition clause because she had to have a reasonable belief that the complained-of activity created a hostile work environment under Title VII. The court concluded that a reasonable person could not find that the isolated incident that the claimant complained of rose to the level of severe or pervasive conduct sufficient to amount to a cognizable Title VII claim. Thus, the claimant could not have conducted a protected activity under the opposition clause. Finally, the EEOC argued that the claimant's application for unemployment benefits and denial thereof constituted protected activity. But the court ruled that since this claim was not the subject of an EEOC charge, that the claimant had not exhausted her administrative remedies on that claim.

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Title VII Sex Discrimination Failure to Hire	Unit Drilling Co.	U.S. District Court for the Northern District of Oklahoma No. 13-CV-147	2015 U.S. Dist. LEXIS 36590 (N.D. Okla. Mar. 24, 2015)	Employer's Motion For Partial Summary Judgment **Result:** Employer's motion denied	Whether the employer was entitled to partial summary judgment as to four of the plaintiffs? In support thereof, employer argued there is no proof that it denied employment to women on rigs operated by the company on account of their gender, but rather their employment was denied because they lacked the requisite qualifications. Are statements by rig managers admissible non-hearsay statements, where rig managers were involved in the decision-making process, but did not make final hiring decision? Are statements that women cannot be hired because they are too pretty and the male employees would not get anything done direct or circumstantial evidence of discrimination?	The court denied the employer's partial motion for summary judgment, finding that the EEOC had created a fact issue as to pretext. First, there were inconsistencies in the employer's stated reason for not hiring women. The company originally told female applicants they would distract male employees, but later claimed females were not hired because they lacked qualifications. In light of these conflicting statements, the court held there is a fact issue as to the employer's stated non-discriminatory reason. Second, the EEOC demonstrated a factual issue as to whether men who were hired had the requisite qualifications. Third, statistical evidence presented by the EEOC showed that of 1,600 floor hands hired on rigs in the last two years, none were women. Statements by high-level employees who were somehow involved in the decision-making process, but were not the final decision makers, are admissible non-hearsay statements. Statements that women cannot be hired because they are too pretty and the male employees would not get anything done are not direct evidence of discrimination, because those statements are capable of both benign and discriminatory interpretations.

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