THE LITTLER REPORT

# ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2017

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

| FEBRUARY 2018 |



Littler®

## 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.**

# Table of Contents

# Table of Contents

*(continued)*

# Table of Contents

*(continued)*

# Table of Contents

*(continued)*

# Table of Contents

*(continued)*

# ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2017

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

## INTRODUCTION

**This Annual Report on EEOC Developments—Fiscal Year 2017** (hereafter "Report"), our seventh 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 analyzes the EEOC's successes, setbacks, changes, and strategies. 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**—*Challenging Harassment in the Workplace: A Key Priority at the EEOC*—discusses the current spate of harassment claims and the EEOC's efforts to stem the tide. This opening chapter includes an analysis of the EEOC's proposed Enforcement Guidance on Unlawful Harassment, and practical recommendations to help prevent and address unlawful harassment in the workplace. Appendices F-I of this Report contain various checklists contained in the EEOC's Report by the Select Task Force on the Study of Harassment in the Workplace.

**Part Two** outlines EEOC charge activity, litigation and settlements in FY 2017, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts, and new case filings involving harassment claims, are summarized in Appendices A & E to this Report, respectively. 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 not only formal rule-making efforts, but also informal guidance on a variety of new and evolving workplace concerns, and the holding of public meetings on several agency priorities. This chapter highlights recent and emerging trends at the agency level, particularly in this transition year as a new Commission takes shape. 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 2017.

**Part Five** of the Report focuses on FY 2017 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; (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, and the use of experts; (6) general discovery issues involving both employers and the EEOC in litigation between the parties; (7) favorable and unfavorable summary judgment rulings; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys' fees to prevailing parties.

**Appendices A-I** are useful resources 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, and decided appellate cases in FY 2017. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2017. **Appendix D** highlights notable summary judgment decisions by claim type. **Appendix E** provides an overview of all of the FY 2017 cases filings involving harassment claims. **Appendices F-I** contain various checklists from the EEOC Task Force Report on Harassment in the Workplace to help employers evaluate their anti-harassment efforts and address claims once they arise.

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. CHALLENGING HARASSMENT IN THE WORKPLACE: A KEY PRIORITY AT THE EEOC

While EEO compliance remains an important objective for the employer community, minimizing the risk of facing a harassment claim has become a top priority. The weekly, and sometimes daily, headlines of new harassment allegations are ample proof of this.

Even prior to the recent headlines, attacking harassment in the workplace has been an important priority for the Equal Employment Opportunity Commission (EEOC), the country's chief federal enforcement agency responsible for receiving and investigating charges of discrimination, as demonstrated by EEOC litigation, settlements and agency initiatives. As an example, in Fiscal Year 2017, nearly 30% (*i.e.*, 54 of 184 lawsuits filed) involved alleged harassment in the workplace.

On August 15, 2017, in one of its largest settlements over the past fiscal year, the EEOC announced a $10.125 million settlement, following an EEOC investigation of racial and sexual harassment of African Americans and women at two Chicago-area facilities of a major automaker. The EEOC also announced that combatting harassment in the workplace was one of the EEOC's top national priorities in both its 2012-2016 and 2016-2020 Strategic Enforcement Plans.

In its most recent Strategic Enforcement Plan ("SEP") issued on October 16, 2016, the EEOC stated that "Preventing Systemic Harassment" is an important focus of the agency, explaining:[1]

> Harassment continues to be one of the most frequent complaints raised in the workplace. Over 30 percent of the charges filed with EEOC allege harassment, and the most frequent bases alleged are sex, race disability, age, national origin and religion, in order of frequency. Forty-three percent of the complaints filed by federal employees in fiscal year 2015 raised harassment. The most frequent bases alleged in federal sector complaints are race, disability, age, national origin, sex and religion, in order of frequency. This priority typically involves systemic cases. However, a claim by an individual or small group may fall within this priority if it raises a policy, practice, or pattern of harassment. Strong enforcement with appropriate monetary relief and effective injunctive relief to prevent future harassment of all protected groups is critical, but not sufficient. In addition, the Commission believes a concerted effort to promote holistic prevention programs, including training and outreach, will greatly deter future violations.

The 2016 SEP, in which the agency announced its renewed commitment to address harassment concerns, was preceded by the EEOC establishing a task force to examine the ongoing challenge of harassment in the workplace.[2] On June 20, 2016, following 18 months of study, EEOC Task Force Co-Chairs, Commissioners Chai R. Feldblum and Victoria A. Lipnic, issued their Report on the "Select Task Force on the Study of Harassment in the Workplace."[3] The goal of the Report was to "reboot workplace harassment prevention."[4]

The Task Force Report was followed in January 2017 by proposed "Enforcement Guidance on Unlawful Harassment," which was described as "a companion piece to the Task Force Report."[5] Unlike the Task Force Report, which is designed to assist employers in "identifying ways to renew

1 *See* Press Release, EEOC, *EEOC Updates Strategic Enforcement Plan*, (Oct. 27, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm and Strategic Enforcement Plan at 9, *citing* the *EEOC's Select Task Force Report on the Study of Harassment in the Workplace* (June 2016).

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

3 *See* Press Release, EEOC, Task Force Co-Chairs Call On Employers and Others to "Reboot" Harassment Prevention (June 20, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-20-16.cfm.

4 *Id*

5 *See* Press Release, EEOC, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment* (Jan. 10, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm and accompanying Proposed Enforcement Guidance on Unlawful Harassment *available at* https://www.regulations.gov/docket?D=EEOC-2016-0009.

efforts to prevent harassment," the purpose of the proposed Enforcement Guidance is to explain "the legal standards for unlawful harassment and employer liability" and provide "a single legal analysis for harassment that applies the same legal principles under all equal employment opportunity (EEO) statutes enforced by the Commission."[6] While the proposed Enforcement Guidance was subject to comments by the employer community and others over many months,[7] and was pending approval at the Office of Management and Budget ("OMB") as of the date this Littler Report went to press, the published draft provides an excellent framework about the EEOC's perspective on the legal standards applicable to harassment claims.[8] The proposed Enforcement Guidance reviews both Supreme Court and federal appellate court decisions, plus selected district court opinions, issued over the years and provides the EEOC's perspective, particularly where the courts differ on interpreting selected issues involving actionable claims and liability for harassment. The Enforcement Guidance highlights that "(t)hirty years after the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson*,[9] that workplace harassment can be an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964, harassment remains a serious problem."

The EEOC has been at the forefront attacking harassment in the workplace for many years, as demonstrated by the $34 million settlement in June 1998, which remains as one of the largest EEOC settlements challenging harassment in the workplace.[10] Ironically, increased sensitivity to concerns of harassment in the workplace initially stemmed from the 1991 televised confirmation hearings of U.S. Supreme Court Justice Clarence Thomas, based on testimony by Anita Hill involving alleged sexual harassment by Thomas when she served as his assistant while he was Chairman of the EEOC.[11]

The objective of this opening chapter is to serve as a resource guide for employers that: (1) highlights key segments of the EEOC's Task Force Report on Harassment and assists employers in harassment prevention; (2) reviews the EEOC's perspective on actionable harassment claims and potential liability for harassment; (3) summarizes recent EEOC litigation and lessons learned; and (4) highlights key legal issues involving EEOC systemic harassment claims.

## A. EEOC Task Force on the Study of Harassment in the Workplace

In January 2015, former EEOC Chair Jenny Yang held a Commission meeting that focused on harassment in the workplace and reiterated that harassment remains a major priority of the Commission.[12] In March 2015, Chair Yang set up the "EEOC Select Task Force on the Study of Harassment in the Workplace,"[13] explaining the ongoing concern, "[c]omplaints of harassment span all industries, include many of our most vulnerable workers, and are included in 30% of the charges that we receive."

Between April 2015 and June 2016, the Task Force held a series of meetings, some of which were open to the public and others involving closed working sessions. The first public meeting of the Task

6 *Id.*

7 *See* Press Release, EEOC, *EEOC Extends Public Input Period on Proposed Harassment Enforcement Guidance to March 21* (Feb. 3, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/2-3-17.cfm

8 The purpose of the guidance is to replace, update, and consolidate several earlier EEOC guidance documents: Compliance Manual Section 615: Harassment; Policy Guidance on Current Issues of Sexual Harassment (1990); Policy Guidance on Employer Liability for Sexual Favoritism (1990); Enforcement Guidance on *Harris v. Forklift Sys., Inc*. (1994); and Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999). *See* Proposed Enforcement Guidance at 5.

9 477 U.S. 57 (1986).

10 *See* Press Release, EEOC, *Mitsubishi Motor Manufacturing And EEOC Reach Voluntary Agreement To Settle Harassment Suit* (June 11, 1998), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-11-98.cfm.

11 *See An Outline of the Anita Hill and Clarence Thomas Controversy,* http://chnm.gmu.edu/courses/122/hill/hillframe.htm. Clarence Thomas was Chair of the EEOC from May 6, 1982 until March 8, 1990. *See* https://www.eeoc.gov/eeoc/history/35th/bios/clarencethomas.html.

12 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.

13 *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.

Force was held in June 2015, in which the EEOC focused on "Workplace Harassment: Examining the Scope of the Problem and Potential Solutions."[14] A second public meeting, held in October 2015, dealt with "Promising Practices to Prevent Workplace Harassment."[15] Based on the October 2015 meeting, the EEOC announced the findings of a "panel of experts," and stated: "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."[16] At a later public meeting, held on December 7, 2015, one 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 focused on the "creative use of social media" to spread an anti-harassment message, particularly among millennials and/or to provide "a platform for workers to bring complaints to the public's attention."[17]

## B. Results of EEOC Task Force Report on Harassment

On June 20, 2016, the EEOC announced the results of the Task Force in an 88-page report entitled, "Select Task Force on the Study of Harassment in the Workplace" (hereinafter "Task Force Report" or "TF Report").[18] Discussed below are various highlights of the TF Report.

### 1. Executive Summary

The focus of the TF Report is harassment prevention, and for that reason the Task Force reviewed "conduct and behaviors which might not be 'legally actionable,' but left unchecked, may set the stage for unlawful harassment."[19] The key findings of the TF Report are as follows:

- Workplace harassment remains a persistent problem, as illustrated by the fact that in the fiscal year prior to issuance of the TF Report, approximately one-third of all discrimination charges involve an allegation of workplace harassment.
- There is a "compelling business case" to stop and prevent harassment, based on both "direct costs," such as the millions paid in settlement of claims, and indirect costs, based on the negative impact on the workplace resulting in "decreased productivity, increased turnover, and reputational harm."
- Effective harassment prevention includes not only the importance of senior leadership taking the view that harassment will not be tolerated, but also "accountability," both in terms of ensuring that those who harass "are held responsible in a meaningful, appropriate and proportional manner," and those "whose job it is to prevent or respond to harassment should be rewarded for doing that job well (or penalized for failing to do so)," and anti-harassment efforts must be given "the necessary time and resources to be effective."
- Training programs need to go beyond merely "avoiding legal liability," and training should be "part of a holistic culture of non-harassment," recognizing that such training should be tailored to the specific workforce, and middle managers and supervisors "can be an employer's most valuable

14 *See* Press Release, EEOC, *EEOC Task Force to Probe Workplace Harassment at Public Meeting on June 15* (June 8, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-8-15.cfm.

15 *See* Press Release, EEOC, *U.S. EEOC Harassment Task Force to Host Public Meeting, First In Los Angeles* (Oct. 22, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-22-15.cfm.

16 *See* Press Release, EEOC, *Multi-Prong Strategy Essential to Preventing Workplace Harassment* (Oct. 23, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm

17 *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.

18 *See* Press Release, EEOC, *Task Force Co-Chairs Call On Employers and Others to "Reboot" Harassment Prevention* (June 20, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-20-16.cfm, and accompanying Task Force (TF) Report.

19 TF Report at iv.

resource" in harassment prevention. The TF Report underscores that employers need to consider different approaches to training such as "bystander intervention training" so co-workers have the tools to intervene when witnessing harassing behavior, and "civility training" that promotes respect and civility in the workplace.

- The TF Report concludes that it is up to everyone – "it's on us" to "be part of the fight to stop workplace harassment," and employers "cannot be complacent bystanders and expect our workplace cultures to change themselves."[20]

### 2. What We Know About Harassment in the Workplace

In reviewing various studies on harassment in the workplace, the TF Report concluded that "sex-based harassment" has three subtypes: (1) unwanted sexual attention; (2) sexual coercion, and (3) gender harassment. According to the TF Report, research findings indicate that "gender harassment" is the most common form of harassment."[21] Gender harassment includes "sexually crude terminology" or displays (such as using the derogatory "c" word toward a female co-worker or posting pornography) or making sexist comments, including anti-female jokes.[22] The prevalence of other forms of harassment because of race, ethnicity, religion, age, disability, gender identify or sexual orientation, is less known, other than reported harassment charges based on such status.[23]

The TF Report states, "the extent of non-reporting is striking."[24] The TF Report cites certain studies, which attribute victims' non-reporting to fear of several reactions: (1) disbelief of their claim; (2) inaction on their claim; (3) receipt of blame for causing the offending actions; (4) social retaliation; and (5) professional retaliation, such as damage to their career or reputation.[25] According to the TF Report, based on only 6% to 13% of individuals experiencing harassment filing a claim, "anywhere from 87% to 94% of individuals did not file a formal complaint."[26]

Notwithstanding, in fiscal year 2015, 31% of all discrimination charges (*i.e.*, 27,893 out of 89,385 charges) alleged some form of harassment.[27] Settlements through the administrative process resulted in payment of $125.5 million.[28] This amount was augmented by settlement of 42 harassment lawsuits filed by the EEOC, which resulted in an additional $39 million to resolve such complaints.[29] The TF Report points out that such settlement payments do not include private litigation, and even highlighted a 2012 California jury verdict that resulted in a $268 million jury award.[30]

The TF Report also reviews in some detail the "indirect costs" tied to harassment, particularly sexual harassment. In citing various studies and testimony before the Commission, the TF Report references the negative impact on employees, including employees suffering from depression and other psychological disorders and adverse physical effects, such as headaches, sleep problems and weight loss or gain, to name a few.[31] The TF Report also discusses the adverse effect on team and group relationships, employee turnover, and potential reputational damage to the employer.[32]

20 *Id.* at iv-vi.
21 *Id.* at 9-10.
22 *Id.* at 9.
23 *Id.*
24 *Id.* at 15.
25 *Id.* at 16.
26 *Id.*
27 *Id.* at 18.
28 *Id.*
29 *Id.* at 19-20.
30 *Id.* at 19. The details of the April 2012 jury verdict against the defendant, a California medical center, are reviewed in detail at http://abcnews.go.com/US/LegalCenter/168-million-awarded-woman-harassed-raunchy-cardiac-surgery/story?id=15835342. The lawsuit was subsequently settled for an undisclosed amount in December 2012. *See Chopourian v. Catholic Healthcare West*, Case No. 2:09-CV-02972-KJM-KJN, *available at* https://www.leagle.com/decision/infdco20121206937.
31 TF Report at 20-21.
32 *Id.* at 22-23.

As a precursor to various news headlines, the TF Report also addresses the competing economic considerations when the alleged harasser is a workplace "superstar," and cautions that "superstar status can be a breeding ground for harassment."[33] The TF Report refers to various considerations, including special privileges accorded such workers based on "higher income, better accommodations and different expectations," which could "lead to a self-view that they are above the rules."[34] Reference was made to a recent Harvard Business School study, which suggested that avoiding such "toxic workers" actually "can save a company more than twice as much as the increased output by such workers," and "[n]o matter who the harasser is, the negative effects of harassment can cause serious damage to a business."[35]

This section of the TF Report concludes by focusing on certain workplace settings in which employees reportedly are more prone to harass, and includes specific strategies to reduce the risk of harassment.[36]

### 3. Preventing Harassment in the Workplace

In the crucial section of the TF Report, the Co-Chairs address preventive strategies to reduce the risks of harassment in the workplace. Discussed below are the key points.

***Leadership and Accountability.*** A central theme of the TF Report is creating a workplace culture with the greatest impact in preventing harassment. The TF Report highlights the paramount importance of "leadership and commitment to a diverse, inclusive, and respectful workplace in which harassment is simply not acceptable."[37] However, as important is "accountability" to ensure that those who harass are held responsible in a "meaningful, appropriate and proportional manner," and those who are tasked with preventing or responding to harassment, directly or indirectly, "are rewarded for doing that job well, or penalized for failing to do so."[38] Leadership and accountability are described as "two sides of the coin."[39] As significantly, the TF Report stresses that commitment to a harassment-free workplace "must not be based on a compliance mindset, and instead must be part of an overall diversity and inclusion strategy." Critical to meeting this objective is creating an environment in which there is mutual respect, regardless of an employee's gender, race or any other protected status.

The TF Report emphasizes that effective leadership requires these actions:

- First, an employer must establish a "sense of urgency" about preventing harassment, which can be done by (i) evaluating whether the workplace setting is one in which workers are more prone to harass, and if so, take proactive steps to address the concerns;[40] and/or (ii) conducting climate surveys to determine whether employees feel that harassment exists in the workplace and is tolerated.[41]
- Second, an employer must have *effective* policies and procedures and *effective* training to ensure that employees understand the employer's policy and ways to report concerns, which may require periodic testing to ensure that the system is working.[42]
- Third, the employer needs to ensure that "money and time" are invested in this initiative, which includes having harassment prevention included as part of an employer's budget.[43]

33 *Id.* at 24.
34 *Id.*
35 *Id.*
36 *Id.* at 25-30; also see Appendix C to TF Report at 83-88.
37 *Id.* at 31.
38 *Id.*
39 *Id.*
40 *See* Appendix C to TF Report at 83-88.
41 *Id.* at 32-33.
42 *Id.* at 33.
43 *Id.* at 34.

- Fourth, those tasked with addressing harassment prevention need to be "vested with enough power and authority to make such change happen."[44]

The TF Report also addresses the importance of "accountability," as demonstrated to employees, so they have confidence that harassment complaints will be taken seriously and that "proportionate corrective actions" will be taken, which will cause employees reporting harassment they *experience or observe*, thus creating a "positive cycle" that reduces harassment in the workplace.

Critical to an effective harassment prevention program is accountability by those who harass, and sanctions that are appropriate for "bad behavior." In other words, the wrong message is sent if highly valued or senior employees engaging in bad behavior are not dealt with severely if they engage in harassment.[45] The TF Report also stresses the importance of mid-level or front-line managers being held responsible for promptly following up on a harassment complaint and/or protecting from retaliation those who report harassment.[46] The TF Report highlights that a "rewards system" that incentivizes and rewards responsiveness "speaks volumes."[47] The TF Report states that "counter-intuitively, rewards initially could be given to reward manager when there is an increase in complaints in their area of responsibility."[48] The TF Report stresses that a "holistic approach" is needed in which each aspect of an effective harassment is addressed, rather than merely focusing on a particular issue, such as having a metric for a manager's performance in responding to a harassment complaint or having a harassment policy mentioned consistently at employee meetings, but not protecting those who complain about harassment.[49]

The TF Report also includes an appendix with various checklists for compliance, including "Checklist One: Leadership and Accountability,"[50] which is included as Appendix F to this Annual Report. Since issuance of the TF Report, the EEOC has also developed "Promising Practices" on leadership and accountability, which are posted on its website and based primarily on this checklist.[51]

***Policies and Procedures***. The Task Force next addresses policies, reporting procedures, investigations and corrective actions as part of an employer's "holistic effort" to prevent harassment.

*Anti-Harassment Policies*. The TF Report recommends that employers adopt a "robust anti-harassment policy, regularly train each employee on its contents, and vigorously follow and enforce the policy."[52] The TF Report recommends that an anti-harassment policy should include the following:[53]

- A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; andAssurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same.

44 *Id.*
45 *Id.*
46 *Id.* at 35.
47 *Id.*
48 *Id.* at 36.
49 *Id.* at 36-37.
50 *Id.*, Appendix B, at 79.
51 *See* EEOC, *Promising Practices for Preventing Harassment, available at* https://www.eeoc.gov/eeoc/publications/promising-practices.cfm.
52 TF Report at 38.
53 *Id.*

The TF Report emphasizes the importance of the policy being in easy-to-understand language, in all languages used in the workplace, be communicated regularly to employees, including information on how to file a complaint, and that employers take a "critical look" at the current policy and determine whether a "reboot" should be considered.

Here, too, the Appendix to the TF Report includes a checklist for compliance, called "Checklist Two: An Anti-Harassment Policy," which is attached to this Annual Report as "Appendix G."[54] The EEOC's website has also included "Promising Practices" with a policy review checklist that appears to be based primarily on this checklist from the TF Report.[55]

*Social Media*. Based on the extensive use of social media today, the TF Report also addresses the positives and negatives of social media. From a positive perspective, social media provides the opportunity for "less formal and more frequent interactions." On the other hand, from a negative perspective, it can "foster toxic interactions." For that reason, the TF Report emphasizes that harassment "should be in employers' minds as they draft social media policies," and "social media issues should be in employers' minds as they draft anti-harassment policies."[56]

*"Zero Tolerance" Policies*. One of the most significant recommendations of the TF Report worth close review involves its "caution" against use of the phrase "zero tolerance" as part of an anti-harassment policy. In the view of Task Force Co-Chairs Lipnic and Feldblum, a zero tolerance policy may inappropriately convey the view that "one size fits all." This could cause under-reporting of harassment complaints, particularly involving minor harassing behavior, because a co-worker does not want the offending employee to lose his or her job over the conduct.[57]

*Reporting Systems for Harassment*. Based on the TF Report, an effective anti-harassment policy needs to serve the needs of those who have *experienced* or *observed* harassment to come forward and report harassment. For the system to have credibility, if an employee has a bad experience, this may negatively affect others relying on the system. As important are those accused of harassment being treated fairly under the system.[58] The TF Report highlights the importance in a unionized environment of the union taking the system seriously and supporting complainants and witnesses, but also considering that unions have obligations to all employees they represent, including union members who may be accused of harassment.[59]

Under any harassment program, however, the TF Report stresses the importance of the reporting system being multi-faceted and robust so employees have various options in reporting harassment concerns, which may include human resources personnel, company managers, complaint hotlines and web-based complaint procedures. The response may also need to vary depending on the nature of the conduct, and it may merely require a manager talking to an employee sometimes or a full-blown investigation in other situations.[60]

54 *Id.,* Appendix G, at 80.
55 *See Promising Practices for Preventing Harassment*, supra note 51.
56 TF Report at 39.
57 *Id.* at 40.
58 *Id.*
59 *Id.* at 40-41.
60 *Id.*

The EEOC also recognized that requirements to keep an investigation confidential under anti-discrimination laws might conflict with certain decisions under the National Labor Relations Act. The TF Report underscores the importance of the EEOC working with the National Labor Relations Board "to harmonize the interplay of federal EEO laws and the NLRA."[61]

Finally, the TF Report discusses key elements of a successful reporting system, including addressing how investigations should be conducted. The TF Report identifies the following as key elements in a successful reporting system:

- Employees who receive harassment complaints must take the complaints seriously.
- The reporting system must provide timely responses and investigations.
- The system must provide a supportive environment where employees feel safe to express their views and do not experience retribution.
- The system must ensure that investigators are well-trained, objective, and neutral, especially where investigators are internal company employees.
- The privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations and the need to conduct a thorough, effective investigation.
- Investigators should document all steps taken from the point of first contact, prepare a written report using guidelines to weigh credibility, and communicate the determination to all parties.

The Appendix to the TF Report also includes "Checklist Three: A Harassment Reporting System and Investigations,"[62] which is attached to this Littler Report as "Appendix H." The EEOC website also posts "Promising Practices for Preventing Harassment" that includes discussion of an "Effective and Accessible Harassment Complaint System," which is based primarily on this checklist.[63]

***Anti-Harassment Compliance Training***. The TF Report highlights several reasons employers have developed anti-harassment training programs: (1) early initiation of such training following the EEOC's 1980 guidelines that suggested training to prevent harassment; (2) the impact of the U.S. Supreme Court's 1998 decisions *in Ellerth* and *Faragher* in which anti-harassment training has been part of an employer's affirmative defense to harassment lawsuits involving supervisors; (3) EEOC conciliation agreements and consent decrees requiring such training; and (4) anti-harassment training mandated by state laws in California, Connecticut and Maine.[64]

The TF Report points to various studies regarding the effectiveness of anti-harassment training and provides certain takeaways: (1) training can increase the ability of employees to understand the nature of the conduct that constitutes "harassment," which is unacceptable in the workplace; (2) to be effective, training must be coupled with other efforts to prevent harassment; and (3) although there was no evidence that training reduced the frequency of harassment, complaints to HR increased based on such training.[65]

The TF Report next provides insights regarding the key contents of anti-harassment training for both non-management and management employees, particularly focusing on "compliance training."[66]

61 *Id.* at 42.
62 *Id.*, Appendix B, at 81.
63 *See Promising Practices for Preventing Harassment*, supra note 51.
64 TF Report at 44.
65 *Id.* at 47-48.
66 *Id.* at 49-51.

*Training for All Employees*. According to the TF Report, compliance training focuses on helping employers comply with legal requirements, but such training should not be limited to actionable harassment. Rather, training should include "conduct, if left unchecked, might rise to the level of illegal harassment."[67] The TF Report recommends that compliance training: (1) address the needs of the particular workplace, rather than using a "one size fits all" approach; (2) focus on "unacceptable behaviors," rather than trying to teach participants the legal standards that will make such conduct "illegal";[68] (3) educate employees regarding their rights and responsibilities, including having "multiple avenues" to report unwelcome conduct; (4) describe how employees who witness harassment report such conduct; and (5) explain how the complaint procedure will proceed.[69] As significant, the TF Report highlights the importance of clarifying what conduct is ***not*** harassment,[70] explaining:

> Compliance training should also clarify what conduct is not harassment and is therefore acceptable in the workplace. For example, it is not harassment for a supervisor to tell an employee that he or she is not performing a job adequately. Of course, the supervisor may not treat employees who are similar in their work performance differently because of an employee's protected characteristic. But telling an employee that she must arrive to work on time, or telling an employee that he must submit his work in a timely fashion, is not harassment. Nor do we suggest that occasional and innocuous compliments – "I like your jacket" – constitute workplace harassment, but rather reflect the reality of human experience and common courtesy.

*Training for Middle Managers and First-Line Supervisors*. As discussed earlier in the TF Report, management and supervisory personnel must receive "clear messages of accountability" regarding their responsibilities in dealing with harassment, including: (1) practical advice on how to respond to different levels and types of offensive behavior; (2) instructions on how to report such conduct "up the chain of command"; and (3) the responsibilities of supervisors to address harassing behavior, even absent a complaint.[71]

The TF Report also focuses on key principles regarding the "structure" of successful compliance training:

- Training should be supported at the highest levels;
- Training should be conducted and reinforced regularly for all employees;
- Training should be conducted by qualified, live, and interactive trainers; and
- Training should be routinely evaluated.[72]

The Appendix to the TF Report also includes "Checklist Four: Compliance Training,"[73] which is included as "Appendix I" to this Littler Report. The EEOC has included in its "Promising Practices for Preventing Harassment," as posted on its website, discussion of "Effective Harassment Training," which is based primarily on this checklist.[74]

67 *Id.* at 50.
68 *Id.*
69 *Id.* at 50-51.
70 *Id.* at 50.
71 *Id.* at 51.
72 *Id.* at 52-53.
73 *Id.,* Appendix B, at 82.
74 *See Promising Practices for Preventing Harassment*, supra note 51.

***Workplace Civility and Bystander Intervention Training***. In discussing training options, the TF Report addresses training that may help shape the "organizational structure" and help prevent harassment in the workplace. The TF Report specifically addresses two types of training programs "showing significant promise for preventing harassment in the workplace: (1) workplace civility training; and (2) bystander training."[75]

*Workplace Civility Training*. Contrary to the typical compliance training that focuses on eliminating unwelcome behavior, the TF Report explains that workplace civility training involves "promoting respect and civility in the workplace generally."[76] Such training stresses the "positive" – "what employees and managers should do, rather than on what they should not do."[77] While the authors of the TF Report comment that the civility training "has not been rigorously evaluated," they submit that such training "could provide an important complement" to compliance training.[78] The authors acknowledge that "civility codes" have been challenged under the NLRA, and they recommend that the NLRB and EEOC confer "to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes."

*Bystander Intervention Training*. According to the TF Report, bystander training frequently has been utilized to prevent sexual assault at high schools and colleges, and such training is used to "empower students to intervene with peers to prevent such assaults from occurring."[79] In the view of the Co-Chairs of the TF Report, such training might be effective in the workplace, explaining:[80]

> Such training could help employees identify unwelcome and offensive behavior that is based on a co-workers' protected characteristic under employment non-discrimination laws; could create a sense of responsibility on the part of employees to "do something" and not simply stand by; could give employees the skills and confidence to intervene in some manner to stop harassment; and finally, could demonstrate the employer's commitment to empowering employees to act in this manner. Bystander training also affords employers an opportunity to underscore their commitment to non-retaliation by making clear that any employee who "steps up" to combat harassment will be protected from negative repercussions.

### 4. Final Comments in Task Force Report

The TF Report concludes by discussing the importance of education and outreach. While explaining that employer on-the-job training is one option, there is significant available information. This includes successful outreach efforts by the EEOC, non-profit organizations providing information for workers, and other resources for employers, such as membership organizations like the Society for Human Resources Management. According to the TF Report, more focused outreach on youth is needed, but the Co-Chairs commended the EEOC for its Youth@Work outreach and education campaign.[81]

The TF Report also refers to the Commission's plan to update Enforcement Guidance on Harassment, to be used as a resource by employers and employees, and making its website "mobile friendly and accessible in a number of languages."[82]

The TF Report includes the observation that although the ideas provided in the TF Report may be helpful, sitting back as "complacent bystanders" will have no impact on workplace cultures needing change. The TF Report refers to the "audacious goal to launch an 'It's On Us' campaign to address anti-harassment efforts in the workplace."[83]

75 TF Report at 54-60.
76 *Id.* at 54.
77 *Id.* at 55.
78 *Id.* at 56.
79 *Id.* at 57.
80 *Id.*
81 *Id.* at 62.
82 *Id.* at 61-62.
83 *Id.* at 64-65.

Recommendations also are included at the end of the TF Report, which reiterate the key points of the TF Report. Appendices provide "Checklists for Compliance" that focus on key preventive efforts, which also are attached to this Littler Report for ease of reference.

## C. Proposed Enforcement Guidance on Unlawful Harassment

### 1. Purpose of Proposed Enforcement Guidance

While the focus of the EEOC's TF Report is harassment prevention, the EEOC has also developed some "rules of the road" in addressing the legal standards applicable to harassment claims, which are discussed in the EEOC's "*Proposed Enforcement Guidance on Unlawful Harassment*" (hereinafter "Enforcement Guidance"), issued on January 10, 2017.[84] In announcing the proposed Enforcement Guidance, the EEOC explained that it should be viewed as "a companion piece" to the TF Report. The three objectives of the Enforcement Guidance are to: (1) explain the legal standards for unlawful harassment and employer liability; (2) provide a "single legal analysis for harassment that applies the same legal principles for all statutes enforced by the EEOC;" and (3) replace the various previously issued EEOC updates and guidance on harassment. In announcing the proposed Enforcement Guidance, the EEOC invited public comment before finalizing the guidance, and the comment period was extended until March 21, 2017.[85] To date, the EEOC has not yet issued the final version of the guidance, which is reportedly pending review at the Federal Office of Management and Budget (OMB) as of the date of this Littler Report's publication. Even in draft form, the proposed Enforcement Guidance provides excellent insight regarding how the agency will evaluate harassment claims.

The proposed Enforcement Guidance includes three primary sections and addresses: (1) the scope of harassment claims, focusing on "legally protected personal characteristics;" (2) the applicable legal standard in determining whether the conduct was "severe or pervasive" to create a hostile work environment; and (3) the applicable standard of liability, which depends on who engaged in such unlawful conduct.

### 2. Individuals Protected from Harassment

The introductory section of the proposed Enforcement Guidance is very straightforward and primarily underscores that harassment based on any protected status is covered, including race, color, national origin, religion, sex (including gender identify and sexual orientation),[86] age, disability or genetic information. However, the Enforcement Guidance highlights certain types of conduct that is unlawful in which coverage is less obvious: (1) harassment based on the "perception" that an individual has a protected characteristic, even if mistaken, using the example of harassment of a Hispanic person based on the mistaken belief he/she is Pakistani; (2) harassment against an individual based on a close relationship to someone in a protected status, called "associational discrimination"; (3) harassment by an individual who is a member of the same protected class; and (4) harassment based on two or more protected classes.[87]

The draft Enforcement Guidance states that the determination whether harassment is based on a protected characteristic will depend on the "totality of the circumstances" and could involve "facially discriminatory conduct" (*e.g.*, racial epithets) or the "context" of certain actions or conduct (*e.g.*, use of the term "boy" or "you people") referring to African Americans.[88]

84 *See EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment*, supra note 5.
85 *Id. See also EEOC Extends Public Input Period on Proposed Harassment Enforcement Guidance to March 21*, supra note 7.
86 The U.S. Chamber of Commerce filed comments to the draft Enforcement Guidance on March 21, 2017, which include reference to the EEOC's omission of court decisions that have held that sexual orientation and gender identify are not covered under Title VII, aside from other exceptions to the guidance.
87 Enforcement Guidance at 9-11.
88 The draft Enforcement Guidance also underscores that the protected status does not need to be the only basis for the harassment, and it is sufficient if the conduct is based, at least in part, on a protected characteristic. *Id.* at 11.

In dealing with sex-based harassment, the draft Enforcement Guidance underscores that such conduct can involve: (1) sexual conduct, including proposals for sexual activity, or (2) non-sexual conduct, such as sexist comments (*e.g.*, using offensive terms directed at females) or bullying directed toward women but not men. The Enforcement Guidance distinguishes between isolated preferential treatment based on a consensual sexual relationship, which is not covered under Title VII because such preferences disadvantage men and women alike,[89] compared to widespread favoritism toward female employees who grant sexual favors, which creates the perception that women will be disadvantaged unless they submit to sexual advances.[90]

### 3. What Constitutes Actionable Harassment

While most employers today establish anti-harassment policies in which offensive behavior violating employer policy need not reach the level of being "actionable" harassment, knowing the applicable legal standards, as set forth in the draft Enforcement Guidance, obviously is important.

The Enforcement Guidance relies heavily on the leading U.S. Supreme Court decisions, but also highlights and relies on numerous federal appellate court decisions in reviewing the applicable legal standards for actionable harassment. *Meritor Savings Bank v. Vinson*[91] is a starting point because this landmark Supreme Court decision, handed down slightly over 30 years ago, determined that workplace harassment can be actionable discrimination prohibited by Title VII of the Civil Right Act of 1964.

In the *Meritor* decision, the Supreme Court highlighted that actionable harassment can arise in two circumstances: (1) a change or condition of employment is "linked" to harassment based on a protected status (*e.g.*, firing a female employee who rejected a superior's sexual advances);[92] or (2) the conduct impacts an employee's terms of conditions of employment based on creating a "hostile work environment."[93] As many employers are aware, harassment linked to sexual favors historically was referred to as "quid pro quo" harassment. As explained in the Enforcement Guidance, the U.S. Supreme Court's 1998 decision in *Burlington Industries, Inc. v. Ellerth*,[94] "questioned the utility of the 'quid pro quo' vs hostile work environment distinction and instead held that employers are vicariously liable for a hostile work environment created by supervisor harassment culminating in a tangible employment action."

***Severe or Pervasive Conduct***. In dealing with hostile environment claims, the *Meritor* decision underscores that harassment is actionable only if it is "sufficiently severe or pervasive" 'to alter the conditions of [the victim's] employment and create an abusive working environment."[95] As significantly, such conduct has to be severe or pervasive enough "to create an objectively and subjectively hostile work environment."[96]

In reviewing actionable claims, the Enforcement Guidance cites the U.S. Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*,[97] explaining:

> Whether conduct creates a hostile work environment depends on all of the circumstances, and no single factor is determinative. Circumstances may include the frequency and severity of the conduct; whether it was physically threatening or humiliating; whether it unreasonably interfered with an employee's work performance; and whether it caused psychological harm. If related harassing acts are based on multiple protected characteristics, then all of the acts should be considered together in determining whether the conduct created a hostile work environment.[98]

89 *Id.* at 17.
90 *Id.* at 18.
91 477 U.S. 57 (1986).
92 *Id.* at 66.
93 Enforcement Guidance at 19.
94 524 US 742 (1998).
95 *Meritor*, 477 U.S. at 67; Enforcement Guidance at 19.
96 Enforcement Guidance at 19.
97 501 U.S. 17 (1993).
98 *Id.* at 20.

On the other hand, as explained in the 1998 U.S. Supreme Court's decision in *Oncale v. Sundowner Offshore Servs., Inc.*[99] Title VII is not intended as a "general civility code." The Enforcement Guidance also cites other decisions reinforcing the view that "boorish, juvenile, or annoying behavior" simply is beyond the scope of actionable harassment.

The guidance further explains "severe or pervasive" conduct, suggesting "[t]he more severe the harassment, the less pervasive it must be to establish a hostile work environment," and there is no "magic number" of harassing incidents establishing a hostile work environment or minimum threshold of severity, underscoring that the "specific facts of each case" must be reviewed.[100] And yet, "a single serious incident of harassment" may be sufficient, using the examples of: (1) sexual assault, (2) sexual touching of an intimate body part, (3) physical violence or threat of violence, (4) use of symbols of violence or hate such as a noose or swastika, (5) use of the "n-word" by a supervisor, (5) using of animal imagery with racial overtones, and (6) threats to deny job benefits for rejecting sexual advances.[101]

Less-serious conduct also can create exposure, using the "pervasive" standard, which involves the "cumulative effects" of such acts, rather than on the individual acts themselves.[102]

**KEY U.S. SUPREME COURT DECISIONS ADDRESSING HARASSMENT IN THE WORKPLACE: A "MUST READ" FOR EMPLOYERS IN UNDERSTANDING THE "RULES OF THE ROAD" DEALING WITH ACTIONABLE HARASSMENT:**

- *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)
- *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)
- *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998)
- *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998)
- *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)
- *National Railroad Passenger Association v. Morgan*, 536 U.S. 101 (2002)
- *Vance v. Ball State University*, 133 S. Ct. 2434 (2013)

***Application of Subjective and Objective Standard***. The proposed Enforcement Guidance explains that to be actionable, the harassment must be both "subjectively hostile" (*i.e.* the complainant perceived the conduct as severe or pervasive) and "objectively hostile" (*i.e.* reasonable person would view the conduct as severe or pervasive).[103] The U.S. Supreme Court's 1993 decision in *Harris v. Forklift Systems, Inc.*,[104] "refined" the hostile environment standard in requiring the conduct to both subjectively and objectively hostile.[105]

In the Supreme Court's decision in *Meritor*, the court also distinguished between "unwelcome" versus "voluntary" conduct, underscoring that voluntary participation in certain conduct does not necessarily mean it was welcome. The proposed Enforcement Guidance goes one step further. In the Commission's view, conduct that is subjectively and objectively hostile is also "necessarily unwelcome;" the Commission disagrees with courts that view "unwelcomeness" separately.

99 523 U.S. 75, 81(1998). *See also* Enforcement Guidance at 20.
100 Enforcement Guidance at 21.
101 *Id.* at 22-23.
102 *Id.* at 25.
103 *Id.* at 26.
104 510 U.S. 17 (1993).
105 *Id.* at 27.

The proposed Enforcement Guidance further elaborates on the "subjective" and "objective" standards. First, in dealing with subjectivity, the Commission views a complainant's own statement that he/she perceived the conduct as offensive as sufficient to establish subjective hostility. As significantly, "subjective perception can change over time," and conduct welcomed in the past can become "unwelcome." Delay in complaining also does not undercut the subjective view that harassment occurred, assuming there is an explanation for the delay.[106]

In reviewing the requirement that conduct also must be objectively hostile, the proposed Enforcement Guidance explains that the conduct "should be evaluated from the perspective of a reasonable person of the complainant's protected class."[107] Other factors also may weigh in the mix, such as a conduct against a teenager by a substantially older person or an undocumented worker who is vulnerable to the risk of deportation.[108] As important, the Enforcement Guidance states that a prevailing workplace culture, such as a "crude environment," does not excuse the conduct.[109]

***Scope of Hostile Environment Claims***. The draft Enforcement Guidance also addresses significant issues that arise in determining whether a harassment claim is actionable: (1) the requirement that the conduct be "sufficiently related;" (2) conduct not directed at the complainant or outside the regular place of work; or (3) non-work related conduct that impacts the workplace.

*Requirement to be Sufficiently Related*. In reviewing whether a harassment claim is actionable, the draft Enforcement Guidance relies on the 2002 U.S Supreme Court decision in *National R.R. Passenger Corp. v. Morgan*,[110] explaining that a complainant "can challenge an entire pattern of conduct, so long as it continues into the limitations period.[111] The touchstone in permitting earlier conduct to be considered is that the conduct must be "sufficiently related" in order for the earlier conduct to be viewed as part of the hostile environment claim.[112]

*Conduct Not Directed at the Complainant or Outside the Regular Place of Work*. In dealing with conduct not specifically directed at an employee, the proposed Enforcement Guidance uses the example of open displays of pornography to illustrate that such conduct can contribute to a hostile work environment for female employees, even if not directed at the female employees.

*Non-Work-Related Conduct*. The proposed Enforcement Guidance further states that even offensive conduct outside the workplace may serve as the basis for a claim if the complainant becomes aware of the conduct during her employment, and it is sufficiently related to the employee's work environment.[113] Use of email systems used for non-work-related reasons, such as conveying inappropriate communications, was identified as an example in which exposure could arise. As significantly, non-work-related conduct, such as employees subjecting a co-worker to racially offensive conduct, such as racial slurs, outside the workplace may be a basis for a hostile work environment claim.[114]

106 *Id.* at 28-29.
107 *Id.* at 30.
108 *Id.* at 31.
109 *Id.*
110 536 U.S. 101 (2002).
111 Enforcement Guidance at 33.
112 *Id. See also Morgan*, 536 U.S. at 120.
113 Enforcement Guidance at 35.
114 *Id.* at 37-38.

### 4. Liability for Harassment

The proposed Enforcement Guidance outlines that the liability standard will depend on whether the harasser is the employer's "proxy or alter ego," supervisor or non-supervisory employee, or co-worker or non-employee, and discusses four standards of liability used by the courts:[115]

- If the harasser is a proxy or alter ego of the employer, the employer is strictly liable for the harasser's conduct. The actions of the harasser are considered the actions of the employer, and there is no defense to liability.
- If the harasser is a supervisor and the hostile work environment includes a tangible employment action against the victim, the employer is vicariously liable for the harasser's conduct. There is no defense to liability.
- If the harasser is a supervisor, and the hostile work environment does *not* result in a tangible employment action, the employer is also vicariously liable for the actions of the harasser, but the employer may limit its liability if it can prove a two-part affirmative defense.
- If the harasser is not a proxy or alter ego of the employer and is not a supervisor, the employer is liable for the hostile work environment created by the harasser's conduct if the employer failed to act reasonably to prevent the harassment or to take corrective action in response to the harassment when it was aware or should have been aware of such conduct.

The Enforcement Guidance explains that an individual is considered an "alter ego or a proxy" of the employer if the individual has "sufficiently high rank that his or her actions 'speak' for the employer," using the example of a sole proprietor, owner, partner or corporate officer.[116]

The Enforcement Guidance next explains that an individual is considered a "supervisor" if the person is "empowered by the employer to take tangible employment actions against the victim," citing the U.S. Supreme Court's 2013 decision in *Vance v. Ball State University*,[117] which rejected the EEOC's position that someone qualifies as a "supervisor" if he or she has the authority to direct another individual's daily work activities.[118] According to *Vance*, the ability to make recommendations regarding hiring and promotion is evidence of supervisory status.[119] The Guidance also reviews actions constituting "tangible employment actions."

***Tangible Employment Actions by Supervisors***. In dealing with supervisory conduct, an employer is always liable if a supervisor's harassment creates a hostile work environment that includes a tangible employment action.[120] As the Supreme Court explained in *Ellerth*, if the hostile environment includes a tangible employment action, the "action taken by the supervisor becomes for Title VII purposes the act of the employer," and the employer is liable.[121] The Guidance identified employer actions constituting "tangible employment actions," which include "hiring and firing, the failure to promote, demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits." The Enforcement Guidance explains that an "unfulfilled threat" to take a tangible employment action does not create automatic liability for supervisory conduct,[122] and the discussion below applies.

115 *Id.* at 39.
116 *Id.* at 40.
117 133 S. Ct. 2434 (2013).
118 Enforcement Guidance at 40, n. 139.
119 *Vance*, 133 S. Ct. at 2446, n. 8; *see also* Enforcement Guidance at 41, n. 1.
120 Enforcement Guidance at 43.
121 *Ellerth*, 524 U.S. at 762.
122 Enforcement Guidance at 44.

***Hostile Work Environment Without a Tangible Employment Action***. The U.S. Supreme Court's 1998 decisions in *Burlington Industries, Inc. v. Ellerth*[123] and *Faragher v. City of Boca Raton*,[124] discussed the applicable legal standard regarding liability for supervisory conduct absent a tangible employment action. In such circumstances, an employer can raise an affirmative defense to liability or damages, and the defense requires:[125]

- the employer exercised reasonable care to prevent and correct promptly any harassment; and
- the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to take other steps to avoid harm from the harassment.[126]

In the EEOC's view, the Enforcement Guidance clarifies that the inability to establish both prongs of the affirmative defense results in employer liability for harassment.[127] Further, if the employee reasonably could have avoided some of the harm from the harassment, the damages may be limited.[128] The Enforcement Guidance uses the example of avoiding the continuing harm by complaining, but the damages for the initial offensive conduct could not be avoided because the complaining employee could not have avoided the harm.[129]

In discussing the first prong of the affirmative defense—an employer exercising reasonable care to prevent and correct harassment—these steps usually consist of: (1) promulgating a policy against harassment; (2) establishing a process for addressing harassment complaints; (3) providing training to ensure employees understand their rights and responsibilities under the policy; and (4) monitoring the workplace to ensure adherence to the employer's policy.[130]

Similar to the TF Report, the Enforcement Guidance outlines what is required for an effective anti-harassment policy and complaint procedure:

*Key Components of Effective Anti-Harassment Policy:*

- the policy defines what conduct is prohibited, and is widely disseminated;
- the policy is accessible to workers, including those with limited proficiency in English;
- the policy requires that supervisors report or address harassment involving their subordinates when they are aware of it; and
- the policy offers various ways to report harassment, allowing employees to contact someone other than their direct supervisor.

*Key Components of Effective Complaint Procedure:*

- the process provides for effective investigations and prompt corrective action;
- the process provides adequate confidentiality protections; and
- the process provides adequate anti-retaliation protections.[131]

123 524 U.S. 742 (1998).
124 524 U.S. 775 (1998).
125 *Ellerth*, 524 U.S. at 765. *See also Faragher,* 524 U.S. at 807; Enforcement Guidance at 45.
126 *Id.* at 45.
127 *Id.*
128 *Id.* at 46.
129 *See* Example 22, Enforcement Guidance at 46.
130 Enforcement Guidance at 47.
131 Enforcement Guidance at 47-48.

The Enforcement Guidance expressly addresses confidentiality, explaining that it may not be reasonable to honor any such request, particularly if the harassment was severe or other employees are vulnerable.[132] The EEOC suggests that an informational phone line or website permitting questions or raising concerns anonymously could be considered.[133]

Based on the second affirmative defense, an employer must establish that the complainant "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[134] According to the EEOC, an employee's failure to use the employer's complaint procedure normally will establish the second prong, but the EEOC pointed to circumstances where delay may be explained and/or where an employee complained through other than the official complaint procedure, which may nullify use of the defense.[135] Further, failing to complain over minor offenses may excuse delay.[136]

As significant, the EEOC highlights several circumstances in which failure to complain may be excused, thus barring reliance on the affirmative defense. The EEOC points to:

- Obstacles to filing complaints, such as undue expense, inaccessible points of contact, or intimidating or burdensome requirements;
- An ineffective complaint mechanism, such as the employee's "reasonable belief" that the complaint procedure was ineffective, or including close friends of the harasser as persons designated to receive complaints; and
- Risk of retaliation, including an employee's reasonable fear of retaliation based on filing a complaint. Such retaliatory actions could include the harasser's threatening to discharge the employee if she complained.

The Enforcement Guidance further highlights that an employee does not have to complain if the employee took other reasonable steps to avoid harm from the harassment, such as filing a union grievance or a discrimination charge.[137]

***Non-Supervisory Employees/Co-Workers or Non-Employees***. The proposed Enforcement Guidance reviews the applicable law regarding employer liability for harassment by others, including co-workers and non-employees, which essentially is a negligence standard. The two key prongs under which employer conduct is evaluated involves: (1) unreasonable failure to prevent harassment; and (2) unreasonable failure to correct harassment of which the employer had notice.[138]

*Unreasonable Failure to Prevent Harassment*. The Enforcement Guidance states that "the relevant considerations will vary from case to case," but factors that come into play include adequacy of the employer's anti-harassment policy and complaint procedure and adequacy of the employer's efforts to monitor the workplace, such as by training supervisors and related personnel on how to recognize potential harassment.[139]

*Unreasonable Failure to Correct Harassment if the Employer Had Notice*. The two key factors dealing with corrective action involve: (1) notice; and (2) a prompt and adequate investigation followed by appropriate corrective action.[140]

132 *Id.* at 48-49.
133 *Id.* at 49.
134 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. *See also* Enforcement Guidance at 50.
135 Enforcement Guidance at 50.
136 *Id.* at 51.
137 *Id.* at 53.
138 *Id.* at 54-55.
139 *Id.*
140 *Id.* at 56-65.

*Impact of Employer Being on Notice*. An employer with notice, which includes knowledge of offending conduct by a supervisor or human resources representative, triggers a duty to investigate and take corrective action, where appropriate. Notice also could arise based on a complaint from a third party, such as a friend, relative or co-worker, regarding concerns about an employee. Significantly, according to the proposed Enforcement Guidance, the duty to take corrective action "may be triggered by notice of harassing conduct that has not yet risen to the level of a hostile work environment, but may be reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken."[141] The proposed Guidance also refers to "constructive notice" of harassing conduct if, "under the circumstances, a reasonable employer should know about the conduct."[142]

*Prompt and Adequate Investigation*. An employer with notice must conduct a prompt and adequate investigation and institute reasonable corrective action. Based on the Enforcement Guidance, acting promptly "is fact-sensitive and depends on such considerations as the nature and severity and the reasons for delay."[143] The proposed Enforcement Guidance outlines the basic requirements for an effective investigation as follows:[144]

> An investigation is effective if it is sufficiently thorough to "arrive at a reasonably fair estimate of truth." The investigation need not entail a trial-type investigation, but it should be conducted by an impartial party and seek information about the conduct from all parties involved. If there are conflicting versions of relevant events, it may be necessary for the employer to make credibility assessments so that it can determine whether the alleged harassment in fact occurred.

The proposed Enforcement Guidance also states that employers should take additional actions as part of a prompt and adequate investigation, such as the following:[145]

- The employer should keep the complainant and the alleged harasser apprised of the status of the investigation;
- Employers should keep records of all harassment complaints and investigations to identify any patterns of harassment and to take appropriate preventive actions;
- Employers should consider intermediate steps during the investigation, which may include: (1) scheduling the complaining employee to avoid contact with the alleged harasser during the investigation; (2) temporarily transferring the alleged harasser, or (3) placing the alleged harasser on paid non-disciplinary leave with pay, pending the results of the investigation; and
- Employers should make reasonable efforts to minimize the burden of negative consequences on the complaining employee.

*Appropriate Corrective Action*. The proposed Enforcement Guidance underscores that to avoid liability, an employer must take corrective action that is "reasonably calculated to prevent further harassment based on review of the applicable circumstances,"[146] taking into account these considerations:

- Proportionality of the corrective action; the corrective action should be "proportionate to the seriousness of the offense."[147] Minor infractions with no prior offenses may warrant counseling or a warning, as contrasted to severe or pervasive conduct that warrants suspension or termination.

141 *Id.* at 58.
142 *Id.* at 58-59.
143 *Id.* at 60.
144 *Id.*
145 *Id.* at 61.
146 *Id.* at 62.
147 *Id.*

- Authority granted the harasser, and the nature and degree of the harasser's authority "should be considered in evaluating the adequacy of the corrective action."[148]
- Whether harassment stops because of the corrective action, recognizing continuation of the harassment does not necessarily mean that the corrective action was inadequate, particularly for first-time offenders engaged in mildly offensive conduct.[149]
- Effect on complainant, based on the objective that complaints of harassment should not result in any adverse consequences on the complainant.[150]
- Options available to the employer, taking into account that an employer may have fewer options when the offending employee is a non-employee or where the alleged conduct occurred at a client site where the employer has limited control over the environment.[151]
- Extent to which the harassment was substantiated, recognizing that if, despite a thorough investigation, the findings are inconclusive, the employer is not required to impose discipline.[152]
- Special considerations to be considered when balancing anti-harassment and accommodation requests tied to religious expression. Employers may violate Title VII by preemptively banning all religious communications in the workplace, but could limit accommodations when religious expression creates or threatens to create a hostile work environment.[153]
- Employers need to follow the same investigative process, regardless of the protected status of the alleged harasser or harassee, explaining, "it would violate Title VII if an employer assumed that a male employee accused of sexual harassment by a female coworker had engaged in the illegal conduct, based on stereotypes about the 'propensity of men to harass sexually their female colleagues.'"[154]

### 5. Systemic Harassment

In the last section of the proposed Enforcement Guidance discussing substantive topics, the EEOC briefly addresses systemic harassment involving an alleged "pattern or practice" of discrimination, "meaning that the employer's 'standard operating procedure' was to tolerate harassment creating a hostile work environment."[155] The Enforcement Guidance describes the applicable standard regarding systemic harassment claims as follows:

> This inquiry focuses on the "landscape of the total work environment, rather than the subjective experiences of each individual claimant"—in other words, whether the work environment, as a whole, was hostile. For instance, in one case, the court concluded that evidence of widespread abuse, including physical assault, threats of deportation, denial of medical care, and limiting contact with the "outside world," was sufficient to establish that Thai nationals employed on the defendant's farms were subjected to a hostile work environment. To avoid liability in a pattern-or-practice case, the employer must adopt a systemic remedy, rather than only address harassment of particular individuals. Moreover, if there have been frequent individual incidents of harassment, then the employer must take steps to determine whether that conduct reflects the existence of a wider problem requiring a systemic response, such as developing comprehensive company-wide procedures.[156]

148 *Id.* at 62-63.
149 *Id.*
150 *Id.* at 64.
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.* at 66-67
156 *Id.* at 67.

According to the Enforcement Guidance, "[E]stablishing a pattern-or-practice violation does not necessarily establish that any particular employee was subjected to a hostile work environment."[157] However, the EEOC notes that the courts have taken different views evaluating potential violations as to individual claimants, explaining that, in one 1998 decision:

> The court concluded that establishing a pattern-or-practice violation shifts the burden of production to the employer to show that individual claimants did not find the conduct unwelcome or hostile and that it took appropriate corrective action, though the claimants retained the ultimate burden of proof on those issues.[158]

> By contrast, in *International Profit Association*, the court concluded that a pattern-or-practice violation does not give rise to a presumption that any individual claimants were subjected to unlawful harassment. Thus, for each individual claimant seeking monetary damages, the EEOC was required to prove that that particular claimant experienced sex-based harassment that a reasonable woman would find sufficiently severe or pervasive to create a hostile work environment and that the claimant subjectively perceived the harassment she experienced to be hostile. The employer, however, bore the burden of production to come forward with evidence showing that it was not negligent with respect to a particular claimant, and if the employer produced such evidence, then the burden shifted back to the EEOC to show that the employer's steps were inadequate.[159]

### 6. Promising Practices

In the final section of the draft Enforcement Guidance, the EEOC essentially incorporates key recommendations of the EEOC's TF Report to prevent harassment in the workplace.

## D. Review of EEOC Harassment Litigation and Lessons Learned

### 1. Overview

As discussed at the outset of this opening chapter, during FY 2017, the EEOC filed 184 "merits" lawsuits,[160] and based on Littler monitoring these case filings, a total of 54 recently filed EEOC lawsuits involve harassment complaints. While a complete list and summary of these lawsuits is attached to this Littler Report as "Appendix E," it is noteworthy that over 50% of these lawsuits (29 of 54 lawsuits/54%) involve multiple victim claims. As significantly, while the EEOC has been attacking alleged harassment based on sex, race and other protected characteristics, it is noteworthy that in fiscal year 2017, a review of EEOC court filings indicates that 34 out of the 54 EEOC harassment lawsuits (63%) include sexual harassment claims. Further, among these lawsuits, over 50% (18 out of 34 lawsuits) involve multiple victim claims, many of which refer to a "class of similarly aggrieved individuals" and/or "pattern or practice" claims.

In recent years, aside from the recent $10.125 million settlement, announced on August 15, 2017, involving claims of racial and sexual harassment involving a major automaker, some of the most significant settlements and/or verdicts involving EEOC harassment litigation have included:

157 *Id.,* n. 251.
158 *See EEOC v. Mitsubishi Motor Mfg., of Am. Inc*., 990 F. Supp. 1059 (C.D. IL 1998); *see also* Enforcement Guidance at 67, n. 251.
159 *EEOC v. Int'l Profit Assocs., Inc.*, No. 01 C 4427, 2007 WL 3120069 at *17 (N.D. Ill Oct. 23, 2007).
160 "Merit" lawsuits involve alleged violations based on a person's protected status, as contrasted to other legal actions initiated by the EEOC, such as a subpoena enforcement action.

- A $17.4 million jury verdict in Florida federal court in favor of various female farm workers, which involved claims that female employees were subjected to repeated sexual harassment by male supervisors, including groping, propositions and rape, in which the jury issued a unanimous verdict for the EEOC with an award of $2.4 million in compensatory damages and $15 million in punitive damages.[161]
- A $14.5 million consent decree involving a multi-state oil drilling company, which included claims that the affected employees were subjected to pervasive racial and ethnic slurs, assigned to the lowest-level jobs, and were subjected to other alleged discriminatory conduct.[162]
- Settlements in 2012 and 2013 totaling $10 million and $11 million, respectively, involving alleged racial harassment, which involved alleged hostile displays such as nooses and racial graffiti, and affected employees being disciplined more severely.[163]
- A $3.8 million settlement involving a joint settlement agreement among the EEOC, the NY Attorney General and a utility company resolving allegations of ongoing sexual harassment and discrimination against women in field positions, which included claims that female workers faced widespread harassment by male co-workers and a hostile work environment based on gender, and that the company failed to address this discrimination.[164]

Based on the recent focus on sexual harassment, the discussion below focuses on selected EEOC settlements and/or litigation involving allegations of sexual harassment in the workplace. While such litigation can be costly and lengthy for employers, the EEOC also faced one of its more embarrassing losses in pursuing harassment litigation in *EEOC v. CRST*.[165] The *CRST* case stemmed initially from an individual charge of discrimination and expanded into a systemic harassment lawsuit, spanning a period of over 10 years from its initial filing in 2005 and still remains in the courts.

After the district court dismissed the EEOC's pattern-or-practice claim, the EEOC continued to pursue a class-type claim on behalf of 270 claimants. Ultimately, and after many years of litigation and various judgments for the employer, the EEOC was left with only two claimants and then dropped the claim of one claimant, and was then left solely with the claim of the initial charging party, which was settled for $50,000. Following an award of over $4 million in attorneys' fees in favor of the employer, the case was appealed to the Eighth Circuit and remanded, and most recently was before the U.S. Supreme Court, which remanded the case for further proceedings regarding the attorneys' fee award. On September 22, 2017, the district court continued to affirm a fee award for the company, although the fees and costs for *CRST* were adjusted to $1,860,127.36, although the final amount to be awarded remains in dispute.[166]

Regardless of the less-than-ideal outcome for the EEOC in CRST, employers still need to properly evaluate the risks involved in EEOC harassment claims and litigation, as shown by the discussion below.

161 *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* https://www.eeoc.gov/eeoc/newsroom/release/9-10-15.cfm, although the jury award subsequently was substantially reduced in light of Title VII's statutory caps.

162 *See* Press Release, EEOC, *Patterson-UTI Drilling to Pay $14.5 Million to Settle Claims of Race / National Origin Discrimination* (Apr. 20, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/4-20-15.cfm.

163 *See* Press Release, EEOC, *EEOC's Systemic Program Shows Significant Success in Past 10 Years* (July 7, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/7-7-16.cfm, and "A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, page 23, *available at* https://www.eeoc.gov/eeoc/systemic/review/upload/review.pdf. https://www.eeoc.gov/eeoc/systemic/review/#IIIBhttps://www.eeoc.gov/eeoc/systemic/review/#IIIB

164 *See* Press Release, EEOC, *Class of Female Blue-Collar Workers Charged Sexual Harassment, Unequal Treatment Because of Sex* (Sept. 9, 2015), *available at* https://www.eeoc.gov/eeoc/newsroom/release/9-9-15.cfm.

165 *See CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642 (2016).

166 *See EEOC v. CRST Van Expedited Inc.*, Case No. 1:07-cv-00095-LRR, Docket 462 and subsequent entries (N.D. Iowa).

### 2. Lessons Learned from Recent Harassment Settlement with EEOC

At the outset, the recent $10.125 million EEOC settlement of a systemic claim with an automaker involving two Chicago-area facilities provides some lessons learned for employers.[167] This matter was resolved following a lengthy EEOC investigation, reasonable cause finding and settlement during conciliation prior to a lawsuit being filed by the EEOC. Most significantly, this was the second major settlement between the EEOC and the same Chicago area automaker facilities. In September 1999, the company agreed to pay nearly $8 million in damages to female employees "alleged to have been victimized by sexual harassment, racial harassment, harassment on the basis of sex, and retaliation for complaining about the harassment."[168]

The 1999 settlement was significant in its scope, as described by the EEOC:

- [The company] has also agreed to train all of its employees on prevention of job discrimination. [The company] expects to spend a projected $10 million to conduct the training. In addition, [the company] will take steps to increase representation of females entering supervisory positions to 30% over the next three years at its Chicago Stamping and Assembly Plants.

* * *

- According to the terms of the main agreement, which will remain in effect for three years, [the company] will pay $7.5 million, to be distributed among a class of eligible claimants as defined in the agreement. Under a related confidential agreement, [the company] will pay a total of $250,000 to two female employees to resolve their individual charges. In addition, [the company] agreed to undertake efforts to increase the level of female representation in the first line supervisory cadre over the term of the agreement. A goal has been set to place females in 30% of the entry supervisory openings at its Chicago Stamping and Assembly Plants.

  The agreement also calls for the company to provide training on the prevention of discrimination and the panel-approved policies and procedures. The company projects that it will spend $10 million to provide the training to all its employees. The agreement requires that the company provide such training, as well as the implementation of the revised policies and procedures, not only at the Chicago-area plants, but at certain other company facilities.

The 2017 conciliation agreement with the EEOC resulted in revisiting some of the very same issues previously addressed in the earlier settlement, as described in the EEOC's recent description of the settlement:

> The conciliation agreement provides monetary relief of up to $10.125 million to those who are found eligible through a claims process established by the agreement. The agreement also ensures that during the next five years, [the company] will conduct regular training at two of its Chicago-area facilities; continue to disseminate its anti-harassment and anti-discrimination policies and procedures to employees and new hires; report to EEOC regarding complaints of harassment and/or related discrimination; and monitor its workforce regarding issues of alleged sexual or racial harassment and related discrimination.[169]

167 *See* Press Release, EEOC, *Ford Motor Company to Pay up to $10.125 Million To Settle EEOC Harassment Investigation* (Aug. 15, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/8-15-17.cfm.

168 *See* Press Release, EEOC, *EEOC And Ford Sign Multi-Million Dollar Settlement Of Sexual Harassment Case* (Sept. 7, 1999), *available at* https://www.eeoc.gov/eeoc/newsroom/release/archive/9-7-99.html.

169 *Id.*

This recent settlement also demonstrates that risks of litigation are not necessarily eliminated based on settlement of a systemic claim with the EEOC. As an example, despite the automaker's 2017 settlement with the EEOC, the company has been confronted with an ongoing private class action lawsuit, initially filed in 2014 by 30 named plaintiffs, alleging harassment.[170] On October 14, 2017, the plaintiffs moved to stay distribution of the settlement notices based on the EEOC settlement to potential claimants, alleging that it was an attempt by the company "to undercut class certification in this matter."[171] While the court denied the motion on October 18, 2017,[172] it raised concerns of the company's engaging in "gamesmanship" to "limit their own liability and undercut certification of the class," but nevertheless determined that "plaintiffs' experienced counsel should have been on notice of the timing and procedures that follow a Conciliation Agreement" and determined that plaintiffs failed to meet the burden to justify injunctive relief.[173]

The dual-front attack faced by the automaker in defending itself against claims by both the EEOC and private counsel is a reminder that any settlement entered into with the EEOC does not have the binding effect of a Rule 23 class action, whether entered into during conciliation or based on a consent decree following a lawsuit initiated by the EEOC. In short, an employee or former employee is not bound by the terms of a conciliation agreement or consent decree entered into with the EEOC unless the individual specifically signs off on specific terms, such as executing the conciliation agreement or signing a release tied to the conciliation agreement or consent decree.

As significantly, a private settlement entered into with a charging party may have no effect on the EEOC if the EEOC elects to continue investigating a systemic charge that initially stemmed from the individual charge of discrimination.[174] both the Seventh Circuit and Ninth Circuit have permitted the EEOC to continue investigating systemic claims stemming from an individual charge, even after a private lawsuit is filed.[175]

### 3. Lessons Learned From Recent Harassment Trial with EEOC

The risks in harassment litigation are evident because the perspectives of the reported victim and the employer frequently differ markedly. These lawsuits are fact-driven, and significant risks arise, even if an employer engages in good-faith efforts to maintain a harassment-free workplace.

A recent jury verdict for the EEOC is ample proof of this fact. On December 22, 2016, the jury in *EEOC v. Costco Wholesale Corp*. ruled for the EEOC, and awarded $250,000 in compensatory damages to a former Costco employee who alleged that she was harassed and stalked by a customer.[176] The *Costco* lawsuit is a reminder of the risks involving third-party harassment, particularly in the retail and hospitality sectors.

Based on the complaint against the employer, the EEOC alleged that it engaged in "unlawful employment practices" by "creating and tolerating a sexually hostile work environment of offensive comments of a sexual nature, unwelcome touching, unwelcome advances, and stalking by a customer and constructively discharging her." [177]

170 *See Christie Van et al. v. Ford Motor Company*, Case No. 1:14-CV-08708 (N.D. Ill., Filed Nov. 3, 2014).
171 *Id.*, Docket No. 157; s*ee also* Docket No. 166
172 *Id.* Docket No. 169 (Oct. 18, 2017).
173 *Id.* The court noted, however, that the 2017 conciliation agreement was similar to the 1999 conciliation agreement entered into between the EEOC and the company at the same facilities involving virtually identical issues.
174 *See EEOC v. Watkins Motor Lines*, 553 F.3d 593, 597 (7th Cir. 2009).
175 *See EEOC v. Union Pacific Railroad*, No. 15-3452 (7th Cir. Aug 15, 2017); *see also EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009); *but* see *EEOC v Hearst*, 103 F.3d 462 (5th Cir. 1997) (Fifth Circuit held that EEOC's authority to investigate a charge ends when it issues a right-to-sue letter).
176 Case No. 1:14-cv-06553 (N.D. Ill., Filed: Aug. 25, 2014); *see also* jury award at Docket No. 234 (Dec. 21, 2016); *see* Press Release, EEOC, *EEOC Wins Jury Verdict in Sexual Harassment Case against Costco* (Dec. 22, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm.
177 *EEOC v. Costco Wholesale, Inc.*, Case No. 14-CV-6553, Docket No. 1 (Aug. 24, 2014).

Following extensive discovery, the district court denied the employer's summary judgment motion.[178] It is noteworthy that the company maintained anti-harassment and reporting policies, which prohibited all forms of harassment, including conduct by both employees and customers, and required employees to report any conduct they considered to be harassing. The employer also had an "open door" policy permitting employees to contact any supervisor with any concerns and permitting employees to contact ascending levels of management until their issue was resolved. Further, the employer conducted annual training on equal employment and anti-harassment for all employees, which included videos, interactive discussions and instruction designed to assist employees in identifying and reporting harassment, and the employer conveyed a "zero-tolerance" stance regarding harassment.[179]

The former store employee, whose discrimination charge led to the EEOC's lawsuit, was employed as a part-time employee for approximately 15 months, and worked as a front-end assistant until she began a leave of absence from which she never returned. The employee initially complained about the customer to a loss-prevention representative several months after starting work at the store, and referred to the customer "constantly" trying to speak with her, and had commented that she "looked scared," which "unnerved her." Within a matter of days, the loss-prevention agent, her manager and assistant store manager approached the customer, took him to the office and explained that he was making the complainant uncomfortable, and he was told to "minimize" his contact with the complainant. Her manager and the store's assistant general manager followed up with the complainant, advising her to let them know if anything else happened, although the complainant allegedly stated that following her complaint, she was told by a company manager to be "friendly" with the customer. The complainant also filed a police report, claiming that the customer was stalking her at work.[180]

The facts were disputed regarding what occurred over the next year. The complainant alleged there were periods of time in which the customer returned to the store, would stare at her, and continued to speak with her, repeatedly asking "intimate questions," such as whether she would go out with him and whether she had a boyfriend, asked about her age, touched her face once, and her wrist on another, and told her she looked "beautiful" and "exotic." The complainant alleged that she complained to her manager on multiple times and that her father even complained to company management. Company management disputed whether there were complaints during this period, and claimed that they had spoken to her, but she never identified any concerns.

Interactions came to a head shortly before the complainant went on medical leave when she allegedly caught the customer videotaping her with his cell phone while she was working, which led to her complaining about the incident. Company management immediately investigated, such as reviewing security video. The issue was "run up the ladder," and the customer was told to shop at a different store while the matter was being investigated. In response, the customer complained to store management about what he viewed as unfair treatment of him. Meanwhile, the complainant went to court and obtained an order of protection and subsequently requested and was placed on an extended medical leave under company policy, which permitted leaves of up to one year. The company's investigation of the matter was inconclusive, but the customer was advised that it was best that he shop at a different store location. The customer responded by threatening to sue the store for harassing him. Following a year of being on leave, the complainant subsequently requested an additional one-to-two years of leave, but this was denied based on the view that company did not provide indefinite leaves of absence.[181]

178 *Id.*, Court Order denying summary judgment motion, Docket No. 104 (Dec. 15, 2015).
179 *Id.* at 1-3.
180 *Id.* at 4-5.
181 *Id.* at 8-12.

In ruling on the summary judgment motion, which most likely involved similar facts at the later trial, the district court judge viewed the record as "the 'proverbial swearing contest.'" From the company's perspective, it was in a difficult situation in which the customer and employee provided vastly different accounts of incidents that occurred and there was an inability to confirm or refute the employee's allegations. However, the court determined that a "reasonable jury" could conclude that the actions, over an extended period, could rise to the level of a "hostile environment."[182]

Particularly noteworthy was the court's view of the company's knowledge of the incidents and its efforts to take remedial action. The court viewed as significant the complainant's claim that a manager told her to be friendly with the customer after she contacted the police, citing case law that "'a rational jury could have believed that [plaintiff ] did not feel comfortable' reporting the harassment based on the employer's harsh reaction to an earlier complaint." The court also raised concerns regarding the company's response to the situation because it waited for more than a year before telling the customer not to return to the store, which the jury could conclude was "an unreasonable period of time," thus finding the court "cannot conclude as a matter of law that [the store] took reasonable steps to end the alleged harassment."[183]

The store filed an appeal following the adverse jury ruling, and the EEOC filed a cross-appeal based on various rulings, including post-trial rulings, in the case, which most likely included the district court's granting summary judgment for the store on the "constructive discharge" claim.[184] The matter remains pending on appeal.

### 4. Key Legal Issues Involving EEOC Systemic Harassment Claims

Although private plaintiffs may have challenges in bringing pattern-or-practice sexual harassment claims unless they can meet the strict requirements under Rule 23 to certify a class action,[185] the U.S. Supreme Court long ago eased the EEOC's burden for bringing class-type claims. In 1980, the Court in *General Telephone Company v. EEOC*[186] held that the requirements under Rule 23 do not apply to the EEOC, thus making it easier to file class-type claims against employers.[187]

The debate over the years has been how class-type or "pattern-or-practice" lawsuits are initiated and pursued by the EEOC. Congress empowered the EEOC to challenge discriminatory practices based on two separate sections in Title VII—Sections 706 and 707.[188] The courts historically have applied a different standard of proof for claims under each section, depending on the nature of the claim. Notably, jury trials and compensatory damages are available under Section 706, but not under Section 707.

Only Section 707 makes express reference to pattern-or-practice claims, but the EEOC frequently has tried to blur the lines based on the goal to seek compensatory and punitive damages against an employer when asserting both individual and class-type claims, including sexual harassment claims. Section 707 authorizes the EEOC to sue when it "has reasonable cause to believe that [an employer] is engaged in a pattern or practice" of unlawful discrimination.[189]

182 *Id.* at 17.
183 *Id.* at 21.
184 *See EEOC v. Costco Wholesale, Inc.*, Case No. 14-CV-6553, Docket Nos. 274 and 278.
185 Although a district court permitted a private pattern-or-practice harassment claim in *Jenson v. Eveleth Taconite Co*, 824 F. Supp. 847 (D. Minn. 1993), the courts generally have refused to permit "pattern or practice" litigation unless the plaintiffs comply with Fed. R. Civ. P. 23. *See e.g., Davis v. Coca-Cola Bottling Co.*, 516 F. 3d 955, 968 (11th Cir. 2008); *Bacon v. Honda of America Mfg., Inc.*, 370 F. 3d 565, 575 (6th Cir. 2004); *Lowery v. Circuit City Stores, Inc.*, 158 F. 3d 742, 759-761 (4th Cir. 1998); *Brown v. Coach Stores, Inc.*, 163 F. 3d 706 (2d Cir. 1998)
186 446 U.S. 318 (1980).
187 Fed. R. Civ. P. 23(a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.
188 42 U.S.C. §§ 2000e-5, 2000e-6.
189 42 U.S.C. § 2000e-6(a). It is noteworthy that pattern-or-practice claims focus solely on "intentional discrimination" and do not apply to disparate impact claims. *See, e.g., Davis v. Coca Cola Bottling Co.*, 516 F. 3d 955, 964-65 (11th Cir. 2008) ("section 707(a) of the Civil Rights Act of 1964…entitles the Government to bring a pattern or practice claim on behalf of a class of similarly situated employees…against an ongoing act of intentional discrimination").

The Supreme Court's decision in *International Brotherhood of Teamsters v. United States*[190] set forth the basic standard, consistently relied on over the years, that a pattern or practice of discrimination can be proven by "establish[ing] by a preponderance of the evidence that…discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[191] On the other hand, a pattern-or-practice claim fails by an employer's showing "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[192] These cases are typically proved based on statistical evidence, coupled with anecdotal evidence.

When the *Teamsters* framework is used, the courts typically have bifurcated the proceedings into a liability phase, followed by a damages phase, in which the scope of individual relief is determined and a presumption of liability applies.[193] From an employer's perspective, the EEOC has an advantage in proving pattern-or-practice claims because once the EEOC passes the threshold of demonstrating class-wide discrimination, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[194]

One of the landmark cases involving pattern-or-practice litigation involving sexual harassment, as relied on by the EEOC, is *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*[195] Here, the district court relied on the *Teamsters* framework for pattern-or-practice cases for determining whether the employer's "standard operating procedure" was to ignore complaints of sexual harassment. The court also addressed how such a pattern-or-practice case can be proven. Specifically, the court looked at two primary Supreme Court decisions, *Meritor Savings Bank v. Vinson*[196] and *Harris v. Forklift Sys., Inc.*,[197] and determined that although a hostile and abusive work environment normally would include both an "objective and subjective component," the sole focus in determining pattern-or-practice liability in harassment claims is an objective standard. In another significant pattern-or-practice lawsuit filed years later, *EEOC v. Dial Corporation*,[198] the court relied on the same reasoning applied in *Mitsubishi*.

Despite the risks of EEOC-filed pattern-or-practice harassment lawsuits, the agency has not always succeeded in asserting such claims, as shown by the 2005 summary judgment ruling in *EEOC v. Carrols Corporation*,[199] in which the EEOC asserted pattern-or-practice harassment claims against the employer involving 350 restaurants in 16 states. *Carrols Corporation* demonstrates the challenges faced when asserting broad-based pattern-or-practice claims in which the EEOC relies on *Teamsters* and the assertion that sexual harassment was "the standard operating procedure." The court focused on the fact that during the relevant time period, the restaurants employed 172,649 employees, of which 90,835 were women. Among the 511 purported victims, the court found 333 statements alleged facts, which if proven, could constitute sexual harassment,[200] but determined this number also represented only .367% of the women the defendant employed during the relevant time period. The court thus concluded that it did "not find that even a substantial minority of Defendant's employees experienced harassment" or "that sexual harassment was Defendant's 'standard operating procedure'—the regular rather than the unusual practice."

190 431 U.S. 324 (1977).
191 *Teamsters*, 431 U.S. at 336.
192 *Id.*
193 *Id.* at 361.
194 *Id.* at 362.
195 990 F. Supp. 1059 (C.D. Ill. 1998).
196 477 U.S. 57 (1986).
197 510 U.S. 17 (1993).
198 156 F. Supp. 2d 926 (N.D. Ill. 2001).
199 2005 WL 928634 (N.D.N.Y. Apr. 20, 2005).
200 The EEOC asserted claims on behalf of 511 purported victims.

Despite this favorable ruling for the employer in *Carrols Corporation*, this litigation by the EEOC demonstrates that even winning the pattern-or-practice argument may not eliminate continued litigation by the EEOC. There, the EEOC nevertheless continued to pursue the claims on behalf of the original 511 purported victims under Section 706 of Title VII, relying on the Supreme Court's 1980 *General Telephone* decision, which permits the agency to pursue claims on behalf of a group of individuals. While the court granted summary judgment for the employer regarding several claims, in a ruling dated March 2, 2011,[201] the court reviewed each claim individually and permitted the EEOC to continue to pursue claims on behalf of 89 purported victims. Two years later, on January 13, 2013, after 15 years of litigation, the parties signed a consent decree in which the employer agreed to pay $2.5 million in compensatory damages and lost wages to the remaining purported victims, aside from agreeing to certain injunctive relief.[202]

Further complicating the legal landscape is that two U.S. courts of appeal have permitted the EEOC to pursue pattern-or-practice suits under Section 706 of Title VII, thus permitting compensatory and punitive damages for pattern-or-practice claims.[203] From the EEOC's perspective, "The significance of these rulings is that the agency may seek the full panoply of monetary relief for victims of a pattern or practice of discrimination."[204]

The one significant limitation regarding the EEOC pursuing pattern-or-practice harassment claims is that a majority of the courts have applied a 300-day statute of limitations, limiting claims on behalf of individuals whose harassment claims occurred more than 300 days before the underlying charge. One of the most recent decisions addressing this issue is *EEOC v. Discovering Hidden Hawaii Tours, Inc.*,[205] which included an alleged pattern or practice of sexual harassment, constructive discharge and retaliation claims against three purportedly related defendants, which initially stemmed from claims involving five former employees. The court noted that an aggrieved employee who fails to file a timely charge may be able to pursue a claim under the "piggyback or single-filing rule," in which the employee "piggyback[s] on the timely charge filed by another plaintiff for purposes of exhausting administrative remedies."[206] However, the central issues before the court, and disputed between the parties, was "whether, when the EEOC brings a Section 706 pattern-or-practice hostile environment claim on behalf of a class of aggrieved employees, it may extend liability to included employees who suffered the same type of harassment outside of the 300-day limitation period." The court concluded that the "weight of authority supports Defendants' position that the continuing violation doctrine properly applies to include only the additional, otherwise time-barred claims of aggrieved individuals, who suffered at least one unlawful employment action within 300 days of the filing of the charge, but does not permit the inclusion of employees who did not themselves suffer any unlawful employment practice within that 300-day period."[207]

201 *EEOC v. Carrols Corp.*, 5:98-CV-1772 (N.D.N.Y. Mar. 2, 2011).

202 *See* Press Release, EEOC, *Carrols Corp. To Pay $2.5 Million to Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Jan. 11, 2013), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-9-13.cfm.

203 *See EEOC v. Bass Pro Outdoor World, L.L.C.*, 2016 WL 3397696 15-20078 (5th Cir. June 17, 2016) and *Serrano & EEOC v. Cintas Corp*, 699 F.3d 884 (6th Cir. 2013).

204 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. Similar provisions exist under § 207(a) of the Genetic Information Nondiscrimination Act (GINA). The Commission also has had authority to pursue class cases under the Age Discrimination in Employment Act (ADEA) and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.

205 *See EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576 (D. Haw. Sept. 21, 2017).

206 The court cited *Arizona ex rel Horne v. Geo Grp., Inc.* 816 F. 3d 1189 (9th Cir. 2016), *cert. denied*, 137 S.Ct. 623 (2017).

207 The court provided a detailed review of case law supporting this view, but also included reference to case cites supporting the minority view, as supported by the EEOC, that no limitation period applies to pattern-or-practice harassment claims in relying on a "continuing violation" theory.

## E. Conclusion

We hope this opening chapter will serve as a useful resource to assist employers in understanding the complex legal landscape they face today when confronted with potential harassment claims in the workplace, including harassment prevention. The following "takeaways" should be considered:

- Harassment will remain an important priority at the EEOC over at least the next several years, and the EEOC has made it abundantly clear that it will not restrict its focus to sexual harassment. Rather, a charge involving alleged harassment on the basis for race, sex, religion, national origin, disability, age or any other protected status may lead to an expanded investigation by the EEOC beyond the individual who initially filed the charge.
- Employers should consider "rebooting" their anti-harassment programs and policies to ensure they have considered the recommendations proposed by the EEOC's Task Force Report, including sending the appropriate message from senior leadership, modifying the express terms of any anti-harassment policy, as needed, and ensuring there is accountability to ensure that those who harass are held responsible "in a meaningful, appropriate and proportional manner," and those whose job it is to prevent or respond to harassment, directly or indirectly, are rewarded for a job well done, or penalized for failing to do to so."[208]
- In enforcing an anti-harassment policy, employers should be mindful of the recommendation of the Co-Chairs of the Harassment Task Force Report that employers should take care in use of the phrase "zero tolerance" in anti-harassment policies because such language actually may hinder, rather than improve, the work environment and "may contribute to employee under-reporting of harassment, particularly where they do not want a colleague or co-workers to lose their job over relatively minor harassing behavior." Rather, "[a]ccountability requires that discipline for harassment be proportionate to the offensiveness of the conduct."[209]
- Based on the Task Force Report, the most effective approach to harassment prevention is to address actions in the work environment that have not yet risen to the level of a hostile work environment from a legal perspective (*i.e.*, "severe or pervasive" conduct to create an objectively and subjectively work environment), but may be reasonably be expected to lead to a hostile work environment if appropriate corrective action is not taken.
- Employers must be mindful of the courts' view that harassment by supervisors or managers will cause strict liability if a supervisor's harassment creates a hostile work environment that includes a "tangible employment action" (*e.g.*, hiring, firing, failure to promote, demotion, etc.), and strict liability will arise for supervisory harassment even absent a tangible employment action, unless the employer can effectively raise an affirmative defense by demonstrating: (1) the employer exercised reasonable care to prevent and correct promptly any harassment; and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities to prevent harm or take other steps to avoid harm from the harassment.
- Liability will also arise for actions by employees or non-employees based on actual or constructive notice of such harassment and the employer fails to promptly investigate and take appropriate corrective action or to correct the harassment of which the employer had notice.

208 TF Report at 31.
209 *Id.* at 40.

- Employers need to remember that in resolving any discrimination charge with the EEOC, particularly involving systemic harassment claims, the only individuals bound by a conciliation agreement and/or consent decree are those who have signed such agreement and/or release of such claims. Conversely, the private settlement of a claim with a charging party may not be a bar to the EEOC continuing a systemic harassment investigation; even initiation of a private lawsuit may not bar the EEOC from continuing such an investigation.
- Employers need to closely monitor state and federal legislative developments in this evolving area, recognizing that the plaintiffs' bar, various organizations, and others may seek passage of legislation barring confidentiality of settlements involving harassment claims and/or required arbitration of such claims, which shield such claims from public disclosure.[210]

210 For example, the Tax Cuts and Jobs Act, H.R. 1, 115th Cong. (2017), Pub. Law No. 115-97, signed into law on December 22, 2017, prevents employers from deducting as a business expense sexual harassment settlement amounts if those settlements include nondisclosure agreements.

# II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

## A. Review of Charge Activity, Backlog and Benefits Provided

The EEOC announced the publication of its FY 2017 Performance and Accountability Report (EEOC 2017 PAR) on November 15, 2017. According to the FY 2017 PAR, the Commission received 84,254 private-sector charges during this past fiscal year.[211] This figure represents a 7.92% decrease from the number of charges filed in FY 2016. As shown by the following chart, the number of charges filed in FY 2017 is approaching the lowest number of charges (82,792) filed a decade ago.

| 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% |
| 2016 | 91,503 | +2.37% |
| 2017 | 84,254 | -7.92% |

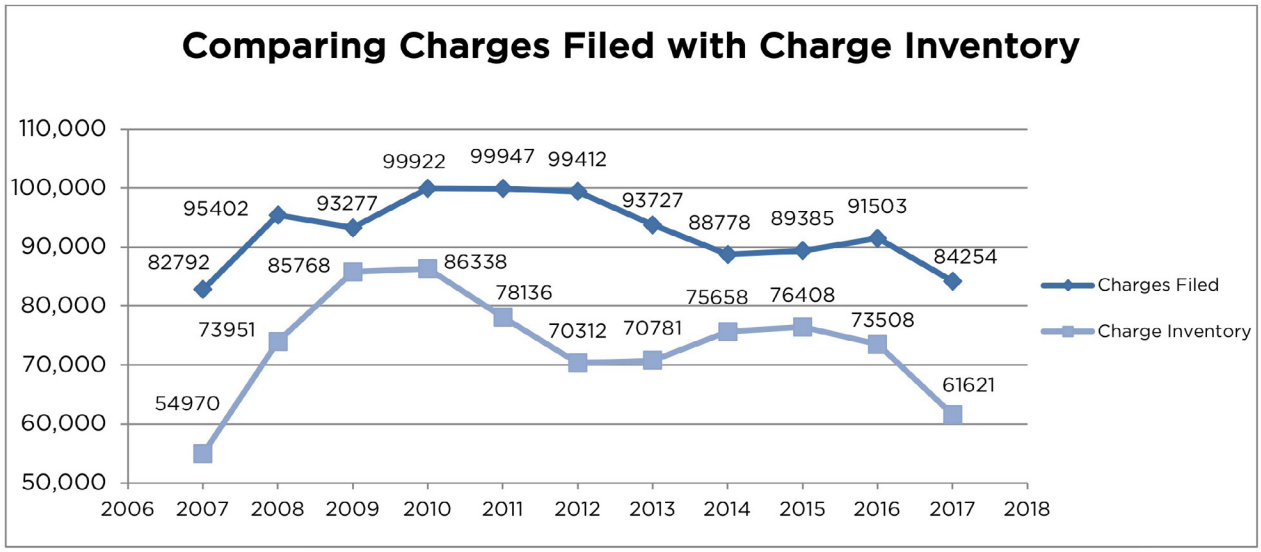
Over the last few years, the business community and some members of Congress have accused the EEOC of focusing on systemic initiatives at the expense of its growing inventory of charges (*i.e.*, its charge backlog or "pending workload"). For example, on May 23, 2017, the House Subcommittee on Workforce Protections held a hearing to discuss the direction of the EEOC, during which the Commission's charge backlog came under scrutiny.[212] The EEOC has acknowledged this criticism. According to Acting Chair Victoria A. Lipnic, "The pending inventory of private sector charges . . . has been a longstanding issue for the EEOC and the public it serves."[213] To that end, the Acting Chair explained that early in the year the Commission made tackling the backlog a priority, and that "a primary point of discussion at the Senior leadership meeting in July was to share strategies among district offices that have been particularly effective in dealing with the pending inventory, while ensuring we are not missing charges with merit."[214]

As a result of these efforts, in FY 2017 the Commission made significant progress in reducing its charge inventory. The Commission resolved 99,109 charges, reducing the backlog by 16.2% to 61,621 charges—the smallest charge backlog the EEOC has maintained in 10 years.[215]

211 EEOC, *FY 2017 Performance and Accountability Report* 2017, at 34, *available at* https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf.
212 *See* Ilyse Schuman and Michael J. Lotito, *House Hearing Examines EEOC's Regulatory and Enforcement Policies*, Littler ASAP (May 23, 2017), *available at* https://www.littler.com/publication-press/publication/house-hearing-examines-eeocs-regulatory-and-enforcement-policies.
213 Press Release, EEOC, *EEOC Issues FY 2017 Performance Report* (Nov. 15, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/11-15-17a.cfm.
214 EEOC 2017 PAR at 7.
215 *Id.*

| 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% |
| 2016 | 73,508 | -3.7% |
| 2017 | 61,621 | -16.2% |

This is the second year in a row that the charge inventory has decreased. It remains to be seen whether the FY 2017 charge reduction was an aberration or the beginning of a trend.




## B. Continued Focus on Systemic Investigations and Litigation

Acting Chair Lipnic states in her opening message for the Commission's FY 2017 PAR, "Addressing systemic discrimination has long been a part of the EEOC's work."[216] Indeed, as far back as March 2006, the Commission reported in its Systemic Task Force Report that "combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency's daily work."[217] The EEOC defines "systemic cases" as: "pattern, or practice, policy, or class cases where the alleged discrimination has a broad impact on an industry, occupation, or geographic area."[218]

In recent years, the Commission has taken a very proactive approach in evaluating the efficacy of its systemic program. In 2012, the EEOC's Strategic Plan and Strategic Enforcement Plan made dedicated efforts to strengthen its resolve towards combating systemic discrimination. The Strategic Plan

216 EEOC 2017 PAR at 7.
217 EEOC Systemic Task Force Report (Mar. 2006), at 2.
218 EEOC 2017 PAR at 22.

specifically included clearly defined performance measures[219] and the 2012 Strategic Enforcement Plan furthered its intent to support its initiative by identifying six national priority areas—one of which was the prevention of harassment through systemic enforcement and targeted outreach.[220]

On July 7, 2016, the EEOC published "Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission."[221] The goal of the EEOC's publication was to conduct a top-to-bottom review of the Commission's systemic initiative since its 2006 System Task Force Report. Among other things, *Advancing Opportunity* identified eight key findings: "(1) EEOC has the capacity in every district to undertake systemic investigations and litigation, and all districts have initiated systemic investigations and lawsuits; (2) coordination of systemic investigations and cases has significantly increased, with staff regularly sharing information and strategies on systemic cases and partnering across offices on lawsuits to support a nationwide or multi-facility focus; (3) EEOC has developed national strategies on specific priority issues that have enabled the agency to better identify the strongest cases and provide a model for other key areas; (4) investments in hiring and training staff focused on systemic work have produced a 250% increase in systemic investigations in the past five years; (5) more than 80% of systemic resolutions in fiscal year 2015 raised national priority issues identified in the [Strategic Enforcement Plan]; (6) concerted efforts to reach voluntary resolutions of systemic investigations have resulted in the conciliation success rate tripling from 21% in fiscal year 2007 to 64% in fiscal year 2015; (7) the systemic litigation program has achieved significant impact, with a 10-year success rate of 94% for systemic lawsuits; and (8) EEOC tripled the amount of monetary relief recovered for victims in the past five fiscal years from 2011 through 2015, compared to the relief recovered in the first five years after the Systemic Task Force Report."[222]

Later that same year, in 2016, the EEOC specifically prioritized systemic cases as one of the three major categories of cases in its National Enforcement Plan.[223] In addition, on September 30, 2016, the Commission continued to build upon its prior Strategic Enforcement Plan for Fiscal Years 2017 through 2021. Under the prior Strategic Enforcement Plan for Fiscals Years 2012-2016, the EEOC's aimed to "identify and attack discriminatory policies and other instances of systemic discrimination."[224] In the revised Strategic Enforcement Plan, the EEOC "reaffirm[ed] its commitment to a nationwide, strategic and coordinated systemic program as of [the] EEOC's top priorities."[225]

Under its "Strategic Objective I," which is to "combat employment discrimination through strategic law enforcement" efforts, one of the Commission's four key strategies includes "us[ing] administrative means and litigation to identify and attack discriminatory policies and other instances of systemic discrimination."[226] Under its established performance metric, 22-24% of the cases in the Commission's litigation docket must be systemic cases.[227] As demonstrated in the chart below, the EEOC met its goal this last fiscal year with nearly a quarter of its litigation docket comprising systemic cases.[228]

219 *See* EEOC, EEOC FY 2012-2016 Strategic Plan, *available at* https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm#objective1 (last visited Nov. 29, 2017).
220 *See* EEOC, *EEOC FY 2013-2016 Strategic Enforcement Plan*, *available at* https://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Nov. 29, 2017).
221 *See* EEOC, *Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*, *available at* https://www.eeoc.gov/eeoc/systemic/review/index.cfm#VB (last visited Nov. 29, 2017).
222 *Id.*
223 *See* EEOC, EEOC National Enforcement Plan, available at https://www.eeoc.gov/eeoc/plan/nep.cfm (last visited Nov. 29, 2017) (In the EEOC's National Enforcement Plan ("NEP"), the EEOC set forth its intent to prioritize "[c]ases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature could have a potential significant impact beyond the parties to the particular dispute[,]" including (1) "[c]ases involving repeated and/or egregious discrimination, including harassment, or facially discriminatory policies"; and (2) "[c]hallenges to broad-based employment practices affecting many employees or applicants for employment, such as cases alleging patterns of discrimination in hiring, lay-offs, job mobility, including "glass-ceiling" cases, and/or pay, including claims under the Equal Pay Act.").
224 EEOC Strategic Enforcement Plan for FY 2012-2016, at 17.
225 EEOC Strategic Enforcement Plan for FY 2017-2021, at 5.
226 EEOC 2017 PAR at 19.
227 *Id.* at 22.
228 *Id.*

| FISCAL YEAR | NUMBER OF TOTAL LITIGATION CASES | NUMBER OF SYSTEMIC CASES | % OF SYSTEMIC CASES IN LITIGATION |
|---|---|---|---|
| 2012 | 309 | 62 | 20.0% |
| 2013 | 231 | 54 | 23.4% |
| 2014 | 228 | 57 | 25.0% |
| 2015 | 218 | 48 | 22.0% |
| 2016 | 165 | 47 | 28.5% |
| 2017 | 242 | 60 | 24.8% |

It is the Commission's belief that "[w]ithout systemic enforcement, many discriminatory systems and structures would persist—leading to more harm to individuals subject to such discriminatory practices and potentially more individuals filing charges of discrimination against their employers."[229] The EEOC FY 2017 PAR likewise states that "systemic enforcement [has been shown through research studies to be] a greater driver of employer compliance than individual investigations or cases."[230] In short, the Commission will continue to pursue its systemic agenda and will likely rely on systemic cases to further its mission of eradicating discrimination in the workplace.

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

Despite some concerns that a focus on systemic discrimination has detracted the EEOC from addressing its charge backlog and other core missions, the Commission continues to find value in prioritizing systemic investigations. Among the six priorities listed in the EEOC's 2017-2021 Strategic Enforcement Plan (SEP) are (a) preventing systemic harassment, and (b) eliminating barriers in recruitment and hiring, both of which typically involve systemic charges.[231] In FY 2017, therefore, the Commission continued its focus on these categories of cases. In FY 2017, EEOC resolved 329 systemic investigations during the administrative process, obtaining over $38.4 million in remedies.[232] The EEOC made 167 reasonable cause findings during this time, the highest number over the past six fiscal years.[233]

In terms of systemic litigation, one of the EEOC's goals for FY 2017 was to increase the proportion of systemic cases on its litigation docket to approximately 22-24% of all active cases.[234] By the end of the fiscal year, the agency had exceeded this target, reporting that 60 out of 242, or 24.8%, of the cases on its litigation docket were systemic cases.[235] Moreover, the EEOC resolved 22 systemic cases, and filed 30 new systemic lawsuits, the largest number of such lawsuits filed over the past six years, and a 67% increase over the number of systemic lawsuits filed in FY 2016.[236] Of the settled matters, four cases involved at least 100 victims of discrimination, and two involved over 1,000 victims of discrimination.[237] A comparison of the EEOC's systemic investigation results can be seen in the table below.

229 *Id.* at 38.
230 *Id.*
231 EEOC Strategic Enforcement Plan for FY 2017-2021, at 3.
232 EEOC FY 2017 PAR at 7.
233 *Id.* at 38-39.
234 *Id.* at 22.
235 *Id.*
236 *Id.* at 39-40.
237 *Id.*

| SYSTEMIC INVESTIGATIONS | 2012 | 2013 | 2014 | 2015 | 2016 | 2017 |
|---|---|---|---|---|---|---|
| Number Completed | 240 | 300 | 260 | 268 | 273 | 329 |
| Monetary Recovery | $36.2 million | $40 million | $13 million | $33.5 million | $20.5 million | $38.4 million |
| Reasonable Cause Findings | 94 | 106 | 118 | 109 | 113 | 167 |
| Systemic Lawsuits Filed | 12 | 21 | 17 | 16 | 18 | 30 |

## D. EEOC Litigation and Systemic Initiative

For FY 2017, consistent with the EEOC's current focus on "strategic law enforcement," the EEOC filed 184 "merits" lawsuits, 98 more than in FY 2016, which included 124 individual suits, 30 non-systemic class suits and 30 systemic suits.[238] FY 2017 signals a sharp change in what had been a steady decrease in the number of merits lawsuits filed since FY 2005—with increases in FY 2014 and FY 2015.[239] Overall, however, prior to FY 2017, there had been a dramatic decrease (by nearly 80%) in merits lawsuits filed over the past 11 years: 381 merits lawsuits were filed in FY 2005 compared to the 86 merits suits filed in FY 2016.

| 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 |
| 2016 | 55 | 31 | 36% | 86 |
| 2017 | 124 | 60 | 33% | 184 |

Particularly noteworthy is that the 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, 2017 and September 30, 2017, the EEOC filed 112 lawsuits, which was 61% of the lawsuits filed during the entire fiscal year.[241] Similarly, during FY 2016, of the 86 lawsuits filed, 48 suits (56%) were filed during the last two months of the fiscal year.

238 EEOC 2017 PAR at 36.
239 *See* EEOC, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2014, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.
240 *See Id.* The EEOC has defined "merits" suits as direct or by intervention lawsuits 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 2017 is based on the firm's tracking.

In reviewing all new court filings, the EEOC lawsuits included 158 Title VII claims, 75 Americans with Disabilities Act (ADA) claims, 12 Age Discrimination in Employment Act (ADEA) claims, and 3 Genetic Information Non-Discrimination Act (GINA) clams.[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 | 75 |
| Multiple Claims | 22 |
| Retaliation | 53 |
| Sex Discrimination or Related Harassment | 64 |
| Pregnancy Discrimination | 12 |
| Racial Discrimination or Related Harassment | 21 |
| Age Discrimination | 12 |
| Religious Discrimination or Related Harassment | 12 |
| National Origin Discrimination or Related Harassment | 8 |

The top 11 states for EEOC lawsuits filed over the past fiscal year are as follows:[243]

| STATE | NUMBER OF LAWSUITS |
|---|---|
| California | 20 |
| Maryland | 16 |
| Texas | 16 |
| Illinois | 13 |
| Georgia | 10 |
| Florida | 9 |
| New York | 8 |
| Tennessee | 7 |
| Louisiana | 6 |
| Michigan | 6 |
| Mississippi | 6 |

With respect to the Commission's efforts on behalf of non-systemic class suits and its systemic initiative, the FY 2017 PAR described active EEOC lawsuits as follows:

- Among the 242 lawsuits on its active docket at the end of FY 2017, 42 (17.4%) were non-systemic class cases and 60 (24.8%) involved challenges to systemic discrimination, thus showing that 42% of all pending matters involve claims on behalf of more than one purported victim.[244]
- In FY 2017, the Commission filed 30 systemic lawsuits.
- The Commission resolved 109 merits lawsuits during FY 2017 and recovered $42.4 million.[245]

242 EEOC 2017 PAR at 36.

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.

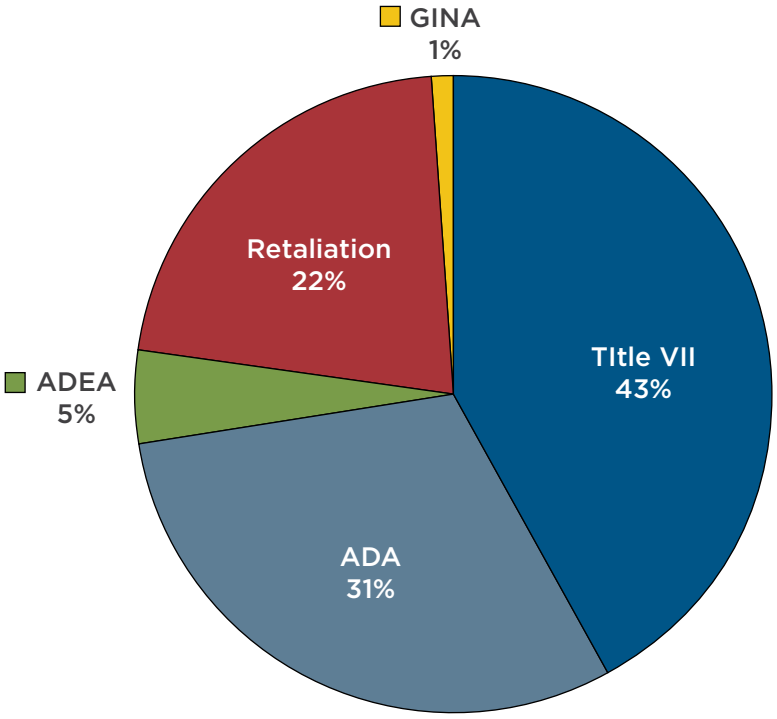
244 EEOC 2017 PAR at 36.

245 *Id.* at 36.

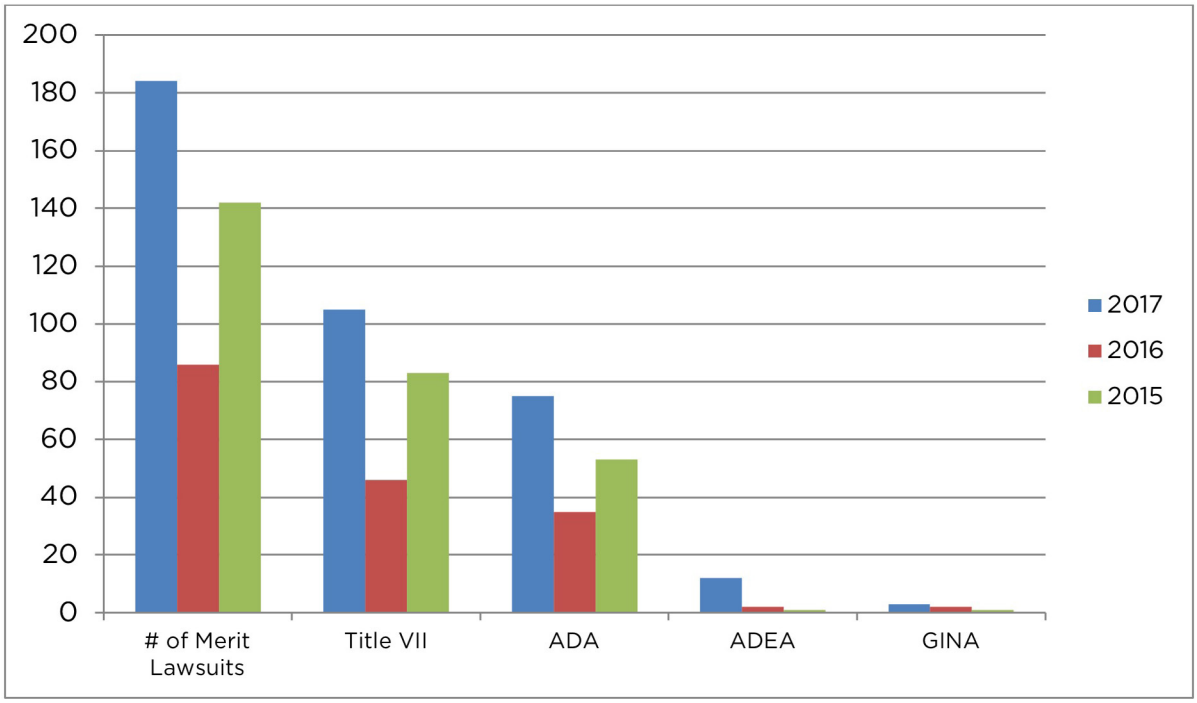
As discussed, based on the EEOC's new Strategic Plan, a central aim is "combat[ing] employment discrimination through strategic law enforcement."[246] A key performance measure has been the establishment of a "baseline" by examining the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against that baseline. For FY 2012, the Commission established a baseline of 20%; the FY 2017 target was to increase the percentage of systemic cases on the agency's litigation docket to approximately 22-24% of all active cases.[247] In FY 2017, the EEOC "reported that 60 out of 242, or 24.8%, of the cases on its litigation docket were systemic, exceeding the annual target."[248] By FY 2018, "the agency projects that 22-24% of cases on its active litigation docket will be systemic cases."[249]

## E. Highlights From EEOC Litigation Statistics

In FY 2017, the Commission reported a significant uptick in the number of merit-based lawsuits filed when compared to FY 2016. Specifically, the EEOC states that it filed a total of 242 merit lawsuits—105 lawsuits implicated Title VII claims (i.e., race, sex, religion, and national origin), 75 contained ADA claims, 12 contained ADEA claims, 53 filings included retaliation claims, and 3 contained a GINA claim.[250]

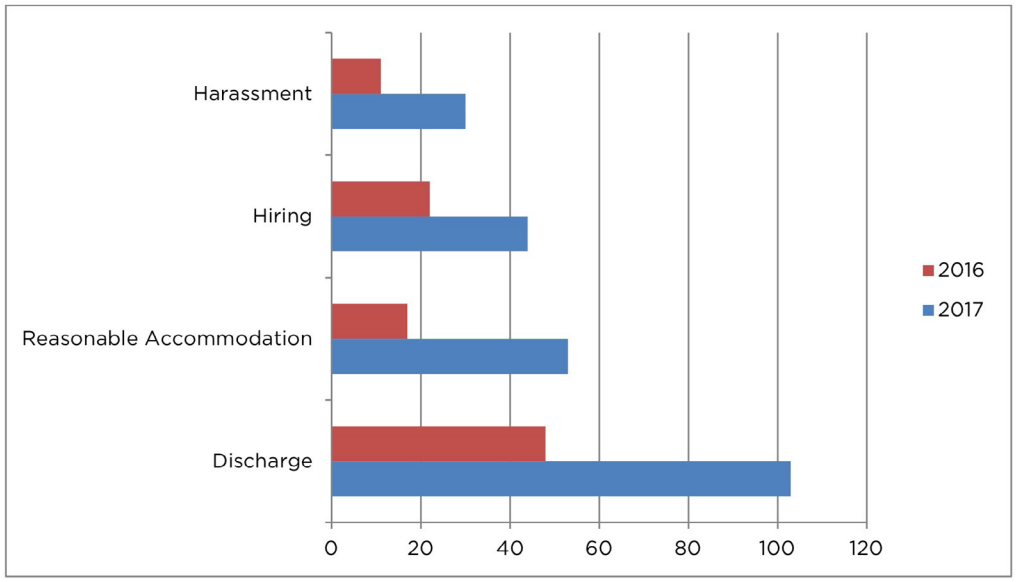



246 *Id.* at 18.
247 *Id.* at 22.
248 *Id.*
249 *Id.*
250 *Id.* at 36.




The number of non-systemic multiple victim cases also dramatically rose from FY 2016. Indeed, in FY 2016, only 13 of its filings involved non-systemic multiple victims, but in FY 2017, 42 of the total 242 cases on its active litigation docket were non-systemic multiple victim cases.

For the past two years, the EEOC's PAR has also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[251] Not surprisingly, there was also a corresponding increase in the overall numbers for each issue when comparing FY 2017 to FY 2016. The chart below demonstrates the variance by issue for each fiscal year.[252]




251 *Id.*
252 *Compare id.* with EEOC 2016 PAR at 36.

Based on the data, discharge is the most heavily-litigated issue in both FY 2016 and FY 2017.[253] However, FY 2016 showed a greater number of hiring-based issues being litigated as opposed to reasonable accommodation disputes. That statistic flipped in FY 2017 with more issues relating to reasonable accommodation when compared to hiring matters.[254]

## F. Mediation Efforts

In its FY 2017 PAR, the EEOC states that its mediation program "continues to receive overwhelmingly positive feedback from participants."[255] Out of a total of 9,476 mediations conducted, the EEOC was able to obtain 7,218 mediated resolutions. Moreover, the Commission secured $163.7 million in monetary benefits for complainants through its mediation program. Comparatively, the number of mediated resolutions has decreased slightly since FY 2016 in which there were a total of 7,989 mediated resolutions out of 10,461 conducted for a total of $163.5 million in monetary benefits.[256]

## G. Significant EEOC Settlements and Monetary Recovery

Although the administration has changed, the EEOC continues to follow its updated SEP for FY 2017-2021. This SEP places a high priority on pursuing systemic charges of discrimination, which typically involve a pattern or practice of discrimination affecting a class of individuals working for a particular employer or within a specific industry or geographic region. The settlement agreements the agency entered into in FY 2017 reflect the Commission's commitment to large-scale allegations of discrimination and harassment.

In FY 2017, the Commission secured $355.6 million for individuals in the private sector and in state and local government workplaces through mediation, conciliation, and settlements.[257] With respect to systemic discrimination resolutions, in FY 2017 the EEOC resolved 22 systemic cases, four of which involved at least 100 individuals and two of which included over 1,000 individuals allegedly impacted by discrimination. As a result, the EEOC obtained approximately $33.8 million in relief for victims of systemic discrimination.[258]

Overall, the EEOC entered into fewer high-monetary-penalty agreements in FY 2017 than it did in FY 2016. This past year, the Commission entered into 15 agreements in which the defendant employer consented to paying monetary damages exceeding $500,000. In FY 2016, the EEOC entered into over 20 high-penalty agreements. However, the payout in four of this year's consent decrees exceeded the largest settlement amount ($8.6 million) agreed to in FY 2016.

Specifically, the defendants in 12 settlement agreements entered into in FY 2017 consented to paying $1 million or more to the claimants. Three of those settlements exceeded $10 million in damages. Another three settlements resulted in payments between $750,000 and $950,000.

Five of these consent decrees involved allegations of race discrimination, four involved allegations of disability discrimination, and rest included claims of retaliation and age, pregnancy, and sex discrimination.

253 *Id.*
254 *Id.*
255 EEOC 2017 Annual Report at 34.
256 EEOC 2016 Annual Report at 34.
257 EEOC 2017 PAR at 13.
258 *Id.* at 40.

The largest settlement of the fiscal year involved allegations of an employer's engaging in a pattern or practice of age discrimination. In this matter the EEOC claimed a restaurant chain violated the ADEA by failing to hire individuals age 40 and over for front-of-house positions. The defendant agreed to pay a class of approximately 800 older job applicants $12 million, and altered its hiring and recruiting practices.

A retail employer agreed to pay $10.5 million to a class of approximately 1,500 job applicants and employees who alleged the company discriminated against African-American and Hispanic applicants, retaliated against current employees who protested the alleged discriminatory practices, and failed to preserve employment records. The company also agreed to amend its hiring process and improve its diversity outreach.

Appendix A of this Report includes a description of other notable consent decrees and conciliation agreements averaging $500,000 or more, as well as significant judgments and jury verdicts.

## H. Appellate Cases

### 1. Notable Wins for the EEOC

The EEOC had a reduced appellate workload in FY 2017 as compared to prior years but achieved several key victories, particularly with respect to the agency's subpoena powers. At the close of FY 2017, the EEOC was handling 19 appeals in enforcement actions and was participating as *amicus curiae* in 26 appeals in private suits.[259] Several notable appellate wins are discussed below.

The EEOC has broad powers to investigate potential violation of federal antidiscrimination laws, such as Title VII, the ADA, and the ADEA. This investigative power includes the authority to issue an administrative subpoena and bring an enforcement action to compel compliance.[260] Multiple court decisions in FY 2017 affirmed the EEOC's right to seek information from respondent-employers.

Indeed, two opinions were issued in a subpoena enforcement action brought by the EEOC and arising out of a sex discrimination charge. In April of 2017, the U.S. Supreme Court clarified the proper standard of review—*de novo* or abuse of discretion—to be used by appellate courts when evaluating a district court's decision to enforce or quash an EEOC subpoena.[261] In reaching its conclusion, the Court resolved a circuit split on this question. The Court held that appellate courts must review these lower court decisions for an abuse of discretion and remanded the case to the U.S. Court of Appeals for the Ninth Circuit. On remand, the Ninth Circuit found that the district court had abused its discretion by denying enforcement of the EEOC's subpoena.[262] The appellate court thus sent the case back to the district court for further consideration relating to undue burden.

In *EEOC v. United Parcel Service, Inc.*, the Sixth Circuit reviewed the district court's enforcement of a subpoena seeking information relevant to the underlying ADA claims. The complainant alleged that he suffered discrimination after applying for medical leave and that his medical information (along with the information of other workers) was accessible to employees generally on an intranet site. The EEOC requested information, such as: (1) reports of employee injuries and accidents; (2) how the employer determined which complaints were to be kept private; and (3) the database that stored and allegedly disclosed employee information. The employer challenged these requests as overly broad and burdensome. The district court held to the contrary, however, and the appellate court agreed. The Sixth Circuit found this information relevant to the claimant's allegations, which included a pattern-or-practice claim.

259 U.S. EEOC, *Performance and Accountability Report*, Fiscal Year 2017, *available at* https://www.eeoc.gov/eeoc/plan/upload/2017par.pdf.
260 42 U.S.C. § 2000e-9.
261 *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017).
262 *EEOC v. McLane Co.*, 857 F.3d 813 (9th Cir. 2017).

The Fifth Circuit also found in the EEOC's favor in a case involving a respondent's assertion of attorney-client privilege as grounds for withholding requested materials. In *EEOC v. BDO USA*, the EEOC sought information related to the complainant's Title VII and Equal Pay Act claims.[263] The employer objected to the scope of the requests and also claimed that the EEOC was seeking information protected by the attorney-client privilege, as some documents included communications between the claimant and counsel and other allegedly privileged exchanges. In the enforcement action, the EEOC contended that the employer had not established that the privilege applied. The magistrate judge disagreed, concluding that the EEOC had not shown that the privilege log was insufficient. The magistrate entered a protective order for the employer, and the district judge affirmed. The Fifth Circuit overturned those rulings, however, because the magistrate had inverted the burden of proof as to the privilege question, by requiring the EEOC to show that the privilege did not protect the materials in dispute.[264]

In a case before the Third Circuit, the EEOC technically secured some of its requested relief—but in an unusual "one step forward, two steps back" manner. The district court in *EEOC v. City of Long Branch* partially enforced the EEOC's subpoena by affirming the magistrate's ruling on the issue.[265] The EEOC appealed, arguing that the magistrate and district judges had made two errors that hindered its discovery into the discrimination allegations. The appellate court vacated the district court's judgment but on different grounds. Without reaching the EEOC's arguments, the Third Circuit identified a serious procedural defect in the proceedings. The court explained that the district court had mistakenly treated the motion to enforce as a nondispositive motion, rather than a dispositive motion, and thus applied an incorrect standard of review when evaluating the magistrate's ruling.[266] The Third Circuit therefore remanded the case to the district court, either to analyze the motion to enforce in the first instance or to further review the magistrate's order as a report and recommendation.[267]

Outside the subpoena realm, the EEOC also secured a victory in a case highlighting the tension between an employee's ADA claim and a concurrent disability benefits claim. The district court in *EEOC v. Vicksburg Healthcare, L.L.C.* granted summary judgment for the employer based on the former employee's representation for disability benefits purposes that she was temporarily totally disabled following a rotator cuff injury.[268] The Fifth Circuit reversed, however, finding that the EEOC had met its burden of explaining the discrepancy. As the court noted, the EEOC sufficiently showed that the employee's ADA and benefits claims were not incompatible because the agency asserted that she could have performed the essential functions of her job with a reasonable accommodation.[269]

The Fourth Circuit handed the EEOC a memorable win in a religious discrimination case, *EEOC v. Consol Energy, Inc.*[270] There, the employee requested an exemption from using a new biometric hand scanner as a timeclock; he maintained a sincerely-held religious belief that the scanner was immoral and that using it would result in his eternal damnation.[271] The EEOC sued after the employer refused to accommodate his concerns, leading to a jury verdict for the EEOC and a significant award for the employee. The Fourth Circuit rejected the employer's arguments on appeal, concluding that use of the hand scanner legitimately conflicted with the employee's beliefs.[272]

263 2017 U.S. App. LEXIS 23067 (5th Cir. Nov. 16, 2017).
264 *Id.* at **5-7, 9-12.
265 866 F.3d 93 (3d Cir. 2017).
266 *Id.*at 98-101.
267 *Id.* at 101.
268 663 F. App'x 331 (5th Cir. 2016).
269 *Id.* at 333-34.
270 860 F.3d 131 (4th Cir. 2017).
271 *Id.* at 137-39.
272 *Id.* at 142-43.

### 2. Notable Wins for Employers

Not all subpoena enforcement actions went the EEOC's way in FY 2017. In *EEOC v. Tricore Reference Laboratories*, the Tenth Circuit reiterated the EEOC's authority to request relevant discovery from respondent-employers but ultimately declined to provide the relief sought by the agency.[273] The appellate court considered whether the district court abused its discretion in refusing to enforce an EEOC administrative subpoena in an ADA and Title VII matter. Suspecting that a corporate policy might indicate an unlawful pattern or practice, the EEOC expanded its investigation and requested information about employees similarly situated to the claimant. The employer objected, and the EEOC initiated an enforcement action. Although the lower court found the question close, it ruled in favor of the employer.[274] The Tenth Circuit affirmed, stressing that expanded discovery into a pattern-and-practice claim was not warranted absent an express pattern-and-practice charge. The court further noted that even though some information might be relevant as to the individual charge, the request was overboard and unsupported.[275]

Employers notched wins in three additional disability discrimination cases. The Eleventh Circuit agreed with the employer in *EEOC v. St. Joseph's Hospital, Inc.*, addressing the terminated employee's argument that she should have been granted a reassignment to another unit as a reasonable accommodation without having to vie for an open position.[276] The court affirmed the defense jury verdict, reiterating that that the ADA does not require a job reassignment—without competition—as a reasonable accommodation.[277]

In *EEOC v. BNSF Railway Co.*, the Tenth Circuit entertained an appeal involving a "regarded as" disabled claim.[278] The claimant, an applicant, was denied employment after a medical examination revealed that he was not qualified for the job due to an impairment restricting the use of his right hand.[279] The prospective employer withdrew its offer and informed the candidate that he could apply for certain other positions. He declined and filed a charge, which the EEOC pursued. The EEOC argued that the applicant was regarded as disabled because the employer did not believe that he could perform the duties of the desired job.[280] But, as the court discussed, the burden for the EEOC was to show that the employer doubted the applicant's ability to perform both the sought-after position *and* either: (1) other similar jobs in that area; or (2) a broad range of jobs. Because the agency failed to meet that burden, the lower court properly granted summary judgment for the employer.[281]

A final noteworthy ADA ruling involved a dispute about "the interplay between the ADA's prohibition on involuntary medical examinations and its insurance safe-harbor provision."[282] Pursuant to company policy, the defendant-employer would contribute towards insurance premiums only for employees who participated in a wellness program, which required staff to undergo biometric testing and complete a medical questionnaire. The EEOC challenged the policy, arguing that it violated the

273 849 F.3d 929 (10th Cir. 2017).
274 *Id.* at 935. This is the second favorable ruling for employers involving denying enforcement of a subpoena action in the Tenth Circuit. *See EEOC v. BNSF*, 669 F.3d 1154 (10th Cir. 2012). The Eleventh Circuit is the other federal appellate court in which the courts have leaned in favor of employers in denying broad-based subpoena enforcement actions. *See EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014).
275 *Id.* at 937-42.
276 842 F.3d 1333 (11th Cir. 2016).
277 *Id.* at 1344-45. The Eleventh Circuit also reversed the district court's order partially granting the EEOC's post-trial motion. The appellate court entered judgment for the hospital employer in the entirety. *Id.* at 1348-50. It should be noted that the Seventh Circuit has taken a contrary position in this area. In *EEOC v. United Airlines*, the appellate court held that the mandatory reassignment could be considered a reasonable accommodation under the ADA, provided such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer. 673 F.3d 543 (7th Cir. 2012).
278 853 F.3d 1150 (10th Cir. 2017).
279 *Id.* at 1153-55.
280 *Id.* at 1154-56.
281 *Id.* at 1156-59. The EEOC also failed to convince the appellate court on its other theories, including its claim that the medical exam was unlawful. *Id.* at 1159-60.
282 *EEOC v. Flambeau, Inc.*, 846 F.3d 941, 944 (7th Cir. 2017).

ADA's prohibition against mandatory medical examinations. The employer, on the other hand, contended that wellness programs are exempted from that limitation because of a statutory safe harbor that protects organizations administering benefit plans.[283] The district court agreed with the employer, and the Seventh Circuit affirmed on alternative grounds. According to the Seventh Circuit, the remedy sought was either unavailable (*i.e.*, the complaining employee suffered no compensable damages) or moot (*i.e.*, the employer had abandoned the program). The appellate court thus avoided the merits of the thorny question, finding that the EEOC was not entitled to relief.[284]

Employers scored another victory before the Seventh Circuit in *EEOC v. AutoZone, Inc.*[285] That case required the court to evaluate a lesser-known provision in Title VII that prohibits employers from limiting, segregating, or classifying employees in a manner that "would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect" employment.[286] The African-American complainant had been transferred out of a store in a largely Hispanic neighborhood and reassigned to another location with no reduction in pay, benefits, or responsibilities.[287] According to the EEOC, the employer's transfer of the employee "for the purpose of creating a predominantly Hispanic workforce" was unlawful.[288] The court evaluated whether the claim could stand given that the employee suffered no material adverse action. The Seventh Circuit followed the statutory text and concluded that a claim under 42 U.S.C. § 2000e-2(a)(2) requires case-specific proof that the disputed employment action deprived or tended to deprive the individual of opportunity or otherwise adversely affected his or her employment status. Because the EEOC had no such evidence, summary judgment was appropriate.[289]

For additional information regarding appellate cases in which the EEOC was a party or filed an amicus brief, see Appendix B to this Report.

283 *Id.* at 944-46
284 *Id.* at 946-50.
285 860 F.3d 564 (7th Cir. 2017).
286 *Id.* at 568-70 (interpreting 42 U.S.C. § 2000e-2(a)(2)).
287 *Id.* at 566-68.
288 *Id.* at 568.
289 *Id.* at 568-70.

# III. EEOC REGULATORY AGENDA AND RELATED DEVELOPMENTS

## A. Update on the Commission

### 1. Change in Leadership

FY 2017 was the Commission's first year under the new administration, and brought changes to its leadership. However, any significant change in direction in the EEOC's policy and enforcement agenda will occur only after a new General Counsel is nominated and confirmed, and vacant Commission seats filled.

On December 11, 2016, then-EEOC General Counsel David Lopez announced he would leave his post by the end of the year.[290] Lopez joined the agency in 2010 after being nominated by President Obama, and departed the agency after 6 ½ years of service.

Lopez was the first EEOC field trial attorney to be appointed as the agency's general counsel, the first Latino general counsel, and, was the longest-serving general counsel in the history of the agency. Under his leadership, the Commission aggressively pursued litigation, and obtained, among others, the largest jury verdict in the Commission's history to the tune of $240 million.[291] Lopez was also known for pursuing protections for the LGBT community. During his tenure, the Commission filed and settled its first cases alleging sex discrimination on the basis of transgender status and on the basis of sexual orientation.

Additionally, Lopez formed the Commission's Immigrant Worker Team to help strengthen and coordinate the EEOC's enforcement and outreach on employment discrimination issues affecting immigrant and other vulnerable workers, which focused on eliminating sexual harassment, racial slurs, discriminatory application of English-only policies, and criminal background checks that unlawfully discriminated against African Americans. Lopez has been recognized by various organizations for his work.

The EEOC's Strategic Enforcement Plan for FY 2017-2021 was issued in October 2016, prior to Lopez's departure, and continued to prioritize areas identified in the prior Plan. Thus, the enforcement priorities of this past fiscal year largely reflect the priorities of Lopez and the prior administration. Once a new General Counsel, nominated by President Trump, is in place, combined with Senate approval of President Trump's appointment of a new Chair and new Commissioner, these priorities are likely to change considerably.[292] The position remains vacant pending the nomination and Senate confirmation of Lopez's successor.

On January 25, 2017, President Trump named Commissioner Victoria A. Lipnic Acting Chair of the EEOC.[293] Lipnic has served as an EEOC Commissioner since 2010. She was initially nominated to serve by President Barack Obama, for a term ending on July 1, 2015, after which President Obama nominated her to serve a second term ending on July 1, 2020. However, for the remainder of FY 2017, the EEOC remained under control of the Democratic Commissioners. Accordingly, the Commission largely continued pursuing its prior agenda. Once new Republican commissioners are confirmed, the balance on the Commission will shift to Republican control and significant changes in policies and priorities are expected to ensue.

290 *See* Press Release, EEOC, *EEOC General Counsel David Lopez to Depart Agency* (Oct. 11, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-11-16.cfm.

291 *EEOC v. Hill Country Farms Inc.*, case number 3:11-cv-00041 (S.D. Iowa May 1, 2013). This amount was eventually reduced to $1.6 million because of Title VII's statutory damage caps.

292 In fact, on December 8, 2017, the EEOC issued its *Draft Strategic Plan for Fiscal Years 2018-2022*, listing revised priorities for the coming years. *See* Press Release, EEOC, *EEOC Seeks Input on FY 2018-2022 Strategic Plan* (Dec. 8, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/12-8-17.cfm.

293 *See* Press Release, EEOC, *President Appoints Victoria A. Lipnic EEOC Acting Chair* (Jan. 25, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-25-17a.cfm.

President Trump has nominated two Commissioners to fill two vacancies on the five-member Commission who—as of the date this Report went to press—are awaiting Senate confirmation. On June 28, 2017, the president named Janet Dhillon, executive vice president and general counsel of a retail company, to serve as the new EEOC Chair. It is anticipated Commissioner Lipnic will return to her role as Commissioner once the Senate confirms Dhillon as Chair. A month later, on July 31, 2017, President Trump nominated Daniel M. Gade to fill the remaining vacancy on the Commission. Gade is a veteran who has taught at West Point, served on various advisory committees advising the Secretary of Veterans Affairs, and was appointed to serve on the National Council on Disability in 2015. According to a White House press release, he also cofounded the Independence Project, a program aimed at improving veteran's employment.[294]

During their Senate confirmation hearing on September 19, 2017, the nominees provided some insight as to what the Commission's focus might be as its composition changes.[295] The nominees said in their opening statements to the Senate Health, Education, Labor and Pensions (HELP) Committee that they would emphasize guidance and negotiation with respect to lawsuits brought by the Commission. According to their testimony, they would tackle the backlog of charges, in part, by educating employers on discrimination law and seeking early resolution of charges before litigation is commenced. Chair nominee Dhillon described litigation as a "last resort" during the hearing. Nominee Gade said he would "spend time on the [EEOC's] educational and outreach functions … on the sincere belief that most discrimination is unintentional and would be prevented with better information."

Both nominees said they are personally opposed to employment discrimination against members of the LGBTQ community, but would not confirm whether they would seek to further the agency's current interpretation that sexual orientation discrimination constitutes sex discrimination under Title VII. On October 18, 2017, the Senate HELP Committee approved Dhillon and Gade's nominations, which remained pending for a full Senate vote at the time this Report went to press.

As of the date of publication, the members and nominees to the Commission and their term expirations are:

- Victoria A. Lipnic (R), Acting Chair (July 1, 2020)
- Chai R. Feldblum (D), Commissioner (July 1, 2018) *(nominated for a third term ending July 1, 2023)*
- Charlotte A. Burrows (D), Commissioner (July 1, 2019)
- Janet Dhillon (R), *nominee for Chair (expected July 1, 2022)*
- Daniel Gade (R), *nominee for Commissioner (expected July 1, 2021)*[296]

General Counsel:

- Vacant

294 *See* Press Release, White House, *President Donald J. Trump Announces Intent to Nominate Personnel to Key Administration Posts* (July 31, 2017), *available at* https://www.whitehouse.gov/the-press-office/2017/07/31/president-donald-j-trump-announces-intent-nominate-personnel-key.

295 *See EEOC Noms Stress Negotiation, Guidance at Senate Hearing,* Law 360 (Sept. 19, 2017)

296 The most recent vacancy occurred on January 3, 2018, when Jenny Yang officially ended her term as a Commissioner at the EEOC.

### 2. Wellness Regulations

On August 22, 2017, in *AARP v. EEOC*, the U.S. District Court for the District of Columbia invalidated the EEOC's final regulations on the operation of voluntary wellness programs under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA).[297] The AARP filed this action against the EEOC alleging that the EEOC's wellness regulations were invalid under the ADA and GINA because the EEOC did not provide a sufficient explanation for its decision to allow plans and insurers to offer incentives of up to 30% of the cost of coverage in exchange for an employee's participation in a wellness program.[298] The AARP principally argued that this 30% incentive was inconsistent with "voluntary" requirements of the ADA and GINA because employees who were unable to afford the 30% increase in premiums would effectively be required to disclose their protected information.[299]

The court agreed with the AARP's position that the EEOC failed to sufficiently explain the 30% level, noting that "[n]either the final rules nor the administrative record contain any concrete data, studies or analysis that would support any particular incentive level as the threshold past which an incentive becomes involuntary in violation of the ADA and GINA."[300] However, the court declined to immediately vacate the regulations in order to avoid confusion for employers and employees.[301] Instead, the court ordered that the regulations be remanded to the EEOC for further consideration.[302] To that end, it its Statement of Regulatory and Deregulatory Priorities released on December 14, 2017, the EEOC stated, "in accordance with the court's ruling, the EEOC will consider and take actions to cure defects in the rules."[303] New notices of proposed rulemaking revising the ADA and GINA are expected to be published in the *Federal Register* in or around August 2018.[304] In the meantime, inconsistency and uncertainty for employers with respect to wellness plans remains.

### 3. Revised EEO-1 Reporting

In late August 2017, the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) announced that it indefinitely suspended the Commission's revised EEO-1 reporting compliance date.[305] The revised report would have required private-sector employers with 100 or more employees and covered federal contractors to provide information on employee compensation and hours worked in addition to demographic information. The new requirements would have applied to EEO-1 Reports for 2017, which would have been due by March 31, 2018. The EEOC has now issued instructions for filing the upcoming EEO-1 Report, which remains due on or before March 31, 2018.[306] The information to be reported includes demographic information by EEO-1 job category, but it will not include information on compensation or hours worked. Federal government contractors that are required to file VETS-4212 forms were required to file those reports by September 30, 2017.

OIRA's decision is likely in response to the myriad complaints from the business community. Common criticisms of the updated report, which would have required inclusion of pay data and hours

297 *AARP v. United States Equal Employment Opportunity Comm'n*, CV 16-2113 (JDB), 2017 WL 3614430 (D.D.C. Aug. 22, 2017); *See also* Russel F. Chapman, *EEOC Must Reconsider its Wellness Regulations*, Littler ASAP (Aug. 23, 2017), https://www.littler.com/publication-press/publication/eeoc-must-reconsider-its-wellness-regulations.
298 *AARP*, 2017 WL 3614430 at *15.
299 *Id.* at *2.
300 *Id.* at *16.
301 *Id.*
302 *Id.*
303 EEOC, *Statement of Regulatory and Deregulatory Priorities* (Dec. 14, 2017), *available at* https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/201710/Statement_3046.html.
304 See EEOC, Agency Rule List – Fall 2017, *available at* https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=3046&Image58.x=35&Image58.y=10&Image58=Submit.
305 David J. Goldstein and Ilyse W. Schuman, *New EEO-1 Report Suspended Indefinitely*, Littler ASAP (Aug. 29, 2017), https://www.littler.com/publication-press/publication/new-eeo-1-report-suspended-indefinitely.
306 *See* 2017 EEO-1 Survey, *available at* https://www.eeoc.gov/employers/eeo1survey/index.cfm.

of work, included the substantial cost of compliance, lack of privacy safeguards, and its questionable utility in promoting pay equity. The updated/revised report would have called for a broad range of data, which when analyzed, was unlikely to adequately explain pay differentials.

Although the revisions to the EEO-1 as proposed under the prior administration have been stayed, the topic of equal pay remains a politically important topic. With more states enacting or considering equal pay-related legislation, additional proposals by the Commission or Congress on this topic may be forthcoming.

### 4. The Trump Administration Examines the Commission's Regulatory and Enforcement Policies

On May 23, 2017, the House Subcommittee on Workforce Protections held a hearing to discuss the direction of the EEOC.[307] The witnesses and lawmakers raised several topics related to the EEOC's regulatory and enforcement priorities in recent years and the Commission's revised EEO-1 report. The EEOC's focus on systemic investigations came under scrutiny as did the FY 2018 proposed budget's call for merging the EEOC with the Office of Federal Contract Compliance Programs (OFCCP).

The following provides a brief overview of the hearing.

- The Revised EEO-1 Report, which had caused an uproar in the employer community for a variety of reasons, was discussed. Witnesses and lawmakers highlighted the time and expense associated with gathering the data required by the anticipated new report, with no explanation from the Commission as to the purpose, utility, or value of the data.
- Enforcement, systemic investigations and charge backlog were other points of contention raised at the hearing. Critics of the EEOC's focus on pursuing systemic discrimination cases—which the agency defines 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"—versus individual charges of discrimination, claimed that this focus resulted in "fishing expeditions" and allowed the backlog of over 73,000 individual charges to languish. The U.S. Chamber of Commerce's witness elaborated that since 2013, this charge backlog had increased 3.9%, while the number of merits lawsuits filed has significantly declined.
- The White House's FY 2018 budget, released the same day as the House Committee hearing, proposed merging the OFCCP into the EEOC, "creating one agency to combat employment discrimination," which "will work collaboratively to coordinate this transition to the EEOC by the end of FY 2018." The transition of the agencies was geared at reducing operational redundancies, promoting efficiencies, improving services to citizens, and strengthening civil rights enforcement." The proposed merger faced significant opposition at the hearing from both the business community and civil rights advocates. A common criticism was that the two agencies serve different primary missions with different procedures, and different remedies. Facing widespread criticism of the proposal in Congress and stakeholders from all sides, the merger of the two agencies did not gain any traction following the hearing.
- Finally, some witnesses also found fault with the Commission's delegation of litigation authority to the EEOC's general counsel. Some claimed that this practice had resulted in a lack of quality control standards, and advocated for rescinding the delegation of litigation authority in most cases, and instead, letting the full Commission have final say over which lawsuits to pursue.

307 Ilyse W. Schuman and Michael J. Lotito, *House Hearing Examines EEOC's Regulatory and Enforcement Policies* Littler ASAP (May 23, 2017), https://www.littler.com/publication-press/publication/house-hearing-examines-eeocs-regulatory-and-enforcement-policies.

## B. EEOC Strategic Enforcement Plan and Updates on Strategic Plan

The Strategic Enforcement Plan (SEP) for 2017-2021 is still in place, with the following six priorities: (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.[308]

The revised SEP, however, also focuses on several specific, emerging areas of law and policy. Notably, the SEP announced the EEOC's intention to scrutinize fair employment practices in the context of the so-called "gig" economy. Specifically, it would examine "issues related to complex employment relationships and structures in the 21st century workplace, focusing specifically on temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy."

To further its objective, the Commission held a meeting entitled "The State of the Workforce and the Future of Work," on April 5, 2017.[309] The meeting consisted of a panel discussion amongst individuals distinguished in the fields of economic policy, human resources, and workplace consultants, among others.

With respect to the Commission's Strategic Plan, which "serves as a framework for the Commission in achieving its mission to prevent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace,"[310] on February 12, 2018, the EEOC released its final Strategic Plan for FY 2018-2022. The plan lists the following as the Commission's strategic objectives and outcome goals for FY 2018-2022:

1. Combat and prevent employment discrimination through the strategic application of EEOC's law enforcement authorities. The corresponding outcome goals are: 1) Discriminatory employment practices are stopped and remedied, and victims of discrimination receive meaningful relief; and 2) Enforcement authorities are exercised fairly, efficiently, and based on the circumstances of each charge or complaint.
2. Prevent employment discrimination and promote inclusive workplaces through education and outreach. The corresponding outcome goals are: 1) Members of the public understand the employment discrimination laws and know their rights and responsibilities under these laws; and 2) Employers, unions, and employment agencies (covered entities) prevent discrimination, effectively address EEO issues, and support more inclusive workplaces.
3. Organizational Excellence. The corresponding outcome goals are: 1) A culture of excellence, respect and accountability; and 2) Resources align with priorities to strengthen outreach, education, enforcement and service to the public. The plan also identifies strategies for achieving each outcome goal and identifies 12 performance measures (with yearly targets) to track the EEOC's progress as it approaches FY 2022.[311]

308 *See* Strategic Enforcement Plan 2013-2016. *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).
309 *See* Press Release, EEOC, *EEOC to Examine the State of the Workforce and the Future of Work* (Mar. 29, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/3-29-17.cfm.
310 Press Release, EEOC, *EEOC Approves Strategic Plan for Fiscal Years 2018-2022* (Feb. 12, 2018), *available at* https://www.eeoc.gov/eeoc/newsroom/release/2-12-18.cfm.
311 Strategic Plan for FY 2018-2022, *available at* https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm#objective2.

According to the EEOC, "[t]hese three strategic objectives have associated performance measures detailing outcomes to be achieved during the four-year period the plan is in effect. The outcomes are designed to demonstrate the Commission's progress in carrying out its mission in a time of shrinking resources and an increased demand for its services."[312]

## C. Noteworthy Regulatory Activities

### 1. Equal Pay Initiatives – Pay Data/Revised EEO-1 Report

As explained above, the EEOC's anticipated new EEO-1 reporting requirement has been indefinitely suspended. The EEOC has now issued guidance on the upcoming EEO-1 reports that employers are required to file by March 31, 2018, based on a workforce snapshot taken between October and December 2017.[313]

### 2. Age Discrimination

The Commission launched its commemoration of the 50th anniversary of the enactment of the ADEA by holding a public meeting on June 14, 2017, at its headquarters in Washington, D.C., entitled: "The ADEA @ 50 - More Relevant Than Ever."[314] The meeting included a panel discussion aimed at exploring the state of age discrimination in America today and the challenges it poses for the future.[315]

Acting Chair Victoria Lipnic explained: "With so many more people working and living longer, we can't afford to allow age discrimination to waste the knowledge, skills, and talent of older workers. Outdated assumptions about age and work deprive people of economic opportunity and stifle job growth and productivity. My hope is that 50 years after the enactment of the Age Discrimination in Employment Act (ADEA), we can work together to fulfill the promise of this important civil rights law to ensure opportunities are based on ability, not age."

Experts anticipate that the older worker population will continue to grow, and the Commission is expected to have a renewed focus on enforcing the ADEA in the coming fiscal year.

### 3. Harassment

As discussed in the opening section of this Report, in January 2017, the EEOC announced that it released proposed enforcement guidance addressing unlawful harassment under the federal employment discrimination laws for public input.[316] The proposed guidance explains the legal standards applicable to harassment claims under federal employment discrimination laws, and was the product of extensive research, analysis, and deliberation.

On November 7, 2017, the Commission approved the above-referenced guidance. final This marks the first time in over 20 years that harassment guidelines have been updated. The Commission sent the final version to the Office of Management and Budget for approval. Once the OMB approves, the revised guidance will be made public.

312 EEOC *Approves Strategic Plan for Fiscal Years 2018-2022*, supra note 310.
313 *See* https://www.eeoc.gov/employers/eeo1survey/index.cfm.
314 *See* Press Release, EEOC, *Age Discrimination and Outdated Views Of Older Workers Persist, Experts Tell Commission* (June 4, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-14-17a.cfm.
315 *See* Press Release, EEOC, *EEOC to Examine Age Discrimination at Commission Meeting* (June 6, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/6-6-17.cfm.
316 *See* Press Release, EEOC, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Harassment* (Jan. 10, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/1-10-17a.cfm; Press Release, EEOC, *EEOC Extends Public Input Period on Proposed Harassment Enforcement Guidance to March 21* (Feb. 3, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/2-3-17.cfm.

Between fiscal years 2012 and 2015, the Commission saw an increase in the number of charges alleging harassment. Preventing systemic harassment has been one of EEOC's national enforcement priorities since 2013, and the Commission reaffirmed is priority in its SEP for 2017-2021. With national attention focused on the topic of sexual harassment in the workplace, this topic is likely to be a focus area for the EEOC and many employers around the country.

### 4. National Origin Discrimination

On November 18, 2016, the EEOC released final enforcement guidance national origin discrimination.[317] The EEOC had not comprehensively addressed national origin discrimination since 2002.

The final guidance replaces the existing EEOC Compliance Manual, Volume II, Section 13: National Origin Discrimination issued in December 2002. The revised guidance discusses Title VII's prohibition on national origin discrimination as applied to a wide variety of employment situations, and includes several employer suggestions that may reduce the risk of national origin discrimination claims.

There are some notable differences between the final guidance and the EEOC's guidance published in 2002.

First, the final Guidance on National Origin Discrimination proposes an expansive "joint employer" definition. According to the EEOC:

> Staffing firms, including temporary agencies and long-term contract firms, also are covered as employers by Title VII when each has the statutory minimum number of employees and has the right to exercise control over the means and manner of a worker's employment (regardless of whether they actually exercise that right). If both a staffing firm and its client employer have the right to control the worker's employment and have the statutory minimum number of employees, then they would be covered as "joint employers."[318]

This formulation of the joint employment standard is borrowed from the controversial National Labor Relations Board's decision in *Browning-Ferris Industries of California*.[319] That decision has been criticized for altering the "direct control" standard for joint employment by holding that "indirect" or "reserved" control by an employer may be sufficient to establish a joint employment relationship.[320]

Second, the Guidance on National Origin Discrimination also takes a fairly aggressive stance regarding national origin discrimination based upon accent. The Guidance takes the position that "an employment decision may legitimately be based on an individual's accent if the accent 'interferes materially with job performance.'"[321] The Guidance then states that "[t]o meet this standard, an employer must provide evidence showing that: (1) effective spoken communication in English is required to perform job duties; and (2) the individual's accent materially interferes with his or her ability to communicate in spoken English."[322] Arguably, this test shifts the burden of proof onto the employer to prove these two elements, which would be impermissible because, absent an affirmative defense, an employer never carries the burden of proof under Title VII.[323]

317 EEOC, *Enforcement Guidance on National Origin Discrimination*, No. 915.005 (Nov. 18, 2016), *available at* https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm. *See also* Kevin M. Kraham and Eunju Park, *EEOC Issues Enforcement Guidance on National Origin Discrimination*, Littler ASAP (Nov. 29, 2016), http://www.littler.com/publication-press/publication/eeoc-issues-enforcement-guidance-national-origin-discrimination.

318 *Enforcement Guidance on National Origin Discrimination*, Section III.A.

319 362 NLRB No. 186 (2015), *appeal docketed*, No. 16-1028 (D.C. Cir. Jan. 20, 2016), *remand order* (D.C. Cir. Dec. 22, 2017).

320 The *Browning-Ferris* decision had been overruled by *Hy-Brand Industrial Contractors, Ltd.*, 365 NLRB No. 165 (2017), but the NLRB vacated that decision on February 26, 2018.

321 *Enforcement Guidance on National Origin Discrimination*, Section V.A.

322 *Id.*

323 *Guimaraes v. SuperValu, Inc.*, 674 F.3d 962 (8th Cir. 2012).

Third, the Guidance on National Origin Discrimination takes that position that fluency requirements are permissible "only if required for the effective performance of the position for which it is imposed."[324] Contrary to this formulation, many courts have held lack of fluency is a legitimate, nondiscriminatory reason for an adverse employment action.[325] Furthermore, the Ninth Circuit has held that fluency requirements do not raise an inference of discrimination because "[e]thnicity and status as a non-English speaking person are not necessarily linked."[326] Thus, the Guidance's position relating to fluency requirements provides greater protection to employees who bring claims of national origin discrimination based on fluency than courts that have considered these claims.

Finally, the Guidance on National Origin Discrimination reaffirms the EEOC's position from the 2002 Guidance that English-only workplace rules presumably violate Title VII.[327] However, as the Guidance acknowledges, this policy has been expressly rejected by many courts.[328]

### 5. Mental Health

On December 12, 2016, the EEOC published a resource document titled, "Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights," which summarizes the rights of individuals with mental health conditions under the Americans with Disabilities Act of 1990.[329] The EEOC styled this document as questions that employees who are suffering from a mental health condition may face in the workplace.[330] Although this document is styled as questions posed by employees, it also provides helpful guidance for employers.[331] For example, the document explains that although it is illegal to discriminate against an employee because of a mental health condition, "[a]n employer doesn't have to hire or keep people in jobs they can't perform, or employ people who pose a 'direct threat' to safety (a significant risk of substantial harm to self or others)."[332] This document also provides helpful guidance regarding reasonable accommodations for employees with mental health disorders.[333] The EEOC estimates that it resolved approximately 5,000 charges of discrimination based on mental health issues in FY 2016.[334]

### 6. Federal Sector

On January 3, 2017, the EEOC amended the regulations implementing Section 501 of the Rehabilitation Act of 1973, which prohibits the federal government from discriminating in employment on the basis of disability and requires it to engage in affirmative action for people with disabilities.[335] The new regulation requires federal agencies to provide Personal Assistance Services to individuals who need them because of certain disabilities.[336] According to the EEOC, "PAS are services that help individuals who, because of targeted disabilities, require assistance to perform basic activities of daily living, like eating and using the restroom."[337] To assist federal agencies with providing PAS, the EEOC released a Questions and Answers Guide Regarding PAS Services on September 18 2017.[338]

324 *Enforcement Guidance on National Origin Discrimination*, Section V.B.1.
325 *Desai v. Tompkins County Trust Co.*, 34 FEP 938, 942 (N.D.N.Y), *aff'd*, 37 FEP 1312 (2d Cir. 1984); *Kureshy v. City Univ.*, 561 F. Supp. 1098, 110 (E.D.N.Y. 1983), *aff'd mem.*, 742 F.2d 1431 (2d Cir. 1984).
326 *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987).
327 *Enforcement Guidance on National Origin Discrimination*, Section V.C.
328 *See Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1489 (9th Cir. 1993); *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25 (1st Cir. 2001)
329 EEOC, *Depression, PTSD, & Other Mental Health Conditions in the Workplace: Your Legal Rights* (Dec. 12, 2016), *available at* https://www.eeoc.gov/eeoc/publications/mental_health.cfm.
330 *Id.*
331 *Id.*
332 *Id.*
333 *Id.*
334 Press Release, EEOC, *EEOC Issues Publication on the Rights of Job Applicants and Employees with Mental Health Conditions* (Dec. 12, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/12-12-16a.cfm.
335 EEOC, *Questions and Answers: Federal Agencies' Obligation to Provide Personal Assistance Services (PAS) under Section 501 of the Rehabilitation Act* (Sept. 18, 2017), *available at* https://www.eeoc.gov/federal/directives/personal-assistance-services.cfm
336 29 C.F.R. § 1614.203(d)(5).
337 EEOC, *Questions and Answers: Federal Agencies' Obligation to Provide Personal Assistance Services (PAS) under Section 501 of the Rehabilitation Act* (Sept. 18, 2017), *available at* https://www.eeoc.gov/federal/directives/personal-assistance-services.cfm.
338 Press Release, EEOC, *EEOC Issues New Guide to Assist Federal Agencies to Provide Personal Assistance Services (PAS)* (Sept. 18, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/9-18-17.cfm.

### 7. EEOC's Digital Charge System

On March 3, 2017, the EEOC announced that it launched an Online Inquiry and Appointment System in its Charlotte, Chicago, New Orleans, Phoenix and Seattle offices.[339] In these offices, individuals will be able to electronically submit initial inquiries and requests for intake interviews with the agency.[340] EEOC Acting Chair Lipnic released a statement explaining that "[t]his new system will make the EEOC much more accessible to the public – it's a big step forward in the agency's move to online services."[341]

## D. Current and Anticipated Trends

### 1. The Future of Work

On April 5, 2017, the EEOC held a public meeting regarding updating the skills of the United States workforce and creating employment opportunities for a wide-range of employees.[342] Apprenticeship programs and other ways private-sector employers are training the workforce and reducing the skills gap were one focus of this meeting.[343] For instance, Kenneth Rigmaiden, president of the International Union of Painters and Allied Trades, was present at the meeting and "praised apprenticeship programs and joint labor-management structures that ensure that the training of workers is directly connected to market needs."[344] The EEOC believes that it can help promote these programs by "expanding education and training programs, and by removing barriers to hiring for various segments of the population, including women and minorities."[345]

Panelists also discussed the changing nature of work. Dr. Aparna Mathur, resident scholar in Economic Policy Studies at the American Enterprise Institute, cited some studies suggesting that about "45 to 47 percent of jobs in the U.S. are susceptible to automation."[346] Mathur predicted that this trend will only increase over the next decade. As a result, "[w]e must encourage individuals to upgrade their skills so that they can complement the jobs being done by these new machines more easily rather than have their jobs be automated away," he said. Mathur noted also that technology will continue to be a huge factor in some aspects of the labor market. Independent workers in particular are increasingly choosing to offer services through digital platforms, he explained.

Mathur also testified that there is "much disparity" in an employee's access to paid leave, which might impact women's participation in certain workforce sectors.[347]

339 Press Release, EEOC, *EEOC Launches Online Inquiry and Appointment System for the Public in Five Offices* (Mar. 13, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/3-13-17.cfm.
340 *Id.*
341 *Id.*
342 Press Release, EEOC, *Experts Examine the Current State of The U.S. Workforce and What Jobs May Be in Future Demand* (Apr. 10, 2017), *available at* https://www.eeoc.gov/eeoc/newsroom/release/4-10-17c.cfm.
343 *Id.*
344 *Id.*
345 *Id.*
346 EEOC, Transcript of April 5, 2017 meeting, *available at* https://www.eeoc.gov/eeoc/meetings/4-5-17/transcript.cfm.
347 *Id.*

### 2. Big Data

On October 13, 2016, the EEOC held a public meeting on Big Data.[348] The EEOC described Big Data as "the use of algorithms, 'data scraping' of the internet, and other means of evaluating tens of thousands of pieces of information about an individual ...."[349] This meeting featured a wide-range of Big Data experts, including Littler Mendelson Shareholder Marko J. Mrkonich.[350] Mr. Mrkonich observed that "new tools and methods that rely on concepts of Big Data are becoming part of the daily landscape in human resource departments."[351] Further, former EEOC Chair Jenny R. Yang stressed, "it is critical that these [Big Data] tools are designed to promote fairness and opportunity, so that reliance on these expanding sources of data does not create new barriers to opportunity."[352]

### 3. Small Businesses

On September 27, 2016, the EEOC announced the release of The Small Business Resource Center (SBRC), which is located in the EEOC's website.[353] The SBRC was developed as part of the EEOC's Small Business Task Force, which was launched in 2011.[354] According to the EEOC, the SBRC was "designed for the busy small business owner who needs information both quickly and in a format that is easy to understand."[355] The SBRC provides small employers with answers to frequently asked questions and materials on a variety of potential workplace issues.[356]

348 Press Release, EEOC, *Use of Big Data Has Implications for Equal Employment Opportunity, Panel Tells EEOC* (Oct. 13, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/10-13-16.cfm.
349 *Id.*
350 *Id.*
351 *Id.*
352 *Id.*
353 Press Release, EEOC, *EEOC Releases New Online Resource Center for Small Businesses* (Sept. 27, 2016), *available at* https://www.eeoc.gov/eeoc/newsroom/release/9-27-16.cfm
354 *Id.*
355 *Id.*
356 *Id.*

# IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

## A. EEOC Investigations

### 1. EEOC Authority to Conduct Class-Type Investigations

This year, the progeny of *Mach Mining* and *Caterpillar*[357] continued to settle the issue of how charges and conciliations affect the EEOC's authority to investigate and litigate. At least in the Seventh Circuit, the courts have been granting the EEOC broad leeway in its investigation and conciliation process with minimal judicial interference.[358]

In *EEOC v. Dolgencorp, LLC*,[359] for instance, the EEOC moved the court to summarily adjudicate two of the employer's defenses: (1) that the EEOC's claims were barred because they were beyond the scope of the charges of discrimination and the EEOC's investigation, and (2) that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate on one of the particular grounds of its suit.[360] The court disposed of the first of these in short order. Citing *Caterpillar* and *EEOC v. Autozone, Inc.*,[361] the court found that the EEOC was not limited to the claims raised by the charging party, nor by the sufficiency of its pre-suit investigation.[362]

The *Dolgencorp* court likewise gave wide latitude to the EEOC in meeting its conciliation requirements. In disposing of the second affirmative defense, the court applied *Mach Mining*'s "extremely narrow" standard of review.[363] Under this "barebones" review, the court limited its review to whether the parties "engaged in written and oral communications regarding the alleged discrimination."[364] Finding that they had, the court ruled that the employer's conciliation-defense failed as a matter of law.[365]

The scope of a charge may be one matter, but what if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate remains unabated.[366] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[367] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[368] While the federal appellate courts have been split on this issue,[369] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further

357 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015); *EEOC v. Caterpillar Inc.*, 409 F.3d 831 (7th Cir. 2005) (Posner, J.).
358 *But see, e.g.*, *EEOC v. Tri-core Reference Labs.*, 849 F.3d 929, 937 (10th Cir. 2017) (applying a narrower view of EEOC relevance based on the narrower scope of the charge); *EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (rejecting notion that, just because an individual charge of discrimination could be part of a pattern or practice of discrimination, the EEOC was entitled to such evidence).
359 249 F. Supp. 2d 890 (N.D. Ill. 2017)
360 *Id.* at 892.
361 141 F. Supp. 3d 912, 915 (N.D. Ill. 2015).
362 249 F. Supp. 2d at 892-93 (N.D. Ill. 2017).
363 *Id.* at 896.
364 *Id.*
365 *Id.* at 896-97.
366 *EEOC v. Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Federal Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).
367 867 F.3d 843 (7th Cir. 2017).
368 *Id.* at 845.
369 See *EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).

action on the part of the EEOC.[370] In *Waffle House*, the Court held that, "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[371] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[372] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[373] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority.

### 2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it 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."[374] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[375] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[376] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] 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."[377]

Challenges to subpoenas typically turn on two related issues: (1) relevance and (2) burdensomeness. As reviewed in Littler's prior Annual Reports on EEOC Developments, the courts have been extremely deferential to the EEOC in subpoena enforcement actions. On balance, the courts have been least deferential in the Tenth and Eleventh Circuits.[378]

As discussed below, other issues also arise in dealing with subpoena enforcement actions, particularly the risk of "waiver" when faced with subpoenas issued by the EEOC.

#### a. Applicable Timelines for Challenging Subpoenas (i.e., Waiver Issue)

An employer may be barred from challenging a subpoena in a subpoena-enforcement action in circumstances where it does not timely move to challenge or modify the subpoena.[379] 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

370 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).
371 *Id.* at 291.
372 867 F.3d at 851 (7th Cir. 2017).
373 *Id.*
374 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.
375 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).
376 *Id.* at 59.
377 *Id.*
378 *See, e.g., EEOC v. BNSF, 669 F.3d 1154* (10th Cir. 2012) (denying the EEOC's request for nationwide recordkeeping data, as such information is not "relevant to" charges of individual disability discrimination filed by two men who applied for the same type of job in the same state) and *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) ("Although eradicating unlawful discrimination and protecting other as-yet undiscovered victims are laudatory goals and within the Commission's broad mandate, the EEOC must still make the necessary showing of relevancy in attempting to enforce its subpoena.").
379 *See, e.g., EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. Sept. 30, 2009) (providing a thorough discussion of the 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).

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.[380]

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*,[381] 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.

Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC 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 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."[382]

Despite the *Aerotek* decision, in one decision over the past fiscal year, the court more carefully considered the justifications offered by an employer for failing to file a petition to modify or revoke within the five day period. In a decision by the U.S. District Court for the Eastern District of Kentucky, a large retailer had, like the staffing agency *Aerotek*, filed its petition a day late.[383] Unlike the staffing agency, however, it had excuses. Whether these excuses could overcome procedural failure turned on the application of *EEOC v. Lutheran Social Services*.[384] There, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[385] The *Lutheran* court also suggested, however, that the standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[386] On that suggestion, the EEOC tried to distinguish *Lutheran*, but the court rejected it as *dictum*. Applying *Lutheran*, the court found several circumstances that weighed against waiver: (1) the employer raised the same objections nearly a month before the subpoena was issued, (2) the parties disputed whether the deficiency even occurred, (3) the employer

380 *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).

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

382 *Id.* at 648.

383 *EEOC v. Wal-Mart Stores East*, LP, 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016).

384 *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).

385 *Id.* at 959.

386 *Id.*

cited "extraordinary" postal circumstances, (4) the delay was only a day, and (5) the employer tried to comply with the requirements.[387] The court therefore ruled in favor of the employer and permitted the employer to raise challenges to the subpoena.

It should also be noted, however, that an employer does not have the option to file a petition to modify or revoke a subpoena when faced with subpoenas involving ADEA and EPA claims.[388]

#### b. Who Must Appear to Challenge Subpoenas, and Who Must be Represented by an Attorney

A relatively recent district court decision 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*,[389] 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, therefore, 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 company was neither the sole owner nor licensed counsel. Thus, the court deemed his appearance ineffective.

### 3. Review of Recent Cases Involving Broad-Based Investigation by the EEOC[390]

#### a. Supreme Court Decisions

In a much-anticipated case (at least by procedural-issue standards), the Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until this year's Supreme Court decision,[391] in which the Court brought the Ninth into line with her sister circuits. Rejecting the Ninth's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[392] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[393] For the Court, each favored a more deferential standard.[394] Otherwise, while the Court explained that the district courts need not defer to the EEOC on what is "relevant," it did emphasize Shell Oil's "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[395]

387 *Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071, at *7.

388 The EEOC may initiate a systemic investigation under either the ADEA or the EPA. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute. *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").

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

390 *But see EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014), in which the Eleventh Circuit limited the scope of a subpoena enforcement action.

391 *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017).

392 *Id.* at 1170.

393 *Id.* at 1166-67.

394 *Id.* at 1169.

395 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.

### b. Court of Appeals Decisions

In reviewing other court decisions involving subpoena enforcement actions, several decisions, as discussed below, touched on important issues such as privilege, judicial review, and relevance. A review of the notable federal appellate court decisions involving subpoena enforcement actions are discussed at greater length in Section II.H of this Report.

In one decision favorable to employers, the Tenth Circuit took a more restrictive approach in reviewing the EEOC's subpoena enforcement authority. In *EEOC v. Tri-core Reference Laboratories*,[396] the Tenth Circuit affirmed the lower court's decision to deny an application to enforce a pattern-or-practice subpoena that arose out of an individual charge of discrimination. The court concluded that, "[g[iven the EEOC's paltry explanation of how the . . . request was relevant, the overbreadth of the request, and the EEOC's burden of showing the subpoena's relevancy to the charge," it could not "say the district court abused its discretion."[397]

On the other hand, taking a broader review of the related principle of burdensomeness, the Sixth Circuit ruled in the EEOC's favor regarding evidence to which the EEOC is entitled.[398] At issue was how the employer stored and disclosed employees' medical information. While this was related to the charge, the EEOC sought company-wide evidence on how the information is stored and disclosed. Rejecting the employer's unduly burdensome request, the court found that, because the employer had not shown any material undue burden and had in fact admitted the information could be transmitted electronically, the EEOC was entitled to it.[399]

Regardless of an investigation's scope relative to the charge, the parties and courts also have to grapple with the evidentiary issues that may arise. In the *EEOC v. BDO U.S.A. LLP*,[400] for instance, the Fifth Circuit decided whether the district court erred when it affirmed the magistrate judge's ruling that the documents were privileged, without an *in camera* inspection and without supporting documentation supporting why the documents were privileged. In deciding the magistrate judge did so err, the court held that the "the privilege log" provided by the employer "lacked sufficient detail to ascertain whether" the withheld documents came within the privilege's scope. The magistrate judge therefore erred when she placed the burden on the EEOC to show that BDO's withheld communications were not privileged.[401]

Like much else in this area, determining whether a magistrate judge errs is no easy matter. It depends, in large part, on the district court's standard of review, which in turn depends on whether an application to enforce an administrative subpoena is a dispositive motion. A magistrate judge's findings of fact are reviewed de novo for dispositive motions, clear error for non-dispositive motions.[402] While the question has already been decided in the Third Circuit as precedent, its application is not without issue. In *EEOC v. the City of Long Branch*,[403] for instance, the district court had misapplied the precedent and treated the magistrate judge's ruling as a non-dispositive motion. On appeal, therefore, the Third Circuit affirmed the circuit precedent treating an application as dispositive and remanded the case to the district court for consideration in the first instance or reference of the motion to a magistrate judge for a report and recommendation.[404]

396 *EEOC v. Tri-core Reference Labs.*, 849 F.3d 929 (10th Cir. 2017).
397 *Id.* at 942.
398 *EEOC v. UPS*, 859 F.3d 375 (6th Cir. 2017).
399 *Id.* at 380.
400 2017 U.S. App. LEXIS 23067 (5th Cir. Nov. 16, 2017).
401 *Id.* at **12-13.
402 28 U.S.C. § 636(b)(1)(A), (B).
403 866 F.3d 93 (3d Cir. 2017).
404 *Id.* at 101-02.

### c. District Court Cases

District courts had several opportunities in FY 2017 to interpret and apply the Tenth Circuit's *EEOC v. TriCore Reference Laboratories* decision, discussed earlier. On the whole, these cases reiterated the principle that the EEOC cannot issue subpoenas to give force to an informal expansion of an investigation. To the contrary, the EEOC must initiate additional charges in order to broaden the scope of relevant discovery.

In *EEOC v. Southeast Food Services Co.*, for example, the agency sought to expand the inquiry surrounding a single claim of discrimination into a pattern-or-practice investigation.[405] The claimant, a fast-food crew member, was selected for promotion. The employer maintained a long-standing practice of requiring workers to sign a release as a condition of promotion. The crew member refused to sign the release and was denied the promotion. After learning of this practice, the EEOC informed the employer that it intended to widen its investigation and subsequently issued a subpoena.[406] The magistrate judge rejected the EEOC's claim to information concerning the identities and contact information for current and former employees, along with dates of employment, reasons for discharge, job titles, and other data. The magistrate focused on the relevance of the request and concluded that the information sought would not be relevant to the individual charge of discrimination before the EEOC.

In denying the EEOC's order to show cause, the magistrate explained that the EEOC's "decision to expand its investigation after it learned of [the employer's] promotion policy does not provide any further justification for the subpoenaed information."[407] The court reasoned that the EEOC's subpoena power remains tethered to, and limited by, the "charge under investigation."[408] Citing to *TriCore Reference Laboratories*, the court instructed the EEOC to file a Commissioner's charge if it desired discovery relevant to identifying other potential claimants.[409] The district court upheld the magistrate judge's ruling over the EEOC's objections, further finding that the individual claimant's charge did not allege a pattern-or-practice claim that might warrant the desired discovery.[410]

An Alabama federal court reached a similar conclusion in *EEOC v. Austral USA, LLC.*[411] There, a single employee filed an EEOC charge under the ADA. He alleged that his employer fired him for excessive absenteeism instead of granting him leave time as a reasonable accommodation.[412] The EEOC requested the names and titles of all employees who had similarly been terminated, for violation of the employer's inflexible, no-fault attendance policy. When the employer pushed back on that request, the EEOC informed it that the agency was expanding the scope of its investigation to include a pattern-or-practice theory.[413] The employer provided some information, and the EEOC issued a subpoena for additional details. The employer repeatedly asked the EEOC to explain the basis for the expanded investigation, to no avail. Instead, the EEOC applied to the court for an order to show cause why the subpoena should not be enforced.[414]

The magistrate judge recommended denial of the application, however, because it asked the court "to bridge the gap between [the claimant's] individual charge of discrimination and the agency's pattern or practice investigation."[415] Relying on *TriCore Reference Laboratories*, the court found that the requested

405 2017 U.S. Dist. LEXIS 44266 (E.D. Tenn. Mar. 27, 2017).
406 *Id.* at **2-4.
407 *Id.* at *7.
408 *Id.* (quoting 42 U.S.C. § 2000e-8(a)).
409 *Id.* at **10-11 (noting that the EEOC "may not use [the claimant's] charge as a backdoor means to obtain information that is more appropriate available through other channels").
410 *EEOC v. Southeast Food Servs. Co., LLC*, 2017 U.S. Dist. LEXIS 97340, at **7-17 (E.D. Tenn. June 23, 2017).
411 2017 U.S. Dist. LEXIS 133302 (S.D. Ala. Aug. 18, 2017).
412 *Id.* at **2-7.
413 *Id.* at **7-8.
414 *Id.* at **15-18.
415 *Id.* at *27.

information would not prove the employee's charge, clarify application of the attendance policy, or otherwise advance the EEOC's specific investigation.[416] The magistrate judge reiterated that the EEOC's letter purportedly expanding the investigation was no help to the agency because "that letter is not a charge of discrimination."[417] Although the EEOC objected to the ruling, the district court summarily adopted the magistrate's opinion and denied the application.[418]

The EEOC's subpoena faced the same fate in *EEOC v. VF Jeanswear LP*.[419] Here, however, the charge at issue involved both individual and some class allegations. Before addressing the substantive dispute about the scope of the subpoena requests, the court resolved the question of whether the EEOC had the right to continue its investigation after a charging party has received a right-to-sue letter. Pursuant to Ninth Circuit precedent, the magistrate judge confirmed that the agency retains that authority, particularly where investigating systemic discrimination.[420]

The judge then turned to assess the relevance of the EEOC's broad discovery requests. The court noted that "the crux of this . . . inquiry is whether [the claimant's] charge of demotion is enough for a companywide and nationwide subpoena for discriminatory promotion, a practice not affecting the charging party."[421] With some hesitation, given conflicting case law, the court concluded that "the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from [the claimant's] charge of one-off demotion from a sales job to be relevant in a practical sense."[422] In the alternative, the court also held that, even if the material desired was relevant, the scope of discovery should extend only to computer data and should not encompass "searches of files or people's memories."[423] The court also expressed frustration that the parties presented a question that was still evolving and not truly ripe for review. Indeed, the judge lamented that the parties focused on the back-and-forth of the litigation phases but neglected the "prompt and compromising dialog of real needs and practical burdens that civil litigators owe and district judges expect in document litigation."[424]

Meanwhile, in *EEOC v. Centura Health*, a magistrate judge had the chance to analyze not the relevance of the discovery sought, but the purported burden to the employer.[425] In *Centura Health*, the EEOC received 11 discrimination charges against the employer, spanning 6 facilities across Colorado. The EEOC issued a subpoena, which was challenged in part. A district judge ordered the employer to comply with all disputed items, except for certain data compilations. While the judge found that material relevant, he referred the question of burden to the magistrate.[426]

As the magistrate explained, a valid administrative subpoena must be enforced unless the employer shows that compliance would be unduly burdensome—*i.e.*, that it would "unduly disrupt or seriously hinder normal operations" or "that the costs of complying would be undue in light of [the employer's] normal operating costs."[427] The court heard evidence and found much of the employer's assertions speculative. It concluded, for example, that certain witness declarations describing the burdens of compliance were conclusory. Nonetheless, the court held that full compliance would likely be burdensome to the extent that it required a manual review of more than 15,000 employee paper

416 *Id.* at *29.
417 *Id.* at *31.
418 *EEOC v. Austral USA, LLC*, No. 17-00006, Docket Entry 13 (S.D. Ala. Oct. 12, 2017).
419 U.S. Dist. LEXIS 103487 (D. Ariz. July 5, 2017
420 *Id.* at **7-8.
421 *Id.* at *16.
422 *Id.* at **16-17.
423 *Id.* at *23.
424 *Id.* at **21-22.
425 2017 U.S. Dist. LEXIS 141469 (D. Colo. Sept. 1, 2017).
426 *Id.* at **1-5.
427 *Id.* at **10-11.

files, where the vast majority would not have qualified as responsive to the EEOC's request. The court therefore whittled the scope down to the 880 employees of interest identified by the EEOC.[428] In resolving the enforcement application, the court shut down the employer's relevance argument, as that issue had been resolved by the district judge.

The magistrate in *Centura Health* also addressed the "privacy" argument, which is frequently raised by employers.[429] The employer contended that its non-charging employees had privacy interests in their personal information—particularly medical data—that may be contained in their files. Although the court concluded that privacy concerns are "not a basis for an employer to withhold the information from the EEOC," it ordered the parties to mark and treat such information as confidential.[430]

## B. Conciliation Obligations Prior to Bringing Suit

Similar to other "reasonable cause" findings by the EEOC, before filing a pattern-or-practice lawsuit under Section 707 of Title VII or a "class" lawsuit 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 failed to conciliate in good faith before filing suit, the law had been that a court might stay the proceedings to allow for conciliation or dismiss the case.[433] Employers in recent years had with some frequency 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] clarifying that the EEOC's conciliation efforts *are* judicially reviewable, but that EEOC has broad discretion in the efforts it undertakes to conciliate.

### 1. The *Mach Mining* Decision

Before *Mach Mining*, the circuits were split regarding whether the EEOC's conciliation efforts were subject to judicial review and the extent of that review. The Fourth and Sixth Circuits 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."[435] The Second, Fifth and Eleventh Circuits required courts to evaluate "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances," which meant the EEOC had to 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 way to the reasonable attitudes of the employer.[436] The Seventh Circuit had held that the EEOC's conciliation efforts were not judicially reviewable at all.[437]

428 *Id.* at **17-22.
429 *See, e.g.*, Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2016*, pp. 59-60 (Feb. 2017), *available at* https://www.littler.com/files/annual_report_on_eeoc_developments_-_fy_2016.pdf; *Annual Report on EEOC Developments: Fiscal Year 2015*, p. 58 (Jan. 2016), *available at* https://www.littler.com/files/eeoc_annual_report_-_fy_2015_1.pdf; *Annual Report on EEOC Developments: Fiscal Year 2014*, pp. 45 (Jan. 2015), *available at* https://www.littler.com/files/press/pdf/Annual-Report-On-EEOC-Developments-Fiscal-Year-2014.pdf; *Annual Report on EEOC Developments: Fiscal Year 2013*, pp. 35 (Jan. 2014), *available at* https://www.littler.com/files/press/pdf/Annual%20Report%20on%20EEOC%20Developments%20-%20FY%202013.pdf. *But see EEOC v. Loyola Univ. Med. Ctr.*, 823 F. Supp. 2d 835 (N.D. Ill. 2011) (denying enforcement of overbroad subpoena requesting documents that included information relating to employees subjected to a fitness-for-duty exam, partly on the grounds that the information sought was of a sensitive and confidential nature relating to employees' medical conditions).
430 *Id.* at **26-32. The employer has since filed objections to the magistrate's order, which remain pending.
431 42 U.S.C. § 2000-e5(b).
432 *EEOC v. Global Horizons, Inc.*, 2012 Dist. LEXIS 35915, at *12 (D. Haw. Mar. 16, 2012).
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. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984)
436 *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).
437 *EEOC v. Mach Mining*, LLC, 738 F.3d 171, 177 (7th Cir. 2013).

In *Mach Mining*, the Supreme Court unanimously vacated the Seventh Circuit's decision of non-reviewability and resolved the circuit split, holding that the EEOC's attempts to conciliate a discrimination charge before filing a lawsuit *are* judicially reviewable.[438] It also ruled that Title VII both gives the EEOC "wide latitude" to choose which informal conciliation methods to employ while providing "concrete standards" for what the conciliation process must include.

Specifically, the Court held that the EEOC, to meet its statutory conciliation obligation, must inform the employer about the specific discrimination allegation(s), describing what the employer has done and which employees (or class of employees) have suffered. The EEOC must try to engage the employer in discussion to give the employer a chance to remedy the allegedly discriminatory practice. Judicial review of whether these requirements are met is appropriate, but "narrow." It is just a "barebones review" of the conciliation process and a court is not to examine positions the EEOC takes during the conciliation process, since the EEOC will have "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them." The Court noted that, although a sworn affidavit from the EEOC stating that it has performed these obligations generally would suffice to show that the agency has met the conciliation requirement, if an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or try to engage in a discussion about conciliating the claim, then a reviewing court will have to conduct "the fact-finding necessary to resolve that limited dispute." 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 remedy appears no longer available, based on the Court's decision.

On remand, the EEOC moved to strike part of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[439] The Southern District of Illinois held that because the Supreme Court determined that "[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," it would grant the motion to strike and would bar the parties from "disclosing anything said or done during and/or as part of the informal methods of 'conference, conciliation, and persuasion.'"[440] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[441]

### 2. Post-*Mach Mining* Decisions

Subsequent to the Supreme Court's *Mach Mining* decision, in *Arizona ex rel. Horne v. Geo Group, Inc.*, a lawsuit in which the EEOC alleged that a purported class of 20 female employees was sexually harassed at two correctional facilities, the Ninth Circuit concluded that the EEOC could meet its conciliation and requirements *without* naming individual class members.[442] The court "reject[ed] the [] premise that the EEOC . . . must identify and conciliate on behalf of each individual aggrieved employee . . . prior to filing a lawsuit seeking recovery on behalf of a class."[443] It held that, instead, the EEOC "satisf[ies] [its] pre-suit conciliation requirements to bring a class action if [it] attempt[s] to conciliate on behalf of an identified class of individuals prior to bringing suit."[444] The court reasoned that this

438 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).
439 *EEOC v. Mach Mining*, LLC, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
440 *Id.* at 635-636.
441 *Id.* at 635.
442 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).
443 *Id.* at 1200.
444 *Id.*

holding was "consistent with the Supreme Court's broad interpretation of the EEOC's enforcement powers."[445] In *EEOC v. Bass Pro Outdoor World, LLC* the Fifth Circuit similarly held, based on *Mach Mining*, that the EEOC need *not* name specific aggrieved individuals as part of the conciliation process in a pattern-or-practice lawsuit.[446]

Apart from the issue of whether aggrieved individuals must be named, after *Mach Mining*, courts have almost uniformly taken a "hands-off" approach to evaluating whether the EEOC's investigation and/or conciliation efforts satisfy the requirements of *Mach Mining*. If there have been any efforts to conciliate at all, courts will generally deem the investigation and conciliation requirements satisfied.

In *EEOC v. Dimensions Healthcare System*, the EEOC sued on behalf of a single plaintiff, alleging sex discrimination.[447] The District of Maryland held that the EEOC met its conciliation obligations by submitting a declaration in which the Director of the Commission's Baltimore Field Office noted the EEOC had "engaged in communications with the [Employer] . . . including sending [the Employer] a conciliation proposal."[448] The district court noted that "to the extent Dimensions Healthcare requests that this Court pry into whether the EEOC negotiated in good faith, any such argument was explicitly foreclosed by *Mach Mining*, as multiple courts have recognized since the Supreme Court issued that decision."[449]

In *EEOC v. East Columbus Host, LLC*,[450] two EEOC investigators informed the employer on separate occasions that they would recommend a finding that certain of its employees (all but one went unnamed) were sexually harassed and subject to retaliation. The employer was invited to provide additional information but did not, claiming it could not respond unless it knew the identity of the women. The EEOC issued a determination that the employer violated Title VII, and submitted its only demand letter on behalf of the women. The employer did not accept the demand. The EEOC notified the employer that conciliation efforts had failed and then filed suit. The court found that the EEOC complied with the "bare bones" conciliation requirement by (1) informing the employer about the specific allegations, (2) trying to engage the employer in some form of discussion so as to give the employer a chance to remedy the alleged improper practices, and (3) issuing a notice of failure to conciliate. The court said *Mach Mining* "prohibits a court from doing a 'deep dive' into the conciliation process," and that it must only look for "bare compliance."[451]

In *EEOC v. Amsted Rail Co.*,[452] the court found that the EEOC had satisfied its obligation to notify the employer of the disability discrimination allegations against it, even though the communications did not name the relevant disability. The court also declined the employer's request to review the EEOC's correspondence regarding conciliation to determine whether the agency's conciliation efforts were a "sham." In light of *Mach Mining*, the court concluded it could only look to determine whether discussion took place and it reached the conclusion that it had.

Another court rejected an argument by an employer that the EEOC must present specific evidence supporting its allegations during the conciliation process, and reinforced the principle that the EEOC need only notify the employer of the alleged unlawful practices.[453] In *EEOC v. Stone Pony Pizza, Inc.*, the court found that a determination letter and an invitation to engage in a face-to-face conciliation conference sufficed to satisfy the conciliation requirements.[454]

445 *Id.* at 1201.
446 *EEOC v. Bass Pro Outdoor World. LLC*, 826 F.3d 791, 805 (5th Cir. 2016).
447 *EEOC v. Dimensions Healthcare System*, 2016 U.S. Dist. LEXIS 70126 (D. Md. May 27, 2016).
448 *Id.* at **13-14.
449 *Id.* at *16.
450 *EEOC v. East Columbus Host, LLC,* 2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016).
451 *Id.* at *33.
452 *EEOC v. Amsted Rail Co.*, 2016 U.S. Dist. LEXIS 6466 (S.D. Ill. Jan. 20, 2016).
453 *EEOC v. Lawler Foods*, 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015).
454 *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016).

The burden on the EEOC to engage in conciliation efforts is light, but the courts are clear that the EEOC must engage in at least *some* efforts at conciliation. Courts finding in favor of the employer generally do so only in cases where no conciliation takes place. In *EEOC v. College America of Denver, Inc.*, a case in which the court ultimately determined the EEOC failed to meet its conciliation requirement with respect to claims challenging an employer's separation agreements, the EEOC argued it attempted to conciliate separate, unrelated claims and that a case cannot be dismissed for lack of conciliation if any effort to conciliate has taken place.[455] The district court rejected that argument, reasoning that to satisfy its conciliation obligations the EEOC must give an employer "an adequate opportunity to respond to all charges and negotiate possible settlements," and in this case the EEOC did not do that. Since there was no evidence the EEOC made *any* effort to conciliate its allegations that the separation agreements at issue violated the ADEA, the court refused to stay proceedings to permit conciliation on that claim and dismissed the EEOC's claim "for lack of jurisdiction as a result of the EEOC's failure to satisfy the jurisdictional prerequisites of notice and conciliation."[456] This ruling was upheld on a motion for reconsideration.[457]

In *EEOC v. Dolgencorp, LLC*, the Northern District of Illinois held that the EEOC met its pre-suit investigation and conciliation obligations under the *Mach Mining* standard before filing suit.[458] The EEOC claimed that the employer's use of background checks in hiring and firing discriminated against employees on the basis of race in violation of Title VII and moved for partial summary judgment.[459] The employer argued that the EEOC failed to meet its conciliation obligations under Mach Mining by failing to provide adequate notice of the allegations of discrimination and failing to engage adequately in conciliation discussions.[460] With respect to the adequacy of the EEOC's notice, the court held that the EEOC had adequately identified the persons or class of persons affected by the alleged discriminatory practice in two letters of determination it sent to the employer.[461] With regard to the substance of the conciliation discussions, the court held that it was bound under *Mach Mining* to determine only whether the EEOC had attempted to confer regarding the charge, which it had.[462]

In *EEOC v. Western Distributing Co*., the District of Colorado held that the EEOC met its pre-suit conciliation and investigation obligations.[463] Noting that the EEOC had engaged the employer in discussions regarding remedying the discriminatory practice by providing a settlement offer, meeting in person, and exchanging letters, the court held the EEOC had met its conciliation obligations.[464] The court also rejected the employer's argument that the EEOC was required to identify all aggrieved individuals to satisfy the conciliation requirement, noting that *Mach Mining* makes clear that the EEOC need not identify each aggrieved individual, even if doing so would have placed the employer in a better position to respond to the EEOC's settlement offer.[465]

In *EEOC v. CRST Van Expedited, Inc.*, the court upheld a previous ruling dismissing the case due to a complete failure to investigate or conciliate the claims.[466] The court distinguished *Mach Mining*, noting that it addressed the level of judicial inquiry into the EEOC's conciliation process, and did not prevent the court from dismissing where no investigation or conciliation efforts took place at all. Further, the

455 *EEOC v. College America of Denver, Inc.*, 75 F. Supp. 3d 1294, 1302-03 (D. Colo. Dec. 2, 2014).
456 *Id.*
457 *EEOC v. College America of Denver, Inc.*, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015). However, the court allowed the EEOC's retaliation claim to stand.
458 *EEOC v. Dolgencorp*, 249 F. Supp. 3d 890 (N.D. Ill. 2017).
459 *Id.* at 891.
460 *Id.* at 893.
461 *Id.* at 893-94.
462 *Id.*
463 *EEOC v. Western Distribution Co.*, 218 F. Supp. 3d 1231 (D. Colo. 2016).
464 *Id.*
465 *Id.* (citing *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1654 (2015)).
466 *EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).

court noted that, because it found that no investigation or conciliation efforts occurred, it was not limited to *Mach Mining*'s directive that the case be stayed in order to allow the EEOC to comply with these requirements.[467]

In *EEOC v. Sensient Dehydrated Flavors Co., et al.*, the Eastern District of California relied on *CRST* in upholding an employer's challenge to discovery demands served by the EEOC that went well beyond the scope of the allegations in the charge in issue.[468] The EEOC claimed that the court had impermissibly challenged the sufficiency of the EEOC's investigation in violation of *Mach Mining*. However, the court distinguished *Mach Mining* on the grounds that the investigation the EEOC wanted to perform was completely unrelated to the charges that would have been conciliated, and accordingly, *Mach Mining* was not implicated.[469]

### 3. EEOC's Challenge That Any Conciliation Obligation Exists in Pattern-or-Practice Claims Under Section 707

Although there were no cases over the past fiscal year addressing the conciliation obligation in pattern or practice cases under Section 707, employers are reminded that in circumstances in which the EEOC solely relies on Section 707 in any "pattern or practice" lawsuit against an employer, the EEOC cannot circumvent its obligation to engage in conciliation prior to filing suit.

In *EEOC v. CVS Pharmacy, Inc.*,[470] the EEOC argued that Section 707(a) of Title VII authorizes it to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without alleging that the employer engaged in discrimination and without following any of the pre-suit procedures contained in Section 706, including conciliation. Specifically, the EEOC argued that Section 707(a) creates an independent power of enforcement to pursue claims alleging a pattern or practice "of resistance" and that Section 707(e), by contrast, requires only that claims alleging a pattern or practice "of discrimination" comply with Section 706 procedures.[471] The Seventh Circuit rejected this argument, holding that "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)," and that "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."[472] Adopting the EEOC's interpretation, the court reasoned, would read the conciliation requirement out of Title VII because the EEOC could always contend that it was acting pursuant to its broad authority under Section 707(a).[473] Noting that the EEOC's interpretation would undermine both the spirit and letter of Title VII, the court held that the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues pattern-or-practice violations.[474]

467 *Id.* at *8.
468 *EEOC v. Sensient Dehydrated Flavors Co., et al.*, 2016 U.S. Dist. LEXIS 109479 (E.D. Cal. Aug. 17, 2016).
469 *Id.* at *21.
470 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
471 *Id.* at 340-41.
472 *Id.* at 341-42.
473 *Id.* at 342.
474 *Id.* at 343. *But see EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015), in which a district court took the opposite view.

# V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

## A. Pleadings

### 1. Attacking Complaint Based on Scope of Lawsuit

In FY 2017, courts upheld the EEOC's right to pursue litigation beyond the scope of an initial charge under the "reasonable investigation" standard, and to file suit alleging compliance with a settlement agreement was unlawful despite a claim of mootness.

In Pennsylvania, a district court denied a motion to dismiss for lack of subject matter jurisdiction, where the EEOC filed suit seeking to redress alleged sexual harassment of a former employee who had not filed a charge with the EEOC, but which the EEOC uncovered while investigating sexual harassment charges filed by five other employees.[475] The employer argued that the EEOC is subject to the same procedural requirements as private plaintiffs and its suit therefore required a new charge on behalf of the new claimant. The court rejected that argument, concluding that the EEOC's authority to initiate litigation is defined by the "reasonable investigation" standard. Because the EEOC learned of the alleged sexual harassment during its investigation of charges filed by five other employees alleging the same type of harassment, the new allegations were discovered in the course of the EEOC's "reasonable investigation" and therefore were actionable.

The Tenth Circuit reversed the dismissal of an EEOC-filed complaint arising out of an employer's state court suit against a former employee whom the employer asserted had breached a settlement agreement.[476] The EEOC filed suit in federal court, claiming unlawful interference with statutory rights. When the employer disavowed the legal positions that concerned the EEOC, the district court dismissed the EEOC's claim as moot. However, the employer intended to proceed in state court on a new theory – that the former employee breached the settlement agreement by reporting adverse information to the EEOC. The Tenth Circuit rejected the claim that the dispute continued to be moot because: (1) the new theory created the potential for recurrence of claimed wrongful behavior; and (2) if it succeeded in its claim, the EEOC could obtain an injunction preventing the employer from presenting its new theory, which would be a real world effect.

### 2. Title VII/ADA Litigation

FY 2017 saw several courts clarify standards for the EEOC in pursuing enforcement actions.

In Texas, a district court rejected an employer's argument that the EEOC had to show that employees were "similarly situated" in order to prosecute a pattern-or-practice claim of race discrimination.[477] The employer claimed the EEOC's anecdotal and statistical evidence suggesting employees were similarly situated could not be used in an individual Title VII claim, and therefore could not be considered in an EEOC enforcement action. The district court held Rule 23 standards do not apply to EEOC enforcement actions, so the EEOC is not required to justify its pursuit of such cases because it has statutory authority to pursue them. Regardless, the Fifth Circuit had repeatedly held statistical evidence admissible in Title VII cases and that it could be enough to establish a *prima facie* case.

A district court in Florida addressed the requirement for the EEOC to plead damages in an ADA action brought by the EEOC arising from an employer's use of an unlawful pre-employment medical

475 *EEOC v. Scott Medical Health Center, P.C.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016).
476 *EEOC v. CollegeAmerica Denver, Inc.*, 2017 U.S. App. LEXIS 17094 (10th Cir. Sept. 5, 2017).
477 *EEOC v. Bass Pro Outdoor World, LLC*, 2016 U.S. Dist. LEXIS 179403 (S.D. Tex. Dec. 28, 2016).

questionnaire.[478] The EEOC filed suit on behalf of a class of individuals, claiming in conclusory fashion that they "suffered damages" as a result of the employer's use of a pre-employment medical questionnaire. The court granted the employer's motion to dismiss the class action based on the EEOC's failure to plead any actual damages as failing to meet *Twombly* and *Iqbal* standards, but allowed the EEOC to proceed with its enforcement action based on its own "statutory enforcement authority." The EEOC stated a plausible claim by pleading that "injury" was use of the medical questionnaire, which could be redressed by injunctive relief.

### 3. Challenge to Pattern-or-Practice Claims

Courts in FY 2017 continued to confirm that the EEOC could pursue pattern-or-practice claims based on a combination of anecdotal and statistical evidence.

A California district court rejected an employer's argument that limited anecdotal accounts of discrimination were inadequate to establish discrimination as the employer's standard operating procedure, holding allegations based on anecdotal evidence and gross statistical disparities were sufficient to state a pattern-or-practice discrimination claim.[479] The combination of allegations regarding the workplace's homogeneity, alleged accounts of non-Hispanic applicants being told the employer was not hiring despite job postings, and the employer's acceptance of applications from Hispanic applicants was sufficient to allow the court to draw a reasonable inference that unlawful discrimination was occurring.

### 4. ADEA Litigation

In Massachusetts, the district court allowed a failure-to-hire pattern-or-practice discrimination case to proceed past summary judgment based the EEOC's use of statistical and anecdotal evidence.[480] There, the parties presented differing statistical analyses regarding the percentage of individuals hired in the above-40 age group. Both parties also introduced anecdotal evidence from headquarters and local stores, and the EEOC offered headquarters guidance about hiring objectives as evidence of age bias. Ultimately, the court denied the employer's motion for summary judgment, concluding there were genuine issues of material fact as to the EEOC's pattern-or-practice claim, which should be resolved by a jury.

### 5. Eligible Class Members

In a pattern-or-practice Title VII class action in Texas, the EEOC was unsuccessful in its attempt to include as class members individuals who applied after the EEOC concluded its investigation.[481] The district court acknowledged that the EEOC could engage in the investigation and conciliation process without naming specific victims, but could not possibly have known about individuals who applied post-letter of determination, and therefore, could not have conciliated their claims. Because the EEOC could not have satisfied Title VII's administrative perquisites with respect to claims for those individuals, they could not be included as class members.

### 6. Who is the Employer?

In FY 2017, the courts generally continued to allow significant leeway at the pleading stage to keep successor and affiliate entities as defendants in actions brought by the EEOC.

478 *EEOC v. KB Staffing, LLC*, 2017 U.S. Dist. LEXIS 37938 (M.D. Fla. Mar. 16, 2017).
479 *EEOC v. Marquez Brothers, Int.'l*, 2017 U.S. Dist. LEXIS 15339 (E.D. Cal. Sept. 18, 2017).
480 *EEOC v. Texas Roadhouse, Inc.*, 2016 U.S. Dist. LEXIS 145545 (D. Mass. Oct. 19, 2016).
481 *EEOC v. Bass Pro Outdoor World, LLC*, 2017 U.S. Dist. LEXIS 495 (S.D. Tex. Jan. 3, 2017).

In an unusual case, a Texas district court in a failure-to-hire case found a defendant was not prevented from arguing it is not a "covered entity"—*i.e.* neither an employer nor a joint employer—even though it admitted covered entity status in its answer.[482] The defendant obtained temporary employees through a contract with a staffing company and asserted throughout the litigation that the staffing company was the employer at issue, not the defendant. The defendant moved for summary judgment, arguing it was not a covered entity under the ADA because it was neither the employer nor a joint employer. In opposition, the EEOC argued that the defendant had admitted in its answer it was a covered entity under the ADA, had not amended the answer, had not pled a defense that it was not a covered entity, and thus was estopped from asserting it was not a covered entity. The court rejected the argument, noting that the defendant correctly admitted it was a covered entity because it was such with respect to its own employees. The court found that the admission did not implicate the complaining parties, and that the defendant unequivocally asserted elsewhere in its answer that it was not the complaining parties' employer. Accordingly, the court found that the defendant properly preserved its argument that it was not the complaining parties' employer or prospective employer, even in light of its general admission that it is an entity covered by the ADA.

With respect to successor liability, an Alabama district court noted a variety of factors relevant to determining whether a successor company should be held liable for the acts of its predecessor.[483] The complaint alleged that a staffing agency operating from 2010 to 2013 engaged in discriminatory acts, but named as defendant a different staffing agency formed in 2014 based on a theory of successor liability. The court noted that imposition of successor liability may be appropriate in Title VII and in ADA cases, but that no established set of factors apply to determine successor status. The court reviewed factors used in a 1983 Eleventh Circuit decision: (1) the interests of the employees, the employer and labor law policy generally; (2) the extent to which the successor company continued the operations of the former company; and (3) whether the new company had notice of the former company's practices.[484] It reviewed a subsequent Eleventh Circuit decision that focused on two factors: (1) whether the new business retains enough common aspects of the prior business to allow the conclusion of successorship; and (2) whether the successor knew of the unfair labor practices at the time of purchase.[485] It noted a district court decision that considered whether (1) the successor employer had prior notice of the claim against the predecessor, (2) the predecessor was or is able to provide the requested relief, and (3) there has been sufficient continuity of business operations to justify imposing liability.[486] Finally, the court noted a 2016 Eleventh Circuit decision applying five factors: (1) whether the successor had notice of the pending action; (2) whether the predecessor could have provided the relief sought before the sale; (3) whether the predecessor could have provided the relief after sale; (4) whether the successor can provide the relief sought in the action; and (5) whether there is a continuity of operations and work force between the predecessor and the successor.[487] The court concluded that the test for successor liability is fact-specific and must be addressed on the facts of each case and the particular legal obligation in question. The court dismissed the complaint for failure to state a claim under a theory of successor liability, but allowed leave to amend to include facts relevant to the inquiry under the tests discussed in the decision.

482 *EEOC v. S&B Industry, Inc.*, 2016 U.S. Dist. LEXIS 169483 (N.D. Tex. Dec. 8, 2016).
483 *EEOC v. Labor Solutions of AL, LLC*, 2017 U.S. Dist. LEXIS 38619 (N.D. Ala. Mar. 17, 2017).
484 *In re Nat'l Airlines, Inc.*, 700 F.2d 695 (11th Cir. 1983).
485 *Evans Servs., Inc. v. N.L.R.B.*, 810 F.2d 1089 (11th Cir. 1987).
486 *Desporte-Bryan v. Bank of Am.*, 147 F. Supp. 2d 1356 (S.D. Fla. 2001).
487 *Hatfield v. A+ Nursetemps, Inc.*, 651 Fed. App. 901 (11th Cir. 2016).

A district court in New Mexico also addressed successor liability in FY 2017.[488] After stating the Tenth Circuit's three-factor test for determining successor liability (whether (1) the successor entity had prior notice of the claim against the predecessor, (2) the predecessor is or was able to provide the relief requested, and (3) there was sufficient continuity of operations), the court found the EEOC was entitled to conduct discovery from non-party entities in order to address these factors and also whether there was an integrated enterprise—*i.e.*, a situation where one corporation would be liable for another's actions based on their close relationship. The relevant factors on the latter point were (1) interrelations of the operations, (2) common management, (3) centralized control of labor, and (4) common ownership and financial control. Whether two or more entities are an integrated enterprise could impact on an award of punitive damages.[489]

In a subsequent opinion in the same case, the district court allowed the EEOC to amend the complaint to add a successor entity.[490] Using the three factors for successor liability noted above, the court found that the EEOC properly alleged a successor relationship at the pleadings stage, and allowed the amendment. The court further noted that, if successor liability was established, there was no need for the EEOC to exhaust administrative remedies as to the later entity, because all that was required was for a charging party to name those who were known to him. The court reasoned that, if a successor company could argue a failure to exhaust because it was not involved at the time the alleged violations occurred, evasion of liability through corporate transfers would be encouraged and there would be significant statute of limitations concerns. Accordingly, the court permitted the amendment and the addition of the successor entity as a party, noting that discovery would reveal whether the new party could be held liable as a successor entity.

The issue of which entities are named in an EEOC charge may also bear on which can be sued. In denying a motion to dismiss, the U.S. District Court for the Eastern District of California found that the EEOC's failure to name all relevant affiliates on a charge was not a bar to suit against those affiliates.[491] The underlying charge named only the parent company and referenced events concerned one facility, but the EEOC's complaint listed five corporate entities as defendants and asserted claims based on company-wide policies. The defendants argued that the limited scope of the charge failed to place the affiliate companies on adequate notice of the scope of the investigation. The court rejected that argument, first noting that violations discovered by the EEOC in the course of reasonable investigation into a charge are actionable, even if beyond the scope of the charge. Even if that were not the case, the court set forth four exceptions to the general rule that a defendant must be named in the charge: (1) if a named defendant was involved in the alleged unlawful acts; (2) if the respondent is a principal or agent of an unnamed party and they are substantially identical, (3) if it could be inferred that the unnamed party violated the law, and (4) if the unnamed entity had notice of the EEOC conciliation effort and participated in the proceedings. The court found that the complaint pled facts that could support a conclusion that the affiliates and the parent company were substantially identical, that the determination of reasonable cause had been directed to all defendants, and that all defendants were permitted to engage in the conciliation process. Accordingly, the motion to dismiss for failure to name the affiliates in the charge was denied.

488 *EEOC v. Roark-Whitten Hospitality 2*, 2017 U.S. Dist. LEXIS 132026 (D.N.M. Aug. 17, 2017).
489 *EEOC v. Columbine Health Systems, Inc.*, 2017 U.S. Dist. LEXIS 152986 (D. Colo. Sept.19, 2017).
490 *EEOC v. Roark-Whitten Hospitality 2*, 2017 U.S. Dist. LEXIS 153891 (D.N.M. Sept. 21, 2017).
491 *EEOC v. Marquez Bros. Int'l, Inc.*, 2017 U.S. Dist. LEXIS 153339 (E.D. Cal. Sept. 18, 2017).

### 7. EEOC Motions – Challenges to Affirmative Defenses

In 2017, the EEOC had success in challenging the affirmative defense that it failed to satisfy its administrative prerequisites prior to filing suit.

In Colorado, a district court granted summary judgment in favor of the EEOC on the employer's failure-to-properly-conciliate affirmative defense, holding that the EEOC is subject to no formal requirements when engaging in conciliation.[492] The employer argued that it had made monetary settlement offers, but the EEOC did not communicate those offers to the employees, violating its duty to conciliate. The court refused to impose this requirement on the EEOC, noting its limited judicial review of the EEOC's conciliation efforts, based on Supreme Court precedent.[493] The EEOC also obtained summary judgment on an employer's affirmative defense, based on after-acquired evidence, since the employer failed to present evidence that the plaintiffs intentionally misrepresented that they could speak fluent English on their job applications or that speaking fluent English was material to the performance of their job.

The U.S. District Court for the Eastern District of New York similarly acknowledged that the scope of review of the EEOC's pre-suit obligations, including the duty to conciliate, is narrow and thus struck the employer's failure-to-conciliate-in-good-faith and failure-to-satisfy-administrative-prerequisites defenses, holding that the EEOC does not have to try to conciliate on behalf of all potential claimants before filing suit.[494] Citing the EEOC's ability to add new allegations it uncovers while conducting investigations, the court also struck the employer's affirmative defense that the EEOC improperly added claims outside of the scope of the underlying charge.

In a different case, the same district court noted the EEOC's limited obligation to investigate to satisfy administrative prerequisites.[495] The court granted the EEOC's motion to strike the employer's affirmative defense that the EEOC failed to properly investigate, rejecting the employer's argument that the EEOC must adhere to certain ethical standards when performing its initial investigation. It struck the employer's affirmative defense that the EEOC retaliated against the employer after it filed a complaint with the Office of the Inspector General because allegations of retaliation, even if meritorious, are not an affirmative defense to discrimination. Finally, the court, overruling the magistrate judge's recommendation, struck the employer's two affirmative defenses contending that the EEOC's bad faith and improper actions entitled the employer to attorneys' fees and costs on the ground that a request for attorney's fees was not an affirmative defense.[496]

In some circumstances, employers have overcome the EEOC's challenges to employer affirmative defenses.

In the Northern District of Texas, the EEOC sought to dismiss 11 affirmative defenses and the court denied the EEOC's motion as to nine of them.[497] Notably, the court denied the EEOC's motion to dismiss two defenses concerning the EEOC's failure to satisfy its administrative prerequisites and conciliation obligations after the agency conceded they could be disposed of through summary judgment. The court allowed the employer's estoppel, laches, unclean hands, statute of limitations and failure-to-make-a-prompt-determination affirmative defenses to remain, based on the presence of factual issues seemingly at an early stage of the case.[498]

492 *EEOC v. Columbine Health Systems, Inc.*, 2017 U.S. Dist. LEXIS 152986 (D. Colo. Sept. 19, 2017).
493 *See id.* at **23-24 *citing Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 191 L. Ed. 2d 607 (2015).
494 *EEOC v. United Parcel Serv.*, 2017 U.S. Dist. LEXIS 34929 (E.D.N.Y. Mar. 9, 2017).
495 *EEOC v. AZ Metro Distributors, LLC*, 2016 U.S. Dist. LEXIS 176918 (E.D.N.Y. Dec. 20, 2016), *recommendations adopted in part and modified in part by* 2017 U.S. Dist. LEXIS 132447 (E.D.N.Y. Aug. 9, 2017).
496 *See AZ Metro*, 2017 U.S. Dist. LEXIS 132447.
497 *EEOC v. S&B Indus., Inc.*, 2016 U.S. Dist. LEXIS 169483 (N.D. Tex. Dec. 8, 2016).
498 *See United Parcel Serv.*, 2017 U.S. Dist. LEXIS 34929.

In Illinois, an employer avoided summary judgment on its failure-to-mitigate affirmative defense because a district court found that the former employee's resume, filled with grammatical errors, presented a question of fact as to whether the employee exercised reasonable diligence to mitigate her damages.[499] The court stated "[t]his court has no trouble concluding that many, if not most, employers would not give serious consideration to a job application accompanied by such a sloppily prepared resume."

In Hawaii, a federal district court granted an employer motion to dismiss asserting multiple affirmative defenses—most notably, that the statute of limitations had passed for some claimants and that the EEOC failed adequately to allege joint employment.[500] The Hawaii court, citing Ninth Circuit precedent, held the 300-day limitations period for filing a charge applies to individual class members in a class. Given that the alleged wrongful activity against two claimants occurred beyond the 300-day period, the court dismissed all claims as to those claimants. The court further held that the EEOC merely asserted conclusory allegations concerning joint employment. Pursuant to the Ninth Circuit's "economic realities" test, the court considered who supervised the claimants, who had the authority to hire, fire, or discipline them, and who controlled them and their work site. Concluding that "[t]here are no allegations that [the employer] exhibited any of these powers or characteristics with respect to any claimant," the court held that the EEOC's allegations were insufficient to establish joint employment.

### 8. Miscellaneous – Unique Issues

In FY 2017, two courts applied the liberal standard on amendment of pleading to permit the EEOC to cure deficient pleadings. In Hawaii, a federal district court dismissed the EEOC's constructive discharge claims when the agency failed to plead facts supporting them—that one claimant notified the employer of the alleged harassment in order to give the employer the opportunity to address the harassment, and as to the other claimant, that the claimant resigned.[501] The district court granted the employer's motion to dismiss, but allowed the EEOC to replead.

In Texas, a district court granted the EEOC leave to amend its complaint five months after the deadline to amend pleadings, after discovery had closed and after the court had partially granted summary judgment and recognized the EEOC's judicial admissions.[502] In an ADA reasonable accommodation and discharge claim, the EEOC alleged the claimant notified the employer she would be out of work for an "indefinite" period of time, but the evidence showed she indicated she would be out for an "extended" period of time. In ruling on summary judgment, the district court precluded the EEOC from contradicting its admission on this particular communication, unless it amended its complaint to change the allegation. The district court concluded good cause was shown to support leave to amend because (1) the EEOC only recently became aware of the implications of its use of the term "indefinite," when it received the district court's summary judgment ruling, (2) the amendment was important so the evidentiary admission would not be binding at trial, (3) the amendment would not prejudice the employer as the allegation was supported by evidence already in the record, and (4) any prejudice caused by the need for additional trial preparation could be cured by continuing the trial scheduled for four months.

499 *EEOC v. Rent-A-Center East, Inc.*, 2017 U.S. Dist. LEXIS 147695 (C.D. Ill. Sept. 8, 2017).
500 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. LEXIS 154576 (D. Haw. Sept. 21, 2017).
501 *Id.*
502 *EEOC v. Accentcare, Inc.*, 2017 U.S. Dist. LEXIS 152472 (N.D. Tex. Sept. 20, 2017).

## B. Statute of Limitations for Pattern-or-Practice Lawsuits

Individual claims under Section 706 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. Section 707, governing pattern-or-practice actions, 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]

In the past, the Commission has argued that the claims of individuals whose alleged harm occurred more than 300 days before the filing of the charge could still be eligible to participate in a pattern-or-practice lawsuit. There has yet to be a court of appeals decision to determine 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. However, most district courts have held in recent years that the 300-day limitation applies and the Commission appears to be asserting this argument less often.[504]

Prior to 2015, a handful of district courts did hold that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day period.[505] In the most recent example, *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 but then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[506] In doing so, the *New Prime* court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 district court case, that held, "[a]fter 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."[507] 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.[508] 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."[509] 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.[510]

503 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the 300-day charge-filing requirement is 180 days.

504 *See EEOC v. FAPS, Inc.*, 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. 2012) ("spate" of recent decisions applying 300-day limitations period).

505 *EEOC v. New Prime*, 42 F.Supp. 3d 1201, 1217 (W.D. Mo. 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).

506 *New Prime*, 42 F.Supp. 3d 1201, 1217 (W.D. Mo. 2014).

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

508 *Id.* at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

509 *Id.* at 1087.

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

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 or acts occur within that timeframe).[511] If the discriminatory act is a termination, the date of the termination is considered to be the date the employer gives the employee unequivocal notice of the final decision to terminate the employment.[512] An employer is obligated to assert the statute of limitations defense as soon as it has knowledge of facts suggesting that the discriminatory act occurred outside the 300-day window.[513] In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts should be encompassed in the lawsuit.[514]

These principles have proved challenging to apply where the EEOC takes an individual charge and expands its investigation to incidents involving employees who have not filed a charge. 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.[515] Such rulings are helpful to employers because they shorten the time period during which the EEOC can reach back to draw in additional claimants. However, in *Arizona ex rel. Horne v. Geo Group, Inc.*, the Ninth Circuit disagreed with this approach, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[516] The Ninth Circuit observed the trial court's choice to use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[517]

The EEOC has also sought to avoid the applicable statute of limitations using equitable principles. The EEOC has relied on *Zipes v. Trans World Airlines*,[518] in which the Supreme Court held that the 300-day statute of limitations is subject to challenge using equitable theories. In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC has turned to equitable theories, including waiver, estoppel, equitable tolling, the continuing violation doctrine—which allows a timely claim to be expanded to reach additional violations outside the 300-day period where they are part of continuing pattern of illegal behavior[519]—and, the single-filing rule, which allows the EEOC to litigate a substantially related non-filed claim, where it arises out of the same time frame and similar conduct as a timely filed claim.[520]

511 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 at *6-7 (D. Md. Aug. 4, 2014).
512 *Spurling v. C&M Fine Pack, Inc.*, 739 F.3d 1055, 1061 (7th Cir. 2014). *See, e.g., EEOC v. Orion Energy Sys. Inc.*, 145 F.Supp. 3d 841, 845 (E.D. Wis. 2015) (date plaintiff overheard employer planned to terminate her employment was not unequivocal notice of final termination decision).
513 *Orion Energy Sys. Inc.*, 145 F. Supp. 3d 841, 844 (E.D. Wis. 2105) (employer lacked diligence by waiting to assert statute of limitations defense where employee had disclosed her knowledge of the alleged discriminatory act, as well as the date she gained that knowledge, during her termination meeting).
514 *See, e.g., EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015) (granting EEOC's motion for leave to conduct discovery on statute of limitations issue raised in pending motion to dismiss).
515 *See, e.g., EEOC v. Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012) (concluding that notice of investigation triggers a new statute of limitations for added claimants).
516 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).
517 *Id.*
518 455 U.S. 385, 393 (1982).
519 *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of America*, 927 F.2d 1283, 1295 (3d Cir. 1991).
520 *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server's otherwise untimely claims against the harasser's coworker permitted under the single filing rule where another server had timely filed a charge of discrimination against the main harasser and where the EEOC had given notice that the harassing behavior was not limited to one person).

In *National RR Passenger Corp. v. Morgan*,[521] the Supreme Court made it clear that the continuing violation doctrine is not applicable to "[d]iscrete actions such as termination, failure to promote, denial of transfer or refusal to hire" because each such action is an independent action that states a new clock.[522] Despite this limitation, the EEOC has continued to raise the continuing violation doctrine. In fact, the EEOC successfully raised the continuing violations doctrine 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.[523] In FY 2017, the court in *EEOC v. Discovering Hidden Hawaii Tours, Inc.* rejected that argument, stating,

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[524]

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers can now rely on *Discovering Hidden Hawaii Tours* and other district court decisions holding 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."[525] 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.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[526] In *EEOC v. Marquez Brothers International, Inc.*, the court noted, however, that a defendant may not assert a laches defense in an enforcement action brought by the United States unless the defendant can show affirmative misconduct on the part of the government.[527]

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 are outside the 300-day window based on the continuing violations doctrine. In addition, employers have made the argument—at least before district courts—that the statute of limitations set forth in Section 706 must be applied to Section 707 claims.

## 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 recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their administrative remedies,

521 536 U.S. 101 (2002).
522 *Id.* at 114. *See, e.g., Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *10-13 (refusing to apply continuing violation theory to include untimely acts of termination).
523 *EEOC v. PMT Corp.*, 40 F. Supp. 3d 1122, 1128-29 (D. Minn. 2014).
524 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576, at *13 (D. Haw. Sept. 21, 2017).
525 *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1033-34 (D. Ariz. 2013); *see also EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *8 (E.D. Wash. Nov. 12, 2012) (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); *EEOC v. PBM Graphics Inc.*, 877 F Supp. 2d 334, 353-54 (M.D.N.C. 2012) ("the continuing violation doctrine, which revives stale claims, not stale parties, is inapplicable to...individuals who suffered discrimination entirely outside the statutory period...").
526 *EEOC v. Baltimore Cty.*, 2016 U.S. Dist. LEXIS 112731, at **65-66 (D. Md. Aug. 24, 2016).
527 *EEOC v. Marquez Brothers International Inc.*, 2017 U.S. Dist. LEXIS 153339, at *23 (E.D. Cal. Sept. 18, 2017).

allowing intervention by an individual whose claims were subject to mandatory arbitration, and the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-or-practice claims.[528]

### 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.

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[529] 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.[530] The same approach is followed in dealing with intervention in ADA actions.[531]

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."[532] 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.[533]

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

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[534]

### 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.[535] The ADEA, on the other hand, makes no mention of

528 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*.
529 42 U.S.C. § 2000e-5(f)(1).
530 *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).
531 42 U.S.C. § 12117.
532 FED. R. CIV. P. 24(b) (as amended Dec. 1, 2007).
533 *Id.*
534 *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Unio*n, 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 16958, 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."
535 *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.").

intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence his/her own lawsuit terminates.[536]

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,[537] 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 claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[538] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[539] or the movant is a governmental entity other than the EEOC.[540]

Courts are permissive in granting individuals' requests to intervene in lawsuits brought by the EEOC regardless of whether the proposed intervenors failed to exhaust their administrative remedies.

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[541] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against African American employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court declined to hold the individuals were "persons

536 *See* 29 U.S.C. § 626(c)(1); *see also EEOC v. SVT, LLC*, 297 F.R.D. 336, 341(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); *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 149897 at **4-5 (S.D. Fla. Nov. 3, 2015) (holding the proposed plaintiffs-intervenors "have no conditional or unconditional right to intervene in the ADEA action because the ADEA expressly eliminates such a right upon the EEOC's filing of an action on a person's behalf").

537 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187 (S.D. Cal. Aug. 31, 2017) (citing *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) ("Mere lapse of time is not determinative")) and *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620 (W.D. Okla. Nov. 16, 2016) ("When determining timeliness for purposes of intervention..."[t]he analysis is contextual; absolute measures of timeliness should be ignored.") (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)).

538 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).

539 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).

540 *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)).

541 *EEOC v. Stone Pony Pizza, Inc.*, 172 F.Supp.3d 941 (N.D. Miss. 2016).

aggrieved" or entitled to application of the "single filing rule." The court, however, dismissed the claims of intervenors that arose long before the lone charging party's claims, holding that the charging party's charge could not possibly have put the company on notice of these individuals' older claims.

Similarly, in *EEOC v. J & R Baker Farms, LLC*,[542] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the "single filing rule" (The court had previously ruled that potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the "single filing rule."). Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

A mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[543] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

### 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 discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[544]

As explained 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. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[545]

For example, in *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[546] the court allowed the plaintiff-intervenor to assert her state law claims for assault, battery, intentional and negligent infliction of emotional distress, negligent hiring, supervision, training, and retention, and wrongful discharge because the factual bases for these claims and the Title VII gender discrimination and sexual harassment claims were closely related, and it would not require a lengthy extension of the case deadlines.

### 4. Individual Intervenor Claims Alongside EEOC Pattern-or-Practice Claims

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[547] Where individual employees or the EEOC also assert individual

542 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
543 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
544 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, **8-9 (W.D. Okla. Nov. 16, 2016).
545 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, **9-10 (S.D. Cal. Aug 31, 2017).
546 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
547 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).

claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes.

In *EEOC v. JBS USA, LLC*,[548] the EEOC sued a meatpacking company—alleging it discriminated against Somali, Muslim, and African American employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer 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 or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 intervenor-plaintiffs sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also intervenor-plaintiffs.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, that the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding this year, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for the plaintiff-intervenors to file written notice of his/her current address and telephone number.[549]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the "single filing rule," described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted that only the Third Circuit has held it only applies to class actions.[550] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given that multiple employees filed charges alleging similar discriminatory treatment on the same day.

## D. Other Critical Issues in EEOC Litigation

### 1. Reliance on Experts in Systemic Cases

Expert testimony is a frequent topic of law and motion in EEOC cases. In one FY 2017 age discrimination case,[551] the EEOC alleged that a defendant restaurant discriminated against older job applicants for front-of-house positions. The parties filed mutual cross motions to strike expert testimony. The defendant filed a motion to strike the opinion and proffered testimony of an economist engaged by the EEOC. The economist analyzed the rates of hire of persons in the protected age group ("PAG") as compared against three different sets of data: (1) census data for similar occupation codes; (2) data of applicants who applied electronically; and (3) a random sample of unsuccessful paper applicants.[552]

The defendant's first argument was that the economist's use of census data was not reliable under Fed. R. Evid. 702 because the breadth and variety of jobs reflected in the data exceeded that of the

548 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
549 *EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
550 *See Communications Workers of Am. v.New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).
551 *EEOC v. Texas Roadhouse, Inc.*, 215 F. Supp.3d 140 (D. Mass. 2016).
552 *Id.* at 152 and 15.

four front-of-house categories at issue.[553] The court concluded that while the census data included a variety of jobs outside of the positions at issue, it did not warrant exclusion of the economist's opinions.[554] The court noted that even general population census data has not been precluded on Fed. R. Evid. 702 grounds, and here, "the subset of census data was more particularized than general population census information."[555] The court held that relying on this census data was a reliable proxy.[556] After addressing defendant's remaining arguments regarding the census data, the court held that while the defendant "has highlighted possible flaws in [the economist's] analysis, none rise to the level of causing unfair prejudice or creating inflammatory effect with the jury, particularly where the probative value—the statistical support for the EEOC's allegations of discriminatory animus . . . is clear."[557]

The court next explained that, contrary to defendant's argument, the economist's compilation and use of nationwide statistics was probative, and not improper or unduly prejudicial, and further noted that the economist's analysis did address location-to-location data.[558] The court held that if the defendant took issue with "whether those more granular calculations discredit the EEOC's theory of disparate treatment, it may do so on cross-examination."[559]

The court next addressed the defendant's contention that certain of the economist's opinions were speculative. Noting that under Fed. R. Evid. 702, "expert testimony must be more than unsupported speculation or abstract beliefs," the court struck the economist's opinion that there was a causal link between defendant's effort to hire older workers and its receipt of the EEOC's Letter of Determination in 2010 in part because he had made no "professional conclusion" that such hypothesis was true.[560] The court finally struck the economist's opinions regarding a "post-opening chilling" effect on applications from people 40 years of age or older after concluding that the opinion was speculative because the economist again admitted he made no "empirical evidence" to support his opinion as to the causal effect.[561]

Turning to the EEOC's motion to strike portions of defendant's expert, the court first addressed defendant's expert's use of American Community Survey Public Use Microdata Sample ("PUMS") data as his external labor market benchmark.[562] The court disagreed with the EEOC's contention that the use of the PUMS data and resulting opinions were unreliable, explaining that "[a]ny perceived shortcomings associated with using the PUMS data goes to the weight, not the admissibility, of the evidence."[563]

EEOC next objected to defendant's expert's opinion on statistically significant thresholds for variation in location-level hiring shortfalls, claiming it amounted to testimony about the legal standard, *i.e.*, whether defendant's conduct amounted to a pattern or practice of age discrimination.[564] The court declined to strike the opinion, stating that "an expert may still offer an opinion that bears upon the factual determination that the jury will have to make . . . ."[565] The court explained that the jury can decide the weight, if any, they give to the testimony, and thus the proffered opinion falls within the bounds

553 *Id.* at 154.
554 *Id.* at 155.
555 *Id.* at 155 (citing *EEOC v. FAPS, Inc.*, 2014 U.S. Dist. LEXIS 136006 at *21-28 (D.N.J. Sept. 26, 2014)).
556 *Id.*
557 *Id.* at 157.
558 *Id.*
559 *Id.* at 157-58.
560 *Id.* at 158-59.
561 *Id.* at 159-60.
562 *Id.* at 160. According to the U.S. Census Bureau, the American Community Survey (ACS) Public Use Microdata Sample (PUMS) files provide "the full range of population and housing unit responses collected on individual ACS questionnaires, for a subsample of ACS housing units and group quarters persons. The PUMS files allow data users to conduct a custom analysis of the ACS data using a sample of actual responses to the American Community Survey (ACS)." *See* https://www.census.gov/programs-surveys/acs/technical-documentation/pums/about.html.
563 *Id.* citing *Freeman v. Package Mach. Co.*, 865 F.2d 1331, 1338 (1st Cir. 1988).
564 *Id.*
565 *Id.* at 161.

of Fed. R. Evid. 702 and 704.[566] The court further declined to strike the opinion on the grounds it was unreliable.[567]

The EEOC finally moved to strike the defendant's expert's analysis stemming from "duration dependence," a theory that "accounts for changes in average applicant pools given the changes that workers undergo as they progress through their careers," as "junk science."[568] The EEOC argued that the duration dependence theory was inadmissible because it had never been used in the hiring context and no peer-reviewed publications were cited to support its application in this matter.[569] The court ultimately disagreed, noting that while application of this theory might be new in this context, the theory itself was not new or novel.[570] The court denied the EEOC's motion to strike after addressing the EEOC's remaining concerns which the court held could be addressed through cross examination and went to weight, not admissibility.[571]

The EEOC also moved to strike the report and testimony of the defendant's second expert witness, contending that his analysis was not relevant, his report and testimony were unreliable, and his opinion would not assist the trier of fact.[572] This expert was retained to determine whether the employer's interviewing and hiring materials "reflected the characteristics of behavioral interview questions found in industrial and organizational psychology literature" and whether the employer's "legendary traits" reflected the worker characteristics of jobs similar the front-of-house job positions at issue.[573] The court denied the motion on several grounds, including the fact that simply because the expert did not offer an opinion as to the ultimate issue, such did not preclude admission of the opinion, and also noted that the EEOC's concerns could be addressed in its cross-examination of the expert.[574]

In a separate FY 2017 case alleging disability discrimination, *EEOC v. S&B Industry, Inc.*,[575] the defendant moved to exclude the EEOC's expert's report and testimony. In this case, the EEOC alleged the employer discriminated against two job applicants who had hearing impairments, and failed to provide them with a reasonable accommodation during the hiring process.

The court first addressed defendant's request to exclude the expert's testimony related to the first two objectives stated in the expert's report: "(1) providing background information on the historical barriers that deaf and the hard of hearing face, and (2) providing statistics on approximately how many deaf and hard of hearing individuals need access to employment."[576] Defendant argued that the expert's opinions related to these two objectives were "unreliable, irrelevant, inadmissible," and they contained "enormous analytical gaps."[577]

Related to the first objective, the court excluded the expert's opinion that "audism and phonocentric views may have prevented accommodations from being made," as neither relevant nor reliable because it relied on assumptions that the decisionmakers subscribed to such "anti-deaf" stereotypes and not on direct or circumstantial evidence.[578] As for the second objective, the court found that the expert's opinion that the defendant must have discriminated against and failed to accommodate

566 *Id.*
567 *Id.*
568 *Id.* at 161-62.
569 *Id.* at 162.
570 *Id.*
571 *Id.* at 163-64.
572 *Id.* at 164.
573 *Id.* at 164.
574 *Id.* at 165 ("That [the expert] does not offer an opinion as to the ultimate issue of age discrimination does not preclude admission of his opinion where, presumably, such evidence is presented in conjunction with percipient witness testimony....").
575 *EEOC v. S&B Industry, Inc.*, 2017 U.S. Dist. LEXIS 9259 (N.D. Tex. Jan. 24, 2017).
576 *Id.* at *6.
577 *Id.* at **6-7.
578 *Id.* at **10-11.

plaintiffs based on general statistics was "neither relevant nor reliable."[579] The court explained that the EEOC "failed to show how general statistics on the approximate number of deaf and hard of hearing individuals that need access to employment will assist the jury in deciding whether [plaintiffs] failed to mitigate their damages in the specific context of this case."[580] The court granted defendant's motion "to the extent of precluding [the expert] from opining that [defendant's] decisionmakers were motivated by audism, phonocentric views, or an anti-deaf attitude in their interactions with, and decisions regarding" plaintiffs.[581]

The court next addressed the defendant's contention that the expert's opinion regarding objective 3—"determining the type of auxiliary aids that would be most suitable for deaf and hard of hearing individuals when needing to access employment "situations"—was not helpful or relevant to individuals such as the plaintiffs, who are profoundly deaf.[582] The court held that the expert's opinions and testimony related to this objective were relevant to issues in the case such as whether the use of an auxiliary aid would have been a reasonable accommodation to plaintiffs during their job interviews with the defendant.[583]

In *EEOC v. Commonwealth of Pennsylvania*,[584] the EEOC filed a motion in limine asking the court to exclude at trial the testimony of the defendant's expert witness, a forensic accountant, on the subject of backpay damages under Fed. R. Evid. 702.[585] The EEOC argued that the expert's reliance on the "aggregate method" of calculating backpay damages was inappropriate because "mitigation of backpay must be calculated periodically by quarter rather than in the aggregate."[586] The court granted the motion in part and denied it in part.[587] The court agreed with the EEOC that a periodic mitigation method rather than an aggregate mitigation method should apply to any backpay damages calculation *sub judice*, but disagreed that this amount be computed quarterly as the "weight of authority in the ADEA context supports computation on a yearly basis."[588]

In an order on the parties' cross motions for summary judgment, in *EEOC v. Columbine Health Systems, Inc.*,[589] a race and national origin discrimination case, the court ruled that it was faced with conflicting expert opinions relating to a material factual issue, which had to be resolved by a jury such that summary judgment on the disparate impact claim was inappropriate.[590] At issue in this case was whether the defendant's new requirement that personal care providers complete a training course and pass a written examination, both of which were in English, had a disparate impact on certain protected classes.

The court explained that a *prima facie* showing of disparate impact required "a threshold showing of a significant statistical showing," and that statistical disparities between the protected and non-protected groups must be substantial to raise an inference of causation.[591] The EEOC's expert opined that there was a 42.8% pass rate for African American exam-takers, 55.6% for black exam-takers, 99.3% for white exam-takers, and 100% for Hispanic exam-takers.[592] Defendant's expert did not contradict the EEOC's expert's mathematical findings, but criticized the small sample size for African and black exam-takers

579 *Id.* at *12.
580 *Id.* at **12-13.
581 *Id.* at *13.
582 *Id.* at *14.
583 *Id.* at *15.
584 *EEOC v. Commonwealth of Pennsylvania*, Office of Open Records, 2017 U.S. Dist. LEXIS 107664 (M.D. Pa. July 12, 2017).
585 *Id.* at *1.
586 *Id.*
587 *Id.* at *3.
588 *Id.*
589 *EEOC v. Columbine Health Systems, Inc.*, 2017 U.S. Dist. LEXIS 152986 (D. Colo. Sept. 19, 2017).
590 *Id.* at **13-14.
591 *Id.* at *7 (quoting *Ricci v. DeStefano*, 557 U.S. 557, 587(2009)).
592 *Id.* at *10.

and the decision to exclude or include various exam-takers from the analysis.[593] Defendant's expert also applied the "flip-flop" rule: "in situations involving extremely small sample sizes, if a single hypothetical individual is subtracted from the group with the higher selection rate and added to the group with the lower rate, and the hypothetical recalculated standard deviation results in the reversal of an adverse impact determination . . . there is a relatively high likelihood that the difference in selection rates is a random one."[594] Because there were no specific objections as to defendant's expert's methodology or results, the court concluded that the jury must resolve the conflict between the two experts.[595]

## E. General Discovery By Employer

The EEOC takes 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 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.

For example, in *EEOC v. Doherty Grp., Inc. (Doherty I)*,[596] the court permitted a limited deposition of the assigned EEOC investigator regarding two specific areas related to the investigator and the issue of how an arbitration agreement came into the EEOC's possession. The employer also sought to depose the Enforcement Supervisor, but the court granted the EEOC's motion for a protective order regarding the supervisor's deposition because the EEOC showed that she did not play any role in the investigation or litigation, and therefore, did not have any personal knowledge of any relevant, non-privileged information. The court did not permit the employer to invade the attorney-client privilege, work-product privilege, or governmental deliberative process privilege.

In *EEOC v. Doherty Grp., Inc. (Doherty II)*,[597] the same employer as in *Doherty I* sought to take the depositions of two EEOC attorneys who verified interrogatory responses and who testified as the EEOC's 30(b)(6) representative. The court first observed that a party who seeks to take the deposition of an attorney must demonstrate that the information sought is relevant, will not invade the realm of the attorney's work product or attorney-client privilege, the need for the information outweighs the dangers of deposing a party's attorney, and the attorney's deposition is "the only practical means available of obtaining the information." Applying the standard, the court granted the EEOC's motion for a protective order in part and denied in part.

As to the attorney who testified as the 30(b)(6) witness, the court found that the employer could have but failed to ask the questions that it sought to ask in a second deposition at the 30(b)(6) deposition. For this reason, the court concluded that the employer failed to demonstrate that the attorney's deposition was the only practical means available for obtaining the information or that any of the other requirements for taking an attorney's deposition were met (*i.e.*, relevance, non-privileged information, and need for information). Accordingly, the court issued a protective order prohibiting the deposition.

593 *Id.* at **10-11.
594 *Id.* at **11-12.
595 *Id.* at **13-14.
596 *EEOC v. Doherty Grp., Inc.*, 2017 U.S. Dist. LEXIS 34689 (S.D. Fla. June 20, 2016).
597 *EEOC v. Doherty Grp., Inc.*, 2017 U.S. Dist. LEXIS 34787 (S.D. Fla. Feb. 28, 2017).

The court did permit, however, the employer to take the deposition of the attorney who verified responses to interrogatories on behalf of the EEOC. Because she verified the discovery responses and was the only individual who had personal knowledge about how she herself searched for the employer's arbitration agreement (relevant to an important defense theory), the court concluded that the employer made a sufficient showing to justify the attorney's deposition. However, the court made it clear that it would only allow a limited and targeted deposition regarding how and when the attorney conducted her internet search for the employer's arbitration agreement, and why the EEOC supplemented its response to one particular interrogatory. The court specifically directed the employer to not ask any questions that invade the attorney-client, work-product, or deliberate process privileges, including, among other areas of inquiry, questions related to the steps the EEOC undertook during the investigation, the EEOC's determination of reasonable cause, or the EEOC's "true motivation" in bringing the suit.

### 2. Third-Party Subpoenas

In *EEOC v. Bojangles' Restaurants, Inc.*,[598] the transgender claimant alleged that she was subjected to a hostile work environment because of her gender identity, and was discriminated and retaliated against when the employer involuntarily transferred and terminated her.

During discovery, the employer issued subpoenas to the claimant's current employer for production of personnel records, documents, file and correspondence. The EEOC moved to quash the subpoena on the grounds that it was procedurally defective, sought irrelevant and duplicative information, was overbroad, and imposed an undue burden. The court agreed that the subpoenas failed to comport with procedural requirements under Fed. R. Civ. P. 45 and therefore quashed the subpoenas. While the court permitted the employer to reissue new subpoenas to address the procedural deficiencies, it also found that they were overbroad because, as drafted, they potentially sought irrelevant medical and other extraneous information. Accordingly, the court directed the employer to provide a more narrow description of documents that specifically excluded any documents relating to medical information and information about family members in its reissued subpoenas.

In *EEOC v. The Cheesecake Factory, Inc.*,[599] an ADA case involving claims for failure to accommodate, discrimination and retaliation, the employer issued third-party subpoenas to the claimant's past employers for all records related to the claimant, including any personnel and medical records. The EEOC objected and filed a motion to quash the subpoenas, which was granted in part and denied in part.

The court overruled the EEOC's objections to the production of medical records in the possession of the claimant's former employers based on the psychotherapist-patient privilege and the claimant's privacy interest. Regarding the psychotherapist-patient privilege, the court concluded that the privilege does not attach to statements or documents the claimant provided to his former employers, where there was no evidence that they were communicated "in the course of diagnosis or treatment," and that even if it did, the claimant waived the privilege by disclosing the medical records to a third-party. As to the EEOC's objection based on medical privacy, the court held that the claimant waived any privacy interest in his medical records related to his alleged hearing or any other disability.

The court agreed with the EEOC, however, that the scope of the subpoenas was overbroad and limited the time period for requested documents to a 10-year period and only employment-related records were to be produced.[600]

598 *EEOC v. Bojangles' Rests., Inc.*, 2017 U.S. Dist. LEXIS 105347 (E.D.N.C. July 6, 2017).
599 *EEOC v. The Cheesecake Factory, Inc.*, 2017 U.S. Dist. LEXIS 144391 (W.D. Wash. Sept. 6, 2017).
600 Several of the claimant's prior employers provided social services, and there was evidence that the claimant was, in addition to being an employee, a resident of at least some of them. Therefore, the court took care to ensure that the order only encompassed employment-related records.

### 3. Employer Request for Medical Records

As noted above, in *EEOC v. The Cheesecake Factory, Inc.*,[601] the court rejected the EEOC's objections to third-party subpoenas for personnel and medical records issued to the claimant's former employers on the grounds of psychotherapist-patient privilege and privacy. The court rejected the same objections asserted by the EEOC in response to interrogatories and requests for production seeking medical information and records. Thus, the court ordered the EEOC to provide information related to mental health providers that treated the claimant and to produce all medical and mental health records related to his alleged hearing impairment or any other condition constituting a disability.

## F. General Discovery by EEOC/Intervenor

### 1. Scope of Permitted Discovery

This year, several courts considered challenges to the scope of discovery sought by the EEOC. In a recent case, the Southern District of Florida considered whether the defendant was required to produce documents related to complaints of harassment in addition to complaints of discrimination when the EEOC did not specifically request the former. In *EEOC v. Doherty Grp. Inc.*,[602] the EEOC sought to compel responses to discovery "of any internal complaint of employment discrimination either: (1) made by any applicant or employee via Defendant's hotline; or (2) made by any applicant or employee to any person and made known to Defendant's human resources personnel in accordance with Defendant's EEO policies."[603] Following a court order, the EEOC claimed the defendant only provided information about internal complaints of discrimination, not harassment. The defendant argued that the court only ordered it to produce internal complaints of employment discrimination. The defendant asserted that the word "harassment" was not useful when locating documents related to employment discrimination because such a search would return numerous irrelevant documents.[604] Further, the defendant argued that the search, which would include a large number of paper files, would be overly burdensome. In response, the EEOC claimed the defendant should have known that harassment is a form of discrimination and produced such documents. Siding with the defendant, the court reasoned that the EEOC never explicitly sought, nor did the court explicitly order, production of complaints of harassment. The court stated that the EEOC should have specifically sought production of documents regarding harassment complaints if that is what it truly wanted.

An employer was successful in defending against the EEOC's motion to compel in another FY 2017 case.[605] The EEOC argued that the documents it sought were not privileged and, even if they were, the defendant waived the privilege by publically disclosing the content of some of the documents. The EEOC further asserted that the defendant was collaterally estopped from asserting privilege due to a finding of waiver in a parallel arbitration proceeding. However, the court disagreed and denied the EEOC's motion to compel. The court reasoned that the documents were privileged as either attorney-client communications or attorney work product, and the defendant only waived privilege as to the information that was publically disclosed.[606] The court also held that the ruling from the parallel arbitration did not apply.[607]

601 *EEOC v. The Cheesecake Factory, Inc.*, 2017 U.S. Dist. LEXIS 144391 (W.D. Wash. Sept. 6, 2017).
602 2017 U.S. Dist. LEXIS 34688 (S.D. Fla. Feb. 28, 2017).
603 *Id.* at *2.
604 *Id.*
605 *EEOC v. Sterling Jewelers, Inc.*, 2017 U.S. Dist. LEXIS 3011 (W.D.N.Y. Jan. 3, 2017).
606 *Id.* at **13-15.
607 *Id.* at *18.

As previously discussed, in FY 2017 the Fifth Circuit also dealt with the issue of privilege in reviewing the scope of the EEOC's subpoena. In in *EEOC v. BDO U.S.A. LLP*,[608] the EEOC sought information related to the complainant's Title VII and Equal Pay Act claims. The EEOC had issued a subpoena seeking communications related to the claimant's claims of discrimination as well as other discrimination claims not directly related to the claimant. The employer and EEOC agreed to produce the communications, except for 278 documents, which the employer claimed as attorney-client privileged. The EEOC subsequently moved to enforce the subpoena to obtain the allegedly privileged documents. The magistrate held, and the district court affirmed, that the documents were privileged based on the employer's privilege log, even though no *in camera* inspection was conducted. Nor did the employer provide supporting documentation supporting why the documents were privileged.

On appeal, the Fifth Circuit found that the magistrate used an over-broad definition of attorney-client privilege in determining the communications were shielded from disclosure. In essence, the Fifth Circuit held the magistrate had inverted the burden of proof as to the privilege question, by requiring the EEOC to show that the privilege did not protect the materials in dispute.[609] The appellate court did not, however, hold that a protective order was unwarranted, and therefore left the decision whether to grant such an order to the trial court.

In another FY 2017 out of Maryland, the court addressed whether the EEOC can compel a nonparty to comply with a subpoena to attend a deposition and produce documents. In this case, the nonparty was the defendant's former Chief Human Resources Officer.[610] The EEOC issued a subpoena to the former CHRO to attend a deposition and to produce documents related to her own EEOC charge that she filed against the defendant following her separation from employment. The former CHRO later withdrew her EEOC charge as part of a confidential settlement agreement entered into with the defendant in an unrelated lawsuit. The defendant argued the continuance of the former CHRO's deposition was unnecessary because her "refusal to answer certain questions . . . related to a confidentiality agreement that she executed relating to her personal lawsuit against [the defendant], and not to the issues in this lawsuit."[611] The court disagreed and held that the scope of discovery was broad. The court further stated that the Fourth Circuit does not recognize a settlement privilege, and confidential settlement materials are not automatically shielded from discovery.

The court in *Roark-Whitten Hospitality*[612] addressed whether the EEOC was entitled to financial information from the initial defendant, its successor, and non-party hotels owned/operated by the same owner. The EEOC alleged that the defendant created a hostile work environment and discriminated against a class of minority workers, and its claims were based on the behavior of the initial defendant's former owner. In its second amended complaint, the EEOC brought its claims against three other hotels that were owned and operated by the same entity, then requested the financial information at issue. The EEOC contended that such financial information was relevant to its claims for integrated enterprise, punitive damages, and successor employer liability. In granting the EEOC's motion, the court stated, "In this phase of the case, the only questions are whether the discovery sought is relevant to the parties' claims or defenses and is proportional to the case. Despite [the defendants'] argument to the contrary, I find that it is both."[613]

608 2017 U.S. App. LEXIS 23067 (5th Cir. Nov. 16, 2017).
609 *Id.* at **5-7, 9-12.
610 *EEOC v. Performance Food Grp.*, 2017 U.S. Dist. LEXIS 87131 (D. Md. June 7, 2017).
611 *Id.* at *9.
612 2017 U.S. Dist. LEXIS 132026 (D. N.M. Aug. 17, 2017).
613 *Id.* at *12.

The court in *EEOC v. Brown-Thompson General Partnership*[614] resolved a motion to compel filed by the EEOC challenging the sufficiency of the defendant's discovery responses. The EEOC alleged the defendant violated the ADA when it discharged a warehouse stocker in need of a reasonable accommodation. The EEOC alleged the company failed to make a reasonable accommodation for the claimant's and other employees' disabilities by failing to provide light or modified duty assignments in the absence of workers' compensation claims or on-the-job injuries and by enforcing a policy that permitted no more than three days of consecutive absences rather than additional leave as an accommodation. During litigation, a discovery dispute arose, which prompted the EEOC to file a motion to compel, which the court granted in part and denied in part. The court ordered the production of information and documents relating to the defendant's provision of light or modified duty to employees with non-work-related medical conditions, including the identities of such employees; leaves of absence for non-work-related medical conditions, including the identity of such employees; reasonable accommodations for employees with non-work-related medical restrictions, including the identity of such employees; and reasonable accommodations to employees with work-related medical conditions, among others. The court held these discovery requests were relevant, and the defendant failed to establish that provision of the requested information or documents would create an undue burden. The defendant's reliance on a decentralized personnel system and the lack of computers did not insulate the defendant from discovery.

In another FY 2017 decision,[615] the court settled a discovery dispute involving the EEOC's outreach to the defendants' former employees, including former managers. Following a hearing, the court held that the EEOC could contact former managers, but required that it comply with the parties' agreed-upon protocol and disclose any relevant information it obtained. The protocol mandated, among other things, that the EEOC interviewers must identify themselves as EEOC attorneys and terminate the interview at the request of the interviewee.[616] The court also held that the EEOC could interview former employees and was not required to advise the defendants of the names of those contacted, when contact was made, or how long the interviews lasted. However, the court required the EEOC to disclose any relevant information gleaned from the interviews.

### 2. Spoliation Issues

Courts may sanction parties that destroy, materially alter, and fail to preserve evidence in pending or reasonably foreseeable litigation. Courts exercise wide discretion as to whether to sanction a party who engaged in spoliation as well as in choosing the type of sanction imposed. Generally, courts choose the least onerous sanction corresponding to the willfulness of the destructive act and the prejudice suffered by the other party.

For example, in *JBS USA, LLC*,[617] the defendant terminated 96 Muslim workers after they walked off the job during the holy month of Ramadan because the defendant denied them prayer breaks. The defendant asserted that granting prayer breaks to employees would be an undue burden, in part, due to losses resulting from production downtime. During discovery, the EEOC requested two sets of documents: "downtime reports," which identified when, why, and how long work stopped on the production line each shift, and "clipboards," which provide the "total number of minutes of downtime and slowdown" for each shift.[618] The EEOC did not learn of these documents until depositions. Although

614 2017 U.S. Dist. LEXIS (W.D. Okla. Aug. 21, 2017).
615 Post-Hearing Administrative Order, *EEOC v. Darden Restaurants, Inc.*, et al, No. 15-20561-CV (S.D. Fla. June 24, 2016).
616 *See* Defendants' Memorandum of Law Regarding Issues to be Heard During June 23, 2016 Discovery Hearing at 3, *EEOC v. Darden Restaurants, Inc.*, et al, No. 15-20561-CV (S.D. Fla. June 20, 2016); Transcript of Discovery Hearing Before the Honorable Jonathan Goodman United States Magistrate Judge at 4, *EEOC v. Darden Restaurants, Inc.*, et al, No. 15-20561-CV (S.D. Fla. June 23, 2016).
617 2017 U.S. Dist. LEXIS 122908 (D. Colo. Aug. 4, 2017).
618 *Id.* at **37-38.

the defendant provided some documents, it said the rest were lost or destroyed because it did not know the EEOC would need them. The court disagreed with the defendant, holding that the defendant's apparent carelessness in storing the documents was no excuse for failing to produce them. However, because the EEOC did not prove the defendant intentionally destroyed the records, it did not grant the EEOC's request that the court assume the records would show "no downtime or slowdown attributable to prayer breaks."[619] Instead, the court barred the defendant from presenting evidence, testimony, or argument in its motions, at hearings, or at trial that unscheduled prayer breaks led to production line slowdowns.

### 3. Miscellaneous

EEOC cases gave rise to numerous other discovery disputes this year. The court in *EEOC v. Hospman, LLC*[620] addressed the EEOC's motion to compel challenging the sufficiency of the defendant's discovery responses. The EEOC sued the defendant for allegedly terminating several African American housekeepers. The defendant asserted it fired the employees for legitimate business reasons related to its financial condition. The EEOC claimed that the defendant's incomplete responses deprived it of critical information needed to assess the defendant's financial condition. The EEOC argued that the court should prevent the defendant from asserting its business justification. However, given the severity of such a sanction, the court gave the defendant one final opportunity to explain its conduct and issued an Order to Show Cause. The EEOC also sought the award of its reasonable expenses caused by the defendant's allegedly insufficient discovery. However, the EEOC did not provide any documentation as to the amount of time expended to prepare the motion or the hourly rate, so the court ordered the EEOC to provide supplemental briefing with such information.

After the defendants failed to timely respond to the EEOC's discovery requests in *EEOC v. Indi's Fast Food Restaurants*,[621] they filed two motions for extensions and requested that the court accept their late responses as timely. The court applied a five-factor test to determine whether the defendants' untimely responses were due to excusable neglect. The five factors are: (1) the danger of prejudice to the nonmoving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay; (4) whether the delay was within the reasonable control of the moving party; and (5) whether the late-filing party acted in good faith.[622] Although the court found that factors 3, 4, and 5 weighed in favor of the EEOC, it ultimately held that factors 1 and 2 weighed in favor of the defendants and were more significant. In granting the defendants' motion, the court found that the EEOC had not been prejudiced and reasoned that this result would be preferable to ensure a more complete record.

## G. Summary Judgment

In FY 2017, district and appellate courts addressed summary judgment motions in about 20 cases involving claims brought by the EEOC. While the results in about 20% of these cases were mixed, the EEOC prevailed about one-third of the time. Employers thus secured a slight, but not overwhelming, edge in summary judgment outcomes.

As in prior years, the majority—about half—of these summary judgment rulings involved claims of disability discrimination. The remaining claims ran the gamut. Roughly seven cases raised questions under Title VII, including claims for discrimination (pregnancy, racial, religious, sex), harassment (racial), and retaliation. Courts also heard claims arising under the ADEA and the EPA at the summary judgment stage.

619 *Id.* at **48-49.
620 2016 U.S. Dist. LEXIS 141845 (M.D. Fla. Oct. 13, 2016).
621 2017 U.S. Dist. LEXIS 65748 (W.D. Ky. May 1, 2017).
622 *Id.* at 89.

Several notable summary judgment decisions issued in FY 2017 are discussed below.

### 1. ADA Decisions Emphasize Employer Responses to Reasonable Accommodations Requests

Many of the cases resolved at summary judgment this year alleged that an employer failed to accommodate the disability of a qualified employee or applicant. These cases often reflect the courts' evolving approaches to determining when a leave of absence qualifies as a reasonable accommodation, which continues to be a hot topic in this area.

Several cases this year specifically addressed whether an extended leave, or an indefinite leave, might constitute a reasonable accommodation. In *EEOC v. Accentcare Inc.*, for example, a district court out of Texas considered the claims of an employee with bipolar disorder who alleged that her employer terminated her after she requested leave as a reasonable accommodation.[623] The employee initially indicated by e-mail that she required an extended leave and did not know when she might be cleared by her doctor to return. In a follow-up phone call, she explained that she might have more information about a return date after an appointment later that week. Nonetheless, her employer fired her, and the EEOC sued for failure to accommodate. The employer argued that the employee was not a "qualified individual" protected by the ADA because she was unable to work for an unknown period of time. The court disagreed, however, due to lingering fact questions about whether she had requested an indefinite leave when further details would have been forthcoming after her appointment.[624]

The trial court in *EEOC v. GGNSC Administrative Services, LLC* faced a similar question.[625] There, an employee suffered a shoulder injury at home, resulting in her need to take FMLA leave. As her FMLA leave wound down, her employer indicated that she could be entitled to additional leave under the ADA and instructed her to submit a physician's questionnaire in support of any such request. The employee submitted documentation, which indicated that the duration of her incapacity was "unknown." After reviewing the doctor's certification, the employer terminated her employment. At the summary judgment stage, the EEOC asserted that the employee could have performed her essential duties as a scheduling coordinator and stock clerk, with or without accommodation. The court rejected these theories, based on evidence that the employee could not work without accommodation (hence, the need for leave). The court held that, even if she had requested one, the evidence did not show that she could have returned to work with accommodation, rendering her unqualified.

The court in *GGNSC Administrative Services, LLC* relied on precedent from the Seventh Circuit, which revisited similar issues in FY 2017. In *Severson v. Heartland Woodcraft, Inc.*, the appellate court examined the claims of a plaintiff who sought extended leave for a back injury.[626] While on FMLA leave, the plaintiff informed his employer that he would require surgery and requested an extension of his medical leave for at least two more months. The employer responded that, while plaintiff would be welcome to reapply in the future, his employment would expire along with his FMLA leave period if he failed to return to work. On the final day of his FMLA leave, the plaintiff underwent surgery and later sued for his employer's alleged failure to accommodate. The parties disputed whether the desired multi-month leave of absence constituted a reasonable accommodation.

Plaintiff Severson—supported by the EEOC as *amicus curiae*—argued that long-term medical leave should be considered a reasonable accommodation if it is of a fixed duration, is requested in advance, and is likely to enable the employee to perform his or her essential job functions upon return to the workplace.[627] The Seventh Circuit rejected this approach, however, because it would transform the ADA

623 2017 U.S. Dist. LEXIS 95922 (N.D. Tex. June 14, 2017). The employee was not otherwise entitled to leave under the FMLA or corporate policy.
624 *Id.* at **16-19.
625 2017 U.S. Dist. LEXIS 45488 (E.D. Wis. Mar. 28, 2017).
626 872 F.3d 476, 481 (7th Cir. 2017).
627 *Id.* at 482.

into an "open-ended extension of the FMLA."[628] Rather, the court clarified that "a long-term leave of absence cannot be a reasonable accommodation."[629] In reaching this holding, the court emphasized that an extended leave does not provide an individual with disabilities with the "means to work; it excuses his not working."[630]

Another interesting ADA case involved an alleged denial of an employee's request for reassignment to another position. The employer in *EEOC v. Windstream Communications* reviewed a call center employee's request for a day-shift assignment to accommodate her diabetes, which was exacerbated by night-shift work.[631] Her supervisor informed the employer that no volunteers agreed to switch shifts and that the position had to be filled. As a result, the employer informed her than it could not offer day shift but asked what other options might be suitable. By e-mail, human resources personnel suggested that the employee consider other open positions or a leave of absence.[632] The employee rebuffed those suggestions, however, and resigned. The EEOC contended that the employer failed to engage in the interactive process with the plaintiff or to consider reassignment. Because the employee had summarily rejected the employer's suggestions, the court found that *she* had obstructed the interactive process—not the employer.[633] Moreover, the court noted that "while reassignment to a vacant position can be a reasonable accommodation under the ADA, it is not necessarily required."[634] The employer simply had no day shifts available. For her part, the employee would not consider either open positions or a short leave of absence (about eight days) until the shift-bid process began and she could again request day shift. Under these circumstances, the court granted judgment for the employer.

The court in *EEOC v. M.G.H. Family Health Center* had the relatively rare opportunity to interpret the ADA's regarded-as-disabled prong. In that case, the employer hired an individual as a community outreach coordinator. In doing so, the employer varied from its normal hiring procedures: it did not extend a conditional offer or require the employee to undergo pre-hire medical exam. After the employee began work, however, the employer required her to undergo a physical. Based on her medical history and prior medications, she was later asked to take and pay for a functional capacity evaluation (FCE). While she agreed to do so, the plaintiff also saw, and was entirely cleared to work by, her treating physician. Despite this clearance—and the fact that she worked with no difficulty for more than a month—the employer terminated her employment because of the medical hold still in place from the original examiner (which had not yet conducted an FCE).[635] The court found that the EEOC had presented direct evidence that the employer fired the coordinator "because it perceived her impairments as rendering her ineligible for the position" when it fact she was entirely capable of performing her job.[636]

In another FY 2017 summary judgment decision, a district court in South Carolina struggled with ADA claims based on an employer's requirement that a current employee submit to medical examinations in light of her allegedly declining health and performance.[637] The claimant, the long-time editor of the employee newsletter, had been born with congenital defects that limited her dexterity and stability. Her supervisor noticed a decline in her enthusiasm, creativity, initiative, and ability to meet deadlines, even with a reduced workload. The supervisor received complaints from coworkers that the claimant was

628 *Id.*
629 *Id.* at 481.
630 *Id.* at 481; *see also Golden v. Indianapolis Housing Agency*, 2017 U.S. App. LEXIS 20257 (7th Cir. Oct. 17, 2017) (holding that an employee's request for a leave up to six months, in addition to FMLA leave, removed her from protection of the ADA).
631 2016 U.S. Dist. LEXIS 175912 (E.D. Ark. Dec. 20, 2016).
632 *Id.* at **13-14.
633 *Id.* at **7-10.
634 *Id.* at *12.
635 *Id.* at **5-15. The employer later offered to rehire the employee, but she declined.
636 *Id.* at *3.
637 *See EEOC v. McLeod Health, Inc.*, 2016 U.S. Dist. LEXIS 159923 (D.S.C. Nov. 18, 2016); *see also EEOC v. McLeod Health, Inc.*, 2016 U.S. Dist. LEXIS 44613 (D.S.C. Jan. 21, 2016).

pushing work on others and also perceived that the employee's physical health was deteriorating.[638] After the claimant suffered a couple of falls within a short time frame, the supervisor reached out to human resources for guidance on how to proceed. HR reached out to the employer's occupational health team, and all agreed that the claimant should undergo a fitness-for-duty exam. Based on the results of that exam, the employer then referred claimant for a FCE.[639]

Following the exams, the employer considered the employee's accommodation requests but concluded that, even with accommodations, the claimant could no longer perform the essential functions of her job. The employer offered the claimant a leave of absence and the potential to request a transfer to another position where her restrictions could be accommodated. Ultimately, no solution appeared and the employer discharged the editor. The EEOC alleged that the employer had violated the ADA by subjecting the claimant to excessive medical examinations and by terminating her employment.[640]

A magistrate judge initially recommended that the district judge grant the employer's summary judgment motion. The magistrate judge found that the referrals were appropriate given the supervisor's reasonable concerns about the employee and that scope of the exams had been tailored to exploring whether the claimant could perform her job. He also concluded that the claimant had not participated in the interactive process where she produced no medical assessment from her own physician to counter or supplement the exam findings.[641] The district judge adopted the magistrate's report denying the claim for improper medical examinations but remanded the case for further consideration on the wrongful termination claim.[642] The court agreed with the EEOC that questions of fact remained about the employee's role in the interactive process, particularly because the employer's behavior suggested that it "would have been futile for [the editor] to engage in the interactive process."[643]

The defendant-employer then sought reconsideration from the district court, asking the court to dismiss the wrongful termination claim. The employer argued that the court erred by relying on reasonable accommodation principles when deciding the termination claim, because the EEOC did not assert a reasonable accommodation claim. The court granted the motion, but not in the manner sought by the employer. Instead, the court found that further analysis on any fledging reasonable accommodation claim was necessary, along with review of the termination claim. The judge remanded both issues to the magistrate judge for consideration.[644] At the end of the day, the court ruled in favor of the employer after concluding that no reasonable accommodation claim had been raised or established.[645] In particular, the court found that that reassignment to a vacant position could not have been a reasonable accommodation, in large part because the claimant had rejected available positions suggested to her due to the lower pay.[646]

### 2. Religious Accommodation and Retaliation

The EEOC continues to press claims involving requests for accommodation for headgear, clothing, or religion-related grooming restrictions. In *EEOC v. Triangle Catering, LLC*, for example, the EEOC commenced an action against a catering service that allegedly refused to accommodate a Rastafarian delivery driver.[647] In his interview for the position, the claimant did not wear any headwear

638 *McLeod Health, Inc.*, 2016 U.S. Dist. LEXIS 44613, at **2-7.
639 *Id.* at **8-17.
640 *Id.* at **17-26.
641 *Id.* at **35-51.
642 *EEOC v. McLeod Health, Inc.*, 2016 U.S. Dist. LEXIS 43057 (D.S.C. Mar. 31, 2016).
643 *Id.* at **25-29.
644 *EEOC v. McLeod Health, Inc.*, 2016 U.S. Dist. LEXIS 159923, at **2, 4-5 (D.S.C. Nov. 18, 2016).
645 *EEOC v. McLeod Health, Inc.*, No. 14-3615, Docket Entry 96 (D.S.C. June 19, 2017) & Docket Entry 102 (D.S.C. Sept. 21, 2017).
646 *EEOC v. McLeod Health, Inc.*, No. 14-3615, Docket Entry 102, pp. 19-28.
647 2017 U.S. Dist. LEXIS 28476 (E.D.N.C. Mar. 1, 2017).

or mention that he would need to wear religious headwear if employed.[648] On his second day of work, the driver arrived wearing a hat. Management promptly confronted him and asked him to remove the hat. The driver explained that he wore the hat, or crown, for religious reasons. The employer sent him home shortly thereafter and fired him the next day.[649]

The EEOC raised both unlawful termination and reasonable accommodation claims. As for the accommodation claim, the employer argued that the employee's religious belief was not sincere because he did not wear the crown at his interview. The court was not convinced, in light of evidence that the driver had been a practicing Rastafarian for over 15 years.[650] It left that question for the jury. In addition, the court rejected the employer's assertions that it had accommodated the driver and, alternatively, had demonstrated undue hardship.[651] The evidence at summary judgment did not support either theory, particularly since the "defendant made no effort to accommodate [the driver's] religious beliefs prior to his termination."[652]

A district court out of Minnesota resolved an issue of first impression in *EEOC v. North Memorial Health Care*.[653] The court had to decide whether requesting a religious accommodation constitutes "protected activity," a necessary element for a retaliation claim. The claimant, a nurse and Seventh-day Adventist, sought a position in a residency program with defendant. Although the claimant was initially selected for the program, the defendant rescinded the offer after learning that she could not work on Friday nights due to her religious practices. She indicated that she would find replacements or come to work if needed on Friday evenings, but the defendant concluded that her schedule modification request was not feasible.

After she filed charges, the EEOC took the case on her behalf and asserted a retaliation claim. The defendant challenged the claim on the grounds that requesting an accommodation does not qualify as a protected activity under Title VII. Relying on the plain text of the statute, the court agreed with the defendant. The court reasoned that "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation."[654] Nor did the request fall under the participation clause, as she did not make a charge, testify, or participate in any investigation or proceeding during the act of seeking an accommodation.[655] In sum, the court could not fit the nurse's request into the statutory meaning of "protected activity" and granted summary judgment for the defendant.

### 3. Employment Classification Issues

Employee classification and joint employment remained contentious topics in labor and employment law throughout FY 2017, across issues and industries. The EEOC addressed these questions as well, including in two noteworthy summary judgment cases.

In *EEOC v. S&B Industry, Inc.*, the EEOC tackled these questions head-on.[656] Two candidates with hearing impairments sought employment at a cell phone repair and testing facility ("S&B"). S&B, in turn, relied on staffing agencies—including Staff Force—to fill temporary contractor positions. The two candidates applied with Staff Force, which screened them and selected them to interview for various positions at S&B. No accommodations were provided during the S&B interview process, and neither candidate was selected for any position. The EEOC pursued discrimination and failure-to-accommodate

648 *Id.* at *4.
649 *Id.* at *5.
650 *Id.* at **20-23.
651 *Id.* at **25-27.
652 *Id.* at *26.
653 2017 U.S. Dist. LEXIS 104482 (D. Minn. July 6, 2017).
654 *Id.* at **7-8.
655 *Id.* at **8-10.
656 2016 U.S. Dist. LEXIS 169483 (N.D. Tex. Dec. 8, 2016).

claims against S&B. In response, S&B asserted that it was not a "covered entity" under the ADA because it did not qualify as an "employer." According to S&B, the candidates sought employment with Staff Force only.[657]

The court relied on the hybrid economic realities/common law control test used in the Fifth Circuit. It thus looked to whether S&B had the right to control employees' conduct as well as compensation arrangements.[658] Using these criteria, the court found material questions of fact that precluded summary judgment for S&B. The court noted that S&B directly supervised certain workers and retained the right to hire and fire specific workers.[659] For similar reasons, the court also denied S&B's motion on the EEOC's joint employment theory.[660] Nonetheless, the court stressed that the candidates could not recover under the ADA at all if the jury found they "were prospective *independent contractors* of S&B," rather than prospective employees.[661]

The court in *EEOC v. Triangle Catering, LLC*, followed a similar path in assessing whether the claimant was defendant's employee.[662] There, the EEOC pointed to several facts supporting its claim that the defendant was the employer of a Rastafarian driver who, as noted earlier, was terminated after showing up to work with religious headwear.[663] For example, the EEOC pointed out that the driver's work making deliveries was essential to the business, the defendant directed the driver's work including his schedule, the defendant provided the equipment necessary for the work, and it held the right to terminate workers.[664] The defendant offered evidence to rebut this theory, in part revealing its own confusion about how to classify the claimant.[665] Given the conflicting material facts in the record, the court denied summary judgment.

### 4. Transgender Discrimination

In recent years, the EEOC has contended that Title VII's prohibition against sex discrimination also prohibits discrimination against an individual because of his or her sexual orientation, gender identity, or gender expression. The EEOC has seen increasing success with this position over time, but the question remains undecided. Further confusing the situation, the U.S. Department of Justice, under President Donald Trump's administration, disavowed the EEOC's interpretation.[666] It is unclear whether the EEOC's position may also shift in the future.

Regardless, presently there is a split among the appellate circuit courts as to whether sexual orientation is a protected characteristic under Title VII.[667] In FY 2017, the Seventh Circuit became the first federal appellate court to affirmatively state that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes."[668] Consistent with that holding, a district court in Illinois recently held that transgender employees are similarly protected from discrimination.[669] The court addressed

657 *Id.* at **10-13.
658 *Id.* at **10-11 (describing the test in more detail).
659 *Id.* at *17.
660 *Id.* at **18-21.
661 *Id.* at **21-22.
662 2017 U.S. Dist. LEXIS 28476 (E.D.N.C. Mar. 1, 2017).
663 *Id.* at **4-6, 13-15.
664 *Id.* at **13-14.
665 *Id.* at **14-15 (noting that defendant acknowledged during the EEOC investigation that it was unsure how to classify the driver because it had not yet defined all of his duties).
666 *See Zarda v. Altitude Express, Inc.*, No. 15-3775, Docket Entry 417 (2d Cir. July 26, 2017) (arguing that "sex" and "sexual orientation" are different under the statute and that only Congress can change the defined, protected categories).
667 *See, e.g.*, *Tumminello v. Father Ryan High Sch., Inc.*, 678 F. App'x 281 (6th Cir. 2017) (holding to prior interpretations of Title VII); *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017) (rejecting sexual orientation discrimination claim based on prior precedent). *But see Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. Feb. 26, 2018) (holding discrimination based on sexual orientation violates Title VII).
668 *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017).
669 *EEOC v. Rent-A-Center East, Inc.*, 2017 U.S. Dist. LEXIS 147695 (C.D. Ill. Sept. 8, 2017).

claims brought by an employee who transitioned to female during her employment. According to the EEOC, after learning of the employee's transition, a district manager instructed the employee's store manager to find ways to get rid of her. (The store manager later asserted that he was fired in part for failure to follow that instruction.) Several months later, a new store manager terminated the employee, allegedly for using a company vehicle for personal use. At summary judgment, the employer argued that the employee's sex discrimination claim could not stand because Title VII does not protect transgender individuals. The court disagreed, in light of the Seventh Circuit's decision in *Hively v. Ivy Tech*,[670] and denied the cross-motions for summary judgment in light of outstanding, material questions of fact.[671]

Ultimately, the question of whether Title VII protects individuals on the basis of their sexual orientation, gender identity, or gender expression may ultimately be resolved by the U.S. Supreme Court.[672]

## H. Trial

In FY 2017, the EEOC secured $42.4 million for charging parties through litigation.[673] The vast majority of cases, however, are resolved before trial. The matters that did proceed to trial in FY 2017 explored a variety of issues.

### 1. Jury Instructions

In *EEOC v. St. Joseph's Hospital, Inc.*,[674] an ADA case, a nurse requested reassignment to another unit because she required the use of a cane, which posed a safety hazard in the psychiatric unit where she worked.[675] The nurse was allowed to apply for open positions in other units but was required to compete for them.[676] When she did not obtain another position within the provided 30-day application period, her employment was terminated.[677] The EEOC later brought suit on her behalf.[678]

At trial, the district court instructed the jury to determine whether the hospital had failed to provide a reasonable accommodation by not assigning plaintiff to three alternative positions,[679] and, if yes, whether the hospital established its affirmative defense that it made a good-faith effort to provide a reasonable accommodation.[680] The jury answered the first and second questions in the affirmative, ultimately finding that the hospital had made good-faith efforts to accommodate the plaintiff and, therefore, should not be found liable.[681] The district court entered judgment in favor of the hospital. After post-trial motions, however, it entered judgment in favor of the EEOC and ordered the plaintiff's reinstatement, holding that the hospital's good-faith defense only protected it from jury-awarded compensatory damages, not liability as a whole.[682]

670 853 F.3d 339, (7th Cir. 2017).
671 *Rent-A-Center East, Inc.*, 2017 U.S. Dist. LEXIS 147695 at **7-10.
672 Notably, the U.S. Supreme Court has denied review of *Evans v. Georgia Regional Hospital*, No. 15-15234 (11th Cir. 2015), *cert. denied*, No. 17-370 (Dec. 11, 2017), which would have addressed this issue.
673 EEOC 2017 PAR at 13.
674 *EEOC. v. St. Joseph's Hospital, Inc.*, 842 F.3d 1333 (11th Cir. 2016).
675 *Id.* at 1337.
676 *Id.*
677 *Id.*
678 *Id.*
679 *Id.* at 1341.
680 *Id.*
681 *Id.*
682 *Id.*

Despite this success, the EEOC appealed, arguing, among other things, that the district court erred when it failed to instruct the jury that the ADA *required* that the hospital provide the plaintiff noncompetitive reassignment as a reasonable accommodation.[683] The Eleventh Circuit found the EEOC's argument unpersuasive. It held that the ADA did not require noncompetitive reassignment for two reasons. First, the court found that the ADA does not prescribe *how* employers must go about providing reasonable accommodations.[684] Instead, the court noted, it provides a non-exhaustive list of accommodations, including "reassignment to a vacant position," that "may" be reasonable, implying that there are circumstances where reassignment is not reasonable.[685]

Second, under a two-step framework established in *U.S. Airways, Inc. v. Barnett*[686]—which applies in cases where job reassignment upsets a disability-neutral rule (in that instance, seniority), the individual's request for noncompetitive reassignment was not reasonable in view of the hospital's policy of hiring the best-qualified candidate.[687] Under the first step of the *Barnett* framework, the court found that noncompetitive reassignment would not be reasonable in the "run of cases," because it was efficient and beneficial for the hospital, like other employers, to depend on the best-qualified applicants.[688] Under the next step of the *Barnett* framework, the court did not find any special circumstances that would make noncompetitive reassignment reasonable in the plaintiff's case.[689]

For these reasons, the appellate court held that the district court did not err in failing to instruct the jury that the ADA required noncompetitive reassignment. The Eleventh Circuit emphasized that its decision was consistent with the purpose of the ADA, which is to provide employees with disabilities "equal employment opportunities," not "transform[ing] nondiscrimination into discrimination" against nondisabled employees through noncompetitive reassignment.[690]

### 2. Post-Trial Motions

The EEOC filed comprehensive but unsuccessful post-trial motions in a case that it lost before a jury. In *EEOC v. JetStream Ground Services, Inc.*,[691] the EEOC moved for a new trial under Rule 59 and Rule 60 of the Federal Rules of Civil Procedure based on defense counsel's alleged misconduct at trial.[692] The EEOC alleged that counsel elicited improper testimony about the plaintiffs' Muslim attire creating safety concerns and made inappropriate arguments that "raised the specter of security and passenger safety at a time when the public has a heightened fear of air-industry attacks by extremist Muslims," which constituted "blatant misconduct intended to incite fear and prejudice against Muslims."[693] The court rejected the EEOC's position. It found that the EEOC failed to object at the appropriate time in trial to the alleged misconduct, that the jury and counsel received adequate instruction about evidence that could be weighed at trial, and that the alleged misconduct did not rise to an egregious level, warranting a new trial.

683 *Id.* at 1345.
684 *Id.*
685 *Id.*
686 *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). ("The first step requires the employee to show that the accommodation is a type that is reasonable in the run of cases. The second step varies . . . If the accommodation is reasonable in the run of cases, the burden shifts to the employer to show that granting the accommodation would impose an undue hardship…[I]f the accommodation is not shown to be reasonable in the run of cases, the employee can still prevail by showing that special circumstances warrant a finding that the accommodation is reasonable under the particular circumstances of the case.").
687 *St. Joseph's Hospital, Inc.*, 842 F.3d at 1346.
688 *Id.*
689 *See id.*
690 *Id.* at 1346-1347. *But See EEOC v. United Airlines, Inc.*, 693 F.3d 760 (7th Cir. 2012), in which the Seventh Circuit rejected its earlier approach in *EEOC v. Humiston-Keeling*, 227 F.3d 1024 (7th Cir. 2000), in which it had held that a competitive transfer policy does not violate the ADA. In *United Airlines*, the Seventh Circuit reversed course, holding that "the ADA does indeed mandate that an employer appoint employees with disabilities to vacant positions for which they are qualified, provided that such accommodations would be ordinarily reasonable and would not present an undue hardship to that employer." 693 F.3d at 761.
691 *EEOC v. JetStream Ground Services, Inc.*, No. 13-cv-02340-CMA-KMT, 2016 WL 8201623, at *2 (D. Colo. Nov. 3, 2016).
692 *Id.* at *2.
693 *Id.* at **3-8.

The EEOC also alleged that defense counsel violated conflict-of-interest rules in the Colorado Rules of Professional Conduct by making arguments in closing against the interests of a defense witness, whose counsel also represented JetStream.[694] The court found that this conduct did not warrant a new trial because plaintiffs failed to object to it at trial and could not explain how this conduct prejudiced the EEOC's ability to prepare for trial. Although the EEOC may have been unable to contact the defense witness due to defense counsel's representation of the witness, that alone did not preclude the EEOC from adequately preparing for trial.

Further, the EEOC alleged that defense counsel intentionally exploited the jury's potential stereotypes about immigrants during opening and closing arguments;[695] levied personal attacks against the claimants;[696] and made an inappropriate "evil pinky move that Dr. Evil made [in the Austin Powers film] when he ransomed the world for *one million dollars*" in commenting on the claimants' experts "jacking the rates" of damages.[697] These actions did not warrant a new trial because the EEOC did not object at trial and failed to show how this conduct prejudiced their case.[698]

The EEOC also moved for new trial on grounds that the court erred in (1) prohibiting the EEOC from using a juror questionnaire and (2) denying the EEOC's motions to strike two jurors for cause.[699] As to the jury questionnaires, the court held that it had broad discretion to manage *voir dire* procedures under Rule 47 of the Federal Rules of Civil Procedure, that it was correct to deny use of the EEOC's "unhelpful" questionnaires, and that it had otherwise expanded its normal *voir dire* procedures to ensure the selection of a fair and impartial jury, obviating any need for the questionnaires.[700] As to the denial of the EEOC's motions to strike two jurors for cause, the court found that there was no indication that either juror could not be fair and impartial.[701] The court opined that the first juror's comments were merely an expression of his distaste for Muslim extremists, not Muslims in general. Likewise, the second juror's comments about sometimes getting nervous when she is around Muslims was not an indication that she was incapable of treating Muslims fairly. Further, the court observed that the EEOC had nevertheless struck the jurors at issue with its peremptory challenges, making the court's denial of the EEOC's for-cause challenges harmless error, if anything. Accordingly, the court denied the EEOC's motion for new trial on these grounds as well.[702]

The EEOC also moved for a new trial in *JetStream* on the ground that the court had wrongly denied its spoliation motion.[703] The EEOC alleged that the employer had destroyed a hard copy list of recommendations by made by a subcontractor that worked for the employer, and moved for an adverse inference instruction and an order precluding defendant's witnesses from discussing the subcontractor's list. The district court denied the EEOC's spoliation motion, however, because the EEOC could not show that the employer destroyed the personal records in bad faith. The court relied on analogous case law under Title VII, which required a showing of bad faith, not a mere violation of an employer's obligation to keep and maintain personnel records, before awarding sanctions for spoliation.[704] Accordingly, the court's denial of the EEOC's spoliation motion was not grounds for a new trial.[705] On appeal, the Tenth Circuit

694 *Id.* at *11.
695 *Id.* at **11-12 (referencing counsel's comments in opening about "Tower of Babel" issues caused by the intervenors' inability to communicate, counsel's comments in closing about what the intervenors likely heard when they were told about wearing a headscarf, and counsel's comments in closing about how hard the job of cabin cleaner is, implying that intervenors did not work for JetStream because it was too much work).
696 *Id.* at *12 (referencing counsel's comment that plaintiffs would be working for JetStream but for their attorneys' preventing that from happening.).
697 *Id.*
698 *Id.* at **11-12.
699 *Id.* at *2.
700 *Id.* at **14-16.
701 *Id.* at **16-18.
702 *Id.* at *18.
703 *Id.* at *13.
704 *Id.* at **13-14.
705 *Id.* at *14.

affirmed, finding that the EEOC's argument that the exclusion sanction should have been applied "was waived in their opening statement at trial. And the district court did not abuse its discretion in refusing to give an adverse-inference instruction after Plaintiffs conceded that destruction of the records was not in bad faith."[706]

In the *St. Joseph's* ADA case, discussed *supra*, the EEOC filed a Rule 59(e) motion to alter judgment after the district court entered judgment in favor of the hospital. The EEOC argued that the hospital's good-faith defense shielded the hospital from jury-awarded compensatory and punitive damages—not liability.[707] The district court agreed, reversing judgment in favor of the hospital and ordering the hospital to give the plaintiff opportunity for reinstatement.[708] The hospital appealed to the Eleventh Circuit, arguing that the EEOC's motion to alter judgment was improper under Federal Rule 59(e) because it raised a new legal theory that the EEOC had not relied upon at trial.[709] The Eleventh Circuit agreed. After reviewing the record below, the Eleventh Circuit found that the EEOC proceeded, like the hospital, as if a good-faith finding would absolve the hospital of liability under the ADA, not merely insulate the hospital from jury-awarded compensatory and punitive damages. It ordered that the district court enter judgment in favor of the hospital.[710]

An employer filed post-trial motions after the EEOC prevailed in a religious discrimination trial. *EEOC v. Consol Energy, Inc.*[711] involved an employee's religious objections to the employer's use of hand scanners used for security. The employee objected to the hand scanner policy stating that he believed it was part of an identification system and collection of personal information that would be used by the Christian antichrist to identify his followers with the "mark of the beast."[712] The defendants, a parent company and its subsidiary, supposedly denied the employee a religious accommodation to their policy requiring employees to clock in and clock out using a biometric hand scanner. The matter proceeded to trial. The jury returned a verdict in favor of the EEOC on the religious discrimination claim and awarded the claimant $150,000 in compensatory damages.

The parent company filed post-verdict motions seeking judgment as a matter of law, a new trial, and amendment of the district court's findings regarding lost wages. The district court denied each one. The company appealed to the Fourth Circuit. The EEOC cross-appealed, challenging the district court's decision to deny the EEOC's claim for punitive damages.[713]

The company challenged the denial of its post-trial motion for judgment as a matter of law, arguing that the district court erred in concluding that there was sufficient evidence to support the jury's verdict on the religious discrimination claim. Specifically, it argued that there was insufficient evidence to support the jury's findings (1) that plaintiff's *bona fide* religious belief conflicted with the required use of the hand scanner, and (2) that plaintiff was constructively discharged.

The Fourth Circuit rejected both of the defendant's arguments. It held that there was ample evidence from which a jury could conclude that the claimant sincerely believed that participating in the scanner system—with or without tangible mark—would be a showing of allegiance to the antichrist and inconsistent with his deepest religious convictions, as outlined in the letter he sent his employer during employment and described in his trial testimony. More compelling support for the jury's verdict was the employer's conceded failure to allow the claimant to record his time via key pad, at no additional cost

706 *EEOC v. Jetstream Ground Services*, No. 17-1003 (10th Cir. Dec. 28, 2017), slip op. at 2.
707 *St. Joseph's Hospital*, 842 F.3d at 1349.
708 *Id.*
709 *Id.*
710 *Id.* at 1350.
711 *EEOC v. Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475 (N.D. W. Va. Feb. 9, 2016).
712 *Id.* at *2.
713 *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 137 (4th Cir. 2017).

to the company, even though the company had provided that accommodation to two other employees, albeit for non-religious reasons.[714]

Further, the Fourth Circuit held that there was substantial evidence that the claimant was placed in an untenable position when the defendant refused to accommodate his religious objection—requiring the claimant to use a scanner system that he sincerely believed would render him a follower of the Antichrist "tormented with fire and brimstone."

The defendant next challenged the district court's denial of its motion for a new trial under Rule 59, contending that the district court (1) wrongfully excluded evidence about the availability of the union's grievance process and (2) wrongfully allowed the jury to continue deliberations on compensatory damages after returning an initial finding that the employer construed as a refusal to award compensatory damages.[715] As to the exclusion of the grievance evidence, the employer contended that the employee's failure to complete the grievance process is relevant to whether the employer reasonably accommodated the employee's religious beliefs, because an accommodation could have been reached through that process. The Fourth Circuit rejected this argument, however, because Title VII requires employers to provide a reasonable accommodation "when requested" not "after—and if—a successful grievance process leads to an order by an arbitrator," and because the possibility of success in a subsequent grievance process has no bearing on constructive discharge under Title VII as a matter of law.[716]

Similarly, the employer contended that the district court erred in denying its motion for a mistrial after excluding grievance process evidence on the second day of trial, thereby suggesting to the jury that the defendant's position was incorrect. The Fourth Circuit, like the district court below, rejected this argument. It held that the district court's curative jury instruction provided sufficient protection against unfair prejudice. The instruction admonished the jury to disregard all grievance-related questioning, whether from the defendant or the EEOC. And, the defendant failed to show that the jury ignored or was confused about the instruction to its prejudice.

As to the portion of the motion citing wrongful allowance of continued jury deliberation, the employer contended that the jury had intended to award no damages when it initially returned its verdict, and that the district court had erred in having the jury continue deliberations.[717] The Fourth Circuit, again, disagreed, noting that Rule 49(b)(3) affords a district court discretion in assessing whether the damages verdict "reflects jury confusion or uncertainty" and, if necessary, resubmitting the verdict for a jury decision after clarifying the law, just as the district court had done below. Accordingly, the Fourth Circuit denied the employer's motion for new trial under Rule 59.

The employer also objected to the district court's failure to give three of its requested jury instructions (a topic discussed separately, above)—one cautioning the jury against second-guessing the employer's business judgment; one directing the jury to award only nominal damages if it found that the plaintiff had not proven actual damages; and one about intolerable work conditions and constructive discharge. The Fourth Circuit held, however, that the employer's proposed instructions were subsumed in other instructions that went to the jury, and that it had failed to prove any prejudice resulting from use of the court's instructions instead of the defendant's.

Finally, the EEOC argued that the district erred in granting the employer's Rule 50(a) motion for judgment as a matter of law on the EEOC's claim for punitive damages—that the employer had acted

714 *Id.* at 143.
715 *Id.*
716 *Id.* at 146.
717 *Id.* at 147.

with "reckless indifference" toward the plaintiff's religious accommodation rights, warranting punitive damages under Title VII.[718]

The Fourth Circuit disagreed and again upheld the district court. It opined that it would be counterintuitive to believe that the employer engaged in extended negotiations with the plaintiff over his religious concern only to reach an agreement it believed violated Title VII. While there was evidence that the employer officials were aware of its duty to provide religious accommodations under Title VII, there was no evidence that the employer officials appreciated the risk of failing to meet those obligations. Thus, the Fourth Circuit dismissed the EEOC's motion for a new trial on the punitive damages claim.

In another FY 2017 case that went to trial, *EEOC v. Matamoros*,[719] counsel for defendant moved to withdraw from continued representation due to "sensitive matters concerning their attorney-client relationship." The EEOC and plaintiff-intervenors opposed defense counsel's motion, averring that the withdrawal would result in prejudicial delay of their plan to "relitigate the claims on which the jury deadlocked" and potential default through failure to secure substitute counsel.[720] But, in the courts view, the professional considerations controlled because the EEOC and plaintiff-intervenors failed to show that granting the motion would cause prejudice or unreasonably delay the resolution of the case.[721] Thus, the court allowed defense counsel to withdraw.

## I. Remedies

### 1. Backpay Damages

If a discharged or unhired employee is successful in proving discrimination, backpay is one form of remedy available, which compensates the individual for the amount of wages and benefits he or she would have earned from remaining employed. Amounts awarded as backpay are offset by the individual's "interim earnings or amounts earnable with reasonable diligence" by the successful discrimination claimant.[722]

In *EEOC v. Pennsylvania*,[723] the EEOC filed a motion *in limine*, asking the court to exclude at trial the expert testimony offered by the defendant from a forensic accountant addressing the subject of backpay damages. The witness' expert report relied on the "aggregate method" of calculating such damages. The claimant in this ADEA case earned total mitigation income exceeding his total backpay damages. The EEOC contended that mitigation of backpay must be calculated periodically—by quarter—rather than in the aggregate, and that the expert's report and testimony were therefore inadmissible under Federal Rule of Evidence 702. The court agreed with the EEOC to the extent that a periodic mitigation method, rather than an aggregate mitigation method, should apply to any backpay damages calculation *sub judice*, but disagreed that this amount should be computed quarterly. The court held that the expert's testimony concerning or applying the aggregate mitigation method for calculating backpay damages was inadmissible at trial.

### 2. Punitive Damages

The EEOC can also pursue punitive damages on behalf of individuals making claims under § 706. Title VII allows for punitive damages when the plaintiff "demonstrates the defendant engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights

718 *Id.* at 151.
719 No. 15-1563-RAJ, 2017 WL 2794049, *1 (W.D. Wash. June 28, 2017).
720 *Id.* at *2.
721 *Id.*
722 42 U.S.C. §2000e-5(g)(1).
723 *EEOC v. Pennsylvania*, No. 1:15-CV-1895, 2017 U.S. Dist. LEXIS 107664 (M.D. Pa. July 12, 2017).

of an aggrieved individual."[724] Courts continue to follow the Supreme Court's three-part framework for determining whether an award of punitive damages is proper under Title VII.[725] First, the plaintiff must show that the employer acted with knowledge that its actions may have violated federal law. Second, the plaintiff must impute liability to the employer. 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."[726]

Courts have also held that punitive damages determinations are not properly resolved on a motion for summary judgment unless liability on a claim or defense is uncontroverted.[727] In *EEOC v. Columbine Health Systems*, the court found that such a motion allows a party to "identify each claim or defense—or part of each claim or defense—on which summary judgement is sought." Given that the question of punitive damages standing alone is a remedy, and not a claim or defense, the court denied the EEOC's request for summary judgment on the issue.

The Fourth Circuit similarly denied the EEOC's request for punitive damages in *Consol Energy*, the religious accommodation case discussed *supra*.[728] The EEOC had claimed the employer had acted with "reckless indifference" toward the plaintiff's religious accommodation rights, warranting punitive damages under Title VII.[729] The lower court had found there was insufficient evidence to show that the employer's failure to accommodate the employee's unwillingness to use a biometric hand scanner because it conflicted with his religious beliefs amounted to "malice or reckless indifference" to his rights. The Fourth Circuit found no error in this determination.

### 3. Injunctive Relief

In many lawsuits the EEOC files, the Commission not only seeks monetary damages, but also some form of injunctive relief intended to prevent the defendants from engaging in further discrimination, harassment and/or retaliation. Virtually every consent decree defendant companies entered into with the EEOC contained provisions aimed preventing future violations. In many instances, the defendant agrees that its officers, agents, employees, successors, assigns, and all persons acting in concert with them are enjoined from engaging in the contested activity. Many consent decrees also require the use of independent monitors and training to ensure continued compliance with the agreements' terms. Examples of such injunctive terms can be found in Appendix A to this Report.

In one FY 2017 decision, a Tennessee district court upheld a jury's verdict and award of damages in favor of a diabetic employee who was terminated for violating the company's anti-grazing policy during a hypoglycemic episode. In evaluating whether an award of injunctive relief was proper, the court found the following factors weighed in favor or ordering such relief: (1) the number of defendant's personnel involved in this case; (2) the evidence that defendant's employees do not know defendant's ADA policies; (3) defendant's refusal to admit wrongdoing; (4) the lack of evidence of any action taken against the employee's manager, such as through training or reprimanding; (5) the lack of evidence that defendant has implemented any additional policies or procedures to prevent future ADA violations; (6) the evidence that another employee's circumstances may have constituted an ADA violation; and (7) the fact that the alleged ADA violators still work for defendant. The court reasoned that the above factors show that the EEOC has met its burden in seeking injunctive relief, as they show "a cognizable danger that [the] defendant [will] not take effective steps to prevent the conduct from recurring."[730] In this case, the court

724 *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).
725 *Id.* at *14 (*citing Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999).
726 *Id.* (internal quotation omitted).
727 *EEOC v. Columbine Health Sys.*, Civil Action No. 15-cv-01597-MSK-CBS, 2017 U.S. Dist. LEXIS 152986, at *15 (D. Colo. Sept. 19, 2017).
728 *EEOC v. Consol Energy, Inc.*, 860 F.3d 131, 137 (4th Cir. 2017).
729 *Id.* at 151.
730 *EEOC v. Dolgencorp*, 2017 U.S. Dist. LEXIS 162011, at *43 (E.D. Tenn. Sept. 28, 2017), *citing*; United States District *Prentice v. Am. Standard, Inc.*, Nos. 91-6126, 91-6127, 1992 WL 172662, at *2 (6th Cir. July 23, 1992).

found the defendant presented no evidence that it had taken steps to prevent future ADA violations. Instead, the court noted the "defendant points to its current procedures and insists they are sufficient, despite the failure of such procedures to prevent the circumstances giving rise to this action. For these reasons, the Court finds that the EEOC is entitled to injunctive relief."[731]

The court determined that a three-year injunction order to alleviate the effects of defendant's past discriminatory practices and to prevent similar violations from occurring in the future was proper. However, the court rejected many of the requested provisions in the proposed injunctive order as unnecessary or overbroad. The court ultimately required the company to conduct ADA training, and to ensure compliance with this training, require the defendant to (1) maintain attendance sheets for each training session and forward a copy of the attendance sheets to the EEOC; and (2) submit proof to the EEOC, via an affidavit by a person of knowledge, establishing the completion of training.[732]

## J. Employer's Attorneys' Fees

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."[733] By its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from 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."[734]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[735] 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."[736] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[737] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[738]

In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $1.9 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[739] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees claiming to be sexually harassed. The employer prevailed at the district court level in 2009, but on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits, but rather for procedural deficiencies (in this instance, the EEOC's failure to conduct an adequate pre-suit investigation). The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims

731 *Id.* at *51.
732 *Id.* at **69-70.
733 42 U.S.C. § 2000e-5(k).
734 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
735 *Id.* at 422.
736 *Id.*
737 *Id.* at 421.
738 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)).
739 *EEOC v. CRST Van Expedited, Inc.*, No. 07-CV-95-LRR, 2017 U.S. Dist. LEXIS 155134, at *18 (N.D. Iowa Sept. 22, 2017).

are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements.[740] In essence, a favorable ruling on the merits is not a necessary predicate to an award of attorneys' fees under Section 706 of Title VII. The court, however, reduced the fee award to $1.9 million – from the initial $4.5 million award in 2009. The lower amount was warranted, the court reasoned, because not all of the EEOC's claims were deemed frivolous.

In another FY 2017 lawsuit, against a pharmacy chain, the EEOC alleged that the defendant engaged in a pattern or practice of discrimination in violation of Title VII stemming from its severance agreement policy.[741] The agreements still contained a carve-out to the "covenant not to sue" provision that enabled former employees to file a complaint with the EEOC and participate in enforcement of discrimination laws. The defendant filed a motion to dismiss or, in the alternative, for summary judgment, which was granted on October 7, 2014. The appeals process lasted from late 2014 through 2016, after which time the district court awarded fees to the employer.

It was undisputed that the defendant was the prevailing party. In determining whether a prevailing defendant is entitled to fees, the court considered the following factors: "(1) whether the suit is one of first impression; (2) whether there is or was a real threat of injury to the plaintiff; and (3) whether the record supports a finding that the plaintiff's action was frivolous."[742] The defendant argued that the lawsuit was frivolous for two reasons: (1) because the factual premise of the plaintiff's case was unreasonable and (2) because the lawsuit was filed in violation of Title VII and the EEOC's regulations. The court distinguished between making a "weak argument with little chance of success … and making a frivolous argument with no chance of success" and found that the lawsuit was not brought on a frivolous factual premise. The court, however, found that the EEOC filed a lawsuit without first investigating and attempting conciliation to address a purportedly unlawful employment practice. The court therefore awarded attorneys' fees because the EEOC failed to comply with its enabling act and regulations.[743]

In *EEOC v. CollegeAmerica Denver, Inc.*, the Colorado district court declined to award attorneys' fees to a prevailing defendant in an ADEA action.[744] Although the ADEA does not expressly provide for an award of attorneys' fees to a defendant, the court's precedent provided for such an award to a prevailing defendant in an ADEA case upon a showing that the plaintiff litigated the action in "bad faith, vexatiously, wantonly, or for oppressive reasons."[745] The court held that the EEOC's suit did not fall under these standards. First, the EEOC was able to make out its *prima facie* case. Also, while a finding of subjective spite or animus may be sufficient to show bad faith even if a *prima facie* case can be made under the ADEA, there was insufficient evidence to support an award of attorneys' fees in this case on such basis. In this matter, there was "a broader scope to this case that at times continued to improperly impact discovery and the trial of this case. These circumstances, however, do not demonstrate that the EEOC litigated its retaliation claim in bad faith or wantonly or to vex or oppress CollegeAmerica, particularly in light of the high standard for awarding attorney fees to a prevailing defendant in an ADEA case."[746] Moreover, a court may only use its inherent authority to award fees "when there is 'clear evidence' that the losing party's claim was (1) 'entirely without color' and (2) 'asserted wantonly for purposes of harassment or delay, or for other improper purposes.'"[747] The court found these requirements were not present in this contentious case.

740 *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016).
741 *EEOC v. CVS Pharmacy, Inc.*, No. 14-cv-863, 2017 U.S. Dist. LEXIS 7337, at *1 (N.D. Ill. Jan. 18, 2017).
742 *Id.* at *3 (quoting *EEOC v. Sears, Roebuck & Co.*, 114 F.R.D. 615, 627 (N.D. Ill. 1987)).
743 *Id.* at *7.
744 *EEOC v. CollegeAmerica Denver, Inc.*, Civil Action No. 14-cv-01232-LTB-MJW, 2016 U.S. Dist. LEXIS 160292, at *1 (D. Colo. Nov. 17, 2016).
745 *Id.* at *7.
746 *Id.* at *6.
747 *Id.* at *7 (quoting *F.T.C. v. Kuykendall*, 466 F.3d 1149, 1152 (10th Cir. 2006)).

In *EEOC v. Matamoros*, the jury deadlocked on the EEOC's federal and state sexual harassment claims, resulting in a mistrial on those claims, and found for the employer on all other claims.[748] The U.S. District Court for the Western District of Washington denied the employer's motion for attorneys' fees, finding that neither the EEOC nor the plaintiff-intervenors' claims were frivolous, unreasonable, or groundless. The court noted that the company contended, without elaborating, that the EEOC "must have known" that the company's existing practices to prevent and mitigate sexual harassment were sufficient to establish a successful affirmative defense to a claim of harassment.[749] The court found, however, that "this conclusory assertion does not establish that EEOC's action was frivolous."[750] The company, therefore, failed to show that the EEOC's action was "wholly without merit" at the time it was filed. Accordingly, the court declined to award the employer attorneys' fees.

In *EEOC v. Correct Care Solutions*, the EEOC sought a voluntarily dismissal of a case filed on behalf of the original charging party. The charging party did not intervene, and the defendant did not oppose the EEOC's motion to dismiss.[751] The EEOC maintained in its motion that neither party should be liable for the other party's costs, expenses, and/or attorney's fees. The employer opposed this portion of the motion. The U.S. District Court for the District of South Carolina sided with the EEOC. It determined that because a prevailing defendant cannot receive attorneys' fees unless it proves that a plaintiff's case is frivolous, unreasonable or groundless, a defendant cannot be considered "prevailing" unless the court makes a judicial determination of the plaintiff's case on the merits.[752]

748 *EEOC v. Matamoros*, No. 15-1563-RAJ, 2017 U.S. Dist. LEXIS 94440 (W.D. Wash. June 19, 2017).
749 *Id.* at *7.
750 *Id.*
751 *EEOC v. Correct Care Sols.*, Civil Action No. 3:15-cv-4655-MGL-TER, 2017 U.S. Dist. LEXIS 106880 (D.S.C. June 23, 2017).
752 *Id.* at *7; *but see supra* note 740 (U.S. Supreme Court holding that consideration of case merits is not a prerequisite to award of attorney's fees for failure to satisfy the EEOC's pre-lawsuit requirements).

# APPENDIX A - EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[752]

## SELECT EEOC SETTLEMENTS IN FY 2017

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $12 million | Age Discrimination | According to the EEOC, a national restaurant chain engaged in age discrimination in violation of the ADEA by denying front-of-the-house positions to individuals who were age 40 and older.<br><br>Per the terms of the consent decree, the company will pay $12 million to approximately 800 individuals who were denied such positions between Jan. 1, 2007, and Dec. 31, 2014. In addition, the company will amend its hiring and recruitment practices. Under the terms of the decree, which will be in force for three and one-half years, the company will establish a diversity director and pay for a decree compliance monitor, who will be charged with ensuring that the company complies with the decree's terms.<br><br>The case had been scheduled for a retrial, after the first four-week trial resulted in a hung jury. | U.S. District Court for the District of Massachusetts | 3/31/2017 |
| $10.5 million | Race Discrimination | Per the EEOC, a retail company engaged in a pattern or practice of discriminating against African American and Hispanic job applicants, unlawfully retaliated against employees who opposed practices they believed to be unlawful, and failed to adhere to federal record-keeping laws and regulations.<br><br>Under the terms of the consent decree, which will be in effect for three and a half years, in addition to paying $10.5 million to a class of approximately 1,500 individuals, the company has agreed to strengthen its diversity efforts and commit to non-discrimination in hiring. The company will appoint a director of diversity and inclusion, perform affirmative outreach efforts to increase diversity in its workforce, update its EEO policies and hiring practices, and conduct annual EEO training for management and non-management employees. | U.S. District Court for the Southern District of Texas | 7/25/2017 |
| $10.125 million | Sex and Race Harassment | The EEOC alleged that personnel at two of the employer's facilities had subjected female and African-American employees to sexual and racial harassment, and had retaliated against employees who complained about the harassment or discrimination.<br><br>Per the terms of the conciliation agreement, the company has agreed to pay up to $10.125 million to a group of individuals deemed eligible through a claims process established by the agreement. For the agreement's five-year term, the company has agreed to conduct regular training at the two facilities at issue; continue to disseminate its anti-harassment and anti-discrimination policies and procedures to employees and new hires; report to EEOC regarding complaints of harassment and/or related discrimination; and monitor its workforce regarding issues of alleged sexual or racial harassment and related discrimination. | * This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits. | 8/15/2017 |

752 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2017. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. Appendix A also includes significant jury verdicts and judgments awarding more than $100,000 to plaintiffs and more than $500,000 to defendants.

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $9.6 million | Race Discrimination | The EEOC alleged a restaurant engaged in systemic hiring discrimination against African-American applicants. As part of the five-year conciliation agreement resolving these allegations, the restaurant agreed to pay $9.6 million to a class of individuals impacted by the hiring decisions. In addition, the restaurant agreed to overhaul its hiring procedures, which includes implementing an extensive applicant tracking system to better enable the company to assess its efforts toward meeting the targeted hiring goals. | * 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 39 of the EEOC's FY 2017 Performance and Accountability Report. |
| $4.25 million | Sex Discrimination | According to the EEOC, a group of affiliated coal mining companies unlawfully discriminated against women by effectively excluding them from working in underground mines and other coal production positions. Two lawsuits were resolved under one consent decree, which provides for a payment of $4.25 million to approximately 70 women who were denied positions because of their sex. The three-year decree also requires the companies to provide changing and restroom facilities for women, and sets hiring goals at each of four mines totaling 34 women through various recruitment techniques.<br>In addition, the companies will provide regular reports to the EEOC on compliance with the decree's terms, and post notices informing employees of those terms. | U.S. District Court for the Southern District of Illinois | 1/25/2017 |
| $3.2 million | Disability Discrimination | The EEOC alleged that a trucking company's sleep apnea policy violated the ADA. The company agreed to pay $3,209,000 to three individuals who filed charges with the EEOC, and to a class of 704 employees. The company also agreed to make reinstatement offers to 37 employees who were terminated for refusing to comply with the employer's policy-related demands. The employer agreed to reimburse class members who were required to buy medical equipment and to refrain from requiring such purchases going forward. The company will implement new training requirements on the ADA, and post the terms of the agreement in the workplace. | * 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 39 of the EEOC's FY 2017 Performance and Accountability Report. |
| $2.7 million | Sex Discrimination (Male) | The EEOC alleged a store discriminated against male applicants and employees who were allegedly not hired as store managers or assistant managers. According to the terms of the settlement, the employer agreed to pay $2,672,800 to the class, and provide back pay and preferential placement to these class members for up to 50 management positions. The employer also agreed to implement significant policy changes including targeted training and recruitment efforts. | * 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 39 of the EEOC's FY 2017 Performance and Accountability Report. |

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $2 million | Disability Discrimination | According to the EEOC, the employer violated the ADA when it failed to provide accommodations to employees with disabilities. The EEOC also claimed the employer maintained an inflexible leave policy under which the employer automatically terminated disabled employees after 12 months of leave without engaging in the ADA-required interactive process.<br><br>Under the terms of the consent decree, the employer will provide $2 million in monetary relief, update its policies on reasonable accommodation, improve its implementation of those policies, and conduct training for those who administer the company's disability accommodation processes. For three years, the company will also provide the EEOC periodic reports on the status of every accommodation request it receives. | U.S. District Court for the Northern District of Illinois | 8/8/2017 |
| $1.95 million | Retaliation | The EEOC contends that an organization's former chief legal counsel and the director of human resources were discharged in retaliation for complaining to the board of directors about potential violations of federal anti-discrimination laws.<br><br>The organization has agreed to provide monetary relief to the charging parties, as well as take proactive measures to prevent discrimination and retaliation from occurring in the future. The organization will conduct training on various federal anti-discrimination laws, post a notice of EEOC finding and conciliation visible to all employees, and make all required records available to the EEOC for inspection for the duration of the two-year agreement. | * This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits. | 4/20/2017 |
| $1.9 million | Race Discrimination | According to the EEOC, 13 Italian restaurants operated by the employer discriminated against African-American job applicants by refusing to hire them on account of their race. The lawsuit also alleged management used racial slurs, and that the company failed to maintain employment applications for one year and to file required EEO-1 reports.<br><br>Under the terms of the four-year consent decree, in addition to paying $1.9 million to approximately 320 African-American applicants who were denied jobs, the company will increase its hiring goals for qualified African-American applicants (to 11% of its future workforce); provide anti-discrimination training; provide periodic reports to the EEOC on its compliance with the terms of the consent decree, and post notices informing employees of the decree's terms. | U.S. District Court for the Northern District of Illinois | 5/30/2017 |

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $1.6 million | Disability Discrimination | The EEOC alleged an electric utility violated the ADA by failing to hire applicants and firing current employees based on their disabilities or perceived disabilities. Per the EEOC, the company, in some instances, disregarded the opinions of treating physicians who supported the employees' and applicants' ability to work. Instead of evaluating each applicant, the company refused to hire the disabled applicants, according to the EEOC. In addition, the company allegedly refused to allow employees to return to work following medical leaves of absences.<br><br>In other instances, per the EEOC, the company automatically disqualified employees and applicants under its seizure policy or its drug and alcohol policy, without individually assessing the employees' or applicants' ability to work.<br><br>Under the three-year consent decree, the company will pay $1,586,500 to the 24 applicants or employees affected. In addition, the company has agreed to change both its seizure policy and its drug and alcohol policy to ensure compliance with the ADA; provide equal employment opportunity training to its employees; and post anti-discrimination notices at its facilities. The company will also be subject to reporting and monitoring requirements, including the mandate to report to the EEOC each time it fails to hire an individual because of a disability or does not allow an employee to return to work because of a disability. | U.S. District Court for the Northern District of Georgia | 11/15/2016 |
| $1 million | Age Discrimination | The EEOC alleged an employer violated the ADEA by posting job advertisements for candidates that "must have graduated in the last 2 years." The employer claimed this was part of its "college hire" program and were entry-level positions. However, the EEOC found a quarter of the jobs advertised were not entry-level positions, and therefore adversely impacted older job applicants. The company agreed to pay the charging party and a class of 18 individuals $1,005,263 in back pay. These individuals were allegedly not selected for supervisory positions due to the discriminatory job postings. The employer also agreed to revise its hiring and job advertisement policies, and provide ADEA training for all managers and recruiters. | * 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 39 of the EEOC's FY 2017 Performance and Accountability Report. |
| $950,000 | Pregnancy and Disability Discrimination | The EEOC alleged that a convenience store's managers and area supervisors discriminated against pregnant employees by subjecting them to different working conditions on account of their pregnancy or pregnancy-related disability. The agency claimed these employees were subjected to negative comments based on their pregnancies, and that some pregnant employees were given less favorable tasks and shifts. The employer also allegedly failed to make reasonable accommodations for employees based on their pregnancy-related disabilities and put them on involuntary unpaid leave. The EEOC also claimed that the employer limited medical leave for pregnant employees and fired them when they exhausted such leave. Under the three-year consent decree, the employer is required to pay $950,000 to 28 affected women. The employer must also extend re-employment offers to those former employees, to implement nondiscriminatory policies and practices, and to provide training on preventing pregnancy- and disability-related discrimination. | U.S. District Court for New Mexico | 9/25/2017 |

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $750,000 | Race Discrimination | Per the EEOC, during the agency's investigation of a company that allegedly engaged in race, national origin, and sexual harassment of its warehouse workers, it expanded its investigation into the company's hiring practices. The EEOC issued a reasonable cause finding that the contract logistics company violated Title VII though its use of criminal background checks. The EEOC claimed that the company's hiring practices unlawfully discriminated against African-American and Hispanic applicants.<br><br>Although the company denied these allegations, it agreed to resolve the charges and commit to equal employment opportunity. In addition to paying $750,000 to individuals the EEOC identified as having been unlawfully discriminated against, the company agreed to partner with the EEOC to implement several initiatives to combat employment discrimination. The company agreed to update its criminal background check policy to conform it to the EEOC's guidance on the topic, and ensure such background checks are not conducted until an offer of employment has been made. In addition, the company agreed to conduct an individual assessment of each criminal record it received to take into account the nature and gravity of the offense, the time elapsed, and the specifications of the position.<br><br>Moreover, the company agreed to update its policies on harassment and discrimination, implement an external outlet for individuals who wish to make complaints of discrimination, and conduct annual training for all its employees nationwide, including specialized training for those working in a HR or hiring capacity. The company also consented to provide, over a three-year period, periodic reports of any new complaints of discrimination and applicant flow data to the EEOC. | * This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits. | 10/26/2016 |
| $725,000 | Sexual Harassment | According to the EEOC, the employer repeatedly made lewd remarks to female employees, including comments about their bodies. The employer agreed to pay $725,000 to the five affected individuals, overhaul its sexual harassment policy, and report to the EEOC on its compliance efforts. | U.S. District Court for the Western District of Washington | No press release was issued. The EEOC references this settlement on page 37 of the EEOC's FY 2017 Performance and Accountability Report. |

## SELECT EEOC JURY AWARDS OR JUDGMENTS IN FY 2017:[753]

| JURY OR JUDGMENT AMOUNT | CLAIM | DESCRIPTION | CASE CITATION | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $1.9 million | Sexual Harassment | The EEOC was required to pay the employer $1.9 million in attorneys' fees for pursuing a class sexual harassment claim after it knew or should have known the claims were frivolous. In the decade-old lawsuit, the EEOC alleged the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who allegedly were sexually harassed. The employer prevailed, but on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits, but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements. In essence, a favorable ruling on the merits is not a necessary predicate to find that a defendant is a prevailing party for purposes of an award of attorney's fees under Section 706 of Title VII. The $1.9 million sum, however, is less than the initial $4.5 million award. The lower amount was warranted, the court reasoned, because not all of the EEOC's claims were deemed frivolous. | *EEOC v. CRST Van Expedited*, No. 07-CV-95-LRR, 2017 U.S. Dist. LEXIS 155136 (N.D. Iowa Sept. 22, 2017) | n/a |
| $600,000 | Title VII Religious Accommodation<br>Constructive Discharge | In this case, a coal miner requested an exemption from a new biometric handscanning system on religious grounds. The Fourth Circuit affirmed a jury verdict and award of damages of nearly $600,000 in the EEOC's favor. The employer argued that the coal miner's interpretation of scripture was erroneous. The Fourth Circuit, however, stated: "It is not Consol's place as an employer, nor ours as a court, to question the correctness or even the plausibility of [his] religious understandings. . . . So long as there is sufficient evidence that [his] beliefs are sincerely held . . . and conflict with Consol's employment requirement, that is the end of the matter." | *EEOC v. Consol Energy,* No. 16-1230 (4th Cir. June 12, 2017) | n/a |
| $447,000 | Disability Discrimination | The court upheld a jury's verdict and award of damages in favor of a diabetic employee who was terminated for violating the company's anti-grazing policy during a hypoglycemic episode. The employer argued there were other ways the employee could have addressed her need to balance her blood sugar level, but the court found that it was reasonable for the jury to conclude the employee had reason to believe she would have been disciplined for taking those other measures. The court also held it was reasonable for the jury to find that the employer was required to engage in an interactive process and failed to do so. The court granted some of the injunctive relief requested, and upheld damages and fee awards. | *EEOC v. Dolgencorp, LLC*; No.: 3:14-CV-441-TAV-HBG, 2017 U.S. Dist. LEXIS 162011 (E.D. Tenn. Sept. 28, 2017) | n/a |

753 Fees and costs awarded to defendants are shaded.

| JURY OR JUDGMENT AMOUNT | CLAIM | DESCRIPTION | CASE CITATION | EEOC PRESS RELEASE |
|---|---|---|---|---|
| $250,000 | Sexual Harassment | A former employee who alleged she was stalked and harassed by a customer was awarded $250,000 in a jury trial. The EEOC alleged the company failed to prevent the stalking and harassment for more than a year. According to the EEOC, the company knew about the customer's conduct but failed to take action or prevent it from recurring. Such conduct, the EEOC alleged, created a hostile working environment for the employee, in violation of Title VII. The jury unanimously agreed, rejecting the company's arguments that the employee was unreasonably sensitive to harassment and that the harassment was not sufficiently sexual. | *EEOC v. Costco*, No. 14-CV-6553, (N.D. Ill. 2016) | 12/22/2016 |
| $118,483 | Pregnancy Discrimination | A federal judge entered a default judgment against a debt collection firm in a pregnancy discrimination lawsuit. The EEOC claimed the company at issue rescinded its offer of employment to promote an employee after learning of her pregnancy. Per the EEOC, the employee was told the owners did not believe a pregnant woman could handle the stress or long hours the job entailed. | *EEOC v. Receivable Management, Inc., d/b/a Kramer and Associates*, Case No. 2:15-cv-01997-SDW-SCM (D.N.J. 2017) | 6/2/2017 |

# APPENDIX B – FY 2017 EEOC AMICUS AND APPELLANT ACTIVITY[754]

## FY 2017 – APPELLATE CASES WHERE THE EEOC FILED AN AMICUS BRIEF

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Cargian v. Breitling USA, Inc.* | U.S. Court of Appeals for the Second Circuit<br>No. 16-3592 | 2/2/2017 (amicus filed) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pending |
| **Background:** Plaintiff brought a cause of action for sex discrimination under Title VII. The district court granted summary judgment for defendant, holding that Title VII does not proscribe discrimination because of sexual orientation. The district court further held that plaintiff's claim that as a gay man he was treated as "one of the girls" impermissibly "conflates a sexual orientation discrimination claim with a gender-stereotyping claim."<br><br>**Issue EEOC is Addressing as Amicus:** Whether the court should reconsider its precedent holding discrimination on the basis of sexual orientation is not cognizable under Title VII.<br><br>**EEOC's Position:** The EEOC argued that sexual orientation discrimination necessarily involves sex stereotyping, which Title VII prohibits. The EEOC also argued that by definition, sexual orientation is discrimination "because of . . . sex" and therefore violates Title VII. The EEOC additionally contended that sexual orientation violates Title VII because it constitutes associational discrimination. Lastly, the EEOC argued the Second Circuit should revisit its precedent holding Title VII does not preclude sexual orientation discrimination because the legal landscape has shifted, and the precedent is both misplaced and leads to in consistent legal results.<br><br>**Court's Decision:** The matter remains pending before the court. | | | | |
| *Christiansen v. Omnicom Group* | U.S. Court of Appeals for the Second Circuit<br>No. 16-748 | 6/28/2016 (amicus filed)<br>3/27/2017 (decided) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pro-Employee |
| **Background:** Plaintiff worked as an associate creative director at the company since 2011. He alleges he was harassed by his boss because he is gay. The alleged harassment included comments about whether plaintiff has AIDS/HIV, and pictures drawn by his boss of the plaintiff naked, and another with his head on the body of a bikini-clad woman. Plaintiff's boss originally circulated the bikini picture in 2011, but plaintiff learned that the picture was posted on Facebook in 2014. Plaintiff repeatedly complained but the picture was not removed until January 2015. Plaintiff filed a Title VII EEOC charge of discrimination in October 2014, and later filed suit. The court dismissed his complaint for failure to state a claim because of *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000). That case held that sexual orientation discrimination does not violate Title VII. The court held that plaintiff's complaint did not separate sex stereotyping from the stereotyping inherent in his claim for sexual orientation discrimination. Plaintiff appealed.<br><br>**Issue EEOC is Addressing as Amicus:** Whether claims of sexual orientation discrimination constitute Title VII sex discrimination.<br><br>**EEOC's Position:** Plaintiff alleges he was harassed and discriminated against because he did not conform to traditionally held views of being a man, stating a Title VII claim under a sex-stereotyping theory discussed in *Price Waterhouse*. The EEOC argues that Title VII does not suggest that it protects only heterosexual employees from same-sex harassment.<br><br>The EEOC argues that sexual orientation discrimination is sex discrimination. *Price Waterhouse* prohibits sex stereotyping, regardless whether an individual is heterosexual or homosexual. The EEOC also argues that because Title VII prohibits discrimination based on association, Title VII also prohibits sexual orientation discrimination because it is an associational claim based on sex.<br><br>The EEOC argues that the court should reconsider *Simonton* because it is outdated and there is no longer support for the holding that Title VII does not prohibit sexual orientation discrimination. *Simonton* may have been correct when it was originally decided, but the law has changed since then. Same-sex couples can now legally marry. Also, the EEOC has reconsidered its position, and held that sexual orientation discrimination claims are actionable under Title VII. *See Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015). In light of more recent district court and Commission decisions, the court should hold that Title VII prohibits sexual orientation discrimination.<br><br>**Court's Decision:** The appellate court found that it lacked the authority to reconsider *Simonton*, which it deemed binding authority, but found that the claimant's complaint "plausibly alleges a gender stereotyping claim cognizable under the Supreme Court's decision in *Price Waterhouse v. Hopkins*." Therefore, the appellate court reversed the district court's dismissal of Christiansen's Title VII claim and remanded. | | | | |

754 The information included in Appendix B, including the *"FY 2017 Appellate Cases Where the EEOC Filed an Amicus Brief"* and *"FY 2017– 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 OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Daniel v. T&M Protection Resources, LLC* | U.S. Court of Appeals for the Second Circuit<br>No. 15-560 | 10/5/2016 (amicus filed)<br>4/25/2017 (decided) | Title VII | Harassment<br>National Origin<br>Race<br>Sex<br>**Result:** Pro-Employee |
| **Background:** Plaintiff claimed race discrimination in violation of Title VII. The district court granted summary judgment for defendant, reasoning that plaintiff did not present sufficient evidence of a severe or pervasive hostile work environment. The district court further found that many of the statements at issue were not directly related to plaintiff's race or national origin, and the few that did relate were too episodic to support a hostile work environment claim. Additionally, the district court held that plaintiff failed to show that the alleged harassment interfered with plaintiff's job performance.<br><br>**Issue EEOC is Addressing as Amicus:** (1) Whether a supervisor's statement "you f****** n*****" to plaintiff by itself, created a hostile work environment under Title VII; and (2) Whether a reasonable jury could have found that the multiple statements regarding plaintiff's race and perceived national origin constituted a hostile work environment under Title VII.<br><br>**EEOC's Position:** The EEOC argued that the single instance of plaintiff's supervisor calling him a "f****** n*****" by itself constituted severe conduct to support a hostile work environment claim under Title VII. Alternatively, the EEOC contended that a reasonable jury could also find that the supervisor likening plaintiff to a gorilla, mocking his foreign accent, frequently telling him to go back to England, and calling plaintiff a "homo" two to three times a week was severe or pervasive harassment.<br><br>**Court's Decision:** The Second Circuit vacated the judgment of the district court and remanded. | | | | |
| *Magnusson v. County of Suffolk* | U.S. Court of Appeals for the Second Circuit<br>No. 15-2037 | 9/29/2016 (amicus filed)<br>5/11/2017 (decided) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pro-Employer |
| **Background:** Plaintiff was a 56-year-old gay woman who worked as a custodial worker since 2000. She informed her colleagues of her sexual orientation in 2014. Throughout her employment, plaintiff had short hair, frequently wore jeans, did not carry a purse, and did not wear any makeup. Plaintiff was told by her supervisor that she needed to lose weight to look more like a woman. In 2003, plaintiff's supervisor directed her to undress so he could take her measurements and photograph her, and she complied because she was in shock. She later complained and no remedial action was taken. Her supervisors also made comments to her about being gay throughout her employment. In 2012, the 2003 photos were shown to her coworkers by her supervisors. Plaintiff was ultimately transferred from a position where she could earn overtime to a position with almost no overtime opportunities. Plaintiff filed suit under Title VII alleging that the employer discriminated against her due to sex, including gender identity and gender stereotyping. The district court granted the employer's motion for summary judgment, deciding that Title VII does not prohibit sexual orientation discrimination, and plaintiff's sex harassment claim was not actionable because the incidents occurred nine years apart and did not unreasonably interfere with her work performance. Plaintiff appealed.<br><br>**Issue EEOC is Addressing as Amicus:** (1) Whether sexual orientation discrimination is sex discrimination under Title VII; and (2) whether a jury could find that plaintiff was discriminated against because she did not conform to traditional feminine stereotypes.<br><br>**EEOC's Position:** Regarding the first issue, the EEOC argued that the court should reconsider *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000) because it is outdated and incorrect. *Price Waterhouse* prohibits sex stereotyping, and that standard includes sexual orientation. The EEOC also stated that in this case, the discrimination affected plaintiff's terms or conditions of employment, and sex had been taken into consideration in this case. The EEOC also argued sexual orientation discrimination is associational discrimination, which violates Title VII. Finally, the EEOC argued that the court should reconsider *Simonton* because there is no longer support for the holding that sexual orientation discrimination should not be prohibited by Title VII. Specifically, (1) the Supreme Court has struck down the Defense of Marriage Act, (2) the Court held that same-sex couples have the right to marry, (3) the EEOC's interpretation of Title VII has evolved, and (4) *Simonton* leads to absurd results (i.e., "it is impossible to coherently parse out sexual orientation discrimination from gender stereotyping discrimination").<br><br>With regard to the second issue, the EEOC argued that plaintiff's alleged facts constituted sufficient evidence of gender stereotyping to defeat the employer's summary judgment motion.<br><br>**Court's Decision:** The Second Circuit affirmed the judgment of the district court. The appellate court, however, did "not reach the question of whether defendant's conduct constitutes sex discrimination that would be covered under Title VII because the plaintiff failed to follow defendant's internal grievance procedures." The court noted: "An employer may defend against [a hostile work environment claim] by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus." | | | | |

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Ruggiero v. Mount Nittany Medical Center* | U.S. Court of Appeals for the Second Circuit<br>No. 17-2227 | 6/27/2017 (amicus filed) | ADA | Disability<br>Reasonable Accommodation<br>Retaliation<br>Result: Pending |

**Background:** A registered nurse with severe anxiety and a chronic immune system disease requested exemption from the hospital's vaccination policy. Defendant permitted certain exemptions from the vaccine requirement, but because plaintiff did not meet those exemptions, her vaccination was mandated. Plaintiff was ultimately terminated because she did not comply with the vaccine requirement.

The district court granted defendant's motion to dismiss plaintiff's reasonable accommodation, discriminatory termination and retaliation claims. On plaintiff's reasonable accommodation claim, the district court found that while plaintiff pleaded that defendant knew of her impairments, plaintiff failed to plead that defendant was aware that she had limitations based on these disabilities. The district court also determined that defendant made a good-faith effort to engage in the interactive process with plaintiff because it was willing to exempt plaintiff from the vaccination requirement if she suffered from certain conditions and/or warnings listed in the company nurse's correspondence to plaintiff's physician. The court found that those eight limitations appear to be the reasonable accommodations that defendant was willing to provide. The district court also concluded that defendant satisfied its obligations under the ADA because plaintiff sought the accommodation for a "purely personal preference."

On plaintiff's discriminatory termination claim, the district court found that the complaint contained only "conclusory" allegations that did not support a showing that she was terminated based on her disability, but rather her failure to comply with an employment requirement. On plaintiff's retaliation claim, the district court did not find that plaintiff participated in any protected activity.

**Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in dismissing plaintiff's failure-to-accommodate claim on the rationale that she failed to plead that defendant knew of her substantial physical or mental limitation resulting from her impairment, and that defendant satisfied its obligations under the ADA's interactive process; (2) Whether the district court erred in dismissing plaintiff's discriminatory termination claim; and (3) Whether the district court erred in dismissing plaintiff's retaliation claim on the grounds that she did not allege her participation in protected activity.

**EEOC's Position:** The district court erred in dismissing plaintiff's failure-to-accommodate claim on the rationale that she failed to plead employer notice, and the district court's conclusion as a matter of law, that defendant satisfied its obligations under the ADA's interactive process. Plaintiff pleaded facts sufficient to put defendant on notice that she might have a disability and a need to accommodate them.

The district court erred in holding, as a matter of law, that defendant satisfied its obligations under the interactive process by offering to accommodate individuals with eight specific medical conditions, but not the one that plaintiff suffered from. The ADA does not permit an employer to accommodate some disabilities but not others and may not pick and choose which disabilities it will accommodate.

The district court erred in dismissing plaintiff's discriminatory termination and retaliation claims.

**Court's Decision:** Oral argument was held on January 23, 2018.

| | | | | |
|---|---|---|---|---|
| *Zarda v. Altitude Express, Inc.* | U.S. Court of Appeals for the Second Circuit<br>No. 15-3775 | 6/23/2017 (amicus filed)<br>2/26/2018 (decided) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pro-Employee |

**Background:** Plaintiff brought a cause of action for sex discrimination under Title VII. The district court granted summary judgment for defendant, holding that Title VII does not prohibit discrimination because of sexual orientation.

**Issue EEOC is Addressing as Amicus:** Whether the Second Circuit should reconsider its precedent holding discrimination on the basis of sexual orientation is not cognizable under Title VII.

**EEOC's Position:** The EEOC argued that sexual orientation discrimination necessarily involves sex stereotyping, which Title VII prohibits. The EEOC also argued that by definition, sexual orientation is discrimination "because of . . . sex" and therefore violates Title VII. The EEOC additionally contended that sexual orientation violates Title VII because it constitutes associational discrimination. Lastly, the EEOC argued the Second Circuit should revisit its precedent holding Title VII does not preclude sexual orientation discrimination because the legal landscape has shifted, and the precedent is both misplaced and leads to inconsistent legal results.

**Court's Decision:** The Second Circuit held that "[s]exual orientation discrimination—which is motivated by an employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex," and therefore violations Title VII.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Cooper v. The Smithfield Packing Co.* | U.S. Court of Appeals for the Fourth Circuit<br>No. 17-1002 | 3/27/2017 (amicus filed) | Title VII | Charge Processing<br>Harassment<br>Sex<br>Result: Pending |

**Background:** Plaintiff worked at defendant's meat-processing plant from December 1995 until July 2011. She alleged that she was sexually harassed by her immediate supervisor for over four years, from January 2007 until July 2011. Plaintiff claims that in January 2011, the supervisor's comments became more hostile and, a few months later, in April 2011, she reported to HR that she was being sexually harassed. Plaintiff asserts that HR did not take any action to address her complaint, and that her supervisor subsequently threatened to kill her if she caused him to lose his job. Shortly thereafter, plaintiff and her supervisor allegedly had a physical altercation after he asked her to have sex with him. Plaintiff made a second complaint to HR on July 18, 2011, and requested that she be transferred immediately. She claims that HR informed her that she and her supervisors would be scheduled on separate shifts, but indicates that she objected because they still had to share an office. Plaintiff submitted a written account of the harassment to HR and resigned a few days later.

Plaintiff filed an EEOC charge and filed her initial Complaint, alleging sexual harassment and sex discrimination, on July 11, 2013. She subsequently filed three Amended Complaints, portions of which were stricken by the district court or dismissed. Ultimately, the district court granted defendant's Motion for Summary Judgment on Plaintiff's Fourth Amended Complaint, after finding that plaintiff failed to satisfy her prima facie burden for imputing liability to defendant. More specifically, the district court concluded that there was no evidence in the record to establish defendant knew or should have known about the alleged sexual harassment until her July 2011 report. Additionally, the district court found that because plaintiff's inordinate delay in reporting was unreasonable and inconsistent with her obligations under Title VII.

**Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred refusing to consider any factual allegations related to plaintiff's claim for sexual harassment not explicitly set forth in her EEOC charge; (2) Whether the district court erred in stating that even if a jury could find that the company knew or should have known about the harassment and failed to take prompt corrective action, plaintiff could nonetheless be precluded from bringing a Title VII claim because too much of the harassing conduct predated the period of liability.

**EEOC's Position:** The EEOC argues that, pursuant to agency regulations, plaintiff was only required to include a general description of the allegations in her EEOC charge, and that the court erred in refusing to consider some of the facts composing plaintiff's sexual harassment claim. According to the EEOC, Title VII does not impose any pre-suit requirement that plaintiff include every factual detail in support the claim in her EEOC charge. Furthermore, the EEOC contends that a hostile work environment claim is typically comprises multiple acts over an extended period of time, and argues that the district court impermissibly disaggregated plaintiff's hostile work environment evidence into different types of conduct. The EEOC also asserts that the district court erroneously ruled that plaintiff's delay in reporting the harassment estopped her from invoking certain events as component parts of her claim and effectively stripped her of Title VII protections because she was silent too long. Finally, the EEOC argues that the district court improperly applied the sham affidavit doctrine to plaintiff's declaration because it was not inconsistent with the allegations in her complaints or her testimony during her deposition and established that she complained to HR regarding the harassment on multiple occasions.

**Court's Decision:** Oral argument was heard on December 6, 2017. This case is pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Villa v. Cavamezze Grill* | U.S. Court of Appeals for the Fourth Circuit<br>No. 15-2543 | 7/6/2016 (amicus filed)<br>6/7/2017 (decided) | Title VII | Retaliation<br>**Result:** Pro-Employer |

**Background:** Plaintiff began working at the defendant-restaurant in 2012. Another employee reported sexual harassment to her, and plaintiff reported it to plaintiff's supervisor. Plaintiff also told her supervisor that another employee may have left because of sexual harassment, but that statement was investigated and was not substantiated. Plaintiff was discharged for making a false report. Notably, plaintiff's supervisor never made written notes or records during his investigation, and he was not trained in investigating sexual harassment complaints. The company did not have a written sexual harassment policy and lacked guidelines for conducting a harassment investigation. Plaintiff filed suit, alleging retaliation under Title VII. The district court granted summary judgment to the employer on the Title VII claim because plaintiff's supervisor genuinely (although erroneously) concluded that plaintiff made a false statement, and there was insufficient evidence of retaliatory animus. Plaintiff appealed.

**Issue EEOC is Addressing as Amicus:** Whether the district court erred in granting summary judgment on plaintiff's Title VII retaliation claim.

**EEOC's Position:** The EEOC argued the court should not have deferred to the employer's asserted business judgment, because the case it relied upon, *EEOC v. Total Sys. Servs., Inc.*, 240 F.3d 899 (11th Cir. 2001) (denying rehearing *en banc*), is in serious doubt due to three more recent Supreme Court decisions. First, *Burlington Northern* held that Title VII's anti-retaliation provision prohibits employer actions that "might dissuade a reasonable worker from making or supporting a charge of discrimination." The district court should have determined whether the plaintiff's report of sex harassment might dissuade a reasonable worker from reporting harassment. Second, the district court's decision undermines *Faragher* and *Ellerth* because it will hinder the reporting regime because others will fear retaliation for reporting. Third, the decision will not deter poor investigations conducted by employers.

The EEOC also argued that the district court decision did not follow this court's precedents, namely, that Title VII's anti-retaliation provision is broad and encourages prompt reporting of harassment. Here, plaintiff, a supervisory employee, reported another employee's complaint. Plaintiff received no protection, although she may not know whether the report was true.

Finally, a jury should decide whether the employer's investigation was sufficient, given the facts asserted above, and the fact that there is arguably no independent evidence that verifies that plaintiff made a false report.

**Court's Decision:** The appellate court affirmed the decision of the district court, noting that "to prove that her termination violated Title VII, [the claimant] had to show that her employer was motivated by a desire to retaliate against her for engaging in conduct that the opposition clause protected. . . . When it fired [her], [the company] did not know [she] had engaged in any protected conduct. Because its investigation led it to conclude in good faith that [the claimant] had simply made up her conversation .... [its] reason for terminating her was necessarily not retaliatory." The court further explained: "If an employer, due to a genuine factual error, never realized that its employee engaged in protected conduct, it stands to reason that the employer did not act out of a desire to retaliate for conduct of which the employer was not aware."

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Pando v. Lowe's Market* | U.S. Court of Appeals for the Fifth Circuit<br>No. 17-10578 | 7/21/2017 (amicus filed)<br>8/28/2017 (motion to dismiss granted) | Title VII | Harassment<br>Sex<br>**Result:** Pro-Employer |

**Background:** Plaintiff began working as a cashier for defendant in January 2014 and resigned from her position at the end March 2014. During her employment, plaintiff alleges that she was sexually harassed by a co-worker and, despite repeatedly reporting the conduct to management, defendant did nothing to address her complaint. According to the plaintiff, the harassment began shortly after she started working at the defendant, when her co-worker wrote sexually explicit graffiti on the wall of the men's bathroom and then brought her to read it. Plaintiff reported the graffiti to an assistant manager and the store manager. She further alleged that the harasser continued to make sexually suggestive and harassing gestures after the bathroom incident and often found ways to be around her at work. Plaintiff claimed that the harasser also drove by or waited in his car outside her home. She and her husband made several complaints to the store manager before her husband contacted defendant's corporate human resources department to report the inappropriate behavior. The harasser physically attacked plaintiff's husband on March 26, 2014, in the parking lot of a store across the street from defendant. He reported the attack to the police and plaintiff resigned from her position the following day.

Plaintiff filed a charge of discrimination with the EEOC before filing suit for Title VII violations. The district court granted summary judgment in favor of defendant, after concluding the conduct plaintiff alleged was not sufficiently hostile or pervasive to support a claim for a hostile work environment. The district court found that the incident between the harasser and plaintiff's husband could not be used to impose liability against defendant because the altercation occurred off the premises and plaintiff was not present. Additionally, the district court held that plaintiff's other allegations were not specific enough and, although inappropriate, were not so severe and extreme to create a hostile work environment. The district court also concluded that plaintiff was precluded from asserting a claim for constructive discharge.

**Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in excluding offsite behavior by the alleged harasser and finding that her allegations were not individually specific enough, when concluding that plaintiff had not alleged sufficient facts to establish that she was subjected to sufficiently hostile and pervasive harassment to assert a claim for a hostile work environment; and (2) Whether the district court erred in concluding that plaintiff's claim for constructive discharge was precluded because she failed to assert a claim for a hostile work environment.

**EEOC's Position:** The EEOC argues that the district court erred in dismissing plaintiff's complaint and failed to consider the totality of the circumstances when determining that plaintiff had not alleged sufficient facts to support a claim for a hostile work environment. According to the EEOC, the allegations in the case, if evaluated collectively and believed by a jury, described an actionable hostile work environment. The EEOC contends that the district court improperly excised some of the harasser's actions from consideration because even though they occurred off of defendant's property, they were part of a pattern of harassment. Furthermore, the EEOC asserts that the district court impermissibly disaggregated and diminished the evidence of different types of offensive conduct in determining that each was insufficiently severe to create an actionable hostile work environment. Moreover, the EEOC alleges that the district court erred in dismissing plaintiff's constructive discharged because a jury could have concluded that, given defendant's lack of action or concern regarding the complaint made by plaintiff, a reasonable person could have felt compelled to quit under similar circumstances.

**Court's Decision:** The court granted the appellant's motion to dismiss.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Barlia v. MWI Veterinary Supply, Inc.* | U.S. Court of Appeals for the Sixth Circuit<br>No. 17-1185 | 4/24/2017 (amicus filed)<br>1/9/2018 (decided) | ADA | Disability<br>**Result:** Pending |

**Background:** Plaintiff worked as an Outside Sales Representative for defendant, and was responsible for promoting and selling animal health products to veterinary care providers in her sales territory. She alleged that, at all relevant times during her employment, she suffered from medical conditions that adversely affected her endocrine system. In approximately 2010, plaintiff was diagnosed with a disorder related to her adrenal system and hypothyroidism. As a result of her medical condition, plaintiff had lower energy and stamina than most people, lost weight, and experienced a dizzy spell that prevented her from driving on at least one occasion. According to plaintiff, she discussed her medical issues with her supervisor because his wife also has a thyroid disorder. In fiscal years 2013 and 2014, plaintiff failed to meet her sales goals. In January 2014, she contacted HR to ask that she be excused from attending an out-of-town sales meeting and provided a note from her physician that indicated she had experienced symptoms consistent with thyroid and hormonal imbalances. Several months later, plaintiff's supervisor spoke with HR and decided to place her on a performance improvement plan (PIP), given her failure to meet her sales goal. Based on her supervisor's recommendation, plaintiff was terminated as part of a workforce reduction.

Plaintiff filed suit, alleging that defendant terminated her based on her disability in violation of the ADA. The district court granted defendant's motion for summary judgment after concluding that plaintiff could not establish that she was disabled within the meaning of the ADA. More specifically, the district court found that plaintiff failed to present sufficient evidence to show that she suffered from an impairment or that her condition was episodic and disabling during flare-ups. Furthermore, the district court held that even if plaintiff had demonstrated that she had an impairment, she failed to establish that it substantially limited her in any major life activity or that defendant regard her as disabled.

**Issue EEOC is Addressing as Amicus:** Whether the district court relied on coverage standards inconsistent with the ADAA when concluding that plaintiff's medical condition did not constitute an actual disability and that her employer did not regard her as disabled.

**EEOC's Position:** The EEOC argues the district court mistakenly focused exclusively on the medical evidence provided by plaintiff, but did not consider her deposition testimony when concluding that she was not disabled and had failed to establish that her impairments substantially limited any major life activities. Furthermore, the EEOC rejected the district court's application of Sixth Circuit precedent for the proposition that self-described symptoms are insufficient to establish a substantial limitation on a major life activity. According to the EEOC, the district court erred in concluding that a past diagnosis of an episodic condition does not establish a disability under the ADA, absent evidence that the condition causes a substantial limitation of major life activities at the time of the adverse employment action. Finally, the EEOC contends that the district should have inquired as to whether there was evidence that defendant took action against plaintiff because of an actual of perceived impairment, and erred in focusing on the level of her perceived limitations.

**Court's Decision:** In an unpublished opinion, the Sixth Circuit affirmed the district courts' grant of summary judgment to the employer, finding that the plaintiff failed to offer significant probative evidence indicating that her employer's proffered reason was pretextual, and that the evidence she provided in support of her retaliation claim is legally insufficient to establish the requisite causal link.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Phillips v. UAW International, et al* | U.S. Court of Appeals for the Sixth Circuit<br>No. 16-1832 | 10/5/2016 (amicus filed)<br>4/12/2017 (decided) | Title VII | Harassment<br>Race<br>**Result:** Pro-Employer |

**Background:** Plaintiff was an employee of MGM Grand Casino in Detroit and a member of Local 777, which also made her a member of the International Union, United Automobile, and Aerospace & Agricultural Implement Workers of America – UAW (UAW). Soon after joining the union, she became the MGM Casino Chairperson for the Local. As part of her duties, she handled grievances filed by union members, addressed disputes between union members and MGM, and participated in labor negotiations. In her capacity with the union, plaintiff worked with various UAW representatives, including Brian Johnson.

According to plaintiff, she was subjected to a racially hostile work environment created by Johnson, while she was performing her union duties. She alleged that Johnson generally treated black union members in an aggressive and hostile manner, called them incompetent, and was also violent. Plaintiff further claimed that Johnson treated grievances filed by black union members with lower regard than those filed by white union members, or simply did not address them. Plaintiff complained to the Local president, who, in turn, filed a complaint against Johnson with the UAW, on two occasions. No action was taken with respect to Johnson and plaintiff filed suit after receiving a right to sue letter from the EEOC. A few months later, UAW removed Johnson from his assignment. The district court granted UAW's motion for summary judgment, after concluding that a labor union, in its representational role, cannot be liable to a union member for creating a hostile work because Title VII limits liability for workplace harassment to employers.

**Issue EEOC is Addressing as Amicus:** Whether a labor union can be held liable under Title VII for a racially hostile work environment based on actions by a union employee against another union member and local union official while they were both performing their respective union duties.

**EEOC's Position:** The EEOC argues that Title VII's unqualified prohibition barring a labor organization from discriminating against any individual on the basis of his or her race, necessarily includes failing to prevent or remedy racial harassment of a union member by the union's agent or employee. In support of its position, the EEOC cites to case law from the First, Third, Seventh, and Eighth Circuits that arguably establishes a labor union can be held liable for failing to prevent or remedy harassment of a union member. Furthermore, the EEOC contends that the district court erred in concluding that a hostile work environment theory rests solely on §2000e-2(a)(1)'s "terms, conditions, or privileges," languages and, as such, no similar cause of action can be raised against a labor union because §2000e-2(c)(1) is narrower and does not have an analogous provision. According to the EEOC, the district court's decision ignores the history and purpose of the labor union provision in Title VII.

**Court's Decision:** The Sixth Circuit held that alleged incidents were insufficient to create racially hostile work environment. On June 7, 2017, the court denied the employee's petition for a hearing *en banc*.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Peeples v. City of Detroit* | U.S. Court of Appeals for the Sixth Circuit<br>No. 17-1222 | 7/19/2017 (amicus filed) | Title VII | Race<br>**Result:** Pending |

**Background:** The city determined that a reduction in force was necessary and worked with the firefighters' union to determine which firefighters should be laid off. Initially, to determine who would be laid off, the city relied on each firefighter's total years of service, regardless of the departments in which the firefighter had served. None of the plaintiffs were included on the initial list.

The union then asked the city to determine candidates for layoff based on departmental seniority within the fire department, rather than city seniority, because the union believed using departmental seniority was required under the collective bargaining agreement. Plaintiffs were included in the union's list and removed from their positions of employment.

Based on later advice from counsel, the union learned that city seniority was the correct metric for determining who should be laid off and the union tried to convince the city to use this metric. The plaintiffs were recalled to work. After several plaintiffs filed charges of discrimination and one received a right-to-sue letter, the plaintiffs filed suit against the city and the union. In their complaint, the plaintiffs' sole claim was that the city's and the union's conduct toward them in regard to the layoffs constituted race discrimination in violation of Title VII. On summary judgment, the union argued that to prevail in a Title VII suit against a union, the plaintiffs must establish that the union breached its duty of fair representation to them, and that the plaintiffs could not meet the requirements for establishing such a claim. However, plaintiffs argued that Title VII claims against unions are not subject to the requirements for establishing a claim that the union breached its duty of fair representation, and that in this case the evidence supported their Title VII claim. The district court ruled in favor of the union.

**Issue EEOC is Addressing as Amicus:** Whether the district court erred in concluding that discrimination claims alleging a violation of 42 U.S.C. § 2000e-2(c) by a union are subject to the requirements and limitations applicable to a claim that a union violated its duty of fair representation.

**EEOC's Position:** Title VII discrimination claims alleging a violation of 42 U.S.C. § 2000e-2(c) by a union are not subject to the requirements and limitations applicable to a claim that a union violated its duty of fair representation.

**Court's Decision:** Pending.

| | | | | |
|---|---|---|---|---|
| *Watford v. Jefferson Cty Public School* | U.S. Court of Appeals for the Sixth Circuit<br>No. 16-6183 | 10/24/2016 (amicus filed)<br>9/1/2017 (decided) | ADEA | Retaliation<br>**Result:** Pro-Employee |

**Background:** Defendant terminated plaintiff's employment. As part of a collective bargaining agreement ("CBA"), defendant entered into a lengthy grievance process including arbitration. However, the arbitration was not scheduled until 266 days after her termination. The entire arbitration process would have exceeded the 300-day statutory period permitted for filing a charge of discrimination with the EEOC. Plaintiff filed a Charge of Discrimination with EEOC alleging age, race, and sex discrimination. The CBA also contained a provision that allowed arbitrations to be stayed if an employee pursued resolution through another agency process. As a result, defendant halted the arbitration proceedings. Plaintiff filed two additional charges with the EEOC against defendant and the union alleging that halting the arbitration process was retaliation for filing a charge with EEOC.

**Issue EEOC is Addressing as Amicus:** Is holding arbitration in abeyance upon the filing of an EEOC charge a materially adverse action under the ADEA's anti-retaliation provision because it could dissuade a reasonable employee from filing a charge?

**EEOC's Position:** The district court did not apply the appropriate legal standard. Although the court believes that plaintiff could only prove retaliation by demonstrating a materially adverse change in the terms and conditions of her employment, under more expansive controlling law, a plaintiff may establish retaliation by showing that the challenged action could deter a reasonable employee from exercising her statutory rights. Suspending arbitration pending resolution of an EEOC charge would have this precise effect because the primary benefit of arbitration is a speedy resolution to a complaint. Furthermore, allowing arbitration to continue while an EEOC charge is pending would not be a disincentive to employers to include arbitration as a resolution option. That is because employers also benefit from speedy, low-cost arbitrations.

**Court's Decision:** The Sixth Circuit held that the teacher whose union grievance was stayed after she filed a charge of discrimination with the EEOC can go forward with her retaliation claim. The court said that in its view, "the facts of this case perfectly illustrate why holding grievance proceedings in abeyance, a step that has interminably stalled procedures intended to 'be processed as rapidly as possible,' would dissuade a reasonable worker from making or supporting a charge of discrimination."

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Hively v. Ivy Tech* | U.S. Court of Appeals for the Seventh Circuit<br>No. 15-1720 | 4/4/2017 (decided) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pro-Employee |

**Background:** The plaintiff was an adjunct professor and openly gay. She brought suit under Title VII against her employer alleging she was denied full-time employment because of her sexual orientation. The employer moved to dismiss plaintiff's claims, arguing that sexual orientation is not protected under Title VII. The lower court granted defendant's motion and dismissed the complaint, and plaintiff appealed.

The Seventh Circuit set out to answer whether Title VII's protections against sex discrimination protect plaintiff from discrimination on the basis of her sexual orientation. The question was one of statutory interpretation: "We must decide what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex."

**Issue EEOC is Addressing as Amicus:** Is discrimination on the basis of sexual orientation cognizable under Title VII as a form of sex discrimination?

**EEOC's Position:** Because claims of sexual orientation discrimination necessarily involve consideration of a plaintiff's sex, gender-based associational discrimination, and sex stereotyping, the EEOC believes that they fall squarely within Title VII's prohibition against discrimination on the basis of sex.

**Court's Decision:** On April 4, 2017, the U.S. Court of Appeals for the Seventh Circuit held that discrimination on the basis of sexual orientation is a form of sex discrimination under Title VII of the Civil Rights Act of 1964.

| | | | | |
|---|---|---|---|---|
| *Severson v. Heartland Woodcraft, Inc.* | U.S. Court of Appeals for the Seventh Circuit<br>No. 15-3754 | 3/15/2016 (amicus filed)<br>9/20/2017 (decided) | ADA | Disability<br>**Result:** Pro-Employer |

**Background:** Plaintiff was hired as a supervisor in 2006 and was promoted all the way to operations manager. However, his employer was dissatisfied with plaintiff's performance as a manager and demoted him to second-shift supervisor.

At the same meeting as his demotion, plaintiff informed the employer that that he was experiencing severe back pain, which resulted in his remaining home continuously. Plaintiff provided notice that his non-surgical therapy was ineffective and that he was scheduled to have back surgery. He asked for an additional 2-3 months of leave for recuperation. The employer refused to extend his leave and eventually replaced plaintiff.

Plaintiff filed suit alleging that his ADA rights were violated by refusing to extend his medical leave. The district court granted the employer's motion for summary judgment. The district court rejected plaintiff's contention that he was a qualified individual with a disability because he could have eventually been able to perform the essential functions of the position.

**Issue EEOC is Addressing as Amicus:** Whether the district court erred as a matter of law by (a) assessing whether the plaintiff was qualified under the ADA based upon whether the essential functions while he was out on leave rather than when he returned; and (b) holding that the leave request was not a reasonable accommodation and whether the employer satisfied its burden to show an undue hardship when it only filled plaintiff's position 10 days before his leave was to expire.

**EEOC's Position:** The EEOC asserted that plaintiff met his burden to prove that he was a qualified individual with a disability. The EEOC argued that, when plaintiff or another employee requested a temporary leave of absence as a reasonable accommodation, the employee's ability to perform the essential job functions should be assessed as of the end of the projected leave period.

In this matter, the EEOC argued that plaintiff requested a reasonable accommodation: limited leave, in advance, which was likely to allow him to perform the essential functions following this leave.

Finally, the EEOC argued that the employer did not establish undue hardship because it was not evidence that would have compelled a jury to make a finding of undue hardship. Rather, the employer's evidence could have permitted a finding of undue hardship.

**Court's Decision:** The Seventh Circuit held that "a long-term leave of absence cannot be a reasonable accommodation." *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476, 481 (7th Cir. 2017). Allowing such long-term leave would transform the ADA into an "open-ended extension of the FMLA." In reaching this holding, the court emphasized that an extended leave does not provide an individual with disabilities with the "means to work; it excuses his not working." The court relied on prior precedent, explaining that the inability of a person to work for months at a time removes that individual from ADA coverage.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Dindinger v. Allsteel, Inc.* | U.S. Court of Appeals for the Eighth Circuit<br>No. 16-1305 | 5/19/2016 (amicus filed)<br>4/3/2017 (decided) | EPA | Sex<br>**Result:** Pro-Employee |
| **Background:** Plaintiffs were former managers for the employer, and even though they received promotions, they earned substantially less money than their male comparators. Plaintiffs filed suit alleging unequal pay under the EPA and Title VII. The employer argued plaintiffs earned less because: (1) their jobs were different; (2) their prior experience and education were different; (3) they had less seniority than their male comparators; (4) the employer felt the effects of the nationwide economic downturn and froze salaries. The jury granted its verdict in plaintiffs' favor on both claims, and the employer moved for a new trial because the court equated "market forces" with "economic conditions" in its instructions to the jury. The district court denied the employer's motion and the employer appealed.<br><br>**Issue EEOC is Addressing as Amicus:** (1) Whether the district court properly instructed the jury that the employer could not rely on market forces or economic conditions as a factor other than sex to justify any pay differential complained of by the plaintiffs; (2) If the jury instruction was incorrect, was it harmless error?<br><br>**EEOC's Position:** The district court properly instructed the jury and denied the employer's motion for a new trial on that basis. Here, plaintiffs' pay disparities began *before* the date on which the employer stated it began to feel the effects of the economic downturn. Therefore, that explanation cannot be the cause of the pay disparities. Moreover, even if the instruction was improper, it was harmless error because the employer failed to offer any evidence that the economic downturn explained the pay disparities.<br><br>**Court's Decision:** The Eighth Circuit found that the jury instructions fairly and accurately represented the law in light of the evidence in the case, and therefore upheld the lower court on this issue. | | | | |
| *McLeod v. General Mills* | U.S. Court of Appeals for the Eighth Circuit<br>No. 15-3540 | 2/16/2016 (amicus filed)<br>4/14/2017 (decided) | ADEA | Age<br>**Result:** Pro-Employer |
| **Background:** Defendant conducted a reduction-in-force and in exchange for severance had its employees sign a general release, which contained an agreement to arbitrate disputes under the release agreement. Plaintiffs then filed suit in court alleging they were discriminated on the basis of their age, and that the arbitration agreement did not contain all of the notice requirements under the Older Workers' Benefits Protection Act ("OWBPA"). The district court denied defendant's motion to compel arbitration, reasoning the OWBPA provides that "a court of competent jurisdiction" shall decide whether waiver under the law was knowing and voluntary.<br><br>**Issue EEOC is Addressing as Amicus:** Whether the district court erred in holding that issues of whether there was proper waiver under the OWBPA are not subject to an arbitration agreement.<br><br>**EEOC's Position:** First, the EEOC argued that the district court decision was correct given the plain language of the OWBPA. Specifically, the EEOC noted that the OWBPA states a party asserting validity of waiver under the OWBPA "shall have the burden of proving i*n a court of competent jurisdiction* that the waiver was knowing and voluntary." (emphasis added). Thus, parties cannot agree to arbitrate issues of such waiver. Second, the EEOC relied on its regulations for the OWBPA, which likewise state that disputes over sufficient waiver must be made in a court of competent jurisdiction.<br><br>**Court's Decision:** The Eighth Circuit reversed and remanded the lower court's decision, holding that absent a contrary congressional command, the company can compel employees who signed the agreements to arbitrate their ADEA claims. | | | | |

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Patillo v. Sysco Foods of Arkansas* | U.S. Court of Appeals for the Eighth Circuit<br>No. 17-1110 | 3/30/2017 (amicus filed)<br>12/6/2017 (decided) | Title VII | Charge Processing Limitations<br>**Result:** Pro-Employee |

**Background:** Plaintiff worked for defendant as a Will Call Associate. On September 1, 2015, plaintiff filed an EEOC charge alleging discrimination based on race and sex. She further alleged retaliation for prior complaints, using FMLA leave, and settling workers' compensation claims. After plaintiff resigned, she submitted an authorized EEOC intake questionnaire on March 21, 2016, alleging race discrimination and retaliation for filing her previous EEOC charge. In the questionnaire, plaintiff discussed acts that occurred after she filed her previous charge and claimed that she was harassed about her performance. Plaintiff checked a box on the intake questionnaire form to indicate that she desired to file a charge of discrimination. Plaintiff filed suit against defendant on October 6, 2016, alleging race discrimination, retaliation, and harassment.

Defendant filed a motion to dismiss alleging that plaintiff claims were time-bared because she did not file a timely charge with the EEOC since an intake questionnaire is not a charge of discrimination. The district court agreed. With respect to her hostile work environment claims, the district court found that the intake questionnaire was not a charge and the subsequent charge was not filed within 180 days of her resignation. As a result, her hostile work environment claims were time-barred.

**Issue EEOC is Addressing as Amicus:** (1) Does an intake questionnaire satisfy the charge-filing requirements of Title VII, so long as it is submitted within the limitations period, identifies the parties, describes the actions complained of, indicates a desire to pursue remedial action, and is subsequently verified? (2) Did the district court err in dismissing the employee's properly pleaded hostile work environment claim on the ground that neither her charges nor her intake questionnaire contained specific allegations of ongoing discrimination?

**EEOC's Position:** An intake questionnaire constitutes a timely charge. Title VII only mandates that an employee file a charge of discrimination with the EEOC, but does not limit or define what constitutes a charge. The EEOC noted that *Federal Express Corp. v. Holowecki* already addressed the identical issue in holding that when an intake questionnaire contains the necessary information about the parties, the actions complained of, and declares the claimant's desire that the EEOC take remedial action on her behalf, it constitutes a charge. 552 U.S. 389, 402 (2008). This flexibility is necessary to maintain accessibility to unsophisticated claimants who have no knowledge of statutory mechanisms. The EEOC further rejected defendant's argument that language in the questionnaire about the 180-day period for filing a charge rendered the questionnaire ineffective because the questionnaire also encourages claimant's to check a specific box to indicate their desire to file a charge.

With respect to the second issue, the EEOC contends that the district court erred in dismissing the allegations relating to plaintiff's first EEOC charge. To assert claims for hostile work environment, the claimant need only assert one act that contributed to such an environment that took place during the limitations period to establish liability for earlier acts.

**Court's Decision:** On December 6, 2017, in an unpublished decision, the Eighth Circuit vacated the lower court's dismissal of the plaintiff's employment discrimination case for failure to exhaust administrative remedies, and remanded the case for further consideration. On remand, the district court is directed to consider whether an intake questionnaire the plaintiff filed with the EEOC constituted a valid administrative charge of discrimination in light of relevant Supreme Court precedents.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Terry v. EAN Holdings LLC* | U.S. Court of Appeals for the Eighth Circuit<br>No. 17-1256 | 3/21/2017 (amicus filed) | Title VII | Harassment<br>Sexual Orientation Discrimination<br>**Result:** Pending |

**Background:** Plaintiff, a gay woman, worked as a driver. Plaintiff's co-worker, Williams, frequently told plaintiff that he didn't agree with women dating women and that she needed a man to have intercourse with to make plaintiff want to date men. Plaintiff told her co-worker not to speak to her that way. The next time plaintiff was scheduled to work with Williams, she reported the incidents to her supervisor. Her supervisor said he would reschedule her but seemed generally unconcerned about the incident and did not inform human resources. Later on, plaintiff learned that several co-workers had discussions about plaintiff's sexual orientation and that she lived with a woman. She asked her supervisor to address the comments, but he told her that she couldn't stop others from having an opinion.

Plaintiff contacted human resources several times about her complaint. In April 2015, human resources began an investigation. Plaintiff alleged that her supervisor lied about her during the investigation in retaliation. The investigator did not find plaintiff's claims to be substantiated but sent a memorandum reminding employees that harassment was unacceptable and removed plaintiff's supervisor from the location for training. Plaintiff filed suit alleging hostile work environment because of sexual orientation and retaliation. Defendant moved for summary judgment, arguing in part that plaintiff could not make out a Title VII claim because she could not prove that she "belongs to a protected group" and was harassed based on her membership in that group. Plaintiff responded by saying she did not know what a "protected group was" but she knew Title VII prohibited harassment on the basis of sexual orientation. Plaintiff attached the EEOC's guidelines on "Sex-Based Discrimination," which state that discrimination "against an individual …because of sexual orientation is discrimination because of sex."

**Issue EEOC is Addressing as Amicus:** (1) Title VII prohibits discrimination against employees "because of … sex." 42 U.S.C. § 2000e-2(a)(1). Does sexual orientation discrimination, which by definition involves adverse treatment based on sex stereotyping, gender-based associational discrimination, and consideration of an individual's sex, violate this prohibition? (2) Does this court's opinion in *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (1989) (per curiam), conflict with the Supreme Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), that discrimination based on gender stereotypes violates Title VII? (3) Was plaintiff's belief that she was opposing illegal conduct – based on the EEOC's well-publicized position that Title VII prohibits sexual orientation discrimination and numerous recent federal cases coming to the same conclusion – at least reasonable, such that she was entitled to protection under Title VII from retaliation for her complaint?

**EEOC's Position:** When the issue is considered in light of *Price Waterhouse* and *Oncale*, discrimination based on sexual orientation necessarily violates Title VII's prohibition on sex discrimination. This is consistent with the statute's prohibition on discrimination "because of … sex," 42 U.S.C. § 2000e-2(a). It also stems from precedent because sexual orientation discrimination relies on illegal sex stereotyping. The EEOC further contended that the proper inquiry under a sex-stereotyping theory is not whether lesbians are a protected group under the statute, but rather whether the alleged discrimination was based on a plaintiff's failure to conform to a gender-based stereotype. To find otherwise would create exceptions to Title VII's protection against sex-stereotyping for any man or woman who identifies as gay or lesbian.

Sexual orientation discrimination also violates the act's prohibition against sex discrimination because it constitutes gender-based associational discrimination. Finally, sexual orientation discrimination involves impermissible sex-based considerations because sexual orientation cannot be understood without considering a person's sex.

In addition, the EEOC asserts that *Williamson* is no longer good law. It relies on decisions that predate and conflict with the holding in *Price Waterhouse* and *Oncale*.

Finally, it is the EEOC's position that Title VII prohibits employers from retaliating against employees who oppose practices made unlawful under the act. Plaintiff opposed an unlawful employment practice. Even if the court believes that sexual orientation discrimination is not covered by Title VII, plaintiff's opposition is still protected because she acted in a good faith, objectively reasonable belief that practices were unlawful. Plaintiff relied on the widely published EEOC guidance that stated that discrimination because of sexual orientation is sex discrimination and violates Title VII.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Anderson v. CRST International* | U.S. Court of Appeals for the Ninth Circuit<br>No. 15-55556 | 12/22/2015 (amicus filed)<br>3/24/2017 (decided) | Title VII | Sex<br>**Result:** Pro-Employee |

**Background:** Plaintiff worked as a long-haul truck driver. After the start of her employment, plaintiff was assigned to operate the truck with another driver. Plaintiff alleges that the other employee would frequently subject her to sexual harassment, including riding with his pants unbuttoned and frequently describing his sexual activity, despite plaintiff's protests to stop. In another alleged incident, plaintiff was forced to share a hotel room with this male driver while repairs were made on the truck. Plaintiff ultimately complained to her supervisor and filed a Charge with the California Fair Employment Agency. Approximately one month later, plaintiff was terminated for failing to report to her job. Plaintiff subsequently filed suit under Title VII. The district court dismissed plaintiff's claims, ruling that the co-worker harassment was neither severe nor pervasive, that defendant took prompt remedial steps to resolve the harassment, and there was no evidence of retaliation because plaintiff ignored defendant's attempts to have her return to work.

**Issue EEOC is Addressing as Amicus:** (1) Whether a reasonable jury could find that the conduct plaintiff alleged was severe or pervasive under Title VII; (2) Whether a reasonable jury could find that defendant's response to plaintiff's harassment complaints was prompt remedial and effective action.

**EEOC's Position:** First, the EEOC argued that the conduct was severe or pervasive because the harasser's conduct was heightened due to the atypical work environment in which it occurred. Specifically, plaintiff and the harasser spent much of their workday in a small truck cab, and in one instance had to share a hotel room. The EEOC also argued that the perverseness of the harassment was heightened by the compressed time frame (two weeks) in which they occurred.

Second, the EEOC asserted that defendant failed to take prompt remedial and effective action because it did not discipline the harasser, did not tell plaintiff or the harasser that the harasser was no longer allowed to drive with women, and its response effectively took work from plaintiff.

**Court's Decision:** The Ninth Circuit affirmed in part, and reversed in part, the lower court's decision. With respect to the harassment portions of the decision, the appellate court reversed the district court's grant of summary judgment to the employer on the claimant's Title VII claim alleging hostile work environment. Per the court, the claimant presented evidence from which a jury could determine both that the claimant subjectively perceived her work environment to be hostile and that a reasonable woman in her position would have perceived the environment to be hostile. Second, the claimant presented sufficient evidence to create a material dispute as to whether the company provided an effective remedy.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Baker v. Roman Catholic Archdiocese* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-55961 | 12/29/2016 (amicus filed) | ADA | Disability<br>**Result:** Pending |

**Background:** A former teacher at Roman Catholic high school brought action in state court against a Roman Catholic bishop alleging disability discrimination in violation of the ADA, and retaliation and wrongful termination in violation of California public policy. The case was removed to federal court and the state law claims were dismissed, and the bishop moved for summary judgment on the remaining ADA claim. The district court granted summary judgment, holding that she was no longer disabled after returning from a 10-day medical leave, not regarded as disabled by her employer, there was no evidence that her contract was not renewed due to a disability, the principal's dissatisfaction with her performance was legitimate and not pretextual, and she was not retaliated against by virtue of non-renewal of her contract.

**Issue EEOC is Addressing as Amicus:** Whether the district court applied the wrong legal standard when it granted summary judgment to the bishop on the grounds that plaintiff was neither actually disabled nor regarded as disabled by her employer as defined by the ADA.

**EEOC's Position:** The district court applied the wrong legal standards when deciding, as a matter of law, that plaintiff was not disabled within the meaning of the ADA.

First, plaintiff is regarded as disabled under the ADAAA because she established that she was subjected to an action prohibited under the ADAAA because of an actual or perceived physical or mental impairment. Contrary to the ADA and the district court's ruling, the ADAAA does not require that the impairment limit or is perceived to limit a major life activity. The Ninth Circuit has not addressed this issue, but the Tenth and Fifth Circuits have held that the employer need only regard the employee as being impaired, regardless of whether or not he employer also believed that the impairment prevented the employee from being able to perform a major life activity. Here, plaintiff informed the bishop and the principal in particular that she continued to experience headaches, dizziness, and vision issues from her fall and concussion, all of which are impairments under the ADA.

Second, plaintiff had an actual disability under the ADA. The district court wrongly focused on whether plaintiff's medical condition *prevented* her from engaging in major life activities, when the ADA requires only that an impairment "substantially limit" a major life activity in analyzing whether an individual is actually disabled. Moreover, the district court wrongly focused on only the major life activity of working when determining that her head injury was not substantially limiting; it did not address whether her injury substantially limited any other daily functions, such as seeing, hearing, walking, thinking and operations of a "major bodily function" such as "neurological, brain [functions]."

Third, plaintiff had a record of disability, and the district court erred by refusing to consider any medical records that plaintiff did not provide to the school at the time they were created. The school knew she sought medical treatment following her fall and missed work as a result. The district court determined she had an actual disability for the 10 days she was on leave receiving treatment. The EEOC argues that the treatment she received during her medical leave, together with the treatment and examinations and testing she received thereafter, constitute a "record of" that disability. The employer need only know that the employee had the medical condition that was being treated and was not required to have seen or reviewed the records.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Biel v. St. James School* | U.S. Court of Appeals for the Ninth Circuit<br>No. 17-55180 | 9/28/17 (amicus filed) | ADA | Disability<br>**Result:** Pending |

**Background:** Defendant is a Catholic school. In March 2013, defendant hired plaintiff as a long-term substitute for a part-time first-grade teacher on maternity leave who had been job-sharing with another teacher. Plaintiff taught two days per week. When the position ended in June 2013, the school hired plaintiff as a full-time fifth-grade teacher for the 2013-2014 school year. Plaintiff signed a Faculty Employment Agreement with the church pastor and the school principal. She was not required to be Catholic, but was required to model, teach, and promote behavior in conformity to the teachings of the Roman Catholic Church, pray with her students, and accompany them to mass once per month. She taught standard subjects and religion. Sister Mary Margaret observed her from time to time, like she did for other teachers, and periodically expressed concerns about her teaching – but she conducted only one formal evaluation and commented that it was a "good review." Plaintiff was diagnosed with breast cancer in April 2014, which she told the Sister, and requested time off in May to prepare for cancer treatments. Shortly after being informed of the diagnosis, Sister Mary Margaret prepared a letter that plaintiff would not receive a contract for the following year. Plaintiff never received it, and inquired as to the status of her contract. In July, she met with Sister Mary Margaret who said (1) she was not strict enough; and (2) it would be unfair to her students to have two teachers the following year. The district court granted summary judgment on the ground that the school established a prima facie case that plaintiff was a minister within the meaning of the ministerial exception and there was no triable issue of fact that would preclude granting summary judgment based on the exception. The school also disputed pretext, which the court did not reach. Plaintiff appealed.

**Issues on Appeal:** Did the court misapply the Supreme Court's totality-of-the-circumstances approach in *Hosanna-Tabor* when it granted defendant summary judgment on the basis that plaintiff was a minster in her role as a fifth-grade teacher at the Catholic school, and therefore her discrimination claim fell within the ministerial exception?

**EEOC's Position on Appeal:** The school did not dispute that plaintiff could make out a prima facie case of discrimination, though it did dispute that its reasons for terminating her employment were pretextual. The factors indicating that the employee in the *Hosanna-Tabor* case was a minister and thus subject to the ministerial exception are mostly absent in this case, including (1) a formal religious title given by the church; (2) the substance reflected in that title; (3) her own use of that title; and (4) the important religious functions she performed for the Church. The court also made clear that the first three factors are the most critical. Based on the role plaintiff had for the school, she is not subject to the exception outlined in *Hosanna-Tabor*.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Cheatham v. City of Phoenix* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-15785 | 11/4/2016 (amicus filed) | Title VII | Retaliation<br>**Result:** Pro-Employer |

**Background:** Plaintiff, a former Deputy Chief for the City of Phoenix Fire Department, sued the city for unlawful retaliation under Title VII. The district court granted summary judgment for the city. Plaintiff became Deputy Chief of South Shift Command in March of 2009. Between November and December 2009, plaintiff reported to his supervisor multiple incidents involving sexually explicit conduct around Station One, right near his command, including drawings of male genitalia displayed in a jar, on a nacho cheese machine, on a t-shirt at a gym, on an identical shirt being worn in a common area, and on an envelope delivered to his office (which envelope had pasta in the shapes of male and female genitalia). Four months after complaining, he was reassigned to Deputy Chief of Safety, after which he filed suit and claimed the reassignment was unlawful retaliation.

**Issue EEOC is Addressing as Amicus:** Whether the district court misapplied the standard for opposition articulated in *Crawford v. Metropolitan Gov't of Nashville & Davidson Cty.*; whether the Ninth Circuit should reject the "manager rule" in the Title VII context; and whether under the correct legal standards, a jury could determine that plaintiff reasonably believed that he opposed unlawful activity under Title VII.

**EEOC's Position:** First, the district court misapplied the Supreme Court's decision in *Crawford* when it determined that plaintiff's reports of sexual material in the workplace did not constitute opposition under Title VII's anti-retaliation provision, because he was merely "reporting" and not "complaining." *Crawford* holds that opposition includes a broad range of conduct under Title VII, including communicating to her employer a belief that the employer has engaged in a form of employment discrimination (*i.e.*, by allowing the offensive drawings to remain), as plaintiff did here. *Crawford* does not require "active opposition" to warrant the protections of the anti-retaliation provisions of Title VII.

Second, the district court wrongly applied the "manager rule," a judicially-created exception to the Fair Labor Standards Act's anti-retaliation provision, in rejecting plaintiff's argument that he opposed unlawful activity; the majority of courts of appeals considering this issue have rejected the manager rule in the Title VII context or at least questioned its reasoning, which rule is inconsistent with Title VII's plain language and Supreme Court precedent. The manager rule creates an exception to anti-retaliation protections for employees (such as plaintiff, as the district court held here) who have a duty to report discrimination. This rule is contrary to the plain language of Title VII's anti-retaliation provision because that provision clearly and unambiguously protects *all* employees who oppose discrimination, regardless of their job duties. This rule discourages managers and HR employees from reporting or investigating discrimination as part of their job duties because it affords them no protection from retaliation.

Third, a jury could find that plaintiff reasonably believed that the conduct he opposed was unlawful under Title VII, and the district court misapplied the law in concluding otherwise. Plaintiff need not show that the opposed conduct *actually* violated Title VII. The purpose of the reasonable belief standard is to encourage employees to report harassing conduct before it becomes severe or pervasive. The district court erred in finding plaintiff could not establish a reasonable belief when it discounted incidents that were not directed at plaintiff himself, failing to analyze the cumulative effect of multiple incidents, and by misapplying the principle that reporting a hostile work environment in progress is sufficient to show reasonable belief.

**Court's Decision:** The Ninth Circuit upheld (in an unpublished decision) the lower court's award of summary judgment. Plaintiff cannot establish that he engaged in a protected activity or that there was a causal link between the protected activity and the adverse action. First, there is no evidence that anyone found the conduct at issue subjectively offensive, and plaintiff himself admits that although he found the conduct inappropriate, he did not find it harassing; therefore, plaintiff cannot demonstrate a reasonable belief that there was a hostile work environment and thus cannot show protected activity. Second, he cannot demonstrate causation because he was not reassigned until four months after the last incident he reported, he was one of 16 individuals reassigned on the same day, and he offers no evidence that his superiors disapproved of his reports (rather, the record shows that the city removed the drawings and no similar incidents occurred after December 2009). There is no evidence that but for his allegedly protected activity, the city would not have reassigned him.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *McCoy v. Barrick Gold of North America* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-16945 | 3/9/2017 (amicus filed)<br>12/7/2017 (decided) | ADEA | Age<br>**Result:** Pro-Employer |

**Background:** Plaintiff was hired as a laborer and welder for defendant in 2005. In late 2011, he was promoted, but plaintiff is not sure by whom (it might have been the General Supervisor for Process). Plaintiff's offer letter was signed by a recruiter. Plaintiff was thereafter involved in several incidents, three of which resulted in property damage and/or injury to himself. Eventually, plaintiff was placed on a final warning, the status of which is permanent and can result in termination for any subsequent infraction. However, he received a good evaluation from his supervisor in June 2014. On September 10, 2014 (now age 61) he was injured at work. He was suspended the next day. The General Supervisor then told plaintiff he was fired on September 15, 2014 for unsafe conduct, failing to take responsibility for the accident, and violating company standards of conduct. His termination was upheld on internal appeal. The plaintiff sued, but the district court granted summary judgment to the employer, stating that that to prove a prima facie case of age discrimination under the *McDonnell Douglas* proof scheme, a plaintiff "must" show that "he was performing his job satisfactorily." In this case, the court held there was no genuine dispute as to the plaintiff's "unsatisfactory performance." The one positive comment about his performance did not negate the established performance deficiencies, the court held. Even if the plaintiff had established a *prima facie* case, he proffered no evidence to show the employer's reason—"failing to perform his job in a safe manner"—was a pretext for age discrimination.

**Issue EEOC is Addressing as Amicus:** Whether the district court erred in requiring plaintiff to disprove defendant's proffered reason for his discharge in order to establish a prima facie case of discrimination, and whether the district court erred in applying the "same-actor inference" in this age discrimination case because there were significant temporal gaps between the relevant employment actions and because there was insufficient record evidence to support it.

**EEOC's Position:** First, to establish a *prima facie* case of discrimination, the analysis under *McDonnell Douglas* applies and the burden is not onerous. The burden then shifts to defendant to proffer evidence that the challenged employment decision was made for a legitimate, nondiscriminatory reason. If the burden is carried, it shifts back to plaintiff to prove intentional discrimination, *i.e.*, pretext. Defendant contests that plaintiff was qualified by arguing that he was unsafe (which is a subjective job requirement, and not a part of the prima facie case). Plaintiff's stellar June 2014 evaluation (after he had received a final written warning) was sufficient to carry his burden at the *prima facie* stage. The EEOC argues the district court erred by collapsing the three steps of the *McDonnell Douglas* analysis into one—the trip and fall incident resulting in defendant's termination of plaintiff should have been addressed at the third step (pretext) of the *McDonnell Douglas* proof scheme, not in the *prima facie* case.

Second, the EEOC argues the same actor inference was wrongly applied. Unlike race or sex, aging is a constant and changes over time. An employer may harbor animus towards 58-year-olds and not 45-year-olds, or an employer's assumptions about an older person may change over time. The passage of time between hiring and firing should be especially short. Here, nine years passed between plaintiff's hiring and firing; a jury could easily find that there is a difference between being over and under age 60; and there is no evidence that the same individual made the decision both to hire/promote the plaintiff and to fire him.

**Court's Decision:** On December 7, 2017, the Ninth Circuit panel issued an unpublished memorandum disposition affirming the lower court's decision in favor of the employer.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Nunies v. HIE Holdings, Inc.* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-16494 | 4/13/2017 (amicus filed) | ADA | Disability<br>**Result:** Pending |

**Background:** Plaintiff was hired as a part-time warehouse worker at defendant's Kauai Branch in 2008. He was transferred to a full-time position in 2010, delivering five-gallon bottles of water. By 2013, plaintiff heard popping and pain in his shoulder any time he lifted the bottles, as well as numbness in his left shoulder when he lifted his left arm above his chest. In June 2013, he asked to change jobs with a part-time warehouse worker, which was approved on June 14 by defendant (defendant contends the approval was subject to plaintiff and defendant agreeing on several administrative matters, including pay; plaintiff disputes that there was any discussion about administrative issues). Plaintiff reported shoulder pain to his manager three days after his job change was approved. On June 19, plaintiff told his manager he wanted to see his doctor before his medical benefits ran out, and the manager called the corporate office. Upon his return, the manager told plaintiff the part-time job no longer existed due to budget cuts and that the plaintiff could not have the warehouse position. Plaintiff saw the doctor on June 20, who provided a note directing him to be off work for two weeks. Plaintiff sent the note to defendant. Plaintiff was subsequently terminated because the part-time warehouse job no longer existed and plaintiff could not carry the five-gallon water bottles; plaintiff argued the part-time warehouse job he held was advertised shortly after he was terminated. One year later, in May 2014, plaintiff was cleared without restrictions. Plaintiff sued for ADA discrimination based on his termination and discrimination in employment in violation of the ADA. Defendant argued plaintiff did not have an ADA-covered disability. The district court agreed with defendant, based on defendant's argument plaintiff lacked evidence that his shoulder injury substantially limited him in any major life activity.

**Issue EEOC is Addressing as Amicus:** Whether plaintiff fell within the ADAAA's definition of regarded-as disabled.

**EEOC's Position:** The district court erred in finding that plaintiff offered insufficient evidence to establish a disability under the ADA's regarded-as definition. The district court relied on the more stringent definition of "regarded as" under the ADA. Plaintiff needed to establish that the employer believed he had an impairment, which he did. Plaintiff should not have been required to demonstrate that the employer subjectively believed that the plaintiff was substantially limited in a major life activity by the impairment, which is what the court required of him. The evidence was sufficient to allow a reasonable jury to conclude that defendant rescinded plaintiff's transfer and terminated him because of a shoulder impairment that defendant had learned about only two days before under the ADAAA's standard for "regarded as" disability.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Rizo v. Yovino, Fresno County* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-15372 | 10/5/2016 (amicus filed) | EPA | Sex<br>**Result:** Pending |

**Background:** Plaintiff was an employee of Fresno County public schools. She discovered she was being paid less than her male counterparts of the same work and complained to her employer. Pay was determined by a policy, formalized as SOP 1440 in 2004 (but purportedly in use since 1998), that based starting salary for newly-hired lateral employees exclusively on their most recent prior pay. She was informed by a Human Resources administrator that, after going back 25 years, more women had been placed higher on the salary schedules than men in similar positions under this policy, and therefore, the pay practice was not discriminatory. She filed suit under the EPA, Title VII, and the California FEHA. She presented contradictory evidence to the county's results, showing that since 2004, women tended to earn less than men under SOP 1400.The county conceded that she was paid less for the same work, but argued that the result was lawful because it was "based on any other factor other than sex," an affirmative defense to a claim under the EPA. The other factor was prior salary, and the district court concluded that when an employer bases a pay structure exclusively on prior wages, any resulting pay differential between men and women is not based on any other factor other than sex, which resulted in the district court denying the county's motion for summary judgment. The county filed an interlocutory appeal, which was allowed to proceed, based on the Ninth Circuit's decision in *Kouba v. Allstate Insurance Co.*, in which the Ninth Circuit had held that prior salary can be a "factor other than sex," provided that the employer shows that prior salary effectuates some business policy, and the employer uses prior salary reasonably in light of its stated purpose as well as its other practices.

**Issue EEOC is Addressing as Amicus:** The EPA does not permit employers to base pay decisions solely on applicants' most recent prior salary, and the county did not prove it was entitled to summary judgment on its affirmative defense under proper legal standards.

**EEOC's Position:** Prior pay alone cannot justify a compensation disparity under the EPA because the practice perpetuates the gender pay gap that continues to exist in the field of education as well as elsewhere.

*Kouba* should not be dispositive here because in *Kouba*, prior salary was but one of several factors considered by the employer, whereas here, it was the only factor. The district court was correct in finding that while the affirmative defense of basing the pay on a "factor other than sex" can apply, that factor cannot be solely their prior salary. The evidence shows that there is an across-the-board pay disparity between male and female educators that is perpetuated by this policy. Furthermore, a rational jury would not be compelled to find that the county proved that its business justifications reasonably explain its use of the practice because it results in gross disparities in pay and does not ensure the hiring of better qualified applicants.

**Court's Decision:** On April 17, 2017, the Ninth Circuit vacated and remanded denial of the county's motion for summary judgment to determine whether stated business reasons for use of prior salary was a factor other than sex under the EPA. However, a petition for rehearing *en banc* was granted on August 29, 2017, and that original order from the Ninth Circuit has been vacated pending rehearing. Oral argument was heard on December 12, 2017.

| | | | | |
|---|---|---|---|---|
| *Taylor v. BNSF Railway Co.* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-35205 | 8/3/2016 (amicus filed) | ADA | Disability<br>**Result:** Pending |

**Background:** Defendant extended a job offer to plaintiff for an Electronic Technician position, which was contingent on plaintiff's successfully completing a medical screening because the Electronic Technician position was a safety-sensitive position. During the medical screening, plaintiff disclosed various medical problems as a result of his service in the United States Marine Corps, including problems with his knees and back. The plaintiff was 5'6" and weighed 256 pounds. Defendant sent plaintiff a letter informing him that defendant was unable to determine plaintiff's medical qualification due to "significant health and safety risks associated with extreme obesity . . . and uncertain status of knees and back." Defendant did not hire plaintiff. Plaintiff filed a charge with the EEOC and subsequently filed a civil action in federal court alleging the defendant violated the Washington Law Against Discrimination because: (1) defendant discriminated against plaintiff because of his perceived disability; and (2) defendant discriminated against plaintiff based on his status as a veteran.

**Issue EEOC is Addressing as Amicus:** Whether the district court misinterpreted the EEOC's interpretive guidance when it relied on the EEOC's interpretive guidance to support its ruling that obesity can only be an impairment if it is caused by a physiological disorder.

**EEOC's Position:** Section 1630.2(h) of the EEOC's interpretive guidance states that the term "'impairment' does not include characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder. The EEOC argues defendant incorrectly interpreted this sentence to mean that morbid obesity is not an impairment unless it is caused by a physiological disorder. First, the grammar of the sentence shows that the sentence means that extreme or morbid obesity, because it is well outside the "normal" range of weight, is an impairment regardless of whether it was caused by a physiological disorder. Second, context of the sentence supports the EEOC's interpretation of the sentence discussing morbid obesity. Finally, even if the sentence is ambiguous, the court should defer to the EEOC's interpretation of the "physical characteristics" sentence.

**Court's Decision:** The case is before the Ninth Circuit. Oral argument is set for February 8, 2018.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Iselin v. Bama Companies, Inc.* | U.S. Court of Appeals for the Tenth Circuit<br>No. 16-5132 | 12/7/2016 (amicus filed)<br>5/26/2017 (decided) | ADA | Disability<br>**Result:** Pro-Employee |
| **Background:** The district court granted defendant's motion to dismiss plaintiff's ADA claim. The court held that plaintiff failed to establish he was a qualified individual with a disability. Specifically, the district court reasoned that plaintiff's complaint did not state a plausible claim for relief because plaintiff failed the defendant's job assessment and could not perform the essential functions of his position. The court also reasoned it must defer to defendant's judgment regarding the essential functions of its position.<br><br>**Issue EEOC is Addressing as Amicus:** Whether the district court misapplied the governing legal standards in deeming the sufficiency of plaintiff's amended complaint.<br><br>**EEOC's Position:** The EEOC argued that the district court's decision was inconsistent with Supreme Court standards for granting a motion to dismiss. Specifically, the EEOC argued that plaintiff's pleadings, taken as true, were sufficient to state a claim as a matter of law. The EEOC pointed out that plaintiff's amended complaint pled that he could perform the essential functions of his position. The EEOC also argued that the district court improperly weighed the defendant's evidence at the pleading stage by deferring to defendant's job assessment and alleged essential job functions.<br><br>**Court's Decision:** The Tenth Circuit affirmed the lower court's decision in part, reversed in part, and remanded. Specifically, the court affirmed the district court's dismissal of one of the claimant's claims for relief (misuse of employment testing), but determined that the lower court erroneously dismissed his other claims. | | | | |
| *Jones v. Needham Trucking LLC* | U.S. Court of Appeals for the Tenth Circuit<br>No. 16-6156 | 10/4/2016 (amicus filed)<br>5/12/2017 (decided) | Title VII | Charge Processing<br>Harassment<br>Sex<br>**Result:** Pro-Employee |
| **Background:** A former employee brought an action against his employer and supervisor, alleging sex discrimination under Title VII and wrongful interference with contractual relationship. The district court granted defendants' partial motion to dismiss, holding that plaintiff failed to exhaust his administrative remedies for his *quid pro quo* sexual harassment claim, that his state law tort claim was precluded by the Oklahoma Anti–Discrimination Act ("OADA"), and that his Oklahoma Employment Security Act of 1980 ("OESA") claim failed for want of a private right of action.<br><br>**Issue EEOC is Addressing as Amicus:** Whether the district court applied an unduly stringent standard for failure to exhaust administrative remedies for his *quid pro quo* harassment claim by requiring plaintiff to specifically state facts in his charge to support an allegation that his supervisor conditioned concrete employment benefits on his submission to sexual conduct and fired him when he did not comply.<br><br>**EEOC's Position:** The district court applied an unduly stringent standard regarding the required content of an EEOC charge for purposes of exhausting plaintiff's administrative remedies. Plaintiff's charge of discrimination satisfied the criteria for the level of detail that a charge should contain. In his charge, plaintiff need only generally describe the alleged violation stating that he was subjected to sexual remarks by his supervisor on a certain date and that she terminated his employment. He was not required to specifically state that defendants conditioned concrete employment benefits on his submission to sexual conduct and terminated him when he did not comply.<br><br>**Court's Decision:** The Tenth Circuit held that the employee had exhausted his administrative remedies. Plaintiff's intake form had the appropriate boxes checked for his allegations of sex-based discrimination and retaliation, and it recounted that he was "subjected to sexual remarks," that "[his supervisor] terminated [his] employment," and that no reason was given for the termination. The Tenth Circuit found this was sufficient to alert defendants to the sexual harassment allegations and to trigger an investigation that would look into what the sexual remarks were, why plaintiff was fired, and whether the two events were connected.<br><br>The Tenth Circuit also held that plaintiff's tortious interference claim fell within OADA limitation of common law remedies. Therefore, the appellate court affirmed in part the lower court's ruling, reversed in part, and remanded. | | | | |

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Lincoln v. BNSF Railway Co.* | U.S. Court of Appeals for the Tenth Circuit<br>Case No. 17-3120 | 09/28/2017 (amicus filed) | ADA | Charge Processing, Disability<br>**Result:** Pending |

**Background:** Plaintiffs worked in maintenance positions for railways when they were purportedly exposed to hazardous chemicals that lead to several ailments and conditions. Upon learning of these conditions, defendant removed plaintiffs from their positions pending a medical examination. Plaintiffs submitted applications to work in several other positions that did not require exposure to the hazardous chemicals, but defendant denied these requests. Plaintiffs filed Charges of Discrimination with the EEOC alleging failure to accommodate persons with disabilities by not transferring them to vacant positions for which they were qualified. After filing their charges, plaintiffs continued to apply for vacant positions, but were continuously rejected. Plaintiffs subsequently filed suit against defendant.

Defendant moved to dismiss all claims related to post-charge denials of transfers because plaintiffs failed to exhaust administrative remedies for denials occurring after they filed their charges. The parties subsequently stipulated that all administrative remedies were exhausted for all ADA claims. At summary judgment, defendant disavowed their stipulation, arguing that exhaustion of administrative remedies is a jurisdictional prerequisite that cannot be waived.

**Issue EEOC is Addressing as Amicus:** (1) Did the district court err by not following precedent from the Supreme Court and this court holding that exhaustion of administrative remedies is not a jurisdictional prerequisite to suit under the ADA but is, instead, a condition precedent subject to waiver? (2) Does *U.S. Airways v. Barnett*, which recognizes that reassignment is a reasonable accommodation in the "run of cases," confirm the Tenth Circuit's holding in *Smith v. Midland Brake* that, absent undue hardship, an employer must reassign a disabled employee to a vacant position when no reasonable accommodation can keep him in his current job?

**EEOC's Position:** Where a statute does not clearly indicate that a threshold limitation is jurisdictional, it must be considered a condition precedent subject to waiver. The district court should have enforced defendant's waiver and allowed plaintiffs to challenge the post-charge denials of transfer.

**Court's Decision:** The Tenth Circuit noted that the district court ignored extensive jurisprudence—even from the Supreme Court level—that expressly held that exhausting administrative remedies is not a jurisdictional prerequisite to suit, but rather a condition precedent subject to waiver. The court further confirmed that absent undue hardship, the ADA requires an employer to reassign a disabled employee into a vacant position without competition when he no longer meets the requirements of his current job but satisfies the employer's qualification standards for the vacancy.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Tabura v. Kellogg USA* | U.S. Court of Appeals for the Tenth Circuit<br>No. 16-4135 | 10/21/2016 (amicus filed)<br>1/17/2018 (decided) | Title VII | Religion<br>**Result:** Pro-Employee |

**Background:** Plaintiffs, both Seventh Day Adventists who observed Sabbath from sundown on Friday to sundown on Saturday, worked at defendant's plant in Clearfield, Utah. When plaintiffs first started working for defendant, they were able to avoid Saturday work. In early 2011, however, the company switched to a continuous crewing schedule, under which plaintiffs worked 12-hour shifts during the day, on a rotating schedule and were required to work every other Saturday. Given that employee absences are inevitable, defendant cross-trains employees on various jobs and frequently hires more people than necessary for each shift to ensure adequate coverage.

Defendant maintained an attendance policy under which employees accumulated points for unauthorized absences. If an employee accumulated a certain number of points during a 12-month period, this triggered progressive discipline, starting with a verbal warning and ending with termination. Plaintiffs, and all other employees, were permitted to use vacation and/or sick days without penalty, as long as they submitted their requests 24 hours in advance. Defendant also permitted employees to take leave without pay for periods of at least seven days. Under the attendance policy, employees were able to swap their shifts, with some limitations.

After defendant switched to the new scheduling system, plaintiff contacted his supervisor to request a reasonable accommodation because he was unable to work on Saturdays. He was subsequently informed that he could use vacation or sick leave, or engage in a voluntarily shift swap, to avoid having to work on Saturdays or incurring attendance penalties for failing to do so. Plaintiff had difficulty finding another employee to swap his shift with and did not have enough sick or vacation time to cover all of the Saturdays he was required to work. The other plaintiff was initially able to switch her Saturday shifts with another employee who observed Sabbath on Sunday. However, the co-worker ultimately left the plant and she did not have sufficient sick or vacation leave to cover all of the Saturdays she was required to work. After both plaintiffs accumulated sufficient points under the attendance policy, they were terminated. The district court granted summary judgment in favor of defendant, after finding that the company had provided a reasonable accommodation to both plaintiffs. Additionally, the district court concluded that even if defendant had not granted plaintiffs reasonable accommodations, requiring the company to do more than it had done would have imposed an undue hardship.

**Issue EEOC is Addressing as Amicus:** (1) Whether an employer satisfies its Title VII obligation to provide a reasonable accommodation for the religious beliefs of its employees when it can eliminate the conflict between those beliefs and a neutral work rule without suffering an undue hardship but nevertheless only offers a partial accommodation; and (2) Would defendant have suffered an undue hardship by excusing plaintiffs from all Saturday shifts when it routinely hired more people than necessary for the purposes of covering employee absences?

**EEOC's Position:** The EEOC argues that the district court erred in concluding that defendant had provided a reasonable accommodation for plaintiffs, despite its failure to eliminate the conflict between their religious practice and the company's neutral work rule. More specifically, the EEOC contends defendant eventually terminated plaintiffs in part because of their Saturday absences and, as such, any accommodation granted was not reasonable. Additionally, because the company hired more people than necessary per shift for the express purpose of filling in for absent employees, the EEOC asserts that defendant could not establish that permitting the plaintiffs to take all Saturdays off would have imposed an undue hardship.

**Court's Decision:** A Tenth Circuit panel reversed the decision of the district court, finding questions of fact remain as to whether allowing workers to use paid time off and asking other employees to cover shifts for employees taking time off for religious reasons constituted a reasonable accommodation. According to the panel, "[t]he reasonableness of the shift-swapping accommodation … as well as the reasonableness of the combination of taking paid time off and swapping shifts, are critical disputed issues of material fact in this case that a jury must resolve."

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Evans v. Georgia Regional Hospital* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 15-15234 | 1/11/2016 (amicus filed)<br>3/10/2017 (decided) | Title VII | Sexual Orientation Discrimination<br>**Result:** Pro- Employer |
| **Background:** Plaintiff filed a *pro se* complaint alleging she was demoted and terminated as a result of her sexual orientation. The district court approved the Magistrate Judge's recommendation to dismiss the plaintiff's claims on the grounds that sexual orientation is not a protected class under Title VII.<br><br>**Issue EEOC is Addressing as Amicus:** (1) Is discrimination on the basis of sexual orientation cognizable under Title VII as a form of sex discrimination?; (2) Did the district court err in dismissing the plaintiff's complaint on the ground that she did not engaged in protected conduct when she complained of sexual orientation discrimination?<br><br>**EEOC's Position:** First, the EEOC argued that sexual orientation discrimination necessarily involves the adverse treatment of individuals for failure to conform to heterosexually defined gender norms. Second, the EEOC argued sexual orientation discrimination is associational discrimination, which has been ruled illegal in the race discrimination context. Third, the EEOC asserted that such discrimination is necessarily sex discrimination as it takes the employee's sex into account when making its decision (*i.e.*, only punishing female employees for having a wife, or vice-versa). Lastly, the EEOC argued that the retaliation claim should not have been dismissed because sexual orientation, for the reasons explained above, is a protected class under Title VII and thus the plaintiff engaged in protected activity when complaining about such discrimination.<br><br>**Court's Decision:** The Eleventh Circuit held that Title VII provides an actionable claim for gender non-conformity discrimination, but not sexual orientation discrimination. With respect to the court's decision regarding Title VII's lack of coverage for sexual discrimination claims, the court noted: "we are bound to follow a binding precedent in this Circuit unless and until it is overruled by this court *en banc* or by the Supreme Court." | | | |
| *Gogel v. Kia Motors Manufacturing Georgia, Inc.* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 16-16850 | 3/3/2017 (amicus filed) | Title VII | Retaliation<br>**Result:** Pending |
| **Background:** The district court granted summary judgment on plaintiff Team Relation Manager's retaliation claim, finding that plaintiff could not show defendant's reason for termination – namely its loss of confidence in her abilities to perform her job duties after an investigation showed she had solicited members of her team to file a charge of discrimination – was pretext for retaliation. The court determined that defendant, at the time plaintiff was terminated, honestly believed that plaintiff was no longer fit for the position, as defendant maintained a good-faith belief that had plaintiff solicited employees to file an EEOC charge, which not only conflicted with her job duties, but also critically harmed its posture in the defense of discrimination suits brought against the company.<br><br>**Issue EEOC is Addressing as Amicus:** Whether plaintiff presented facts sufficient to create a genuine dispute of fact as to whether defendant's reason for terminating her – its belief that her solicitation of members in her team to file an EEOC charge conflicted with her job duties – was pretextual.<br><br>**EEOC's Position:** Plaintiff's managerial and/or equal employment functions do not alter the conclusion that she engaged in protected activity. Plaintiff's prior filing of an EEOC charge and repeated complaints to managers about her non-promotion based on sex preceding that charge constitute statutorily protected activity. While the parties dispute whether plaintiff actually assisted another employee in filing an EEOC charge, even if plaintiff had done so, such activity is protected under Title VII.<br><br>**Court's Decision:** Pending. | | | |

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Houston v. City of Atlanta* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 17-12126 | 09/27/2017 (amicus filed) | Title VII | Retaliation<br>**Result:** Pending |

**Background:** Plaintiff, a Sergeant with the Atlanta Police Department, alleged that his employer retaliated against him for complaining about sexual harassment. According to plaintiff, his supervisor yelled at him, denied him sick leave—which another supervisor then granted—increased his work load, and filed a complaint against him that resulted in a written reprimand and a two-year suspension. Plaintiff claims that the Department denied his request to transfer, but did promote him to Sergeant, based on the results of a written and oral examination. Plaintiff subsequently filed suit and the Department moved for summary judgment.

A magistrate judge issued a final report and recommendation in favor of granting the Motion for Summary Judgment, after concluding that plaintiff could not establish that he engaged in a protected activity and that, assuming he had engaged in a protected activity, plaintiff did not demonstrate that he had suffered a materially adverse employment action. The magistrate judge specified that the standing for finding an adverse action for purposes of a retaliation claim, plaintiff must show that he suffered a serious and material change in the terms, conditions, or privileges of employment. The district court approved and adopted the magistrate judge's report and recommendation, and granted summary judgment in favor of the Department.

**Issue EEOC is Addressing as Amicus:** Whether the district court erred in holding that the anti-retaliation provision of Title VII requires a plaintiff to show a "serious and material change in the terms, conditions, or privileges of employment, when the Supreme Court previously required only that a reasonable employee would have found the challenged action materially adverse, such that it might have dissuaded him or her from making or support a charge of discrimination.

**EEOC's Position:** The EEOC contends that in adopting the magistrate judge's report and recommendation, the district court disregarded controlling Supreme Court precedent and applied the wrong legal standard to plaintiff's retaliation claim. The EEOC argues that the magistrate judge erroneously applied the adverse action standard from substantive discrimination cases, which does require a demonstration of a serious and material change in the terms, conditions, or privileges of employment, to plaintiff's retaliation claim. According to the EEOC, plaintiff was only required to show that a reasonable employee would have found the challenged action materially adverse, such that it might have dissuaded him or her from making or supporting a charge of discrimination.

In support of its position, the EEOC cites to Supreme Court and Eleventh Circuit case law that established a relaxed standard for showing a materially adverse action in the retaliation context. While the EEOC acknowledges that the Eleventh Circuit has on occasion applied the adverse action standard for substantive discrimination cases to retaliation claims in non-precedential opinions, it argues that the court must now disregard any decision that contracts the Supreme Court's holding in *Burlington National*. Finally, the EEOC alleges that plaintiff's claims that he was denied a transfer, issued a written reprimand, and placed on probation for two years, could be sufficient to state a claim for retaliation under Title VII.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF AMICUS FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *Jefferson v. Sewon America, Inc.* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 17-11802 | 8/3/2017 | Title VII | National Origin<br>Race<br>Retaliation<br>**Result:** Pending |

**Background:** Plaintiff worked as a clerical employee for defendant's finance department. She purportedly earned favorable performance reviews and raises and was promoted from her initial 90-day probation period. After probation ended, she expressed an interest in an IT position. She received a positive on-the-spot IT evaluation and was told that she would be a good fit for the position, pending her supervisor's approval.

Plaintiff's supervisor then issued a negative performance evaluation citing issues about her phone, her tardiness, and because she failed his own surprise IT test. After she inquired about her application twice, she was told that her current supervisor only wanted a Korean man to fill the vacancy. She complained to HR who told her to ignore the comments. Ultimately, a Korean male was hired for the position. The HR representative also placed a negative evaluation on her file because she did not go directly to her supervisor about the vacancy in IT. An HR representative testified that she had never completed such an evaluation before or after completing a below-average evaluation for plaintiff. Plaintiff completed 30-40 hours of IT training. Plaintiff was terminated seven days after her complaint because her evaluations from HR and her supervisor were below average. The district court found that the denial of the IT position was not actionable conduct under Title VII to arrant an objectively reasonable belief that defendant violated the act because plaintiff did not show she was qualified for the position.

**Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding that plaintiff's complaint to Human Resources was not protected activity under Title VII because she lacked a good-faith, reasonable belief she was opposing unlawful conduct, when the conduct she reported was a manager's statements that he was denying her a transfer because of her race and national origin. (2) Whether a reasonable factfinder could conclude that defendant fired plaintiff in retaliation for her complaint, where the record includes evidence that defendant issued a negative evaluation the same day as her complaint, though her manager testified that plaintiff was performing her job well, and then fired her seven days later.

**EEOC's Position:** Title VII makes it unlawful for employers to discriminate against employees based on a protected characteristic, including race or national origin. See 42 U.S.C. §§ 2000e-2(a)(1); 2000e-2(m). When there is evidence that a manager expressly indicates discriminatory bias in an employment decision with respect to a protected characteristic, an employee is reasonable to believe her employer is acting unlawfully under the statute. The district court incorrectly omitted this fact entirely from its analysis, and instead held that plaintiff lacked a good-faith, reasonable belief because she could not have reasonably believed she was qualified for the IT position or had suffered an adverse action. Plaintiff's qualifications are immaterial to the determination of objective reasonableness here, where a company official told her she did not receive the transfer because she is not Korean or male. Moreover, a jury could find that plaintiff reasonably believed that she was qualified and that the denial of the IT position constituted an adverse action.

The pretext evidence warrants submission of plaintiff's retaliation claim to a jury. The company had given plaintiff a positive performance evaluation and had issued no written warnings about her performance prior to her complaint. The same day that she complained to HR, the company issued her a negative evaluation, and fired her seven days later. A reasonable jury could thus find that the company fired plaintiff in retaliation for her complaint, and not because of purported performance issues.

**Court's Decision:** Pending. Oral argument is scheduled for April 5, 2018.

## FY 2017 – SELECT APPELLATE CASES IN WHICH THE EEOC WAS A PARTY

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. McLane Co.* | U.S. Supreme Court<br>No. 15-1248 | 4/3/2017 (decided) | ADA<br>Title VII | Scope of Review of Subpoena Enforcement<br>**Result:** Pro-Employer |

**Background:** As part of a nationwide investigation, 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 objected, and the district court concluded that the EEOC did not need to know the pedigree and related information to determine whether the company used the examination to discriminate on the basis of sex and refused to enforce the subpoena. The EEOC appealed.

The Ninth Circuit reviewed *de novo*, concluding that the district court had erred in finding the pedigree information irrelevant, and reversed, relying 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.'" The Ninth Circuit pointed out in a footnote a split in the circuits as to the standard used to review issues related to enforcement of administrative subpoenas, noting that other circuits review for abuse of discretion.

The employer appealed to the U.S. Supreme Court.

**Issues on Appeal:** Whether a district court's decision to enforce or quash an EEOC subpoena should be reviewed for abuse of discretion or *de novo*.

**EEOC's Position on Appeal:** The district court's decision was correctly reviewed *de novo* because the district court's primary task is to test a subpoena's legal sufficiency, and thus requires no exercise of discretion.

**Court's Decision:** The district court's decision was to be reviewed by the court of appeals for abuse of discretion rather than de novo (abrogating *U.S. E.P.A. v. Alyeska Pipeline Service Co.*, 836 F.2d 443). The case was remanded to the Ninth Circuit to review the district court's decision under the abuse of discretion standard and in doing so, the court was permitted to consider any of defendant's arguments regarding the burdens imposed by the subpoena.

On remand, the Ninth Circuit found that the district court had abused its discretion by denying enforcement of the EEOC's subpoena. 857 F.3d 813 (9th Cir. 2017). The appellate court thus sent the case back to the district court for further consideration as to the issue of undue burden.

| | | | | |
|---|---|---|---|---|
| *EEOC v. City of Long Branch* | U.S. Court of Appeals for the Third Circuit<br>No. 16-2514 | 7/26/2016 (appeal filed)<br>8/2/2017 (decided) | Title VII | Race<br>Subpoena Enforcement<br>**Result:** Pro-EEOC |

**Background:** The claimant, an African-American Lieutenant for the police department, filed a charge of discrimination with the EEOC alleging that his employer discriminated against him on the basis of race in violation of Title VII. The claimant alleged that "he was subjected to different and harsher disciplinary measures than similarly situated white colleagues who committed the same or similar infractions." The EEOC issued a subpoena to the respondent seeking all disciplinary records for the claimant and the six comparators the claimant identified. The respondent refused to produce the documents unless the EEOC consented to an agreement under which the documents would be designated "Confidential" and the EEOC would agree not to provide, publish, or otherwise reveal, in whole or in part, other than in the form of its opinions and conclusions, any of the confidential material to the claimant or his counsel. After the respondent failed to produce documents in response to the subpoena, the EEOC filed a motion to enforce the subpoena in district court. A magistrate judge held that the EEOC was not entitled to share the requested information about other police officers with the claimant. The EEOC appealed to the district court judge. The district court judge denied the EEOC's motion and affirmed the magistrate judge's order.

**Issues on Appeal:** First, may an employer oppose an EEOC subpoena without following the requirements for administrative review set forth in 29 C.F.R. §§ 1601.16(b)(1) and (2)? Second, did the district court err when it held that the defendant was entitled to withhold subpoenaed information unless the EEOC agreed not to reveal any of that information to the charging party or his attorney?

**EEOC's Position on Appeal:** The respondent waived its right to challenge the subpoena by failing to respond in a timely manner and by neglecting to follow the procedures set forth in the Code of Federal Regulations. More importantly, based on the case law governing EEOC administrative subpoenas, the EEOC is entitled to obtain the personnel files of comparators and to share material contained in those files with the charging party if it determines, in its discretion, that doing so will promote the administrative settlement of his claims. The district court's contrary conclusion, apparently based on a misreading of *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981), is an abuse of discretion.

**Court's Decision:** The Third Circuit vacated the lower court's decision and remanded. The Third Circuit held that the district court erred by proceeding as if a motion to enforce an EEOC administrative subpoena had been referred to a magistrate judge as nondispositive under 28 U.S.C.S. § 636(b)(1)(A), when the motion was instead dispositive and should have been referred under § 636(b)(1)(B). Because the motion was dispositive, the district court should have reviewed an exhaustion of remedies issue even though the EEOC did not raise that issue in its objection to the magistrate judge's order.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. Baltimore County* | U.S. Court of Appeals for the Fourth Circuit<br>No. 16-2216 | 1/11/2017 (appeal filed) | ADEA | Age<br>**Result:** Pending |

**Background:** Baltimore County maintains a compulsory defined-benefit pension plan for its employees. The county deducts a higher percentage from an employee's salary if the employee was older when hired, resulting in lower take-home pay, because their contributions would be earning compound interest for few years. This policy anticipated that employees would retire at age 65 and was not modified after Baltimore County reduced the retirement age to 60 and began permitting employees to retire after they had worked a certain number of years. Two county corrections officers for Baltimore County filed ADEA charges with the EEOC in 1999 and 2000. They alleged that the larger contribution the county required them to make discriminated against them on the basis of their age. Several years later, in March 2006, the EEOC issued a determination finding an ADEA violation against the class of employees who were 40 or older when they enrolled in the pension plan. In September 2007, the EEOC sued Baltimore County. The district court granted the county summary judgment in January 2009, but the decision was appealed and reversed in June 2010. The Fourth Circuit concluded that the higher contribution rates were not justified by the time value of money, at least with respect to employees of different ages who were hired at the same time and could retire after working the same number of years. In October 2012, on remand, the district court found that the county had not pointed to any non-age-based financial considerations that justified the higher contribution rates for older employees and granted the EEOC summary judgment.

In early 2016, the county negotiated new collective bargaining agreements with the six unions that represent employees to phase out the pension contribution rates. After the district court approved a joint consent order in April 2016, the EEOC requested that the county be held liable for monetary relief for those employees who had to pay more into the pension system because of their age at hire. The district court concluded that pre-judgment backpay was discretionary under the ADEA and that the monetary relief sought for post-judgment harm was not mandatory. The district court ultimately denied the EEOC any monetary relief.

**Issues on Appeal:** (1) Whether back pay is a mandatory legal remedy under the ADEA; (2) Whether the district court erred in ruling that its decision denying any monetary relief was justified by the union's actions, the Supreme Court's previous Title VII pension decision, and/or laches; and (3) Whether the district court abused its discretion in denying all monetary relief, even if back pay is a discretionary equitable remedy under the ADEA.

**EEOC's Position on Appeal:** The EEOC argues that back pay is mandatory, not discretionary, under the ADEA, which incorporates the FLSA's remedial scheme. The EEOC further contends that previous Fourth Circuit holdings that liquidated damages are a mandatory remedy for willful violations of the ADEA supports the mandatory nature of back pay. According to the EEOC, the district court's discretionary authority to grant legal or equitable relief to effectuate the purpose of the ADEA does not alter the mandatory nature of the back pay remedy provided by the statute. Furthermore, the EEOC asserts that the equitable doctrine of laches cannot be used to reduce or eliminate legal damages, and, even if it was applicable, the county did not meet its burden to establish that it was entitled to such relief. Although the EEOC recognizes that the unions representing county employees negotiated the adoption of new contribution rates, it argues that this does not provide grounds for eliminating monetary relief in this case because ADEA rights cannot be compromised or bargained away. Given that the pension plan at issue in this case is particularly unique, in that it requires higher contribution rates for older employees where others typically do not, the EEOC argues that any award of monetary relief in this case will not affect any other pension plans. As such, the EEOC asserts previous Supreme Court cases denying such relief in Title VII pension decisions are not prohibitive.

Finally, the EEOC alleges that the district court abused its discretion in denying all monetary relief in this matter because it is necessary to effectuate the central statutory purpose of the ADEA. More specifically, the EEOC contends that rather than eliminating the illegal contribution policy in October 2012 or March 2014, the county continued to discriminate against its older employees and will not eliminate the problem until 2018, as set forth in the CBA. The EEOC argues that one of the principal purposes of the ADEA is to make victims whole, and denying monetary relief prevents that from happening.

**Court's Decision:** Oral argument was held on October 26, 2017. The case remains pending before the court.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. Consol Energy* | U.S. Court of Appeals for the Fourth Circuit<br>Nos. 16-1230, 16-1406 | 3/3/2016 (employer appeal filed)<br>6/12/2017 (decided) | Title VII | Religious Accommodation<br>**Result:** Pro-EEOC |

**Background:** The district court ruled in favor of the EEOC after it filed suit against defendant for its failure to accommodate the employee's sincerely held religious beliefs. Defendant implemented a biometric hand scanning system to track time and attendance. Employee was an evangelical Christian who was against acquiring the mark of the beast through the biometric system. Employee submitted a letter from his pastor to support his request to be exempt from the biometric system. Two other employees who could not use the biometric scan due to physical disabilities were permitted to enter their employee numbers on keypads. Supervisors from defendant were involved in day-to-day management and HR decisions that affect employees, including plaintiff. However, plaintiff was asked to scan his left hand, palm side up, in lieu of scanning his right hand. Based on his religious beliefs, plaintiff could not conform to the proposed course of action. Plaintiff was informed that failure to comply could result in termination. No other accommodations were discussed. Plaintiff retired from his employment.

**Issues on Appeal:** (1) Whether the district court correctly denied defendant's Renewed Motion for Judgment as a Matter of Law based on the jury's findings that (a) defendant failed to reasonably accommodate plaintiff's sincerely held religious beliefs; (b) defendant constructively discharged plaintiff; and (c) defendant was plaintiff's employer. (2) Whether the district court correctly denied defendant's Motion for New Trial based on (a) its exclusion of evidence about the UMWA grievance process; (b) its denial of defendant's Motion for Mistrial; (c) its refusal to give defendant's identified proposed jury instructions; (d) its instruction to the jury to continue deliberations after returning an inconsistent verdict form; and (e) its exclusion of irrelevant testimony about plaintiff's job search in the coal industry. (3) Whether the district court correctly denied defendant's Motion for New Trial Nisi Remittitur because the jury verdict was not excessive. (4) Whether the district court correctly denied defendant's Motion to Amend Its Findings and Conclusions because (a) plaintiff reasonably mitigated his damages; and (b) the court correctly refused to deduct the value of plaintiff's pension benefits from his damages award. (5) Whether the district court correctly granted the EEOC's Motion for Permanent Injunction. (6) Cross-Appeal: Whether the district court erred in granting the defendants' Rule 50(a) motion for judgment as a matter of law regarding punitive damages at the close of EEOC's evidence at trial.

**EEOC's Position on Appeal:** Once a Title VII case has been tried on the merits, courts of appeal do not review "prima facie cases" of discrimination. Instead, they consider whether there was sufficient evidence to support the jury's verdict on the ultimate question of discrimination. Here, there was more than sufficient evidence to support the jury's verdict that defendant failed to reasonably accommodate plaintiff's sincerely held religious beliefs. There was also sufficient evidence to support its verdict that defendant deliberately put plaintiff in a position where he had no choice but to resign by forcing him to choose between his religious beliefs and his job. Finally, there is no basis to disturb the jury's finding that defendant combined into a "single" or "integrated" employer with respect to the plaintiff.

**Court's Decision:** The appellate court held the employer was properly denied a Fed. R. Civ. P. 50(b) renewed motion for judgment as a matter of law because there was sufficient evidence to support the jury's verdict against the employer. There was sufficient evidence to show the employee sincerely believed that participation in the hand scanner system was inconsistent with his religious convictions, that allowing him to bypass the scanner imposed no additional burdens or costs on the employer, and that the employee was forced to retire as a result.

| | | | | |
|---|---|---|---|---|
| *EEOC v. Maryland Insurance Administration* | U.S. Court of Appeals for the Fourth Circuit<br>No. 16-2408 | 2/21/2017 (appeal filed)<br>1/5/2018 (decided) | EPA | Sex<br>**Result:** Pro-EEOC |

**Background:** EEOC initiated the action under the Equal Pay Act alleging that defendant discriminated against female employees by paying them less than their male counterparts for performing equal work. The district court granted defendant's motion for summary judgment. The court found that the male counterparts identified by the EEOC were not proper comparators because they were hired into higher levels than the female employees at issue. The district court also found that the male comparators had higher levels of certification and experience than the female employees. Lastly, the court held that other male counterparts referenced by the EEOC were also not proper comparators because they did not work in substantially similar positions as the female employees.

**Issues on Appeal:** (1) Did the district court err in ruling that claimants and male counterparts were not proper comparators because they worked in different job positions? (2) Did the district court err in concluding male counterparts with the same position as the claimants were paid higher due to their prior work experience and credentials?

**EEOC's Position on Appeal:** The EEOC argued that a reasonable jury could find that the claimants and the male comparators in different positions were comparable because they shared a common core of tasks, their primary purpose was the same type of fraud investigations, they worked under similar conditions, and they required substantially similar levels of skill, effort, and responsibilities. The EEOC also argued that there was a factual dispute regarding whether male counterparts in the same position were paid higher due to their prior experience and credentials, as opposed to gender. Lastly, the EEOC contended that defendant failed to meet its affirmative obligation in proving that its predetermined merit system prevented any inference of sex bias in salary determinations.

**Court's Decision:** A Fourth Circuit panel determined that the lower court erred in dismissing the case, finding that after the EEOC made its prima facie showing of pay discrimination, the state agency failed to "submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity."

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. BDO USA* | U.S. Court of Appeals for the Fifth Circuit<br>No. 16-20314 | 9/12/2016 (appeal filed)<br>11/16/2017 (decided) | EPA<br>Title VII | Subpoena Enforcement<br>**Result:** Mixed |

**Background:** The EEOC issued a subpoena seeking communications related to the claimant's claims of discrimination as well as other discrimination claims not directly related to the claimant. The respondent and EEOC agreed to production of communications, except for 278 documents, which the respondent claimed as privileged. The EEOC subsequently moved to enforce the subpoena to obtain the allegedly privileged documents. The district court affirmed the magistrate judge's ruling that the documents were privileged.

**Issues on Appeal:** Did the district court err when it affirmed the magistrate judge's ruling that the documents were privileged, without an *in camera* inspection and without supporting documentation supporting why the documents were privileged?

**EEOC's Position on Appeal:** First, the EEOC argued that the district court erred in not requiring the respondent to articulate why each specific document was privileged. Second, the EEOC asserted that the district court erred in holding that advice from attorneys was *per se* privileged, without conducting a proper analysis into whether the attorney was providing business, as opposed to legal, counseling. Third, the EEOC contended that the district court should have required affidavits or other supporting information that explained and established why each document was privileged, as opposed to just relying on the respondent's privilege log.

**Court's Decision:** The Fifth Circuit panel vacated and remanded the case, finding the lower court used an overly broad definition of attorney-client privilege in determining the communications were shielded from disclosure. The appellate court did not, however, hold that a protective order was unwarranted, and therefore left the decision whether to grant such an order to the trial court.

| | | | | |
|---|---|---|---|---|
| *EEOC v. Methodist Hospitals of Dallas* | U.S. Court of Appeals for the Fifth Circuit<br>No. 17-10539 | 8/1/2017 (appeal filed) | ADA | Disability<br>**Result:** Pending |

**Background:** Defendant is a large medical complex with over 7,500 full-time employees in the Dallas-Fort Worth Area. During the relevant time period, defendant did not have a written ADA policy concerning requests for reasonable accommodations or permanent reassignment due to a disability. Instead, employees seeking a disability-related permanent assignment had to monitor defendant's job bank, identify other positions for which they are qualified, and submit a transfer application if they can no longer perform the functions of their current position. These employees are required to compete with other internal and external applicants. Defendant's policy seeks to ensure that the most qualified candidates are hired for each vacancy.

The employee, a former PCT or nursing assistant for defendant, was terminated after she sustained a back injury and could no longer perform her job duties. Although she made multiple requests for permanent reassignment, defendant did not transfer her to a new position. She was, however, permitted to apply and compete for other jobs. Employee was ultimately terminated by defendant because she was not selected for another position and could no longer work in her previous role.

In September 2015, the EEOC filed suit against defendant alleging that it unlawfully refuses to reassign employees who become unable to work their current jobs even with accommodations, and requires them to compete against other applicants for open positions for which they are qualified. The EEOC further alleged that the company unlawfully refused to reassign plaintiff to a job for which she was qualified after a back injury prevented her from continuing to work as a patient-care technician. In November 2016, the district court granted summary judgment in favor of defendant after concluding that its policy did not run afoul of the ADA. The district court also found that plaintiff had failed to establish that she was qualified for a vacant position at the time she submitted an application, that she caused the breakdown in the interactive process for a reasonable accommodation, and that she did not seek permanent reassignment as a last resort.

**Issues on Appeal:** (1) Whether an employer can avoid its ADA duty to reasonably accommodate employees who, because of disability, can no longer perform the essential functions of their current jobs even with accommodation, by requiring them to compete for jobs with other applicants, instead of reassigning the disabled employees to vacant positions for which they are qualified; (2)Whether, absent undue hardship, an employer ordinarily has to make an exception to a best-qualified-selection policy, if necessary to reasonably accommodate a qualified disabled employee; and (3) Whether the district court erred in concluding that defendant did not violate the ADA by terminating plaintiff following her back injury, instead of providing her with a reasonable accommodation in the form of reassignment.

**EEOC's Position on Appeal:** The EEOC contends that defendant's policy violates the ADA, which explicitly identifies reassignment, not the opportunity to compete for another position, as an example of a reasonable accommodation. According to the EEOC, the district court improperly concluded that defendant was not required to violate its best qualified policy because it did not have a duty to provided disabled employees with preferential treatment. Instead, the EEOC asserts that Supreme Court precedent overrules the cases on which the district court relies, and establishes that defendant is only excused from providing a disabled employee with a reassignment by establishing that it would cause an undue hardship. The EEOC claims that defendant cannot demonstrate that permitting reassignment would cause an undue hardship or that such a request does not constitute a reasonable accommodation. While the EEOC acknowledges that there were limits on a duty to reassign, it argues that they do not apply to the claimant, given the facts of the case, and do not necessary apply when a best-qualified policy is implicated.

**Court's Decision:** Pending.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. AutoZone, Inc.* | U.S. Court of Appeals for the Sixth Circuit<br>No. 16-6387 | 12/1/2016 (appeal filed)<br>8/1/2017 (decided) | Title VII | Harassment<br>Sex<br>**Result:** Pro-Employer |

**Background:** The claimant began working as a Parts Sales Manager for defendant in 2011. Several months after, another employee was promoted to the position of Store Manager and was transferred to employee's location. Although this manager did not hire the claimant, he had the power to hire new hourly employees and had significant influence over transfers to other stores. The manager could create schedules, issue disciplinary actions and perform other supervisory tasks.

The manager allegedly began making lewd remarks towards the claimant. The comments purportedly escalated to physical acts of grabbing various parts of the claimant's body. The manager reportedly also harassed several other employees. The claimant reported harassment on at least three occasions, but there several months allegedly passed before action was taken. Ultimately, the manager was terminated.

The EEOC filed a complaint on behalf of the employee and others alleging that the manager subjected the employees to a sexually hostile work environment. The district court held that the EEOC "failed to adduce evidence such that a reasonable jury could find in its favor on . . . employer liability." The court held that "[the manager] was not a 'supervisor' for purposes of the EEOC's claim," because although he could "hire hourly employees," this authority did not extend to the victims here, who were "already hired" when he became the store manager and began harassing them.

The district court also ruled that to establish a basis for imposing employer liability based on the actions of a co-worker, the "EEOC must demonstrate that [defendant] 'knew or should have known of the offensive conduct but failed to take appropriate corrective action.'" The district court found that the EEOC failed to make this showing because, according to the court, defendant's response to employee's report of harassment was "reasonably calculated to end the harassment." Thus, the court dismissed the case with prejudice.

**Issues on Appeal:** Did the district court err in finding that the store manager was not a supervisor for purposes of Title VII vicarious liability, even though he had the sole authority to hire, discipline, and evaluate store employees, as well as the power to recommend and influence their terminations, pay raises, job transfers, and demotions?

**EEOC's Position on Appeal:** The district court erred in granting summary judgment because the store manager was a supervisor for purposes of vicarious liability under Title VII. In *Vance v. Ball State University*, 133 S. Ct. 2434, 2443 (2013), the Supreme Court held that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.'" Here, the manager possessed hiring authority over all hourly employees—a tangible employment action listed in *Vance*. The manager directed 12 employees at any given time, yet under the district court's rationale, he would only qualify under Title VII as the supervisor of some of those employees—the ones hired after he transferred to the store—even though all were performing the same work under his management. In addition, the EEOC argued that defendant delegated to the store manager the power to take tangible actions against the victims, which also qualifies him as a supervisor under *Vance*.

**Court's Decision:** The Sixth Circuit affirmed the judgment of the district court.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* | U.S. Court of Appeals for the Sixth Circuit<br>No. 16-2424 | 2/10/2017 (appeal filed) | Title VII | Charge Processing<br>Sex (Transgender Status)<br>**Result:** Pending |

**Background:** A transgender woman initially presented as a man who worked for a funeral home as an embalmer. During her employment, she notified her supervisor that she was transgender and would undergo gender-reassignment surgery to present as a woman. The funeral home also applied a very specific gender-based dress benefit through which it supplied male employees with suits and ties but rarely gave female employees any such privileges. When employee returned after surgery, defendant terminated her employment.

The EEOC filed a complaint alleging that the funeral home fired the employee because she transitioned from male to female and did not conform with the funeral home's gender-based dress policy or stereotypes and only provided a clothing benefit to men. Although the district court found that transgender status is not protected under Title VII, it found that the employee stated a claim for relief under the act based on unlawful sex-based stereotyping. Subsequently, the funeral home filed an amended answer alleging the Religious Freedom Restoration Act defense under Title VII, *i.e.*, permitting employee to continue employment would violate closely held religious beliefs. The district court granted summary judgment to the funeral home on the basis of this defense.

**Issues on Appeal:** (1) Whether Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a), encompasses discrimination based on transgender status and/or transitioning from male to female; (2) Whether the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb-1, provides a defense to the EEOC's enforcement action, allowing the defendant to rely on its sincerely held religious beliefs to justify its termination of employee because she is a transgender woman, thereby depriving employee of her Title VII right to be free from sex discrimination; and (3) Whether the EEOC may pursue its clothing benefit claim for a class of women where the EEOC discovered the alleged violation during a reasonable investigation of employee's charge alleging sex-based discriminatory termination.

**EEOC's Position on Appeal:** Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on transgender status and/or transitioning as outlined in the text of Title VII and decisions of the Supreme Court that have long recognized that Title VII forbids employment decisions based on gender. The court also erred in ruling that RFRA provides the funeral home a defense to the EEOC's enforcement action in this case. Title VII permits religious organizations to prefer employees who hold the same religious beliefs, and the judicially created "ministerial exception" prohibits application of federal anti-discrimination laws to the employment relationship between a religious institution and its ministers. Neither exception applies here. RFRA does not provide a defense that exempts the funeral home from complying with Title VII's prohibition on sex discrimination based on the sincere religious beliefs of its owner. That is because the funeral home failed to meet its initial burden of showing that the EEOC's enforcement action imposed a "substantial burden" on the company's "exercise of religion."

Finally, the district court erred in granting summary judgment on the EEOC's clothing benefit claim as to female employees. The court applied the incorrect legal standard in ruling that the EEOC cannot seek relief for women denied a clothing benefit because that claim was not included in the charge. The Supreme Court has held that the EEOC may seek relief as to any violation determined during the course of a reasonable investigation. Here, the EEOC's investigation revealed that for years male employees were provided with free suits, ties, and tailoring, while women were given nothing. After conciliation efforts failed, the agency was therefore entitled to seek relief in court for a class of women denied the clothing benefit accorded their male co-workers.

**Court's Decision:** Pending.

| | | | | |
|---|---|---|---|---|
| *EEOC v. UPS* | U.S. Court of Appeals for the Sixth Circuit<br>No. 16-2132 | 8/4/2016 (appeal filed)<br>6/9/2017 (decided) | ADA | Subpoena Enforcement<br>**Result:** Pro-EEOC |

**Background:** Employee filed an EEOC charge alleging the employer violated the ADA by publishing confidential medical information about him and other employees on its intranet page and using it to discriminate and retaliate against them. The EEOC filed an application to enforce the subpoena issued in connection with its investigation of the charge, seeking, among other items, databases that stored and allegedly disclosed employee medical information and information relating to the company's privacy case criteria. The district court granted the EEOC's application and the employer appealed.

**Issues on Appeal:** Did the district court abuse its discretion in ordering the employer to turn over databases that stored employees' medical information?

**EEOC's Position on Appeal:** The district court acted squarely within its discretion in enforcing the EEOC's subpoena.

**Court's Decision:** The district court did not abuse its discretion in ordering employer to turn over databases that stored employee medical information. The subpoena's requests, which were for the databases that stored and allegedly disclosed employee medical information, are directly relevant to the charge of discrimination.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. AutoZone, Inc.* | U.S. Court of Appeals for the Seventh Circuit<br>No. 15-3201 | 1/22/2016 (appeal filed)<br>6/20/2017 (decided) | Title VII | Race<br>**Result:** Pro-Employer |

**Background:** The EEOC filed a Title VII action in district court alleging that the company violated Title VII by involuntarily transferring an African-American employee out of a predominantly Hispanic store, on the basis of his race, to limit or eliminate the number of African-American employees at that location. The company filed an amended motion for summary judgment arguing, inter alia, that the EEOC could not establish a *prima facie* case because the transfer of the employee did not amount to a materially adverse action. In opposing the motion, the EEOC alleged the transfer violated 42 U.S.C. § 2000e-2(a)(2), the subsection of Title VII prohibiting the limitation, segregation, or classification of employees based on race. The district court granted summary judgment in favor of the employer.

**Issue on Appeal:** First, whether a race-based transfer, undertaken to segregate employees by race, violates Title VII's subsection that prohibits race-based segregation in employment, regardless of whether the transfer had an economic or other material effect on the employee. Second, whether a reasonable jury could find that the defendant transferred an African-American employee because of his race, to segregate him from Hispanic staff and customers.

**EEOC's Position on Second Appeal:** First, the defendant violated 42 U.S.C. § 2000e-2(a)(2) when it transferred the African-American employee because of his race for the purpose of racially segregating African-American employees from Hispanic employees. The transfer, which the African-American employee repeatedly objected to once he learned he was being moved, deprived him of the employment opportunity of working at that location. Applying the plain language of the statute, no further evidence is required to establish a violation under 42 U.S.C. § 2000e-2(a)(2). Second, a violation under 42 U.S.C. § 2000e-2(a)(2) is established by evidence of race-based segregation, and the evidence in this case would permit a reasonable fact-finder to conclude that the defendant transferred the African-American employee to segregate African-American employees and Hispanic employees by store. Therefore, Seventh Circuit should reverse the district court's grant of summary judgment to the defendant and remand the EEOC's Title VII claim for trial.

**Court's Decision:** The Seventh Circuit upheld the district court's grant of summary judgment in the employer's favor. The appellate court held the EEOC failed to show the former employee experienced an adverse employment action because of the transfer, as it did not deprive or tend to deprive him of wages, benefits, or other employment opportunities.

On November 21, 2017, the appellate court denied the EEOC's petition for a rehearing *en banc*.

| | | | | |
|---|---|---|---|---|
| *EEOC v. CVS Pharmacy, Inc.* | U.S. Court of Appeals for the Seventh Circuit<br>No. 17-1828 | 7/17/2017 (appeal filed) | Title VII | Attorney's Fees<br>Charge Processing<br>**Result:** Pending |

**Background:** The EEOC sued defendant alleging a pattern or practice of preventing enjoyment of the rights and benefits of Title VII by virtue of defendant's severance terms in that its severance agreements restricted the signatory from filing a charge or otherwise participating in EEOC proceedings. Defendant filed a motion to dismiss or, in the alternative, for summary judgment, which was granted on October 7, 2014. On December 5, 2014, the plaintiff filed a notice of appeal. On December 17, 2015, the Seventh Circuit upheld summary judgment in favor of the defendant, whose petition for rehearing *en banc* was denied on March 9, 2016. Defendant then filed a motion for attorney's fees before the district court, alleging the lawsuit was frivolous because the factual premise of the EEOC's case was unreasonable and because the lawsuit was filed in violation of Title VII and the EEOC's regulations. The EEOC argued that the lawsuit was not frivolous or alternatively, that defendant's proposed fees are unreasonable. The district court granted in part and denied in part defendant's motion, finding that the EEOC failed to comply with its enabling act and its regulations, which first requires the EEOC to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred or is occurring (conciliation), which warrants a fee award. The court then reduced the amount of hours billed by defendant in support of its motion from 574.3 hours to 300 hours. Plaintiff appealed that decision to the Seventh Circuit.

**Issues on Appeal:** Whether the district court abused its discretion by awarding attorneys' fees to defendant based entirely on the EEOC's failure to conciliate before filing suit; and whether the amount of the award ($300k plus) is excessive in light of the legal issue and that no discovery was conducted.

**EEOC's Position on Appeal:** First, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) only allows attorneys' fees awards to a prevailing Title VII defendant if the court concludes that the plaintiff's claim was "frivolous, unreasonable, or without foundation." Public policy does not support regular awards of attorneys' fees against Title VII plaintiffs and in favor of defendants. Merely failing to prevail is an insufficient basis to support an award. Second, the EEOC's legal theory was based on a logical and plausible reading of Title VII, even if the court ultimately disagreed with it. Third, the court abused its discretion in concluding that the EEOC's purported failure to comply with its regulations by not entering into conciliation first justified a fee award (other courts have allowed EEOC to proceed without conciliation under similar circumstances) – the difference in opinion demonstrates the EEOC's theory was at least plausible. Fourth, and in the alternative, the fee award was too high because the case involved only a single legal issue in both the district court and court of appeals, with no discovery and a minimal record, and the hours allocated for work on the dispositive motion, the work done on the appeal, and the preparation of the motion for fees are excessive on their face.

**Court's Decision:** Pending. Oral argument was held on December 5, 2017.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. Flambeau* | U.S. Court of Appeals for the Seventh Circuit<br>No: 16-1402 | 4/26/2016 (appeal filed)<br>1/25/2017 (decided) | ADA | Disability<br>**Result:** Pro-Employer |

**Background:** The EEOC filed a civil action against the defendant employer alleging a violation of the ADA—which generally prohibits employers from requiring their employees to submit to medical examinations—by conditioning participation in its employee health insurance plan on completing a "health risk assessment" and a "biometric screening test." The district court granted the defendant's motion for summary judgment on the ground that the health risk assessment and biometric testing fell under the ADA's "safe harbor" provision, 42 U.S.C. § 12201(c).

**Issues on Appeal:** Whether the district court erred in holding that the defendant's wellness program, which required employees to answer disability-related questions and undergo medical exams to enroll in the company's health insurance plan, fell under the ADA's "safe harbor" provision for insurance underwriting, 42 U.S.C. § 12201(c), even though the ADA explicitly prohibits employers from requiring employee medical exams or asking disability-related questions as part of an employee health program unless the exams and inquiries are "voluntary," 42 U.S.C. § 12112(d)(4)?

**EEOC's Position on Appeal:** The safe harbor provision permits insurance companies or organizations to administer the "terms" of a *bona fide* benefit plan that are based on "underwriting risks, classifying risks, or administering such risks" without running afoul of the statute's prohibitions, unless the provision is used as a subterfuge. The EEOC's long-standing position, which is consistent with the ADA's text and legislative history, is that the insurance safe harbor provision does not apply to § 12112(d)(4)(B), which permits disability-related inquiries and medical exams only as part of a voluntary employee health program. Even if § 12201(c) could provide safe harbor to some employer wellness programs that would otherwise violate § 12112(d)(4)(A), there is no safe harbor in this case for the defendant's mandatory health risk assessments and biometric tests because the defendant failed to establish on this record that it used the health risk assessments and biometric test data for "underwriting risks, classifying risks, or administering such risks." The district court also erred in holding that the mandatory health risk assessments and biometric tests were "terms" of the defendant's insurance plan because neither the collective bargaining agreement nor the summary plan description made eligibility for the insurance plan contingent upon completion of a health risk assessment and biometric test. Finally, even if the health risk assessments and biometric tests constituted "terms" of the plan used for "underwriting," the safe harbor provision is inapplicable because the record makes clear that the defendant invoked it as a subterfuge to avoid the prohibition at § 12112(d)(4) on involuntary medical exams and disability-related inquiries.

**Court's Decision:** On January 25, 2017, the Seventh Circuit affirmed the district court's judgment dismissing the case, but did not reach the merits of the parties' statutory debate. Per the court: "We conclude that the statutory debate should not be resolved in this appeal. The relief the EEOC seeks is either unavailable or moot. The employee resigned several years ago, before suit was filed. He did not incur damages as a result of defendant's policy, and he is not entitled to punitive damages. In addition, defendant abandoned its wellness program requirements for reasons unrelated to this litigation. Because the undisputed facts show that the EEOC is not entitled to relief, we affirm the district court's judgment dismissing the case . . ."

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. Union Pacific Railroad* | U.S. Court of Appeals for the Seventh Circuit<br>No. 15-3452 | 11/22/2016 (appellee brief filed)<br>8/15/2017 (decided) | Title VII | Subpoena Enforcement<br>**Result:** Pro-EEOC |

**Background:** The two claimants (the only two African-American employees in their orientation group) began working as Signal Helpers on January 3, 2011, which is an entry-level job. They both became eligible for possible promotion after 90 days, and both applied to take the required test for the promotion. Neither received a response or opportunity to do so, and both were terminated after the Signal Helper position in their zones was eliminated. Both filed charges. Defendant submitted a position statement in response to both. The EEOC sent requests for information and subsequent subpoenas. The parties eventually settled, wherein defendant agreed to provide identification information, including test results, for all individuals who took the test for the promotional position, and the EEOC dismissed its enforcement action. The EEOC averred the information was never provided. In July 2012, right-to-sue letters were issued to both claimants. They then filed suit, in which defendant prevailed at the district court level and on appeal. During the cases, the EEOC sent another RFI, which defendant refused to fulfill. The EEOC then served a second subpoena in May of 2014. Defendant sought to revoke or modify the subpoena, and the EEOC brought an enforcement action in September 2014. The district court denied defendant's motion to dismiss and rejected its arguments that the EEOC lost its investigatory authority either after issuing the right-to-sue letters or when the district court granted judgment in favor of defendant and against the claimants. The district court also rejected defendant's challenge to relevance.

**Issues on Appeal:** Whether the EEOC is authorized by statute to continue investigating an employer by seeking enforcement of its subpoena after issuing a notice of right-to-sue to the charging individuals and the dismissal of the individuals' subsequent civil lawsuit on the merits (reviewed de novo); and whether the information sought in the subpoena was relevant to the EEOC's investigation, which is reviewed under an abuse of discretion standard.

**EEOC's Position on Appeal:** The EEOC's investigatory authority begins when an individual files a Charge, and does not end. Moreover, the EEOC's enforcement actions may not be limited by the outcome of private party suits, which necessarily extends to the EEOC's ability to investigate. Moreover, the Commission's regulation (29 CFR 1601.28(a)(3)) allows it to continue investigating even after it issues a right-to-sue letter, which is a procedural regulation to which deference is due. The relevance of the information sought was waived by defendant as not having been addressed by the lower court.

**Court's Decision:** A Seventh Circuit panel upheld the lower court's ruling that the EEOC's request for the employer's documents was appropriate in light of the agency's public interest role in preventing employment discrimination under Title VII. "Both the United States Supreme Court and this court have repeatedly recognized the EEOC's broad role in promoting the public interest by preventing employment discrimination under Title VII, including its independent authority to investigate charges of discrimination, especially at a company-wide level. Accordingly, we agree with the district court that neither the issuance of a right-to-sue letter nor the entry of judgment in a lawsuit brought by the individuals who originally filed the charges against defendant bars the EEOC from continuing its own investigation."

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. Global Horizons, Inc.* | U.S. Court of Appeals for the Ninth Circuit<br>No. 16-35528 | 1/30/2017 (appeal filed) | Title VII | Harassment<br>National Origin<br>Retaliation<br>Attorneys' fees<br>**Result:** Pending |

**Background:** The First Amended Complaint alleges that the growers, as joint employers with defendant, engaged in discrimination, harassment, and constructive discharge against a group of Thai guest workers on the basis of their national origin and retaliated against them for complaining. The district court partially dismissed the FAC on July 27, 2012, holding that the growers could only be liable for "orchard-related" Title VII violations involving the workers. The district court also found that there were no facts alleged to support a plausible finding of joint employment regarding "non-orchard-related matters" which included recruitment, transportation, subsistence and housing, or "paycheck issues." The district court also dismissed the national origin discrimination claim against the growers for failure to state a claim. On May 28, 2014, the district court granted summary judgment to the growers on EEOC's remaining claims (national origin-based hostile work environment, constructive discharge, and retaliation as against on farm defendant). Default was entered against defendant on March 3, 2015 for failure to defend. The growers filed a motion for attorneys' fees on March 19, 2015, and on November 2, 2015, the district court awarded $986k against the EEOC in the growers' favor. The district court entered final judgment on April 26, 2016, after entering default judgment against defendant in favor of the EEOC in the amount of $7.7 million. The EEOC appealed.

**Issues on Appeal:** Whether the district court applied the wrong legal standard when it partially dismissed the First Amended Complaint as to the growers' liability for "non-orchard-related" conduct and national-origin-based disparate treatment and in denying the EEOC's related discovery motions; whether the district court erred in granting summary judgment to the growers on the EEOC's Title VII hostile work environment and constructive discharge claims; and whether the district court abused its discretion in awarding the growers attorneys' fees under *Christiansburg*.

**EEOC's Position on Appeal:** The EEOC adequately pled that the growers were liable as joint employers of the claimants as to "non-orchard-related" matters under this court's legal standard on joint employment in *EEOC v. Pacific Maritime Association* and *Iqbal/Twombly*. The EEOC adequately pled a plausible national-origin-based disparate treatment claim, as it set forth numerous, specific allegations regarding how the claimants were treated differently from non-Thai workers, often related to the orchards, including being given fewer breaks, harder jobs, could not leave when they wished, had to work in the rain, etc. The district court also abused its discretion in denying the EEOC's discovery motions pertaining to non-orchard-related issues because it precluded the EEOC from making any factual showing as to the growers' involvement in the non-orchard-related aspects of the case and fed directly into the court's ruling that the lawsuit was frivolous (in that the EEOC was unable to show the non-orchard-related conduct). The district court also erred in awarding summary judgment on the EEOC's hostile work environment claims because it applied the wrong standard and simply concluded – without support – that the conduct the claimants suffered was not sufficiently severe to create an abusive working environment and failed to view the evidence in the light most favorable to the EEOC. The district court thereafter erred in granting summary judgment on the constructive discharge claims based on its erroneous hostile work environment ruling. Finally, the district court erred in awarding attorneys' fees under *Christiansburg* because it (1) erred in reviewing the scope and sufficiency of EEOC's administrative investigation of the charges in the case, which are not subject to judicial review and may not form the basis of an award of fees; and (2) the court erred in ruling that the litigation itself was frivolous, unreasonable, or without foundation – including the EEOC's theory of joint liability, remedies sought, and the merits of the claims.

**Court's Decision:** Pending. Oral argument was heard on December 12, 2017.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. BNSF Railway Co.* | U.S. Court of Appeals for the Tenth Circuit<br>No: 15-3265 | 10/27/2015 (appeal filed)<br>4/11/2017 (decided) | ADA | Disability<br>**Result:** Pro-Employer |

**Background:** The employee-claimant has a withered right arm and hand. He applied for a position as a locomotive electrician at defendant, completed a panel interview, and was given a conditional offer of employment. He subsequently submitted to a medical examination, the results of which indicated that his right hand and wrist were significantly functionally impaired. As such, defendant contacted the employee to inform him that the evaluation revealed uncertain functional abilities of his right hand and indicated that he could be reconsidered for the position if he obtained a functional capacity evaluation, at his own expense. Employee obtained the functional capacity information requested and defendant determined that he was not medically qualified for the job. Employee filed a discrimination charge with the EEOC and state agency.

In September 2012, the EEOC filed suit against defendant alleging a violation of the ADA based on the company's withdrawal of a conditional offer for a locomotive electrician position after learning that the applicant had a withered arm and hand. The charging party intervened in the case a few months later. The district court subsequently granted summary judgment in favor of defendant, after finding that there was insufficient evidence that he had a disability within the meaning of the pre-amendments ADA.

**Issues on Appeal:** (1) Whether the district court erred in concluding that there was insufficient evidence to conclude that the employee had a disability within the meaning of the pre-amendments ADA; and (2) Whether a jury could have determined that defendant violated the pre-amendments ADA by refusing to hire the employee as a locomotive electrician because of his impairment because it concluded that he could not comply with certain requirements of the position without offering a reasonable accommodation?

**EEOC's Position on Appeal:** The EEOC argues that defendant violated the pre-amendments ADA by refusing to hire the employee as a locomotive electrician because of his impairment. According to the EEOC, there is sufficient evidence to establish that defendant regarded the employee as substantially limited in working, a major life activity, based on his inability to comply with the three-point rule and other equipment safety procedures, such that a jury could find that employee is disabled within the meaning of the pre-amendments ADA. Additionally, the EEOC contends that a jury could find that the employee was at least as qualified as any other newly-hired locomotive electrician. In support of its position, the EEOC contends that defendant did not provide any evidence to establish that it uniformly enforced the three-point contact rule or that it requires other candidates to show they can comply with the rule prior to employment. Furthermore, the EEOC alleges that defendant did not demonstrate that the rule was job-related and consistent with business necessity, or that any difficulty posed by employee's employment could not be cured by a reasonable accommodation. Finally, the EEOC asserts that there is substantial evidence that the employee can safely use any and all tools used by locomotive engineers, and that there should be no concern with respect to his ability to complete any other job tasks.

**Court's Decision:** A three-judge panel upheld the district court's ruling.

| | | | | |
|---|---|---|---|---|
| *EEOC v. CollegeAmerica* | U.S. Court of Appeals for the Tenth Circuit<br>No. 16-1340 | 9/5/2017 (decided) | ADEA | Age Discrimination<br>Interference<br>**Result:** Pro-EEOC |

**Background:** Defendant entered into an agreement with the former employee that required her to refrain from contacting any governmental or regulatory agency with the purpose of filing any complaint or grievance that shall bring harm to defendant. In early 2013, employee filed a charge of discrimination against defendant with the EEOC. Shortly thereafter, in March 2013, defendant sued the employee in state court for breaching their agreement. In support of its position, defendant argued that one of the ways in which the employee violated their agreement was by filing charges with the EEOC. The EEOC sued defendant in April 2012, seeking, among other things, to prevent defendant from interfering with employee's rights to file charges and to participate in EEOC investigations. The district court dismissed the claim as moot.

**Issues on Appeal:** (1)Whether the district court erred in dismissing the EEOC's complaint as moot; and (2)Whether the EEOC properly stated a claim for relief under the anti-interference provision of the ADEA.

**EEOC's Position on Appeal:** The EEOC asserts that the district court erred in dismissing its complaint as moot. According to the EEOC, defendant did not satisfy its heavy burden under the voluntary-cessation doctrine because there was no reasonable expectation that any violation would recur. In support of its position, the EEOC emphasizes that defendant sued the employee for breach of contract, based in part on her filing of an EEOC charge, and, in doing so, used the agreement to interfere with her protected rights. The EEOC further noted that the state court suit was still pending at the time its appellate brief was filed.

Additionally, the EEOC contends that its complaint against defendant states a claim for relief under the anti-interference provision of the ADEA. The EEOC acknowledges that there is case law that prevents a private plaintiff from seeking affirmative relief based on an employer's failure to satisfy all of the requirements for a knowing and voluntary waiver of ADEA claims. However, the EEOC contends that there is no case law preventing it from pursuing a similar claim, and asserts that the anti-interference provision specifically protests the EEOC's right to enforce the ADEA.

**Court's Decision:** The appellate court reversed and remanded the lower court's decision, holding the EEOC could pursue its claim that the employer improperly interfered with a former director's right to file age discrimination charges with the agency.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. JetStream Ground Services, Inc.* | U.S. Court of Appeals for the Tenth Circuit<br>No. 17-1003 | 5/8/2017 (appeal filed)<br>12/28/2017 (decided) | Title VII | Religion<br>**Result:** Pro-Employer |

**Background:** The EEOC sued defendant under Title VII, alleging that it refused to hire five Muslim women because they would not remove their headscarves ("hijabs") at work, hired two other women only after they agreed to work without wearing their hijabs, and then laid off one of those two women several months later because she wore her hijab during breaks. For several years, defendant asserted that it did not hire these women based on their applications or interviews. When this was found to be untrue, defendant presented a new reason when it contended that it relied exclusively on recommendations from a supervisor who worked at a vendor. Defendant admitted that it destroyed key evidence that could have countered this new explanation and that it had provided false information to the government for several years. The district court denied the EEOC's motion for spoliation sanctions. Ultimately, the jury ruled in defendant's favor. The district court also denied the EEOC's motion for a new trial.

**Issues on Appeal:** (1) Did the district court abuse its discretion by not imposing any spoliation sanction where defendant violated the EEOC's recordkeeping regulation, destroyed or lost every document that could have contradicted its asserted reason for not hiring the claimants, and prejudiced the EEOC? (2) Did the district court abuse its discretion by not excluding evidence regarding documents that defendant destroyed or lost in violation of its duty to preserve them, where the absence of those documents prejudiced the EEOC? (3) Having decided to admit evidence regarding the destroyed documents, did the district court abuse its discretion by refusing to instruct the jury that it should infer that the missing documents would have supported the EEOC's case?

**EEOC's Position on Appeal:** By destroying documents that could have disputed its claims, defendant violated 29 C.F.R. § 1602.14. Its actions prejudiced the EEOC—precisely the situation that 29 C.F.R. § 1602.14 is intended to prevent. Violation of the EEOC recordkeeping regulation, coupled with prejudice to the EEOC, required the district court to sanction defendant for spoliation.

At a minimum, the district court should have excluded all testimony related to the missing documents especially since bad faith is not required to exclude evidence as a sanction for spoliation. Alternatively, the district court should have granted an adverse inference instruction. Bad faith is not required for an adverse inference instruction when an employer destroys documents in violation of 29 C.F.R. § 1602.14 and the destruction prejudices the opposing party.

**Court's Decision:** On December 28, 2017, the Tenth Circuit rejected the EEOC's position that the trial court erred in its jury instruction. The appellate court held that the EEOC's "argument that the exclusion sanction should have been applied was waived in their opening statement at trial. And the district court did not abuse its discretion in refusing to give an adverse-inference instruction after Plaintiffs conceded that destruction of the records was not in bad faith."

| | | | | |
|---|---|---|---|---|
| *EEOC v. Tricore Reference Labs* | U.S. Court of Appeals for the Tenth Circuit<br>No. 16-2053 | 6/20/2016 (appeal filed)<br>2/27/2017 (decided) | ADA<br>Title VII | Disability<br>Subpoena Enforcement<br>**Result:** Pro-Employer |

**Background:** The employee filed a charge with the EEOC asserting the employer discriminated against her based on her disability and sex (pregnancy). Specifically, the employee claimed that her disability, rheumatoid arthritis, was exacerbated by her pregnancy. After the employer objected to the EEOC information request, the EEOC moved to enforce a subpoena seeking a list of other employees who sought an accommodation as well as a list of other pregnant employees. The district court denied the EEOC's motion to enforce the subpoena, reasoning that the information sought was beyond the scope of the employee's charge.

**Issues on Appeal:** May, as part of its investigation into a charge of disability and pregnancy discrimination, the EEOC obtain information from other disabled and pregnant employees?

**EEOC's Position on Appeal:** First, the EEOC argued that it has the authority to investigate any claims of discrimination revealed during the course of a reasonable investigation. Second, the EEOC asserted that the information requested was relevant to the employee's claims because, to determine that the employer discriminated against the employee, it must determine how she was treated compared to both similarly situated pregnant employees without a disability and similarly disabled non-pregnant employees.

**Court's Decision:** The Tenth Circuit upheld the lower court's refusal to enforce the EEOC's subpoena.

| CASE NAME | COURT AND CASE NUMBER | DATE OF APPELLATE FILING AND/OR COURT DECISION | STATUTES | BASIS/ISSUE/RESULT |
|---|---|---|---|---|
| *EEOC v. St. Joseph's Hospital, Inc.* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 15-14551 | 12/7/2016 (decided) | ADA | Disability<br>Reasonable Accommodation<br>**Result:** Mixed |
| **Background:** The EEOC brought action on behalf of a psychiatric ward nurse who suffered from gait dysfunction from spinal stenosis and a hip replacement and needed to use a cane to walk. The nurse sought accommodation in the form of job reassignment because the current job prohibited use of canes for safety reasons. Following a request for reassignment, the nurse was required to compete for other hospital positions and was terminated when she did not obtain another position. The district court granted in part the EEOC's and the hospital's cross motions for summary judgment, clarified its decision, and, following a jury verdict in hospital's favor, denied the EEOC's renewed motion for judgment as a matter of law, but granted in part EEOC's motion for alteration of the judgment. EEOC and hospital appealed.<br><br>**Issues on Appeal:** (1) Whether the district court properly found on summary judgment that the nurse is disabled and a qualified individual within the meaning of the ADA? (2) Did the district court err by failing to instruct the jury that the ADA requires reassignment without competition? (3) Was defendant's 30-day period to identify a new position a reasonable amount of time? (4) Did the district court abuse its discretion by granting EEOC's motion to alter judgment?<br><br>**EEOC's Position on Appeal:** The district court properly found that the plaintiff is disabled and a qualified individual within the meaning of the ADA. With respect to the nurse's request for reassignment, the ADA mandates noncompetitive reassignment. Had the jury been so instructed in this manner, the jury would not have found that the defendant acted in good faith. Further, the jury, not the judge, should have determined that a 30-day period to identify a new position is "reasonable." The jury's verdict that defendant acted in good faith should be vacated.<br><br>**Court's Decision:** The Eleventh Circuit held that the nurse had a disability, as required to establish a *prima facie* case of disability discrimination; requiring reassignment of nurse without competition was not reasonable; the 30-day period for the nurse to apply for vacant positions was reasonable; whether the hospital failed to reasonably accommodate the nurse was a question for the jury; whether the hospital made good-faith efforts to reasonably accommodate the nurse was a question for the jury; and the district court abused its discretion by granting the EEOC's motion to alter judgment. | | | | |
| *EEOC v. West Customer Management Group* | U.S. Court of Appeals for the Eleventh Circuit<br>No. 16- 15003 | 9/19/2016 (appeal filed)<br>1/27/2017 (decided) | Title VII | Attorneys' Fees<br>National Origin<br>**Result:** Pro-EEOC |
| **Background:** The EEOC brought an action seeking to enforce Title VII on behalf of a terminated employee alleging national origin discrimination. A jury ultimately found in favor of the defendant. The defendant subsequently moved for attorneys' fees, which the magistrate judge granted and the district court affirmed.<br><br>**Issues on Appeal:** Did the district court err in affirming attorneys' fees for the defendant after receiving a jury verdict on the EEOC's Title VII claim?<br><br>**EEOC's Position on Appeal:** First, the EEOC argued plaintiff's claims were not "frivolous, unreasonable, and without foundation" because the EEOC's claims survived summary judgment as well as multiple motions for judgment as a matter of law. Second, the EEOC argued that the magistrate judge erred in considering the agency's "overly contentious" litigation strategy, which is not an element in awarding attorneys' fees.<br><br>**Court's Decision:** The Eleventh Circuit reversed, finding that the district court abused its discretion in awarding the employer attorney's fees and costs. The EEOC's case was not "so patently devoid of merit" as to justify an attorney's fee award—the case "merited careful review." | | | | |

## APPENDIX C – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2017[755]

| FILING DATE | STATE | COURT NAME / CASE NUMBER / JUDGE | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | RESULT |
|---|---|---|---|---|---|
| 10/12/16 | MO | USDC Western District of Missouri<br>5:16-mc-09003<br>Hon. Greg Kays | Mayfair Cleaners | Individual Charging Party | Voluntary Dismissal Based Upon Compliance |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of race, color, and national origin discrimination claims. On September 15, 2016, the EEOC personally served a subpoena seeking company policies and procedures, the charging party's personnel file, and the charging party's job description. Respondent did not produce the records, prompting the EEOC to file its application to show cause. On December 9, 2016, the EEOC filed a motion to dismiss based upon Respondent's compliance with the administrative subpoena, which the court subsequently granted. | | | | | |
| 10/17/16 | IL | USDC Northern District of Illinois<br>1:16cv9770<br>Hon. Matthew F. Kennelly | Personnel Staffing Group LLC dba Most Valuable Personnel | Individual Charging Parties<br>Systemic Investigation | Court Granted the EEOC's Application Subject to Modification |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of two charges of race discrimination and one charge of sex discrimination. The EEOC contended it found evidence of a pattern and practice of discrimination involving the honoring of client's discriminatory requests. On March 10, 2016, the EEOC issued a subpoena seeking recruiting, application, placement, and policy records from approximately six different offices of Respondent. On March 18, 2016, Respondent filed a petition to revoke or modify the subpoena, which the EEOC denied in relevant part on June 29, 2016. Respondent produced requested records in relation to the Charging Party's office, but not other locations. On October 17, 2016, the EEOC filed its application to show cause, and Respondent filed a response. On December 4, 2016, the district court granted the EEOC's request for an order compelling Respondent to produce the subpoenaed records subject to some modification of the subpoena to alleviate burden on Respondent. The court found that by alleging a practice of discriminating against African-American and female employees, the EEOC had met its burden to seek records from other offices. | | | | | |
| 2/1/17 | OH | USDC Southern District of Ohio<br>1:17mc9<br>Hon. Susan J. Varian<br>Mag. Stepanie K. Bowman | TriHealth Inc. (Third Party Respondent) | Individual Charging Party | Court Dismissed Action Based on EEOC's Motion |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced arising from an investigation of a disability discrimination claim. The EEOC contended that Charging Party's employer ("Company") has a policy of making inappropriate medical inquires when deciding whether to return employees to work or grant leave of absence. On August 11, 2016, the EEOC issued a subpoena to TriHealth Inc. ("Third-Party Respondent" ) seeking the identities of all individuals who have disclosed medical information to Third-Party Respondent pursuant to this practice as well as any documentation relation to this practice. On August 18, 2016, Third-Party Respondent filed a petition to revoke or modify the subpoena based upon various objections including burden and confidentiality, which the EEOC denied, as well as the fact that the records are not Third-Party Respondent's to produce, but that they belong to the Company. The EEOC filed its application for an order to show why the subpoena should not be enforced, to which Third-Party Respondent responded. On March 29, 2017, the Magistrate Judge held the case in abeyance to permit the EEOC to subpoena or obtain the Company's consent to release the records. Further filings were filed under seal but, on September 28, 2017, the district court dismissed this action on the EEOC's motion. | | | | | |

755 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2017. According to the FY 2017 PAR, the EEOC filed 17, and resolved 15, 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 the issuance of a court opinion.

| FILING DATE | STATE | COURT NAME / CASE NUMBER / JUDGE | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | RESULT |
|---|---|---|---|---|---|
| 5/15/17 | CA | USDC Eastern District of California<br>1:17mc32<br>Mag. Erica P. Grosjean | Salvador Alcantor III (Third Party Respondent) | Individual Charging Party | Voluntary Dismissed Based Upon Compliance |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena against Charging Party's sales manager ("Third-Party Respondent") should not be enforced arising from an investigation of a race and age discrimination claim against the Charging Party's employer ("Respondent"). On December 9, 2016, the EEOC issued a subpoena to Third-Party Respondent seeking documents and testimony, having failed to convince him to be interviewed voluntarily. Third-Party Respondent did not file a petition to revoke. After the EEOC filed its application for an order to show cause, Third-Party Respondent voluntarily complied with the subpoena. On July 17, 2017, the EEOC filed a motion to dismiss the application, which the district court subsequently granted. | | | | | |
| 5/25/17 | MI | USDC Eastern District of Michigan<br>2:17mc50746<br>Hon. Laurie J. Michaelson<br>Mag. R. Steven Whalen | State Farm Mutual Automobile Insurance Company | Individual Charging Party | Court Granted the EEOC's Petition to Enforce the Subpoena |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced, arising out of an investigation of a charge of racial discrimination, harassment, and retaliation filed against Respondent. The EEOC issued a subpoena requesting information pertaining to other employees who had been disciplined for the same reason as the Charging Party as well as all documentation relating to race discrimination investigations. The EEOC contended that Respondent failed to provide a sufficient response. The EEOC filed its application to show cause. Respondent filed a response in which it primarily objected to the EEOC's subpoena on the basis of confidentiality and EEOC's refusal to enter into a Protective Order. On August 1, 2017, the district court granted the EEOC's petition to enforce the subpoena, concluding that the federal regulations protecting the confidentiality of information submitted to the EEOC were sufficient to safeguard the privacy interests of third parties. | | | | | |
| 6/12/17 | NV | USDC Nevada<br>2:17cv1631<br>Hon. Andrew P. Gordon<br>Mag. Peggy A. Leen | Golden Gaming Inc. | Individual Charging Party<br>Systemic Investigation | Court Granted the EEOC's Petition to Enforce the Subpoena, as Narrowed |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced, arising out of an investigation of a charge of disability discrimination and retaliation filed against Respondent. The charge alleges that Respondent, a Nevada gaming company that operates casinos and slot route operations throughout Nevada, Montana, and Maryland, maintains a company-wide policy that prohibits new employees from taking any type of paid leave during the first 120 days of employment and summarily denied leave to the Charging Party. The EEOC subpoenaed records reflecting all employees terminated within 120 days of employment as well as all employees who have sought medical leave within the same time period. Respondent filed a Petition to Revoke and/or Modify Subpoena on November 23, 2016 with the EEOC, which the Commission denied on January 26, 2017. Respondent later produced some records, which the EEOC contended were insufficient. After the EEOC filed its application for an order to show cause, the EEOC narrowed the scope of its subpoena based upon additional information pertaining to the specific policies in Nevada, Maryland, and Montana provided by Respondent. Respondent produced data for its Nevada employees but withheld records for the Maryland and Montana employees. On October 24, 2017, the district court granted the EEOC's petition to enforce the subpoena, as narrowed in its briefing. | | | | | |

| FILING DATE | STATE | COURT NAME / CASE NUMBER / JUDGE | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | RESULT |
|---|---|---|---|---|---|
| 8/8/17 | WI | USDC Eastern District of Wisconsin<br>2:17mc40<br>Hon. Pamela Pepper | Wells Fargo Bank NA | Individual Charging Party | Voluntarily Dismissed Based Upon Compliance |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced, arising out of an investigation of a charge of disability discrimination filed against Respondent. On February 22, 2016, the EEOC issued a subpoena seeking records of employees who were not eligible for salary continuation because they were on leave of absence without statutory job reinstatement rights. On February 29, 2016, Respondent filed a Petition to Revoke or Modify based upon undue burden and relevance, which was denied by the Commission. After not producing the requested records, the EEOC filed its application. Respondent subsequently agreed to comply with the subpoena and, on October 19, 2017, the district court granted the parties' joint motion to dismiss. | | | | | |
| 9/6/17 | MD | USDC Maryland<br>1:17cv2583 | Wells Fargo Bank NA | Individual Charging Party | Voluntarily Dismissed Based Upon Compliance |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced, arising out of an investigation of a charge of sexual harassment filed against Respondent. On July 19, 2017, the EEOC issued a subpoena seeking Charging Party's personnel file, the alleged harasser's personnel file, details relating to the alleged harasser's employment, Respondent's relevant policies, documentation regarding complaints of harassment against various individuals, communications regarding the Charging Party, as well as any settlement agreements between the Respondent and Charging Party. Respondent made a partial production, but the EEOC contended it was insufficient. On September 6, 2017, the EEOC filed its application to show cause. On November 14, 2017, Respondent complied with the subpoena. On November 22, 2017, the EEOC filed a Notice of Voluntary Dismissal, causing the action to be terminated by the district court. | | | | | |
| 9/12/17 | TX | USDC Northern District Texas<br>3:17mc69<br>Hon. Ed Kinkeade<br>Mag. David L. Horan | Oncor Electric Delivery Company | Individual Charging Party<br>Systemic Investigation | Court Granted the EEOC's Application to Show Cause |
| **Commentary:**<br>The EEOC filed an application to show cause why the administrative subpoena should not be enforced, arising out of an investigation of a charge of disability discrimination filed against Respondent. The EEOC contended that Respondent maintained a prescription medication disclosure policy that violated the ADA. On March 15, 2017, the EEOC issued a subpoena seeking information pertaining to each employee who had been discharged or discipline pursuant to this policy as well as their medical files. On March 29, 2017, Respondent filed a Petition to Revoke or Modify based upon relevance and privacy concerns, which the Commission denied on June 20, 2017 (though it did narrow its request for the complete medical file). Respondent also challenged the subpoena as overbroad, since the EEOC sought information pertaining to employees beyond just the Charging Party. On November 16, 2017, the district court granted the EEOC application and ordered Respondent to produce the subpoenaed records. The court rejected Respondent's argument that the EEOC may not seek information pertaining to other employees, recognizing that the EEOC "is not limited to investigating only the specific allegations stated in the charge." | | | | | |

## APPENDIX D - FY 2017 SELECT EEOC-RELATED SUMMARY JUDGMENT DECISIONS BY CLAIM TYPE(S)

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Age Discrimination in Employment Act | Texas Roadhouse, Inc. | U.S. District Court for the District of Massachusetts<br>Civil Action No. 11-11732-DJC | 2016 U.S. Dist. LEXIS 145545<br>(D. Mass. Oct. 19, 2016) | Employer's Motion for Summary Judgment<br>**Result:** Pro-EEOC<br>The court denied the employer's motion for summary judgment, finding questions of fact still remained | Is the EEOC's evidence to support its claim that the employer engaged in a pattern or practice of discriminating against older workers insufficient such that the employer's motion for summary judgment be granted? |

**Commentary:**

The EEOC alleged a restaurant engaged in a pattern or practice of age discrimination under the Age Discrimination in Employment Act. The EEOC claims that between 2007 and 2014, the employer's standard operating procedure was to discriminate against individuals over age 40 for front-of-house positions nationwide.

The company argued the EEOC's statistical evidence provided no support for a pattern or practice of age discrimination. The court declined to strike the bulk of the EEOC's expert economist's testimony regarding statistical data that the EEOC contends supported its claim. Accordingly, the court relied upon this evidence (and a separate expert's proffered opinion, which the court also declined to strike) to determine whether the company had shown that, based upon a record of undisputed material facts, it is entitled to summary judgment. In this instance, the court found that the EEOC had established a statistical analysis that—when coupled with the anecdotal evidence—raises an issue of fact as to whether the company had a system-wide policy of discriminatory hiring and whether that policy was executed nationwide. Therefore, the court denied the company's motion.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act<br>Failure to Accommodate | Accentcare Inc. | U.S. District Court for the Northern District of Texas, Dallas Division<br>Civil Action No. 3:15-CV-3157-D | 2017 U.S. Dist. LEXIS 95922<br>(N.D. Tex. June 21, 2017) | Employer's Motion for Summary Judgment<br>**Result:** Mixed<br>The court granted the employer's motion as to the discrimination claim, but denied the motion as to reasonable accommodation claim. | Did the employer violate the ADA by failing to reasonably accommodate the employee's disability (Bipolar Disorder) and discriminating against her by terminating her employment because of her disability? |

**Commentary:**

The claimant was hired to work as an IT Help Desk Analyst at a homecare services company. The claimant suffers from Bipolar Disorder. During the 90-day probationary period, the claimant had several absences and short days due to her illness. During exchanges with her supervisor and an HR resource manager, the claimant explained that she needed time off, but was aware she did not qualify for FMLA leave. She did not know when she could return to work, but at the same time insisted she would not need indefinite leave. She explained she had a doctor's appointment later that week, and would discuss her return to work at that time. After a second phone call, the company notified the claimant it could not keep her position open indefinitely, and therefore was terminating her employment.

The court reiterated that to prevail on an ADA failure-to-accommodate claim, a plaintiff must show that she is a qualified individual with a disability; the disability and its consequential limitations were known by the covered employer; and the employer failed to make reasonable accommodations for such known limitations. A "qualified individual" is one who can perform the essential functions of the employment position, either with or without a reasonable accommodation.

The court concluded that there is a genuine issue of material fact as to each element of the EEOC's reasonable accommodation claim, and therefore denied the employer's motion on this point. The court determined that the EEOC presented sufficient evidence for a reasonable jury to find that, because of her Bipolar Disorder, the claimant could not have performed the essential functions of the job of IT Help Desk Analyst without a reasonable accommodation. The EEOC's evidence on this point includes the diagnosis itself, the symptoms identified in the claimant's doctor's notes, and the claimant's statements to the employer that she needed medication.

With respect to the employer's contentions that the claimant was not qualified because she needed an indefinite leave of absence, and that there is no evidence that the claimant was ever cleared to return to work, the court found the EEOC presented evidence that would enable a reasonable jury to find that, in the claimant's communications with the employer, she was actually requesting a few days of leave rather than indefinite leave, and that the company terminated her employment before acting on her leave request.

Thus, a reasonable jury could find that the claimant informed the employer of her disability and of its consequential limitations, and that the employer fired her rather than reasonably accommodate known limitations.

As for the disability discrimination claim, the court noted that to survive summary judgment, the EEOC must "offer sufficient evidence to create a genuine issue of material fact . . . that the employer's reason is not true, but is instead a pretext for discrimination."

Because the EEOC failed to meet its burden to create a genuine issue of material fact on the issue of pretext, the court assumed, *arguendo*, that the EEOC has established a prima facie case. It then turned to whether the employer met its burden of production. The court held the employer did meet this burden, because its evidence shows that it had a legitimate, nonpretextual reason (absences, early leave, belief that the employee was requesting indefinite leave) for terminating the claimant's employment.

Interestingly, the court noted the following: "The result of today's ruling may seem facially inconsistent: the court is in effect holding that the EEOC may be able to recover at trial based on [the company's] failure to reasonably accommodate [the claimant's] disability, but it is also holding that the EEOC cannot withstand summary judgment on its claim that [the company] discriminated against [her] based on her disability by terminating her employment. These rulings are not irreconcilable, however, because of differences in the proof burdens that apply to each."

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act<br><br>Failure to Accommodate | GGNSC Administrative Services LLC, GGNSC Holdings LLC, and Silver Spring Operating LLC d/b/a/ Golden Living Center | U.S. District Court for the Eastern District of Wisconsin<br><br>No. 14-CV-1579 | 2017 U.S. Dist. LEXIS 45488<br><br>(E.D. Wis. Mar. 28, 2017) | Employer's Motion for Summary Judgment<br><br>**Result:** Pro-Employer<br><br>The court granted the employer's motion for summary judgment on the grounds the claimant was not a qualified individual with a disability under the ADA. | Was the complainant a qualified individual with a disability? |

**Commentary:**

The claimant worked as a staffing coordinator and as a central supply clerk at a nursing home. The position involved, among other tasks, communicating shift needs to employees, posting schedules, reaching, bending, lifting (minimum of 10 pounds), writing, operating a computer, and answering phone calls.

The claimant suffered a series of non-work-related injuries, first to her foot, then to her back, and finally to her right shoulder. In each instance she was given FMLA leave until she had exhausted this leave. She was informed she might qualify for additional medical leave as an accommodation pursuant to the Americans with Disabilities Act, so long as she provided the proper documentation.

She subsequently obtained a series of doctors' notes, one of which considered the impairment "temporary," and refused to opine on future disability. Another certification said the probable duration of her condition was unknown. She was therefore terminated, and sued under the ADA.

The employer argued that the claimant was not a "qualified individual" with a disability because she required an indefinite leave of absence. The EEOC countered that she could have performed her duties without an accommodation. The court, however, contended the record does not support that claim, as she requested leave to deal with the injuries. The court then looked at whether she could perform her duties with reasonable accommodations. If not, then she is not a qualified individual within the meaning of the ADA.

The EEOC contended it was incumbent upon the employer to engage in the interactive process to find a reasonable accommodation for the claimant. The court disagreed, finding that even if an employer failed to engage in the interactive process, "that failure need not be considered if the employee fails to present evidence sufficient to reach the jury on the question of whether she was able to perform the essential functions of her job with an accommodation." In this case, the claimant did not offer any proof (medical or otherwise) as to how she could have performed her duties with just her non-dominant arm. All she offered in support of her position was that she was able to perform her duties with accommodations, which are conclusory statements. Plus, the only accommodation she requested was indefinite leave.

Finally, in her deposition testimony the claimant conceded that she needed to use both of her arms to perform her lifting and stocking responsibilities, among others. Thus, the court found her declaration insufficient to permit a jury to conclude that she would have been able to perform the essential functions of her job with a reasonable accommodation. The court therefore granted the employer's motion for summary judgment.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act<br>Failure to Accommodate<br>Disability Discrimination | McLeod Health | U.S. District Court for the District of South Carolina<br>Civil Action No.: 4:14-3615-BHH | 2017 U.S. Dist. LEXIS 154156<br>(D.S.C. Sept. 21, 2017) | Parties' Cross Motions for Summary Judgment<br>**Result:** Pro-Employer<br>The court denied the EEOC's motion for summary judgment, and granted the employer's motion. | Does the ADA require automatic reassignment when the employee did not apply for it? |

**Commentary:**

The claimant in this case was born with congenital defects that affected her ability to stand or walk for long periods of time, as well as her balance. Her job as an editor required her to interview individuals off-site, take pictures, and write articles.

The employee's health deteriorated, and she was given a fitness-for-duty exam. The nurse conducting the exam recommended a functional capacity exam, and the employee was placed on leave. The individual who conducted the functional capacity exam determined that the employee should be limited to a 10-mile work radius, use a motorized scooter, among other recommendations. He would not clear her for work until/unless the conditions could be met.

The employer determined the employee could no longer perform the essential functions of her job. The employer offered her medical leave and access to a recruiter to find intra-company positions to which she could apply. She did not, however, find any positions with the same salary, and refused to apply for other open positions. Her employment was terminated after she exhausted her leave.

The EEOC alleged the employer violated the ADA by subjecting her to an unlawful medical exam, and by placing her on leave and ultimately firing her based on her disability. The court had previously granted summary judgment on the medical exam claim. The court agreed with the magistrate's determination that the ability to walk safely round the employer's campus was an essential function of her position. The court also agreed that due to the employee's deteriorating condition that impaired her mobility, the request for a medical exam was job-related and consistent with business necessity. The wrongful discharge claim was sent back to the magistrate for further analysis. The magistrate ultimately recommended that the employer's motion be granted.

The court noted that at the conclusion of discovery, the EEOC attempted to assert a failure-to-accommodate claim, arguing that the employer's failure to accommodate the employee through an automatic reassignment to a vacant position should be viewed as evidence supporting a constructive discharge claim. This claim was rejected, as the EEOC did not seek to amend its complaint. The magistrate had already determined that the employee's failure to apply for new positions amounted to a failure to engage in the interactive process.

The court likewise agreed with the magistrate's findings that an employer does not have an affirmative duty to automatically reassign an employee to a vacant position without requiring her to apply or compete for the position.

| | | | | | |
|---|---|---|---|---|---|
| Americans with Disabilities Act<br>Failure to Accommodate | Methodist Hospitals of Dallas | U.S. District Court for the Northern District of Texas<br>Case No. 3:15-CV-3104-G | 2016 U.S. Dist. LEXIS 153160<br>(N.D. Tex. Nov. 4, 2016) | Employer's Motion for Summary Judgment<br>**Result:**Pro-Employer<br>The court granted the employer's motion for summary judgment. | Did the hospital employer violate the ADA by failing to accommodate an employee with a back injury? |

**Commentary**:

A former patient care technician suffered a back injury, and was unable to work in her current position. The hospital initially placed her on light duty per her doctor's orders, but she was unable to work more than a day in the new position. Her doctor then placed her on "off work" status, meaning she would be unable to perform even light-duty tasks.

The employer therefore placed her on FMLA leave. While on leave, she applied for eight different jobs, including the position of scheduling coordinator, which she alleged she could do without a reasonable accommodation. When she applied, however, she did not provide the hospital with documentation that she would be able to return to work. She was therefore not given the job, and ultimately terminated when she did not respond to inquiries about whether she would need additional FMLA leave.

She sued, alleging her termination was discriminatory under the ADA. The court, however, found that the EEOC was unable to show the employee was a qualified individual with a disability. Notably, the agency was unable to show the employee was capable of returning to work on the day she applied for the new job. "If an employee is placed off work due to a medical condition, the employee may need to provide a release informing the employer when they can return to work. . . . Courts have regularly held that an employee who fails to provide a release is not a qualified individual under the ADA."

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act | Vicksburg Healthcare | U.S. Court of Appeals for the Fifth Circuit<br>Case No. 15-60764 | 2016 U.S. App. LEXIS 18387<br>(5th Cir. Oct. 12, 2016) | Should the Appellate Court Overturn the Lower Court's Grant of Summary Judgment in the Employer's Favor?<br>**Result:** Pro-EEOC<br>The Fifth Circuit reversed and remanded the district court's grant of summary judgment in the employer's favor, finding the filing of a claim for disability benefits does not preclude a failure-to-accommodate claim under the ADA. | Does a disability claim for temporary total disability preclude an employee's claim that she was a qualified individual with a disability under the ADA? |

**Commentary:**

A nurse tore her rotator cuff and took 12 weeks of FMLA medical leave for surgery. Her doctor wrote a note to her employer stating she could return to work provided she was limited to "light duty" requiring "limited use" of her arm. Her doctor recommended she not lift, pull, or push anything weighing more than 10 pounds. Because her employer deemed such actions were essential functions of her job, she was terminated.

The nurse applied for temporary disability benefits the next day, indicating on her claims forms that she was temporarily totally disabled. The EEOC filed suit on her behalf, alleging the employer did not offer a reasonable accommodation.

The lower court had granted the employer's motion for summary judgment, stating her claims were barred under *Cleveland v. Policy Management Systems Corp.*, 526 U.S. 795 (1999), as the agency did not provide a "sufficient explanation for the contradicting statements" between the nurse's claim of temporary total disability and the EEOC's claims that she was "qualified" to perform her job with a reasonable accommodation.

The appellate court reversed and remanded the district court's grant of summary judgment. In essence, the court found that filing a claim for disability benefits did not preclude a claim under the ADA that her disability could have been accommodated.

| | | | | | |
|---|---|---|---|---|---|
| Americans with Disabilities Act | BNSF | U.S. Court of Appeals for the Tenth Circuit<br>No: 15-3265 | 2017 U.S. App. LEXIS 6204<br>(10th Cir. Apr. 11, 2017) | EEOC's Appeal of the District Court's Grant of Summary Judgement in the Employer's Favor<br>**Result:** Pro-Employer<br>The appellate court upheld the lower court's decision. | Did the lower court err in granting the employer its motion for summary judgment on the EEOC's disability discrimination claim? |

**Commentary:**

The EEOC alleged the defendant refused to hire the claimant on the basis of disability in violation of the ADA after the defendant's medical officer in Fort Worth, Texas had determined that he posed a significant risk of injury to himself or others. The EEOC alleges that the employer regarded the individual as disabled, as he had limited grip strength in his right hand and a limited range of motion in his right hand and wrist because of a 1986 car accident. The district court held that the claimant provided insufficient evidence that the applicant had a "disability" within the ADA's definition, so it granted the employer summary judgment on all claims.

On appeal, a Tenth Circuit panel upheld the lower court's grant of summary judgement in the employer's favor, as the EEOC could not show that the applicant had a disability under the ADA, or that the employer believed he had a condition that prevented him from performing major life functions. Although the evidence indicated the company believed the applicant could not perform the specific job duties of the position in question, the EEOC could not show the company believed the applicant's lack of grip strength prevented him from working in general. According to the appellate court, "Because plaintiffs have failed to show that BNSF considered [the applicant] unable to perform jobs other than the locomotive-electrician job, the district court properly held that plaintiffs failed to show BNSF regarded [him] as substantially limited in the major life activity of working."

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act | Flambeau | U.S. Court of Appeals for the Seventh Circuit<br>No. 16-1402 | 2017 U.S. App. LEXIS 1289<br>(7th Cir. Jan. 25, 2017) | Appeal of the Lower Court's Grant of Summary Judgment in the Employer's Favor<br>**Result:** Pro-Employer<br>The appellate court upheld the district court's grant of summary judgment. | Did the lower court err in dismissing the EEOC's suit alleging the employer's wellness program violated the ADA? |

**Commentary:**

The EEOC filed a civil action against the defendant employer alleging a violation of the ADA—which generally prohibits employers from requiring their employees to submit to medical examinations—by conditioning participation in its employee health insurance plan on completing a "health risk assessment" and a "biometric screening test." The district court granted the defendant's motion for summary judgment on the ground that the health risk assessment and biometric testing fell under the ADA's "safe harbor" provision, 42 U.S.C. § 12201(c).

The issue on appeal was whether the district court erred in holding that the defendant's wellness program, which required employees to answer disability-related questions and undergo medical exams to enroll in the company's health insurance plan, fell under the ADA's "safe harbor" provision for insurance underwriting, even though the ADA explicitly prohibits employers from requiring employee medical exams or asking disability-related questions as part of an employee health program unless the exams and inquiries are "voluntary." 42 U.S.C. § 12112(d)(4).

The Seventh Circuit held that the district court did not err when it dismissed a lawsuit the EEOC filed against an employer, as there was no case or controversy for the court to decide because the employer reinstated the employee's health insurance retroactively after he agreed to complete the testing and the employee did not suffer a financial loss, the employer terminated its testing program in 2014 because it was not cost-effective, and the employee resigned his job with the employer in March 2014, six months before the EEOC filed its lawsuit.

| | | | | | |
|---|---|---|---|---|---|
| Americans with Disabilities Act | S&B Industry, Inc. d/b/a Fox Conn S&B | U.S. District Court for the Northern District of Texas, Dallas Division<br>Civil Action No. 3:15-CV-0641-D | 2016 U.S. Dist. LEXIS 169483<br>(N.D. Tex. Dec. 8, 2016) | Employer's Motion for Summary Judgment<br>**Result:** Pro-EEOC<br>The court denied the employer's motion for summary judgment, finding factual issues remained as to whether the employer was a prospective employer or a "joint employer" with the staffing agency that employed the job applicants at issue. | Is the employer a prospective employer or a joint employer with a staffing agency that referred two hearing-impaired job applicants who were denied employment, allegedly on account of their disability? |

**Commentary:**

The EEOC sued the company for alleged disability discrimination. The agency claimed it failed to hire two hearing-impaired individuals who were referred to the company by a temporary staffing agency. The company claimed the applicants' hearing impairments rendered them unqualified for the positions for which they interviewed, which involved troubleshooting smartphone functions, including volume control. The staffing agency allegedly told the applicants it would provide a sign language interpreter for the interviews, but did not. The company was not aware of the applicants' disability beforehand, and did not obtain an interpreter. Following the group interview, the applicants were not hired.

The EEOC alleged the applicants were qualified for other positions that did not involve hearing. The company, however, noted that it was not aware of their disabilities prior to the interview, and also was not the applicants' employer under the ADA, and filed a motion for summary judgment.

The company claimed the Fifth Circuit has not clarified which of two competing joint employer tests governs in ADA discrimination cases: the "single employer/joint enterprise test" or the "joint employer test." Under either test, the employer claimed, it could not be found a joint employer with the staffing agency, and that the applicants were independent contractors.

The court denied the employer's motion, however, finding factual questions remained as to whether S&B was a prospective employer or joint employer with the staffing agency. The court looked at the degree of control, finding a jury could determine the company exercised sufficient control over the employment relationship to be considered a joint employer. For example, the company directly supervised the employees, issued work instructions, and had the right to terminate job assignments.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act | Windstream Communications | U.S. District Court for the Eastern District of Arkansas, Western Division<br>Civil Action No. 4:15-CV-00597-BRW | 2016 U.S. Dist. LEXIS 175912<br>(E.D. Ark. Dec. 20, 2016) | Employer's Motion for Summary Judgment<br>**Result:** Pro-Employer<br>The court granted the employer's motion for summary judgment, finding it did not violate the ADA by failing to give a diabetic employee an earlier shift as a reasonable accommodation, and did not constructively discharge the employee. | Did the employer violate the ADA by failing to give a diabetic call center employee an earlier shift as a reasonable accommodation? Did the steps the employer took meet its obligation to engage in the interactive process? Was the employee constructively discharged? |

**Commentary:**

The claimant is a diabetic who worked at a call center. There are three time shifts, and assignments to particular shifts are made through a quarterly bidding process, partly based on seniority. When the claimant was hired full time, there was no guarantee to a particular shift. She first worked the first shift; during the next bidding process, she chose the second shift. Finally, she opted for the third. She began to have blood-sugar regulation issues while working the third shift. She informed her supervisor she was having issues, and provided a doctor's note recommending a day shift.

The company began the interactive process by asking her to fill out an ADA interactive process questionnaire. She requested a day shift as a reasonable accommodation. HR asked her supervisor whether doing so would cause an undue hardship to the business. The supervisor responded that at the time, the claimant's position needed to be filled, volunteers were requested to swap shifts with the claimant, but none wanted to do so. The supervisor told HR there was no way to move the claimant to the day shift without causing a hardship to the business. The claimant was told there were no day shifts available, and asked her whether there were other ways to help her perform her essential job functions, including whether there were other positions she was interested in, and whether she wanted to take a leave of absence. The claimant rejected these options. She subsequently fell asleep on the job (she claimed this was caused by exhaustion and lack of work) and was written up for the infraction. She refused to sign the corrective action report, and gave notice.

She sued, claiming the defendant did not engage in the interactive process or offer her a reasonable accommodation, and that she was constructively discharged. The court disagreed, and granted the employer's motion for summary judgment.

With respect to the interactive process, the court pointed out the steps the employer took to engage the claimant regarding a possible reasonable accommodation (questionnaire, other job possibilities, leave). Claimant claimed the defendant failed to explain the types of leave available to her. However, the court noted she did not ask for details, she had the details in her employee handbook, which she admits she never consulted, and she rejected the idea of leave outright. Moreover, the court said that based on the record, there were no available job openings on the day shift, no one volunteered to switch shifts, and the claimant's position needed to be filed. The claimant also admitted she never looked at the job board to see if there were other open positions. The court noted: "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." The plaintiff rejected both the idea of another job opening and a leave of absence. Instead of continuing to engage in the interactive process, she threatened to go to the EEOC and gave her two weeks' notice. Therefore, this claim failed.

As for the constructive discharge claim, she had to prove she subjectively believed the environment was abusive, that a reasonable person would have "found the conditions of employment intolerable" and that the employer either intended to force [the claimant] to resign or could have reasonably foreseen that [she] would do so as a result of its actions." The facts in this matter, however, did not support such a claim.

Finally, the court emphasized that while reassignment to a vacant position can be a reasonable accommodation under the ADA, it is not necessarily required.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Americans with Disabilities Act | M.G.H. Family Health Center | U.S. District Court for the Western District of Michigan, Southern Division<br>Civil Action No. 1:15-cv-952 | 2017 U.S. Dist. LEXIS 11158<br>(W.D. Mich. Jan. 27, 2017) | EEOC's Motion for Summary Judgment<br>**Result:** Pro-EEOC<br>The court granted the EEOC's motion, finding there was sufficient evidence to show the employee was qualified to perform the essential job duties, but was fired because her employer perceived her as being disabled. | Did the employer "regard" an employee as disabled when it terminated her after a third-party medical evaluator recommended a medical hold and further medical evaluation? |

**Commentary:**

This case centered around the "regarded as" prong of the ADA. When the claimant was hired as a community outreach coordinator, she was assigned duties and began work before undergoing a "post-offer" examination with a third-party medical evaluator. The court noted the employer made her an unconditional offer of employment, even though employees typically undergo the medical examination beforehand.

After eventually examining the claimant, the third-party evaluator recommended that she be placed on a medical hold, unaware of her job duties and that she had already begun working. Although she passed the physical examination, her medical records revealed impairments that concerned the third party. Specifically, per her records, she had headaches and a neck injury, and was on pain medication. The examiner believed that these conditions and medication "raise[d] a suspector [sic] of a cognitive problem at work." He thus recommended to her employer that she not begin work until a functional capacity evaluation (FCE) was performed.

After two weeks, the employer informed the employee that it was unwilling to pay for the FCE. The claimant offered to pay for it. The employer allegedly encouraged her to seek a medical clearance from her own doctor, which she did. The third-party medical reviewer, however, did not change his recommendation after receiving her medical clearance and a revised job description with lower lifting requirements, and after learning she had been in the position for five weeks. Subsequently, the employer terminated her employment. The company later offered her the job back without any conditions, but she declined.

The court determined the claimant was entitled to summary judgment, as "direct evidence" of the employer's "unlawful discrimination is laid bare: MGH, by its own admission, fired [the claimant] because it perceived her impairments as rendering her ineligible for the position—but it did so prior to the completion of any individualized inquiry."

Although the claimant would ordinarily have been a conditional hire, the court determined she was an employee because the company's normal policies were not followed, and "the undisputed factual record establishes that she was an active employee performing duties as assigned during the relevant time period."

The court therefore held the EEOC, proceeding on behalf of the claimant, was entitled to summary judgment as to liability under the ADA, and that the matter would proceed to a jury for a damages determination. In essence, evidence showed she was a qualified individual able to perform the essential job functions, and the only reason an adverse action was taken was because the third-party examiner regarded her as having an impairment under the ADA.

Notably, the court emphasized that she was indeed "regarded as" having a disability, despite the employer's claim her alleged perceived impairment would not limit any major life activity, as the plain text of the ADA, as amended in the 2008 ADA Amendments Act, clarifies that an individual need not show an employer perceived an impairment as substantially limiting.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Pregnancy Discrimination Act<br>Pregnancy Discrimination | Bob Evans Farms, LLC | U.S. District Court for the Western District of Pennsylvania<br>No. 2:15-cv-1237 | 2017 U.S. Dist. LEXIS 131015<br>(W.D. Pa. Aug. 17, 2017) | EEOC's Motion for Summary Judgment<br>**Result:** Pro-EEOC<br>The court granted the EEOC's motion with respect to liability under the Pregnancy Discrimination Act. | Did the employer discriminate against a pregnant server by removing her from the automatic scheduling system on account of her pregnancy? |

**Commentary:**

The EEOC alleged a restaurant defendant discriminated against a pregnant waitress when it removed her from its automatic scheduling system and decreased her hours despite her desire to continue working. The claimant alleged her general manager asked her when she planned to take leave; she told him that she planned to continue working until she gave birth. The manager, however, told the claimant he was taking her off the automatic scheduling system because her pregnancy made her availability unpredictable.

The manager justified his decision because the plaintiff was pregnant, he believed her need for leave was imminent, and he wanted to ensure that the restaurant's staffing needs were met.

In granting the EEOC partial summary judgment, the court said: "The record evidence here shows directly and without equivocation that the reason for [the manager's] decision to remove [the claimant] from automatic scheduling was because she was pregnant and he believed her need for leave because of child birth (and nothing else) was imminent."

The court explained that one of the Pregnancy Discrimination Act's goals was to "make it unlawful to force pregnant woman who were not unable to work to take leave that they had not requested."

The court considered this one of the rare cases where direct evidence was obvious. According to the court, "The testimony of [the manager] is clear — his perception of [claimant] — several weeks before [she] actually delivered her baby — was that [her] attendance was 'unpredictable' based solely on her pregnancy — and is just the type of stereotypical judgment that Congress legislated against by enacting the PDA."

The record, therefore, contained enough direct evidence to establish that the reason the claimant was removed from the schedule and given reduced opportunity to work was because of her manager' "assumptions about her pregnancy and future childbirth." Summary judgment on the PDA discrimination claim, therefore, was warranted. The court allowed the remaining matters regarding damages to proceed to trial.

| | | | | | |
|---|---|---|---|---|---|
| Title VII<br>Race Harassment | Autozone, Inc. | U.S. Court of Appeals for the Seventh Circuit<br>No. 15-3201 | 2017 U.S. App. LEXIS 10903<br>(7th Cir. June 20, 2017); *reh'g denied*, 2017 U.S. App. LEXIS 23704 (7th Cir. Nov. 21, 2017) | EEOC's Appeal of the District Court's Grant of Summary Judgment in the Employer's Favor<br>**Result:** Pro-Employer<br>The appellate court upheld the district court's grant of summary judgment. | Does a race-based transfer undertaken to segregate employees by race violate Title VII's subsection that prohibits race-based segregation in employment, regardless of whether the transfer had an economic or other material effect on the employee? |

**Commentary:**

The EEOC filed a Title VII action in district court alleging that the company violated Title VII by involuntarily transferring an African-American employee out of a predominantly Hispanic store, on the basis of his race, to limit or eliminate the number of African-American employees at that location. The company filed an amended motion for summary judgment arguing, inter alia, that the EEOC could not establish a prima facie case because the transfer of the employee did not amount to a materially adverse action. In opposing the motion, the EEOC alleged the transfer violated 42 U.S.C. § 2000e-2(a)(2), the subsection of Title VII prohibiting the limitation, segregation, or classification of employees based on race. The district court granted summary judgment in favor of the employer.

One of the issues on appeal was whether a race-based transfer, undertaken to segregate employees by race, violates Title VII's subsection that prohibits race-based segregation in employment, regardless of whether the transfer had an economic or other material effect on the employee.

The Seventh Circuit upheld the district court's grant of summary judgment in the employer's favor. The appellate court held the EEOC failed to show the former employee experienced an adverse employment action because of the transfer, as it did not deprive or tend to deprive him of wages, benefits, or other employment opportunities.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Race Discrimination | Dolgencorp, LLC | U.S. District Court for the Northern District of Illinois<br>No. 13-cv-04307 | 2017 U.S. Dist. LEXIS 54634<br>(N.D. Ill. Apr. 10, 2017) | EEOC's Motion for Partial Summary Judgment<br>**Result:** Pro-EEOC<br>The court granted the EEOC partial summary judgment on the company's seventh and eighth enumerated defenses related to the sufficiency of the EEOC's investigation and conciliation efforts before filing suit. | Did the EEOC meet its investigation and conciliation obligations before filing suit? |

**Commentary:**

The EEOC alleged that the employer's use of background checks in hiring and firing unlawfully discriminated against employees and applicants on the basis of race. The EEOC moved for partial summary judgment on the company's seventh and eighth enumerated defenses: that the EEOC's claims are barred as beyond the scope of the charges of discrimination and the EEOC's investigation (7th enumerated defense), and that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate with the employer (8th enumerated defense). The court disagreed, agreeing with the EEOC that the defenses fail as a matter of law.

The court pointed out that when the EEOC files suit, it "is not confined to claims typified by those of the charging party." *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 833 (7th Cir. 2005). "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The charge incites the investigation, but if the investigation turns up additional violations the Commission can add them to its suit." *Id.* Thus, the employer's focus on the charges of discrimination is misplaced, the court held, as the EEOC is the one bringing suit against the company and not private parties. In addition, the court recognized the broad scope of the EEOC's investigatory powers, and therefore denied the employer's motion "insofar as it seeks to dismiss the EEOC's claims because they go beyond the charges of discrimination or because they were not subject to an adequate pre-suit investigation."

With respect to the defense that the EEOC did not satisfy its pre-suit statutory obligation to conciliate, the court cited *Mach Mining*, which clarified the proper scope of judicial review of the EEOC's conciliation obligations. In general, courts may not examine the sufficiency of the EEOC's conciliation efforts, but rather that such efforts were made. The employer alleged that the EEOC did not meet the *Mach Mining* standard because the agency failed to provide adequate notice of the allegations of discrimination and the EEOC did not adequately engage the company in conciliation discussions. However, the court explained that the EEOC provided notice of the allegations in its Letters of Determination as to the persons or class of persons affected by the alleged discriminatory practice. Therefore, the EEOC provided the employer with sufficient notice and a chance to settle the matter before filing suit.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Race Discrimination | Columbine Health System | U.S. District Court for the District of Colorado<br>No. 15-cv-01597-MSK-CBS | 2017 U.S. Dist. LEXIS 152986<br>(D. Colo. Sept. 19, 2017) | Cross Motions for Summary Judgment<br>**Result:** Mixed<br>The court denied the employer's motion for summary judgment on the disparate impact and retaliation claims, and denied the EEOC's motion for summary judgment on the integrated business operations claim. | Did the employer's use of a written examination have a disparate impact on a protected group?<br>Did the employer retaliate against an employee who disagreed with her boss's criticisms of the employees' English skills? |

**Commentary:**

The EEOC alleged that the defendant unlawfully terminated four personal care providers (PCPs) on account of their race and national origin, and retaliated against their supervisor after she refused to demote the PCPs at the director's behest because of the PCP's limited English skills.

A year after the PCPs were hired, the employer imposed a new PCP exam requirement in English. The four PCPs at issue, all of whom were black and from Africa, scored low on the exam and were terminated. The EEOC alleged that this examination requirement had a disparate impact on African Americans. There was no dispute that the employer required passage of the exam as a condition of employment, so the requirement qualified as an "employment practice" for disparate impact prima facie case purposes. The question then became whether there was evidence that the test did indeed have a disparate impact on a protected group.

Both the EEOC and the employer set forth statistical evidence regarding pass rates and test takers. The court noted that to determine whether the EEOC's statistical evidence is sufficient, it must consider: (1) the size of the disparity between the pass/fail rates of different groups of test takers; (2) the statistical significance of the disparity; and (3) whether the statistical evidence isolates the challenged employment practice as the cause. The size of the disparity between (a) the employees of the protected group enjoying a job or job benefit; and (b) the total composition of the employees enjoying that job or benefit must be significant. The court referred to EEOC guidelines suggesting a disparity of 20% or more in selection rate will be considered evidence of adverse impact in a disparate impact claim. 29 C.F.R. § 1607.4(D). Although not controlling, the court explained, "this guideline often acts as a general rule of thumb."

The second factor, statistical significance, measures the likelihood that the disparity between the groups is random. The third factor is whether the statistical evidence isolates the specific employment practice as the cause of the disparity.

In this case, both the employer and the EEOC presented varying statistical evidence to support their positions. Because the positions were in conflict, the court found a trial was warranted. As such, it was not necessary to consider whether the PCP exam was job-related, or whether a reasonable alternative existed, so summary judgment was denied.

The court also denied the employer's motion for summary judgment as to the retaliation claim, finding that a reasonable fact-finder could consider the supervisor's actions to be protected conduct. The employer argued that (i) responding to allegedly discriminatory remarks about the English skills of "these people" by the director during casual conversations; and (ii) refusing to transfer or terminate one of the PCPs was not protected conduct because it was not motivated by illegal discrimination. The court disagreed, finding that "verbalized disagreement with what could be interpreted as discrimination based on national origin — and especially her vocal objection to [the director's] criticisms of 'these people' — is sufficient for a *prima facie* showing."

A separate issue in this case was whether the named company was the sole owner and operator of the health care facility at issue. The EEOC sought to have them declared a single, integrated entity for punitive damages purposes. The court declined to consider the argument, however, as issues related to punitive damages are not appropriate for summary judgment unless liability on a claim or defense is uncontroverted. Such was not the case here, so summary judgment on this issue was denied.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Religious Discrimination and Accommodation | Triangle Catering | U.S. District Court for the Eastern District of North Carolina<br>No. 5:15-CV-00016-FL | 2017 U.S. Dist. LEXIS 28476<br>(E.D.N.C. Mar. 1, 2017) | Parties' Cross Motions for Summary Judgment; EEOC's Motion to Strike<br>**Result:** Mixed<br>The court granted in part and denied in part the EEOC's motion for summary judgment, denied the EEOC's motion to strike, and granted in part and denied in part the employer's motion for summary judgment. Specifically, the EEOC could proceed with its claim that the complainant was an employee and not an independent contractor, and that the company failed to accommodate the complainant's religious beliefs. The EEOC could not proceed with its discriminatory discharge claim. | Did the employer fail to reasonably accommodate the religious beliefs of a driver who sought to wear a head covering?<br>Did the employer discriminatorily discharge the driver on account of his religious beliefs? |

**Commentary:**

The EEOC alleged that a company failed to accommodate an employee's religious practice of wearing a head covering ("crown") and unlawfully discharged him on the basis of his religion, Rastafarianism. Although the complainant did not wear a head covering during his interview, he wore it once on the job. The complainant alleged that the company's co-owner and executive director asked him to remove his head covering, and terminated his employment shortly thereafter.

As a preliminary matter, the company moved for summary judgment on the grounds the complainant was an independent contractor instead of an employee. The court, however, denied the company's motion, finding genuine issues of material fact remained. For example, the complainant alleged his work as a delivery driver was essential to the company's primary business of catering. In addition, the complainant alleged the company controlled almost every aspect of his work, including his job assignments and work schedules, and that the company provided the complainant with a mentor and provided all needed equipment. The company, however, alleged that it was undisputed that the complainant only worked for one day and an hour, he received no annual leave or retirement benefits, received only one paycheck, and did not pay social security taxes. Moreover, interview notes with the EEOC as well as deposition testimony indicated the parties mutually understood that the complainant was hired as an independent contractor. However, "given the materiality of these disputed facts, summary judgment is not proper."

As to the failure to accommodate question, the company contended because the complainant's actions are inconsistent with his purported beliefs (*i.e.*, he did not consistently wear a head covering), he does not hold a bona fide religious belief. The complaint countered, however, that he refrained from wearing a hat in order to increase his chances at obtaining employment. The court held that because "credibility issues such as the sincerity of an employee's religious beliefs are quintessential fact questions, there exists a genuine issue of material fact" as to whether the complainant holds a bona fide religious belief. Therefore, the failure to accommodate claim survived the company's motion for summary judgment.

In addition, the company contended that the complainant did not provide sufficient evidence to establish his need for an accommodation was a motivating factor in the termination decision. However, the court noted that the facts viewed in the light most favorable to the complainant established that he was sent home from work after telling the company official about his need to wear a head covering for religious reasons. "Viewed in the light most favorable to plaintiff, the temporal proximity between [complainant's] interaction with [the official] and his termination, together with the Notice of Termination's reference to the 'hat' situation . . . creates a reasonable inference" that the need for religious accommodation was a motivating factor in the termination decision. Therefore, there was sufficient evidence to establish a prima facie case for failure to accommodate.

Regarding the discriminatory discharge claim, the court found the complainant's evidence lacking. Because there was no direct evidence of discrimination, the EEOC needed to meet the standard *McDonnell Douglas* criteria: that the complainant 1) is in a protected group; 2) was discharged; 3) was performing his job at a level that met his employer's legitimate expectations at the time of his discharge; and 4) was discharged under circumstances that raise a reasonable inference of unlawful discrimination. In this case, the court found the EEOC failed to produce evidence establishing that the complainant was performing his job at a level that met his employer's legitimate expectations. Self-serving statements without more will not suffice. "Where plaintiff is lacking an essential element of a discriminatory discharge claim, the court need not consider the parties' additional arguments. Accordingly, defendant's motion for summary judgment on plaintiff's discriminatory discharge claim is granted."

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Retaliation | North Memorial Health Care | U.S. District Court for the District of Minnesota<br>Civil No. 15-3675(DSD/KMM) | 2017 U.S. Dist. LEXIS 104482<br>(D. Minn. July 6, 2017) | Employer's Motion for Summary Judgment<br>**Result:** Pro-Employer<br>The court granted the employer's motion for summary judgment, as the court found the claimant's request for a religious accommodation is not a protected activity subject to Title VII's anti-retaliation protections. | Did the employer violate Title VII by rescinding an employee's conditional offer of employment after she requested a religious accommodation? |

**Commentary:**

This case arose when a nurse who is a Seventh Day Adventist alleged a healthcare facility violated Title VII by rescinding her conditional offer of employment after she requested a religious accommodation. The program to which the nurse applied was governed by a collective bargaining agreement, which required nurses in the program to work every other weekend.

After receiving a conditional offer of employment, the nurse told the employer she could not work Friday nights for religious reasons and needed an accommodation. When the employer determined this accommodation was not feasible, they rescinded her conditional offer.

The EEOC, on behalf of the nurse, sued the employer, claiming it retaliated against her by rescinding the offer once she made her religious accommodation request. The employer filed a motion for summary judgment, alleging the case should be dismissed because requesting a religious accommodation is not a protected activity subject to retaliation protections.

Under Title VII, an employee engages in protected activity when she either (1)"oppose[s] any practice made an unlawful employment practice by [Title VII]" or "ma[kes] a charge, testifie[s], assist[s], or participate[s] in any manner in an investigation, proceeding, or hearing under [Title VII]." 42 U.S.C. § 2000e-3(a). The two clauses of this section typically are described, respectively, as the opposition clause and the participation clause.

Applying the plain language of the statute, the court agreed with the employer, concluding that requesting a religious accommodation is not a protected activity. Under the opposition clause, a plaintiff must communicate her opposition to a practice that she believes, in good faith, is unlawful. In this case, there is no evidence the nurse believed the healthcare employer's denial of her religious accommodation request was unlawful. And even if she did, the court explained, she did not communicate that belief to the employer. In essence, merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation.

Therefore, the court held, the accommodation request is not protected activity under the opposition clause. Nor is it protected under the participation clause. The court found there was no evidence the nurse "made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" prior to her termination.

The court declined to apply an Eighth Circuit decision holding that requesting an accommodation was protected activity under the ADA. Notably, the court explained that differences between the ADA and Title VII weigh against applying ADA precedent to a Title VII claim. Specifically, the ADA makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed … any right granted or protected by this chapter." 42 U.S.C. 12203(b). Title VII has no such provision. The court reasoned that this additional provision in the ADA supports an inference that Congress intended to protect activity that did not fall under the opposition or participation clauses.

Therefore, the court granted the employer's motion for summary judgment, as the EEOC was unable to show the act of requesting a religious accommodation under Title VII constituted protected activity.

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION AND RESULT | GENERAL ISSUES |
|---|---|---|---|---|---|
| Title VII<br>Sex Discrimination | Rent-A-Center East, Inc. | U.S. District Court for the Central District of Illinois<br>Case No. 16-CV-222 | 2017 U.S. Dist. LEXIS 147695<br>(C.D. Ill. Sept. 8, 2017) | Employer's Motion for Summary Judgment<br>EEOC's Motion for Partial Summary Judgment<br>**Result:** Mixed<br>The court denied the employer's motion for summary judgment, but likewise denied the EEOC's motion for partial summary judgment. | Did the employer violate Title VII by terminating an employee on account of her transgender status?<br>Did the employee fail to mitigate her damages? |

**Commentary:**

The EEOC alleged that the employer discriminated against an employee on the basis of sex in violation of Title VII because she was transitioning from male to female. According to the EEOC, the employee's store manager informed the district manager of the employee's transition. The district manager allegedly encouraged the store manager to find a way to terminate the employee, and often inquired about the transgender employee's job status. The store manager was himself eventually terminated; he believes the reason, in part, had to do with his refusal to terminate the transgender employee.

The employee was ultimately terminated for using a store vehicle for personal reasons, which was against store policy. Although the employee was given permission to use the vehicle, she gave conflicting reasons for its use. The employee did not secure full-time employment until 2016 (two years after termination).

The employer filed a motion for summary judgment, claiming the employee "made such materially inconsistent and objectively unprovable statements [regarding the reason for using the company vehicle] that there is simply no way to reconcile them in order to find in the EEOC's favor."

The court denied the employer's motion, finding that the evidence taken as a whole could lead a reasonable fact-finder to conclude that the employee's sex, and specifically her transgender status, caused her termination. The court acknowledged the employee's "credibility has been called into question by her changing accounts of why she was using the company vehicle. But it is not this court's role at this stage of the proceedings to make credibility determinations. Further, what she was using the vehicle for is not the issue in this case. The issue is why she was terminated by Defendant. And there is sufficient evidence that she was terminated because she was transgender to go to the jury."

The court relied on Seventh Circuit precedent, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) and *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017), and determined that sex discrimination based on gender identity is cognizable under Title VII.

The EEOC, on the other hand, filed a motion for partial summary judgment, arguing that it was entitled to summary judgment on the employer's affirmative defense of failure to mitigate. The EEOC argued that the evidence showed the employee made substantial efforts to obtain employment after her termination, and eventually succeeded in finding a job.

The court disagreed. To establish the affirmative defense of failure to mitigate damages, an employer must show that: (1) the plaintiff failed to exercise reasonable diligence to mitigate her damages, and (2) there was a reasonable likelihood that the plaintiff might have found comparable work by exercising reasonable diligence. In this case, the employee's resume was riddled with typos and grammatical and spelling errors.

"This court has no trouble concluding that many, if not most, employers would not give serious consideration to a job application accompanied by such a sloppily prepared resume." Therefore, the court agreed that it was sufficient to raise a genuine issue material fact regarding whether the employee failed to exercise reasonable diligence to mitigate her damages.

# APPENDIX E – FY 2017 EEOC CASE FILINGS INVOLVING CLAIMS OF HARASSMENT

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| AZ | USDC Arizona<br>2:17cv182<br>1/21/2017 | 1/23/2017 | Multiple Victim | Sex Discrimination<br>Sexual Harassment<br>Sexual Orientation Harassment<br>Retaliation - Title VII | Charging parties are a gay male employee and a straight male employee who was associated with the gay male employee and was perceived to be gay. Both individuals allegedly were subjected to harassment and physical attacks and intimidation, including very crude comments and jokes about sexual behavior. |
| AZ | USDC Arizona<br>2:17cv945<br>3/30/2017 | 3/30/2017 | Multiple Victim | Age Discrimination<br>Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | EEOC alleged the employer engaged in sex discrimination against female employees by subjecting them to severe and pervasive sexual harassment and by creating and maintaining a hostile work environment because of their sex (female), in continuing violation of Title VII. The EEOC further alleges that the employer engaged in unlawful discrimination on the basis of age by subjecting an employee to a hostile work environment because of her age in violation of the ADEA. The EEOC further alleges that the employer engaged in unlawful discrimination by retaliating against a group of employees and similarly aggrieved female employees by firing them or forcing them to be constructively discharged because they opposed practices made unlawful by Title VII. |
| CA | USDC Central District of California<br>2:17cv7221 | n/a | Multiple Victim | Sexual Harassment | The EEOC alleges that three unnamed charging parties, and a class of affected female employees, were subjected to harassment based on their sex. |
| CA | USDC Eastern District of California<br>1:17cv1270<br>9/22/2017 | n/a | Pattern-or-Practice - §706 | Sexual Harassment<br>Retaliation - Title VII | The charging party alleges she was subjected to a hostile work environment based on her sex and was sexually harassed by coworkers, managers, and supervisors. The charging party alleges that she was subjected to sexually explicitly comments, suggestions, and overtures, as well as sexual gestures, and exposure to male genitalia. |
| CA | USDC Northern District of California<br>4:17cv4188<br>7/24/2017 | 7/25/2017 | Multiple Victim | Race Harassment<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that several named parties (working as caregivers) were subjected to sexual harassment by the client to whom they were assigned by the defendant. The client also allegedly made harassing comments due to the caregiver's race (African American). The caregivers allegedly complained about the treatment and hostile work environment at the residence in which they were working. The EEOC alleges that the defendant failed to take any corrective action and refused to reassign those who complained in retaliation for their complaints of harassment and hostile work environment. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| CA | USDC Northern District of California<br>5:17cv5382<br>9/18/2017 | 9/18/2017 | Single Complainant | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The charging party alleges that he was subjected to constant sexual harassment, including sexual comments, sexual overtures, and gestures by his General Manager (female) due to his sex (male). The General Manager also allegedly kept a sex "scoreboard" where she tracked whether the other employees had sex or not. After complaining about the General Manager's conduct, charging party was allegedly retaliated against by being locked in the walk-in freezer and having his motorcycle moved. As a result, the charging party alleges that he was constructively discharged. |
| CA | USDC Southern District of California<br>3:17cv678<br>4/4/2017 | n/a | Multiple Victim | Sexual Harassment<br>Retaliation - Title VII | The EEOC asserts that the defendants subjected the charging parties and a class of similarly aggrieved individuals to sexual harassment and/or retaliation for opposing unlawful employment practices in violation of Title VII. The EEOC alleges the defendants further subjected a class of workers who were associated with sexual harassment victims to retaliation in violation of Title VII. |
| CA | USDC Southern District of California<br>1:17at00728<br>9/27/2017 | 9/28/2017 | Multiple Victim | National Origin Discrimination<br>National Origin Harassment | The EEOC alleges that the charging party and other employees were subjected to harassment based on their national origin (Hispanic or Mexican), including being called derogatory and offensive names. The defendant-employer allegedly failed to take action despite complaints and comments being made in front of supervisors. |
| CA | USDC Northern District of California<br>3:16cv7093<br>12/13/2016 | 12/13/2016 | Multiple Victim | Disability Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | A supervisor allegedly made sexually offensive verbal statements and acts towards female janitors working the night shift. The supervisor allegedly stared at the female janitor's bodies, would adjust his genitals, would make inappropriate advances, and would hug and massage the charging parties. The agency also alleges that female employees who reported the behavior and/or participated in providing statements supporting the janitors were retaliated against. In addition, the agency brings claims under the ADA alleging that the defendant employer manipulated time studies in order to enable the defendant to pay disabled workers lower rates. |
| DC | USDC District of Columbia<br>1:16cv2477<br>12/20/2016 | 12/20/2016 | Single Complainant | Sexual Orientation Harassment | The agency alleges that the charging party was subjected to a hostile work environment based on his sex. The charging party was allegedly subjected to anti-gay epithets and mocking comments and questions from the defendant's kitchen staff. The charging party was allegedly told he was "too sensitive" when he reported the alleged harassment. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| FL | USDC Middle District of Florida<br>8:17cv1292<br>5/30/2017 | 5/31/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges a farming business growing a variety of produce in Dover, Florida, violated federal law by subjecting a female farmworker to sexual harassment, including rape, and then suspending and firing her for complaining about it. According to the EEOC's suit, a male supervisor in charge of the farm's agricultural operations and field labor engaged in egregious sexual harassment toward the woman, including unwelcome sexual comments, forcible physical contact and rape. Although the rape was immediately reported, the farm undertook no investigation and took no action against the supervisor, forcing the employee to protect herself by obtaining a restraining order. Instead of addressing the problem, the EEOC said, the farm retaliated against the victim, including suspending her and ultimately firing her. |
| FL | USDC Southern District of Florida<br>1:17cv21446<br>4/18/2017 | 4/18/2017 | Pattern-or-Practice - §706 | National Origin Discrimination<br>Race Discrimination<br>Race Harassment | The EEOC alleges the defendant engaged in unlawful employment practices on the basis of race (Black), national origin (Haitian), and/or color (Black) against charging parties and a class of other Black Haitian steward/dishwashers who were allegedly wrongfully terminated on the basis of their race, national origin, and color. |
| GA | USDC Northern District of Georgia<br>1:16cv4118<br>11/3/2016 | 11/4/2016 | Multiple Victim | Sexual Harassment | A co-owner and general manager of a restaurant allegedly sexually harassed four female employees over the course of several years and created a sexually hostile work environment. The alleged behavior includes comments about the claimants' bodies and sexual behavior, comments about the bodies and attractiveness of customers, and showing sexually explicit photos and videos. |
| GA | USDC Northern District of Georgia<br>1:17cv3545<br>9/14/2017 | 9/14/2017 | Multiple Victim | Race Discrimination<br>Race Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging parties were called derogatory names based on their race (African American), including the "n-word," by the owner. Posters and images of monkeys were also displayed in the charging parties' working area. The owner also allegedly pressured, and offered bribes, to the charging parties to withdraw their charges. The owner also allegedly slapped one of the charging parties in the face and reported to the police that tension had been building since the claimant filed his EEOC charge. All three charging parties were terminated. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| GA | USDC Southern District of Georgia<br>6:17cv122<br>9/15/2017 | n/a | Single Complainant | Sexual Harassment | The EEOC alleges that the charging party was subjected to sexually harassing comments, sexual propositions, and unwanted touching by a fellow assistant manager. The charging party allegedly reported the conduct and requested to be scheduled so she did not work with the alleged harasser, but the defendant allegedly took no action. The charging party alleges that she was constructively discharged. |
| HI | USDC Hawaii<br>1:17cv67<br>2/15/2017 | 2/15/2017 | Pattern-or-Practice - §706 | Sex Discrimination<br>Sexual Harassment<br>Sexual Orientation Harassment<br>Retaliation - Title VII | The agency alleges that the owner of the defendant company sexually harassed multiple male employees and job applicants. Alleged harassment included unwanted touching, explicit sexual suggestions, sexual activity, showing explicit pictures and pornography, and suggestions that performance reviews were impacted by engaging in sexual conduct with the owner. |
| HI | USDC Hawaii<br>1:17cv482<br>9/26/2017 | n/a | Multiple Victim | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the owner of the defendant company subjected the charging party and a class of female employees to sexual harassment. The owner allegedly made sexual comments, called employees "bitch" and slut," engaged in unwanted touching, and made sexual overtures. |
| IL | USDC Northern District of Illinois<br>1:17cv6692<br>9/18/2017 | 9/18/2017 | Pattern-or-Practice - §706 | National Origin Discrimination<br>Race Discrimination<br>Race Harassment | The EEOC alleges that the defendant discriminated against a class of African-American or Hispanic employees and applicants in favor of Korean employees and applicants by failing to hire or promote them into management due to their race or national origin. The EEOC further alleges that the named charging parties were subjected to harassment based on their race, including comments and slurs. |
| IL | USDC Northern District of Illinois<br>1:17cv6744<br>9/19/2017 | 9/19/2017 | Single Complainant | Sexual Orientation Harassment | The EEOC alleges that the charging party was subjected to harassment, including derogatory comments and name-calling, from supervisors and coworkers on the basis of his sexual orientation. |
| IL | USDC Northern District of Illinois<br>1:17cv6803<br>9/20/2017 | n/a | Multiple Victim | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging party and a class of female employees were subjected to a hostile work environment based on sex, including unspecified sexual comments, propositions, and touching. The charging party was allegedly terminated after complaining a hostile work environment. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| IL | USDC Northern District of Illinois<br>1:17cv6817<br>9/21/2017 | 9/21/2017 | Single Complainant | Race Discrimination<br>Race Harassment | The EEOC alleges that the defendant engaged in race discrimination by subjecting the charging party to a hostile work environment based on his race. The charging party was allegedly subject to racial epithets, slurs, and comments by his coworkers and supervisors, and a noose was hung in the warehouse where he worked. The charging party alleges that he was constructively discharged because he was afraid to go to work. |
| IL | USDC Southern District of Illinois<br>3:17cv01002<br>9/19/2017 | 9/19/2017 | Multiple Victim | Sexual Harassment | The EEOC alleges that a class of female employees, including several named individuals, were subjected to sexual harassment, including sexual comments, gestures, touching, propositions, and threats. The alleged sexual harassment was perpetrated by the general manager and several cooks. The EEOC also alleges that one male employee has also been subjected to sexual harassment, including sexual comments, overtures, and unwanted sexual touching, by the general manager. |
| IL | USDC Northern District of Illinois<br>1:17cv6815<br>9/20/2017 | 9/21/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging party was subjected to unspecified sexual harassment by a coworker. The charging party was allegedly terminated after reporting her harassment due to sex and comments made in the work place about African-American employees |
| IN | USDC Southern District of Indiana<br>3:17cv147 | 9/20/2017 | Pattern-or-Practice - §706 | Race Discrimination<br>Race Harassment | The EEOC alleges that the defendant had discriminated against several named employees and a class of similarly situated individuals on the basis of their race (African American). Defendant allegedly makes job assignments based on the employees' race and on the racial preference of its residents. The defendants allegedly prohibit African-American employees from providing care to certain residents because of their race. The named charging parties were also allegedly subject to racial harassment and name-calling due to their race by residents and managers, among others. |
| LA | USDC Eastern District of Louisiana<br>2:17cv6565<br>7/7/2017 | 7/7/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the defendant fired the charging party after she reported sexual harassment by the owner/CEO's son. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| MA | USDC Massachusetts<br>1:17cv11860<br>9/27/2017 | 9/27/2017 | Multiple Victim | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that several named charging parties, as well as a class of female employees, were subjected to sexual discrimination and a sexually hostile work environment, including unwanted sexual overtures, propositions, sexual touching of the female employees and forced contact with their male supervisor. The named charging parties were allegedly retaliated against when they reported the harassment. |
| MD | USDC Maryland<br>8:17cv1835<br>7/5/2017 | 7/5/2017 | Pattern-or-Practice - §706 | Race Discrimination<br>Race Harassment<br>Retaliation - Title VII | The EEOC alleges that the defendant has engaged in a pattern and practice of failing to hire a class of African-American applicants for custodian and porter positions. The defendant allegedly told African-American applicants that there were not any openings, and in some cases revoked existing offers of employment. The defendant also repeatedly emphasized the company's criminal background check policy in order to deter African-American applicants. A named area manager also was allegedly subjected to racial harassment, including being called the n-word. Employees were allegedly retaliated against for reporting harassment based on race. |
| MD | USDC Maryland<br>1:17cv2025<br>7/20/2017 | 7/20/2017 | Single Complainant | Race Discrimination<br>Race Harassment<br>Religious Discrimination<br>Retaliation - Title VII | The EEOC alleges that the charging party was subjected to a hostile work environment based on his race (African American) and was called racial slurs. When he complained about this treatment, no action was taken. The charging party's supervisor also demanded that he shave his beard, which he wears in observance of his religion. The charging party was allegedly retaliated against when he made complaints and was eventually forced to quit his job in order to avoid being fired. |
| MD | USDC Maryland<br>1:17cv2463<br>8/28/2017 | 8/28/2017 | Pattern-or-Practice - §706 | National Origin Discrimination<br>National Origin Harassment<br>Race Harassment | The EEOC alleges that Defendants (one of which the EEOC claims is subject to successor liability) hired Hispanics into lower-paying jobs, denied them other opportunities, and subjected them to inferior working conditions. |
| MD | USDC Maryland<br>8:17cv2864<br>9/27/2017 | 9/27/2017 | Pattern-or-Practice - §706 | National Origin Discrimination<br>National Origin Harassment<br>Retaliation - Title VII | The EEOC alleges that the defendant engaged in a pattern and practice of discrimination and harassment based on national origin (African). Several named charging parties allege that they were subjected to actions including name-calling and discriminatory comments as well as discrimination in the terms and conditions of their employment, and were terminated due to their national origin. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| MD | USDC Maryland<br>1:17cv2881<br>9/28/2017 | n/a | Multiple Victim | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging party was subjected to sexual harassment by her manager, including sexual comments, and unwanted sexual touching. The EEOC further alleges that other female employees were subjected to unwanted sexual comments, sexual overtures, and physical touching. The charging party was allegedly terminated after complaining of the sexual harassment and hostile work environment. |
| MN | USDC Minnesota<br>0:16cv3823<br>11/3/2016 | 11/3/2016 | Multiple Victim | Race Discrimination<br>Race Harassment | The agency brings this action on behalf of two charging parties who allege that they were subjected to harassment based on their race by their white supervisor. The supervisor allegedly made racially derogatory comments and used racial slurs. The charging parties allege that the harassment was witnessed by others and no action was taken in response to complaints. |
| MO | USDC Eastern District of Missouri<br>4:17cv2493<br>9/28/2017 | n/a | Single Complainant | Race Discrimination<br>Race Harassment | The charging party alleges that he was subjected to harassment based on his race, including being called "Oreo" and the "n-word." After complaining of harassment, the charging party was allegedly transferred to another location in an inferior position. The defendant then terminated charging party's employment. |
| MS | USDC Northern District of Mississippi<br>3:17cv23<br>2/8/2017 | 2/9/2017 | Multiple Victim | Sexual Harassment | The charging party was allegedly subjected to sexual harassment by her supervisor, the store manager. The store manager allegedly made sexually explicit comments and suggestions, sexual gestures, and inappropriate text messages. Following the charging party's complaint, an investigation was conducted and the store manager was terminated. |
| NC | USDC Middle District of North Carolina<br>1:16cv1429<br>12/21/2016 | 12/21/2016 | Single Complainant | Race Discrimination<br>Race Harassment | The charging party worked as a laborer for the defendant, and alleges that white members of his crew subjected him to a racially hostile work environment. The agency alleges that the charging party was repeatedly called the "n-word" and threatened with physical violence by white crew members. No action was taken in response to his complaints of his alleged treatment. |
| NC | USDC Western District of South Carolina<br>3:17cv00535<br>9/8/2017 | 9/8/2017 | Single Complainant | Disability Harassment<br>Sexual Harassment | The charging party was employed by the defendant as a dishwasher. The EEOC alleges that during his employment he was subjected to lewd and offensive sexual comments and physical sexual assault from his assistant manager. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| ND | USDC North Dakota<br>1:16cv428 | 12/22/2016 | Single Complainant | Sex Discrimination<br>Sexual Harassment<br>Sexual Orientation Harassment | The charging party worked as a driver for the defendant, and alleges that he was harassed due to his sex (sexual orientation). The charging party alleges that his coworkers and supervisor called him derogatory names, left pornographic magazines in his truck, painted his truck with pink polka dots, hearts, and rainbows, made sex-based and offensive gay jokes and comments. |
| ND | USDC North Dakota<br>1:17cv92<br>5/5/2017 | 5/5/2017 | Single Complainant | Sex Discrimination<br>Sexual Harassment | The EEOC alleges that a North Dakota civil construction company violated civil rights law by subjecting an employee to a hostile work environment based on her sex and by subjecting her to work conditions that were so intolerable she was forced to resign. According to the lawsuit, the charging party worked for a landscaping company from June to October 2013 as a truck driver. During her employment, she was subjected to sexual harassment by several male coworkers. According to the EEOC, the charging party complained to company owners and the site manager about the harassment, but the harassment continued and one of the owners suggested that she quit. As a result, the charging party felt she had no choice but to resign, resulting in her constructive discharge. |
| NV | USDC Nevada<br>2:17cv2119<br>8/8/2017 | 8/8/2017 | Multiple Victim | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the defendant's general manager subjected one of the charging parties to sexual harassment and made derogatory comments about her appearance. After the charging party complained to Human Resources she was terminated. The defendant also allegedly terminated the charging party's husband and son - who also are charging parties in the EEOC's suit. |
| NV | USDC Nevada<br>2:17cv2458<br>9/21/2017 | 9/21/2017 | Pattern-or-Practice - §706 | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that several female employees were subjected to sexual harassment by coworkers, including unwanted sexual overtures, touching, viewing pornography in the workplace, vulgar name-calling, and touching. The EEOC alleges that the defendant also maintains a policy that requires employees to report sexual harassment within 72 hours or waive all rights to recovery. |
| NY | USDC Eastern District of New York<br>1:17cv1791<br>3/30/2017 | n/a | Single Complainant | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the defendant company discriminated against the charging party by subjecting her to quid pro quo sexual harassment and/or retaliation when it refused to hire her, in violation of Title VII. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| NY | USDC Eastern District of New York<br>2:17cv4745<br>8/14/2017 | 8/14/2017 | Multiple Victim | National Origin Discrimination<br>Race Discrimination<br>Race Harassment<br>Retaliation – Title VII | The EEOC alleges that four charging parties were subjected to ongoing harassment and were called derogatory names based on their race and national origin (African American, Dominican, and Puerto Rican). Defendant allegedly did not have an anti-discrimination or harassment policy and no ability to complain about harassment. Charging Parties were allegedly retaliated against by having job responsibilities and hours changed and were constructively discharged. |
| NY | USDC Southern District of New York<br>7:17cv4333<br>6/8/2017 | 6/9/2017 | Single Complainant | Sex Discrimination<br>Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging party, a hostess, was harassed and subjected to a hostile work environment because she is transgender, and in retaliation for her complaints about the harassment. The EEOC alleges that the charging party was called derogatory names related to her transgender status and was called the wrong gender pronouns by other employees. After the charging party complained, the general manager allegedly failed to take any action. The charging party was then terminated days after her complaint and after the area manager learned that she was transgender. |
| PA | USDC Eastern District of Pennsylvania<br>2:17cv4346<br>9/29/2017 | n/a | Multiple Victim | Race Discrimination<br>Race Harassment | The EEOC alleges that a supervisor regularly called the charging party and other African-American employees names such as "monkey," "boy," the "n-word," and other racial slurs. The charging party and other employees allegedly complained about the conduct, but no action was taken. One week after the charging party's most recent complaint, the employer terminated his employment. |
| SC | USDC South Carolina<br>4:17cv1150<br>5/3/2017 | 5/4/2017 | Multiple Victim | Sexual Harassment | The EEOC alleges that a restaurant discriminated against the two charging parties by subjecting them to a sexually hostile work environment because of their sex (female). |
| TN | USDC Western District of Tennessee<br>2:17cv2669<br>9/13/2017 | 9/13/2017 | Single Complainant | Retaliation - Title VII | The EEOC alleges that the charging party complained of sexual harassment against a coworker and submitted a written statement regarding the harassment, the failure to address it, and that an executive's friendship with the accused harasser was affecting the situation. As a result, the charging party's employment was terminated. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| TN | USDC Western District of Tennessee<br>2:17cv2717<br>9/28/2017 | n/a | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that charging party was sexually harassed by her area manager, who was a convicted felon sex offender. The area manager allegedly subjected the charging party to sexual comments, propositions, explicit comments, and physical contact. No action was taken after charging party complained of the harassment and she was allegedly terminated after filing a Charge with the EEOC. |
| TX | USDC Southern District of Texas<br>4:17cv574<br>2/22/2017 | 2/22/2017 | Single Complainant | Race Discrimination<br>Race Harassment<br>Retaliation - Title VII | The charging party alleges that his coworkers harassed him based on his race (African American), by wearing "KKK-style" hoods and making comments about the hoods. The charging party alleges that after reported the incidents, the HR director asked the charging party to execute a statement stating that the harassment had not occurred and that his complaint had been addressed. The charging party refused to sign. The next day, the charging party was allegedly reprimanded for failing to provide a statement and for failing to obtain permission to take sick leave. The charging party refused to sign the acknowledgments and was terminated. |
| VA | USDC Eastern District of Virginia<br>2:17cv499<br>9/18/2017 | 9/18/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC alleges that the charging party was subjected to sexually explicitly comments, suggestions, and gestures by a coworker. The charging party allegedly reported the conduct several times to her supervisor, but the behavior did not stop. When the charging party said that she wanted to go to human resources, her supervisor told her that doing so would threaten her employment. Three weeks after reporting the alleged harassment, the charging party's employment was terminated for allegedly inconsistent performance reasons. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| VA | USDC Western District of Virginia<br>1:17-cv-00041<br>9/29/2017 | 10/2/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII | The EEOC claims a restaurant violated federal law by subjecting a female employee to a sexually hostile work environment and retaliating against her by reducing her hours. According to the EEOC's suit, the employee was employed as a hostess in 2015. The EEOC charged that she was subjected to unwelcome sexual comments and touching by a significantly older male manager. According to the EEOC's complaint, the manager had previously engaged in the same or similar sexual conduct with at least one other female employee of the company. At the time the alleged sexual harassment occurred, the restaurant did not have a sexual harassment policy or employee complaint procedures in effect. The EEOC's complaint further charged that after the employee complained to the restaurant's general manager about the harassment, the company reduced her scheduled hours. The complaint alleges that the wife of the alleged harasser was responsible for scheduling the employee's hours after her complaint of sexual harassment was made. |
| WA | USDC Eastern District of Washington<br>2:17cv210<br>6/12/2017 | 6/12/2017 | Single Complainant | Sexual Harassment<br>Retaliation - Title VII<br>Pay Retaliation | The EEOC alleges the defendant violated federal law by subjecting a Latina tractor driver to sexual harassment and then retaliating against her after she reported the abuse. According to the EEOC's lawsuit, the charging party had worked for the defendant as a tractor driver for over three years in Quincy, Washington, when she transferred to the company's Wenatchee, Washington orchard, where she was the only female in this job position. The EEOC charged that on her second day at the new location, the defendant's direct supervisor drove her to a remote area and then proceeded to make sexually explicit comments, proposition her for sex, and attempted to kiss her. After this incident, the supervisor assigned the charging party to pick up trash and excluded her from meetings with the other tractor drivers. When she reported the harassment to upper management, she was given a choice of continuing to work under that supervisor or accepting a transfer to work as a warehouse sorter for lower pay. She took the latter. |
| WA | USDC Western District of Washington<br>2:17cv1098<br>7/20/2017 | 7/20/2017 | Single Complainant | Race Discrimination<br>Race Harassment<br>Retaliation - Title VII | The charging party was allegedly subjected to a hostile work environment based on his race (African American) by his coworkers and supervisors. The charging party was allegedly called racial slurs and was threatened. When the charging party complained of his treatment he was retaliated against by being denied breaks and given less-favorable shifts. |

| STATE | COURT NAME, CASE NUMBER & FILING DATE | EEOC PRESS RELEASE | CLAIM TYPE | CAUSES OF ACTION | SUMMARY OF CLAIMS |
|---|---|---|---|---|---|
| WV | USDC Northern District of West Virginia<br>2:17cv73<br>6/6/2017 | 6/6/2017 | Single Complainant | Disability Discrimination<br>Disability Harassment | The EEOC alleges that the charging party was discriminated against and subjected to a hostile work environment due to her disability. The charging party is fully deaf in one ear and partially deaf in the other, and as a result has a speech impairment. The EEOC alleges that the charging party was called derogatory names related to her disability and mocked by her coworkers and one associate manager. The charging party alleges that she complained of the treatment, but that following an investigation corrective action was not taken. As a result, the EEOC alleges that the charging party was constructively discharged. The charging party also applied for a lead furniture sales position, but another employee without a disability was selected because the charging party was told that employee could "do the talking better." |
| WY | USDC Wyoming<br>2:17cv63<br>3/31/2017 | 3/31/2017 | Single Complainant | Disability Discrimination<br>Disability Harassment | The EEOC alleges the defendant employer discriminated against the charging party because of his Post-Traumatic Stress Disorder by, among other things, referring to him as "crazy'' and "psycho," and by calling the days on which he received therapy for his PTSD "Psycho Thursdays." The company's two principal owners knew about the harassment, and the harassment reached such an egregious level that he was constructively discharged. |

# APPENDIX F - CHECKLIST ONE: LEADERSHIP AND ACCOUNTABILITY

## *(Excerpt from EEOC Task Force Report on Harassment in the Workplace)*

***The first step for creating a holistic harassment prevention program is for the leadership of an organization to establish a culture of respect in which harassment is not tolerated.***

***Check the box if the leadership of your organization has taken the following steps:***

- ☐ Leadership has allocated sufficient *resources* for a harassment prevention effort
- ☐ Leadership has allocated sufficient *staff time* for a harassment prevention effort
- ☐ Leadership has *assessed* harassment *risk factors* and has taken steps to *minimize* those risks

***Based on the commitment of leadership, check the box if your organization has the following components in place:***

- ☐ A harassment prevention *policy* that is *easy-to-understand* and that is *regularly communicated* to all employees
- ☐ A harassment reporting *system* that employees *know about* and is *fully resourced* and which accepts reports of harassment experienced and harassment observed
- ☐ *Imposition of discipline* that is prompt, consistent, and proportionate to the severity of the harassment, if harassment is determined to have occurred
- ☐ *Accountability* for mid-level managers and front-line supervisors to prevent and/or respond to workplace harassment
- ☐ Regular *compliance trainings for all employees* so they can recognize prohibited forms of conduct and know how to use the reporting system
- ☐ Regular *compliance trainings for mid-level managers and front-line supervisors* so they know how to prevent and/or respond to workplace harassment

***Bonus points if you can check these boxes:***

- ☐ The organization conducts *climate surveys* on a regular basis to assess the extent to which harassment is experienced as a problem in the workplace
- ☐ The organization has implemented *metrics* for harassment response and prevention in supervisory employees' performance reviews
- ☐ The organization conducts *workplace civility training* and *bystander intervention training*
- ☐ The organization has *partnered with researchers* to evaluate the organization's holistic workplace harassment prevention effort

***A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is*** not ***in compliance.***

# APPENDIX G - CHECKLIST TWO: AN ANTI-HARASSMENT POLICY

## *(Excerpt from EEOC Task Force Report on Harassment in the Workplace)*

***An anti-harassment policy is a key component of a holistic harassment prevention effort.***

***Check the box below if your anti-harassment policy contains the following elements:***

- ☐ An unequivocal statement that harassment based on *any* protected characteristic will not be tolerated
- ☐ An easy-to-understand description of prohibited conduct, including examples
- ☐ A description of a reporting system - available to employees who experience harassment as well as those who observe harassment - that provides multiple avenues to report, in a manner easily accessible to employees
- ☐ A statement that the reporting system will provide a prompt, thorough, and impartial investigation
- ☐ A statement that the identity of an individual who submits a report, a witness who provides information regarding a report, and the target of the complaint, will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ☐ A statement that any information gathered as part of an investigation will be kept confidential to the extent possible consistent with a thorough and impartial investigation
- ☐ An assurance that the employer will take immediate and proportionate corrective action if it determines that harassment has occurred
- ☐ An assurance that an individual who submits a report (either of harassment experienced or observed) or a witness who provides information regarding a report will be protected from retaliation from co-workers and supervisors
- ☐ A statement that any employee who retaliates against any individual who submits a report or provides information regarding a report will be disciplined appropriately
- ☐ Is written in clear, simple words, in all languages commonly used by members of the workforce

***A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is*** not ***in compliance.***

# APPENDIX H - CHECKLIST THREE: A HARASSMENT REPORTING SYSTEM AND INVESTIGATIONS

## *(Excerpt from EEOC Task Force Report on Harassment in the Workplace)*

***A reporting system that allows employees to file a report of harassment they have experienced or observed, and a process for undertaking investigations, are essential components of a holistic harassment prevention effort.***

***Check the box below if your anti-harassment effort contains the following elements:***

- ☐ A fully-resourced reporting process that allows the organization to respond promptly and thoroughly to reports of harassment that have been experienced or observed
- ☐ Employer representatives who take reports seriously
- ☐ A supportive environment where individuals feel safe to report harassing behavior to management
- ☐ Well-trained, objective, and neutral investigators
- ☐ Timely responses and investigations
- ☐ Investigators who document all steps taken from the point of first contact and who prepare a written report using guidelines to weigh credibility
- ☐ An investigation that protects the privacy of individuals who file complaints or reports, individuals who provide information during the investigation, and the person(s) alleged to have engaged in harassment, to the greatest extent possible
- ☐ Mechanisms to determine whether individuals who file reports or provide information during an investigation experience retribution, and authority to impose sanctions on those who engage in retaliation
- ☐ During the pendency of an investigation, systems to ensure individuals alleged to have engaged in harassment are not "presumed guilty" and are not "punished" unless and until a complete investigation determines that harassment has occurred
- ☐ A communication of the determination of the investigation to all parties and, where appropriate, a communication of the sanction imposed if harassment was found to have occurred

***A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is*** not ***in compliance.***

# APPENDIX I - CHECKLIST FOUR: COMPLIANCE TRAINING

## *(Excerpt from EEOC Task Force Report on Harassment in the Workplace)*

***A holistic harassment prevention effort provides training to employees regarding an employer's policy, reporting systems and investigations.***

***Check the box if your organization's compliance training is based on the following structural principles and includes the following content:***

- Structural Principles
  - ☐ Supported at the highest levels
  - ☐ Repeated and reinforced on a regular basis
  - ☐ Provided to all employees at every level of the organization
  - ☐ Conducted by qualified, live, and interactive trainers
  - ☐ If live training is not feasible, designed to include active engagement by participants
  - ☐ Routinely evaluated and modified as necessary
- Content of Compliance Training for All Employees
  - ☐ Describes illegal harassment, and conduct that, if left unchecked, might rise to the level of illegal harassment
  - ☐ Includes examples that are tailored to the specific workplace and the specific workforce
  - ☐ Educates employees about their rights and responsibilities if they experience conduct that is not acceptable in the workplace
  - ☐ Describes, in simple terms, the process for reporting harassment that is experienced or observed
  - ☐ Explains the consequences of engaging in conduct unacceptable in the workplace
- Content of Compliance Training for Managers and First-Line Supervisors
  - ☐ Provides easy-to-understand and realistic methods for dealing with harassment that they observe, that is reported to them, or of which they have knowledge or information, including description of sanctions for failing to use such methods
  - ☐ Provides clear instructions on how to report harassing behavior up the chain of command, including description of sanctions for failing to report
  - ☐ Encourages managers and supervisors to practice "situational awareness" and assess the workforces within their responsibility for risk factors of harassment

***A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is*** not ***in compliance.***

## ABOUT OUR FIRM

Littler Mendelson is the world's largest labor and employment law firm devoted exclusively to representing management. With over 1,300 attorneys and more than 75 offices throughout the U.S. and globally, Littler has extensive knowledge and resources to address the workplace law needs of both U.S.-based and multi-national clients. Littler lawyers practice and have experience in at least 40 areas of employment and labor law. The firm is constantly evolving and growing to meet and respond to the changes that impact the workplace.

## ABOUT OUR EEO & DIVERSITY PRACTICE GROUP

With the steady rise in the number of discrimination, harassment and retaliation claims filed each year, employers must be more vigilant and pro-active than ever when it comes to their employment decisions. Since laws prohibiting discrimination statutes have existed, Littler's Equal Employment Opportunity & Diversity Practice Group has been handling discrimination matters for its clients. Members of our practice group have significant experience working with all types of discrimination cases, including age, race, gender, sexual orientation, religion and national origin, along with issues involving disability accommodation, equal pay, harassment and retaliation. Whether at the administrative stage or in litigation, our representation includes clients across a broad spectrum of industries and organizations, and Littler attorneys are at the forefront of new and innovative defenses in each of the key protected categories. Our attorneys' proficiency in handling civil cases brought by the EEOC and other state agencies enables us to develop effective approaches to defending against any EEOC litigation, whether it involves claims brought on behalf of individual claimants or class-wide allegations involving alleged "pattern and practice" claims and other alleged class-based discriminatory conduct.

In addition, our firm recognizes the value of a diverse and inclusive workforce. Littler's commitment to diversity and inclusion starts at the top and is emphasized at every level of our firm. We recognize that diversity encompasses an infinite range of individual characteristics and experiences, including gender, age, race, sexual orientation, national origin, religion, political affiliation, marital status, disability, geographic background, and family relationships. Our goal for our firm *and* for clients is to create a work environment where the unique attributes, perspectives, backgrounds, skills and abilities of each individual are valued. To this end, our EEO & Diversity Practice Group includes attorneys with extensive experience assisting clients with their own diversity initiatives, providing diversity training, and ensuring employers remain compliant with the latest discrimination laws and regulations.

For more information on Littler's EEO & Diversity Practice Group, please contact any of the following Practice Group Co-Chairs:

- Barry Hartstein, Telephone: 312.795.3260, E-Mail: bhartstein@littler.com
- Cindy-Ann Thomas, Telephone: 704.972.7026, E-Mail: cathomas@littler.com

# U.S. OFFICE LOCATIONS

**Albuquerque, NM**
505.944.9680

**Anchorage, AK**
907.561.1214

**Atlanta, GA**
404.233.0330

**Austin, TX**
512.982.7250

**Birmingham, AL**
205.421.4700

**Boston, MA**
617.378.6000

**Charleston, WV**
304.599.4600

**Charlotte, NC**
704.972.7000

**Chicago, IL**
312.372.5520

**Cleveland, OH**
216.696.7600

**Columbia, SC**
803.231.2500

**Columbus, OH**
614.463.4201

**Dallas, TX**
214.880.8100

**Denver, CO**
303.629.6200

**Detroit, MI***
313.446.6400

**Fayetteville, AR**
479.582.6100

**Fresno, CA**
559.244.7500

**Greenville, SC**
(864) 775-3190

**Houston, TX**
713.951.9400

**Indianapolis, IN**
317.287.3600

**Irvine, CA**
949.705.3000

**Kansas City, MO**
816.627.4400

**Las Vegas, NV**
702.862.8800

**Lexington, KY**
859.317.7970

**Long Island, NY**
631.247.4700

**Los Angeles, CA**
**Century City**
310.553.0308

**Los Angeles, CA**
**Downtown**
213.443.4300

**Memphis, TN**
901.795.6695

**Miami, FL**
305.400.7500

**Milwaukee, WI**
414.291.5536

**Minneapolis, MN**
612.630.1000

**Morgantown, WV**
304.599.4600

**Nashville, TN**
615.383.3033

**New Haven, CT**
203.974.8700

**New York, NY**
212.583.9600

**Newark, NJ**
973.848.4700

**Orlando, FL**
407.393.2900

**Overland Park, KS**
913.814.3888

**Philadelphia, PA**
267.402.3000

**Phoenix, AZ**
602.474.3600

**Pittsburgh, PA**
412.201.7600

**Portland, ME**
207.774.6001

**Portland, OR**
503.221.0309

**Providence, RI**
401.824.2500

**Reno, NV**
775.348.4888

**Rochester, NY**
585.203.3400

**Sacramento, CA**
916.830.7200

**Salt Lake City, UT**
801.401.8312

**San Diego, CA**
619.232.0441

**San Francisco, CA**
415.433.1940

**San Jose, CA**
408.998.4150

**San Juan, Puerto Rico**
787.765.4646

**Santa Maria, CA**
805.934.5770

**Seattle, WA**
206.623.3300

**St. Louis, MO**
314.659.2000

**Tysons Corner, VA**
703.442.8425

**Walnut Creek, CA**
925.932.2468

**Washington, D.C.**
202.842.3400

# GLOBAL OFFICE LOCATIONS

**Toronto, Ontario, Canada**
+416 865 0504

**Barranquilla, Colombia**
+57 5 385 6071

**Bogotá, Colombia**
+57 1 317 4628

**San José, Costa Rica**
+506 2545 3600

**Santo Domingo, Dominican Republic**
+809 472 4202

**San Salvador, El Salvador**
+503 2296 9500

**Lyon, France**
+33 (0)4 78 62 15 00

**Paris, France**
+33 (0)1 44 51 63 80

**Berlin, Germany**
+49 30-259 25 89-0

**Duesseldorf, Germany**
+49 211-13 06 56-0

**Hamburg, Germany**
+49 40-5 54 34 56-0

**Munich, Germany**
+49 89-41 611 63-0

**Guatemala City, Guatemala**
+502 2335 2179

**San Pedro Sula, Honduras**
+504 2516 1133

**Milan, Italy**
+504 2516 1133

**Mexico City, Mexico**
+52 55 5955 4500

**Monterrey, Mexico**
+52 81 8851 1200

**Managua, Nicaragua**
+506 2545 3651

**Panama City, Panama**
+507 830 6552

**Lima, Peru**
+511 226 1600

**San Juan, Puerto Rico**
+787 765 4646

**Caracas, Venezuela**
+58 212 610 5450

**Valencia, Venezuela**
+58 241 824 4322

**London, United Kingdom**
+44 (0)203 375 0330


Littler
Employment & Labor Law Solutions Worldwide®