

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2016

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

| FEBRUARY 2017 |

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2016

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

INTRODUCTION

This Annual Report on EEOC Developments—Fiscal Year 2016 (hereafter “Report”), our sixth annual Report, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also offers an analysis of the EEOC’s achievements and setbacks, and the implications of those outcomes. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One — *A Review of the EEOC’s Systemic Initiative: Tracking its Progress, the EEOC’s Current Priorities, and Key Developments in FY 2016*—serves as an in-depth summary of the entire Report. This opening chapter sets the stage with a particular focus on the EEOC’s systemic initiative. This chapter highlights key developments involving the systemic initiative in recent years and announced priorities moving forward. This portion of the Report also references major decisions, Commission programs, and settlements achieved over the past fiscal year. Areas touched upon in the opening chapter are discussed in greater detail in subsequent Report sections.

Part Two discusses EEOC charge activity, litigation and settlements in FY 2016, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

Part Three focuses on legislative and regulatory activity involving the EEOC. This chapter includes a discussion of 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, as well as the Commission’s efforts to adhere to its Strategic Plan. References are made to more comprehensive Littler updates and/or reports for a more in-depth discussion of the topic, as applicable.

Part Four summarizes the EEOC’s investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations. Case law addressing the EEOC’s authority to do so is discussed in this chapter as well. Appendix C to this Report is a companion guide, summarizing select subpoena enforcement actions undertaken by the EEOC during FY 2016.

Part Five of the Report focuses on FY 2016 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) 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; (4) class discovery issues in EEOC litigation, including bifurcation, identification of class members and/or communication with the class, and other discovery in pattern-or-practice litigation; (5) other critical issues in EEOC litigation, including reliance on experts, class litigation, and background check litigation; (6) general discovery issues involving both employers and the EEOC in litigation between the parties; (7) favorable and unfavorable summary judgment rulings and lessons learned; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys’ fees to prevailing parties.

Appendices A-D are a useful resource that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury awards. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief, and decided appellate cases in FY 2016. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2016. Finally, **Appendix D** highlights notable summary judgment decisions by claim type.

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

I. A REVIEW OF THE EEOC'S SYSTEMIC INITIATIVE: TRACKING ITS PROGRESS, THE EEOC'S CURRENT PRIORITIES, AND KEY DEVELOPMENTS IN FY 2016

On November 16, 2016, the U.S. Equal Employment Opportunity Commission issued its annual Performance and Accountability Report ("FY 2016 PAR"), which highlights key EEOC developments over the past fiscal year, ending September 30, 2016, including review of the EEOC's current priorities and systemic initiative. On July 7, 2016, the EEOC also published "*A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission*," looking back over the past decade. Based on these publications, the EEOC has been far more transparent than ever in shedding greater light on its systemic initiative.

This introduction reviews key aspects of these recent reports and highlights notable developments over the past year as the agency continues to devote a significant amount of its limited resources to "systemic discrimination," which it 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."

A. Setting the Stage

The EEOC's FY 2016 PAR underscores that the agency has "continued to focus on those activities likely to have strategic impact in advancing equal employment opportunity in the workplace."¹ In order to maximize its impact, the EEOC has been focusing on systemic discrimination.²

The EEOC's recent report on *A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission* ("2016 Systemic Report" or "Report"), as published by the EEOC in July 2016,³ underscores the EEOC's view that the "Commission cannot effectively combat discrimination without a strong nationwide systemic program," and reviews the progress of the EEOC's systemic initiative since issuance of the EEOC's *Systemic Task Force Report* in April 2006.⁴

An important cornerstone of this initiative has been the Commission's 2012 Strategic Plan and related Strategic Enforcement Plan ("SEP"), which "reaffirmed the agency's commitment to the goals set forth by the Systemic Task Force."⁵ As many readers are aware, the SEP "identified six national priority areas to focus the agency's work, identifying key areas for systemic enforcement to increase the impact of the agency's efforts across the country."⁶ On October 17, 2016, the EEOC announced adoption of its SEP for 2017-2021, which slightly modifies the initial SEP, but generally continues the same six priorities initially announced in its 2013-2016 SEP.⁷

1 EEOC FY 2016 Performance and Accountability Report (herein "FY 2016 PAR"), at 33 (Nov. 16, 2016), available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

2 *Id.* at 37.

3 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>.

4 SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (2006), available at https://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

5 See FY 2012-2016 Strategic Plan, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm. See also U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013 - 2016 (Dec. 18, 2012), available at <https://www.eeoc.gov/eeoc/plan/sep.cfm>.

6 *Id.*

7 The EEOC's 2017-2021 SEP is available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>. The EEOC Press Release announcing the updated SEP is available at <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>.

EEOC PRIORITIES BASED ON 2017-2021 SEP⁸ (EXCERPTS FROM SEP)

The following are the EEOC's current priorities:

1. **Eliminating Barriers in Recruitment and Hiring.** EEOC will focus on class-based recruitment and hiring practices that discriminate against racial, ethnic, and religious groups, older workers, women, and people with disabilities. These include exclusionary policies and practices, the channeling/steering of individuals into specific jobs due to their status in a particular group, job segregation, restrictive application processes (including online systems that are inaccessible to individuals with disabilities), and screening tools that disproportionately impact workers based on their protected status (e.g., pre-employment tests, background checks affecting African Americans and Latinos, date-of-birth inquiries affecting older workers, and medical questionnaires affecting individuals with disabilities).

The growth of the temporary workforce, the increasing use of data-driven selection devices, and the lack of diversity in certain industries and workplaces such as technology and policing, are also areas of particular concern. This priority typically involves systemic cases.
2. **Protecting Vulnerable Workers, Including Immigrant and Migrant Workers, and Underserved Communities from Discrimination.** EEOC will focus on job segregation, harassment, trafficking, pay, retaliation and other policies and practices against vulnerable workers, including immigrant and migrant workers, and persons perceived to be members of these groups, and against members of underserved communities.
3. **Addressing Selected Emerging and Developing Issues.** Under this SEP, EEOC will continue to prioritize issues that may be emerging or developing. These issues fall within this category:
 - a) Qualification standards and inflexible leave policies that discriminate against individuals with disabilities;
 - b) Accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA);
 - c) Protecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex;
 - d) Clarifying the employment relationship and the application of workplace civil rights protections in light of the increasing complexity of employment relationships and structures, including temporary workers, staffing agencies, independent contractor relationships, and the on-demand economy; and
 - e) Addressing discriminatory practices against those who are Muslim or Sikh, or persons of Arab, Middle Eastern or South Asian descent, as well as persons perceived to be members of these groups, arising from backlash against them from tragic events in the United States and abroad.
4. **Ensuring Equal Pay Protections for All Workers.** EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.
5. **Preserving Access to the Legal System.** EEOC will focus on policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts. Specifically, EEOC will focus on: 1) overly broad waivers, releases, and mandatory arbitration provisions (e.g., waivers or releases that limit substantive rights, deter or prohibit filing charges with EEOC, or deter or prohibit providing information to assist in the investigation or prosecution of discrimination claims); 2) employers' failure to maintain and retain applicant and employee data and records required by EEOC regulations; and 3) significant retaliatory practices that dissuade others in the workplace from exercising their rights.
6. **Preventing Systemic Harassment.** 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. This priority typically involves systemic cases.

8 *Id.* at 6-9.

While there has been a recent focus on systemic and class-type claims, the EEOC's enforcement authority to file such claims is not a new development. The EEOC has been armed with such power since the 1972 amendments when the EEOC was given authority based on Section 707 of Title VII to file "pattern-or-practice" discrimination lawsuits in support of class-based claims.⁹ Previously, such actions could be brought only by the U.S. Attorney General. As an example, *International Brotherhood of Teamsters v. United States*,¹⁰ one of the leading pattern-or-practice lawsuits that serves as a guidepost in dealing with the applicable burdens of proof in pattern-or-practice cases, was initiated by the U.S. Attorney General.

In 1980, the U.S. Supreme Court in *General Telephone Company v. EEOC*¹¹ eased the EEOC's burden in bringing class-type claims. The Court held that the requirements under Rule 23 of the Federal Rules of Civil Procedure did not apply to the EEOC making it easier to file class-type discrimination claims against employers.¹² As significantly, in *General Telephone*, which involved claims of sex discrimination on behalf of a group of female workers, the Court clarified that the EEOC could seek relief under Section 706 of Title VII on behalf of a "person or persons aggrieved."¹³ These early developments could not have foreshadowed the close scrutiny the Court would place on broad-based employment discrimination claims, as best evidenced by the Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes*.¹⁴ Such developments undoubtedly have contributed to the EEOC's increased focus on pattern-or-practice and class-type litigation based on the view that the Commission is not constrained by the procedural requirements for bringing class actions as set forth in Rule 23 of the Federal Rules of Civil Procedure.¹⁵

In bringing actions under Title VII, particularly pattern-or-practice claims, additional complexity has been added to the mix because Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate sections in Title VII: Section 706 and Section 707. Only Section 707 expressly refers to pattern-or-practice claims, and there are significant distinctions between these sections because jury trials and compensatory and punitive damages are available under Section 706, but not under Section 707 of the Act.¹⁶ Notwithstanding, as highlighted in the 2016 Systemic Report, while employers have challenged the EEOC's authority to pursue pattern-or-practice suits under Section 706 of Title VII, only two appellate courts have addressed the issue,¹⁷ and both courts have ruled in favor of the EEOC. From the EEOC's perspective, "[t]he 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."¹⁸ These decisions avoid the anomalous result that a victim of an individual instance of discrimination would be entitled to relief greater than victims of structural discrimination.¹⁹

B. Review of Systemic Claims Discussed in 2016 Systemic Report

The 2016 Systemic Report highlights that in fiscal year 2015, "more than 80 percent of the EEOC's systemic investigations and lawsuits raised SEP issues, including hiring, systemic harassment, immigrant and vulnerable workers, equal pay, leave policies, and access to the legal system."²⁰ The Report also reviews both successful conciliations and lawsuits over the past five fiscal years "by basis" and "by issue" and provides the following data:

9 42 U.S.C. § 2000e-6 (*i.e.*, Section 707).

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

11 *General Telephone Company v. EEOC*, 446 U.S. 318 (1980).

12 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.

13 42 U.S.C. §2000e-5 (*i.e.*, Section 706).

14 *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541 (2011).

15 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has 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. See Systemic Task Force Report at https://www.eeoc.gov/eeoc/task_reports/systemic.cfm. Similar provisions exist under § 207(a) of GINA. The Commission also has had authority to pursue class cases under the 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.

16 Based on the Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991), *codified at* 42 U.S.C. § 1981 *et seq.*, jury trials and compensatory and punitive damages of up to \$300,000 are limited to claims under Section 706 of Title VII. 42 U.S.C. §1981a. Section 707 merely provides for the traditional equitable remedies available under Title VII (*e.g.* back pay, front pay, attorneys' fees and injunctive relief).

17 See *EEOC. 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).

18 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 GINA. The Commission also has had authority to pursue class cases under the 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.

19 See 2016 Systemic Report at 34.

20 *Id.* at 18.

Successful Conciliations of Systemic Investigations by Basis (FY 2011-2015)²¹

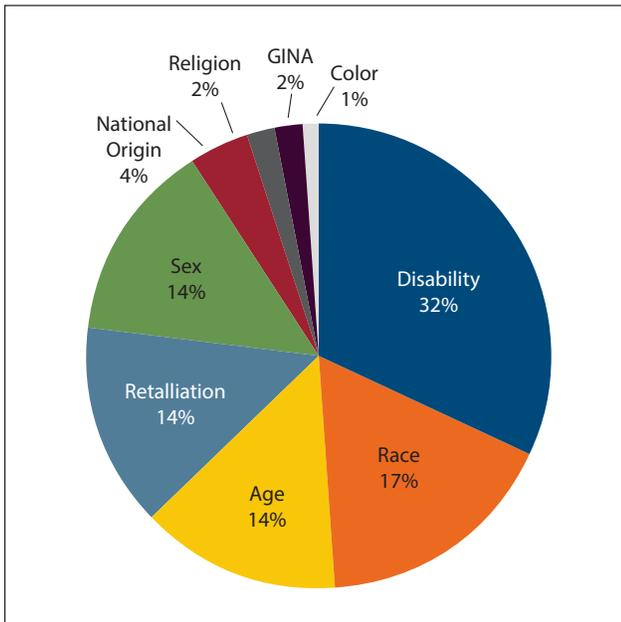


Figure 1

Systemic Lawsuit Resolutions by Basis (FY 2011-2015)

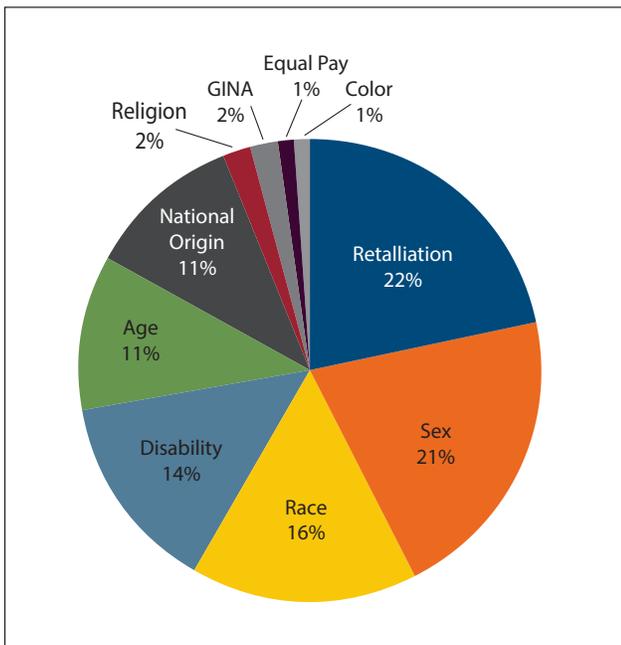


Figure 2

²¹ Per the 2016 Systemic Report, “Data is provided for the last five fiscal years in Figures 1-4 for the bases and issues alleged to allow for comparison. Some cases contain multiple bases. See Report at 2, footnote 17.

Successful Conciliations of Systemic Investigations by Issue (FY2011-2015)²²

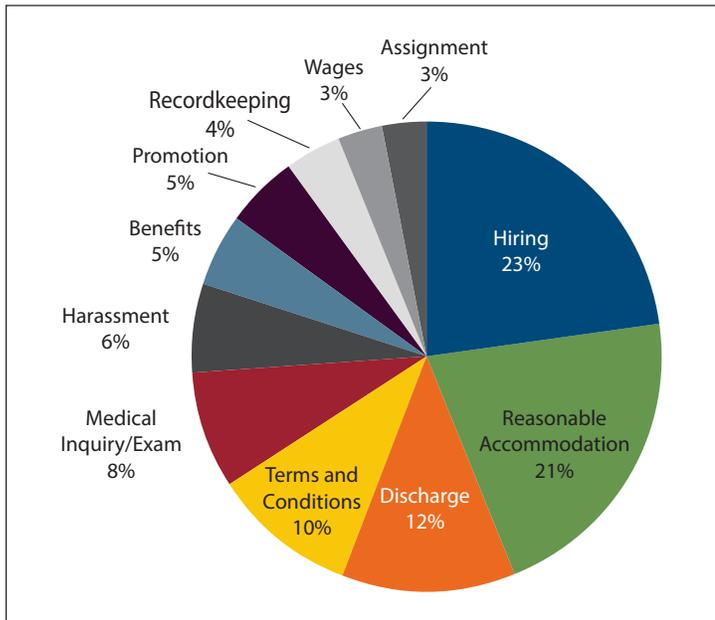


Figure 3

Systemic Lawsuit Resolutions by Issue (FY2011-2015)

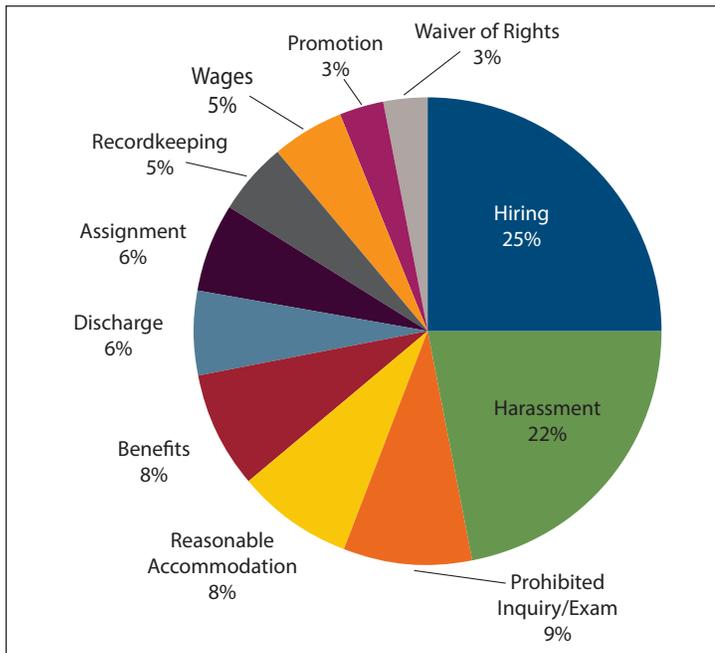


Figure 4

The above charts, prepared by the EEOC, show that charges and litigation involving hiring barriers, harassment claims and reasonable accommodation claims under the ADA have been a primary focus of the agency. Otherwise, litigation involving race and sex discrimination, plus retaliation claims, have been areas of focus based on the EEOC’s systemic initiative.

²² Per the 2016 Systemic Report, “The data in Figures 3-4 represent the significant systemic issues raised in conciliations of investigations and in lawsuits resolved in fiscal years 2011 through 2015. Some cases contain multiple significant issues.” See Report at 3, footnote 18.

C. Genesis of Systemic Investigations

Systemic investigations typically can arise based on one of the following: (1) a charge is filed as a pattern-or-practice claim and/or the EEOC expands an individual charge into a pattern-or-practice investigation; (2) the EEOC initiates on its own authority a “directed investigation” involving potential age discrimination or potential equal pay violations; (3) or the EEOC commences an investigation based on the filing of a “Commissioner’s Charge.”²³

The 2016 Systemic Report reviews the numerous decisions in which the courts have upheld the right to expand an individual investigation to “uncover evidence suggesting a broader policy or practice affecting individuals in addition to the charging party,” in exploring potential systemic discrimination.²⁴ Yet, the Report elects to omit two significant federal appeals court decisions in the Tenth and Eleventh Circuits, which limited expansive investigations based on individual charges of discrimination.²⁵

The 2016 Systemic Report also focuses on the important role of Commissioner charges²⁶ and directed investigations²⁷ in systemic investigations. The EEOC made three significant disclosures in the Report regarding Commissioner charges: (1) more than 75 percent have been opened during the investigation of an individual charge when a policy or practice suggested broader application to other workers; (2) approximately 75 percent of the Commissioner charges have focused on discrimination in hiring (*i.e.*, based on the view that such victims are frequently unaware of a discriminatory hiring policy); and (3) since 2006, the EEOC has found reasonable cause to believe that discrimination occurred in 81 percent of the Commissioner charges (84 out of 104 investigations).²⁸

Although the 2016 Systemic Report did not provide any statistical data on “directed investigations,” in which the EEOC can initiate an Equal Pay Act or ADEA investigation on its own authority in the complete absence of a charge, the Report did disclose that “investigative staff can access EEO-1 data easily to understand workforce demographics of an employer.”²⁹ Based on the current scheduled changes to EEO-1 Reports, in which employers will be required to prepare EEO-1 Reports that include pay data and hours worked by race, ethnicity, sex and job category—assuming these changed requirements for EEO-1 Reports remain in effect—this dramatic change involving required reporting of pay practices most likely would increase the risk of directed investigations involving potential equal pay claims, and Commissioner charges involving potential pay discrimination investigations based on race, ethnicity and sex.

The Report also provided no overall statistics regarding the outcome of systemic investigations, but employers need to be aware of the troublesome statistics regarding the increased likelihood of a reasonable cause finding based on a systemic investigation. While not highlighted by the agency or published on its website, there is nearly a 40 percent

23 As discussed *infra*, when discussing the EEOC’s priorities and “access to the legal system,” over the past couple of years, the EEOC has also begun a practice of initiating an investigation and/or filing suit in the complete absence of a discrimination charge based on Section 707 of Title VII in which the EEOC has alleged that the employer “engaged in a pattern-or-practice of *resistance* to the full enjoyment of any of the rights secured” by Title VII, and this approach has had mixed success in the courts. See *e.g.*, *EEOC v. Doherty Enterprises*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015); *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, (7th Cir. 2015), *reh’g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).

24 See 2016 Systemic Report at 33-34, *citing EEOC v. Aerotek, Inc.*, 815 F.3d 328 (7th Cir. 2016) (rejecting undue burden argument and permitting EEOC to obtain information concerning discriminatory client requests not recorded in staffing company’s database where evidence showed such requests were recorded in the database); *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015) (permitting EEOC to obtain names, social security numbers, addresses and telephone numbers for individuals subject to a strength test in an expanded investigation of an individual sex discrimination charge); *EEOC v. UPMC*, 471 F. App’x 96 (3d Cir. 2012) (permitting the EEOC to discover the identity of all employees fired after 14 weeks of medical leave, noting that the Commission may expand its investigation to include additional claims so long as they might cast light on the underlying charge); *EEOC v. Konica Minolta Bus. Solutions*, 639 F.3d 366 (7th Cir. 2011) (enforcing subpoena relating to applicants for sales personnel at four facilities, where charge contained alleged class allegations of discrimination); *EEOC v. Schwan’s Home Serv.*, 644 F.3d 742 (8th Cir. 2011) (enforcing subpoena of list of employees participating in management development program, where EEOC expanded investigation of sex discrimination charge). While not cited in the Report, See also *EEOC v. Maritime Autowash*, 2016 U.S. App. LEXIS 7416 (4th Cir. Mar. 24, 2016) (enforcing subpoena involving investigation of charge by undocumented worker, stating, “[T]he only question we must consider now is whether the EEOC’s subpoena, designed to investigate Escalante’s Title VII charges, is enforceable. We hold that it is. EEOC and employer disagree on EEOC’s authority to investigate charge based on having undocumented status when hired . . . [the EEOC] reads Title VII’s definition of ‘employee’ and related provisions to cover Escalante despite his undocumented status.”)

25 See *EEOC v. Burlington Northern Santa Fe Railroad*, 69 F. 3d 1154 (10th Cir. 2012) and *EEOC v. Royal Caribbean Cruises, Ltd*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014). The favorable impact of the *Royal Caribbean* decision should be tempered based on the Eleventh Circuit’s view that the EEOC could seek such information in a Commissioner’s charge, but the EEOC had not elected that option in dealing with the matter under investigation.

26 The Report states that “Congress authorized EEOC to use Commissioner Charges under Title VII, 42 U.S.C. §2000e-5(b), the ADA and GINA. See 29 C.F.R. §§1601.1 and 1601.11 (2015).” Report at 16.

27 As explained in the Report, “Directed Investigations are initiated by the EEOC field office directors under the Age Discrimination in Employment Act (ADEA), 29 U.S. C. §§621 et seq. (1967), and the Equal Pay Act (EPA), 29 U.S.C. §206(d) (1963), under the provisions of Section 11 of the Fair Labor Standards act, 29 U.S. C. §211.” Report at 16.

28 See 2016 Systemic Report at 17-18.

29 See Report at 12.

likelihood of a reasonable cause finding when faced with a systemic investigation, as compared to the fact that the EEOC historically has issued reasonable cause findings in less than five percent of the charges filed with the agency.³⁰

D. Resolution of Systemic Claims

The 2016 Systemic Report also discusses the resolution of systemic claims both at the conciliation stage, following a reasonable cause finding, and based on litigation with the EEOC.

In first addressing the “success rate” in resolving matters in conciliation, the Report states it “tripled the success rate of systemic conciliations from 21.4 percent in FY 2007 to 64.2 percent in FY 2015, which the EEOC asserts demonstrates the agency’s “strong commitment to voluntary resolutions.”³¹

When faced with litigation, the Report reviews resolutions from fiscal year 2007 through 2015 and refers to a “favorable outcome in 192 of 205 systemic resolutions, or approximately 94 percent of systemic resolutions,” explaining that the suits generally have been resolved by consent decree “providing for substantial monetary and injunctive relief.”³² The EEOC does not provide a detailed list of its so-called “successes,” nor does it explain the “small number of cases” in which the EEOC “received adverse judgments or sought voluntary dismissal,”³³ but the Report conveys the impression that that it considers any consent decree to be a “favorable outcome.”

E. Key Statistics for FY 2016

As discussed at the outset, on November 16, 2016, the EEOC issued its annual Performance and Accountability Report (referred to as the EEOC’s “PAR”) for Fiscal Year 2016.³⁴ The FY 2016 PAR reviews overall achievements of the agency over the past fiscal year, and significant attention is placed on the EEOC’s systemic initiative.

While various systemic investigations stem from expansion of individual investigations, the FY 2016 PAR also discloses the risk of Commissioner’s charges and directed investigations leading to a systemic investigation. In FY 2016, the EEOC initiated 15 investigations based on a Commissioner’s charge, and at the close of FY 2016 there were approximately 74 ongoing investigations initiated by a Commissioner charge. The nature of these systemic investigations also are reviewed in the PAR, which include failure-to-hire claims, disability claims, harassment charges, broad-based discriminatory terms and conditions of employment, claims of segregated facilities and a broad range of other concerns.³⁵

Similarly, at the close of FY 2016, there were approximately 57 ongoing investigations initiated by a directed investigation, which involves investigations of potential violations under the Age Discrimination in Employment Act (ADEA) or Equal Pay Act (EPA).³⁶ According to the PAR, “[t]hese investigations alleged age discrimination in advertising, hiring, assignment, referral, benefits, retirement pensions, wages, terms and conditions, promotion, discipline, discharge, constructive discharge, involuntary retirement, involuntary retirement incentive, lay off and recall, waivers, and unequal pay based on sex.”³⁷

Regardless of how systemic investigations were initiated, employers faced significant risks based on the outcome of such investigations. Unlike overall EEOC statistics which indicate that the EEOC issues a reasonable cause finding in less than 5 percent of the charges filed with the agency,³⁸ the likelihood of a reasonable cause is far greater when faced with a systemic investigation. In FY 2016, the EEOC issued reasonable findings in 41 percent of the systemic investigations

30 This information is based on a review of the EEOC’s annual Performance and Accountability Report (PAR) since FY 2012, except that the FY 2015 PAR did not include such data, but it was provided to Littler by a senior official at the agency. EEOC data shows the following: (1) the EEOC issued 106 reasonable cause determinations based on 300 systemic investigations in FY 2013 (35%); (2) there were 118 reasonable cause determinations in 260 systemic investigations in FY 2014 (45%); and (3) there were 99 reasonable cause determinations based on 268 systemic investigations in FY 2015 (36%). This would be an overall average of 39 percent for the 3-year period (i.e., 323 reasonable cause determinations and 823 systemic investigations). See Barry A. Hartstein, et al., *Littler’s Annual Report on EEOC Developments: Fiscal Year 2015 at 4 and Littler’s Annual Report on EEOC Developments: Fiscal Year 2014 at 4*. The statistics for FY 2016 are discussed in the next section herein.

31 See Report at 31.

32 *Id.* at 32.

33 *Id.*

34 See EEOC’s FY 2016 Performance and Accountability Report (herein “FY 2016 PAR”) and Press Release, EEOC, *EEOC Issues FY 2016 Performance Report* (Nov. 16, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/11-16-16.cfm>.

35 FY 2016 PAR at 93-94.

36 *Id.*

37 *Id.* at 94.

38 See EEOC charge statistics at <https://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

resolved by the agency (*i.e.*, 113 reasonable cause findings based on 273 systemic investigations).³⁹ This result is in a range similar to the percentage of reasonable cause findings in fiscal years 2015, 2014 and 2013 (36%, 45% and 35%, respectively).⁴⁰

Even so, the EEOC has reported a favorable success rate in conciliation of systemic investigations. While the agency has successfully conciliated only 44 percent of EEOC charges following a reasonable cause finding over the past two fiscal years, the agency has had greater success with resolution of systemic investigations. During FY 2016, the success rate for conciliation of systemic charges was 57 percent; this was a slight decrease from FY 2015 when the EEOC resolved 67 percent of systemic charges through conciliation.⁴¹

In dealing with litigation by the agency, while there was a dramatic decrease in the number of lawsuits filed by the EEOC in FY 2015, the EEOC actually increased the number of systemic lawsuits filed by the EEOC in FY 2016. The EEOC filed only 86 “merits”⁴² lawsuits challenging alleged discriminatory practices, but this included 31 multiple victim suits (36%) – 13 non-systemic suits with multiple victims and 18 systemic suits (cases impacting 20 or more individuals).⁴³ While the total number of suits represented a significant decrease from the 142 “merits” lawsuits filed in FY 2015,⁴⁴ the EEOC increased from 16 to 18 systemic lawsuits filed between FYs 2015 and 2016. As significantly, at the end of FY 2016, among the 165 EEOC lawsuits on the court dockets, approximately 48 percent of the lawsuits were multiple victim lawsuits—32 (19.4%) were non-systemic multiple victim cases and 47 (28.5%) involved challenges to systemic discrimination.⁴⁵

The EEOC also disclosed the type of systemic lawsuits filed by the EEOC over the past fiscal year. The breakdown of the 18 systemic lawsuits filed in FY 2016 are: (1) 11 lawsuits involve ADA claims; (2) sex discrimination and religious discrimination claims are the focus of 2 lawsuits, respectively; and (3) race discrimination, GINA violations and Equal Pay Act claims each are the focus among the remaining systemic lawsuits initiated by the EEOC in FY 2016. Among these lawsuits, 11 suits involve claims on behalf of applicants and the balance involved lawsuits focusing on alleged discriminatory practices affecting current or terminated employees.⁴⁶ A description of systemic lawsuits filed over the past fiscal year is included below.

SYSTEMIC LAWSUITS FILED IN FY 2016			
Nature of Discrimination	Applicant/Employee	Description	Court
ADA	Applicant	EEOC alleges that defendant car dealership rescinded a job offer to an individual with a disability based on its policy of excluding applicants who test positive for certain lawful prescription drugs.	D. Ariz.
ADA	Applicant	EEOC alleges that defendant automotive parts manufacturer denied employment to a class of individuals with disabilities based on their record of sick or FMLA leave use.	N.D. Miss.
ADA	Applicant	EEOC alleges that defendant farm service company made health inquiries of applicants.	W.D. Mo.
ADA	Applicant	EEOC alleges that defendant casino rescinded a job offer to an individual with a disability based on its policy of excluding applicants who test positive for certain lawful prescription drugs.	D.S.D.

³⁹ See FY 2016 PAR at 37.

⁴⁰ See Littler’s *Annual Report of EEOC Developments: Fiscal Year 2015* at 4, available at <https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93fiscal-year-2015>; See also FY 2014 PAR at 27 (<https://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>) and FY 2013 PAR at 32 (<https://www.eeoc.gov/eeoc/newsroom/release/12-16-13.cfm>). While the number of reasonable cause findings for systemic investigations completed in FY 2015 is not included in the FY 2015 PAR, this information was provided to Littler by a senior official at the agency.

⁴¹ See FY 2016 PAR at 35.

⁴² The EEOC has defined “merits” suits as direct lawsuits or by intervention involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements. See EEOC, EEOC Litigation Statistics, FY 1997 through FY 2015, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

⁴³ See 2016 Systemic Report at 6, Footnote 27 (*i.e.*, “‘Multi-victim’ cases are those cases with fewer than 20 identified victims that do not challenge a discriminatory policy or pattern-or-practice”).

⁴⁴ See FY 2015 PAR at 34.

⁴⁵ See FY 2016 PAR at 36.

⁴⁶ *Id.* at 94-96.

SYSTEMIC LAWSUITS FILED IN FY 2016			
Nature of Discrimination	Applicant/Employee	Description	Court
ADA	Applicant	EEOC alleges that defendant staffing firm made health inquiries of applicants.	M.D. Fla.
ADA	Employee	EEOC alleges that defendant convenience store maintained a policy of refusing to provide more than three days of leave or available light duty assignments to individuals with disabilities.	W.D. Okla.
ADA	Employee	EEOC alleges that defendant home improvement chain refused to grant additional medical leave as a reasonable accommodation to employees with disabilities.	C.D. Cal.
ADA	Employee	EEOC alleges that defendant fast food restaurant maintained a policy of requiring employees to disclose use of certain prescription medication.	W.D. Ark.
ADA	Employee	EEOC alleges that defendant farm refused to make exceptions to its inflexible attendance policy as a reasonable accommodation for employees with disabilities.	N.D. Ala.
ADA	Employee	EEOC alleges that defendant transportation company failed to accommodate and discharged individuals with disabilities and retaliated against employees who opposed discrimination.	D. Colo.
GINA	Applicant	EEOC alleges that defendant mining equipment manufacturer made genetic information inquiries of conditional hires.	W.D. Pa.
Religion	Employee	EEOC alleges that defendant hospital failed to accommodate the religious beliefs of employees by refusing to grant them an exemption from its flu immunization policy.	W.D.N.C.
Religion	Employee	EEOC alleges that defendant hospital failed to accommodate the religious beliefs of employees by refusing to grant them an exemption from its flu immunization policy.	W.D. Pa.
Sex	Applicant	EEOC alleges that defendant engaged in a pattern-or-practice of refusing to hire women into entry-level warehouse jobs at two facilities in the Midwest.	N.D. Ohio
Sex	Applicant	EEOC alleges that defendant employee leasing service refused to hire a class of female applicants to assist with transition of waste management services.	S.D. Miss.
Race	Employee	EEOC alleges that defendant nightclub systematically assigned African American dancers only to a club patronized primarily by African American patrons.	S.D. Miss.
EPA	Employee	EEOC alleges that defendant university paid female law professors less than similarly situated male professors for substantially similar work.	D. Colo.

The EEOC also resolved 21 systemic lawsuits in FY 2016. According to the PAR, six settlements included at least 50 victims and two settlements included over 1,000 victims.⁴⁷ The EEOC reported that it obtained approximately \$38 million in relief for alleged “victims” of systemic discrimination, and the PAR highlighted 8 settlements:

- A nationwide consent decree involving an \$8.6 million settlement of an ADA lawsuit that challenged an employer’s maximum leave policy.
- A \$5.26 million settlement involving Indian workers brought to the United States under the H-2B visa program, who worked in “man camps” and allegedly were promised lawful permanent residency but thereafter subjected to racial slurs, poor working conditions and threatening conduct.

⁴⁷ *Id.* at 39-42.

- Payment of \$4 million to a class of 74 African American workers allegedly subjected to a racially hostile work environment that included racial slurs, racist graffiti and the least favorable and most hazardous jobs at the employer's Texas production facility.
- Following a summary judgment ruling in favor of the EEOC based on an alleged company policy of only assigning applicants for over-the-road driver jobs to trainers of the same sex, the parties agreed to a settlement that included payment of \$250,000 to the charging party, and \$2.9 million in compensatory damages to the 69 female class members.
- A consent decree involving settlement of sex discrimination claims against a retailer with operations in four states, which allegedly excluded females from various positions, the employer agreed to payment of \$2.1 million to 46 female applicants who had been denied employment.
- Settlement of a sex discrimination suit in which the EEOC intervened 10 years ago, which included payment of \$1.5 million in backpay to 1,870 women who were denied employment as sales service representatives at facilities throughout the state of Michigan for a supplier of work uniforms and other products for businesses.
- A consent decree of approximately \$1 million paid into a qualified settlement fund for payment to African American and non-Hispanic applicants for entry-level production jobs at a commercial bakery in Texas that also included a preferential hiring list for such persons before hiring other applicants.
- Settlement of a Title VII/ADEA lawsuit against a Minnesota medical devices and equipment company, which included claims of failing to hire women for sales representative jobs because of their sex, denying employment to applicants over the age of 40 and retaliating against a human resources manager who opposed the reported unlawful practices, and the consent decree included \$1 million to be distributed to alleged victims of the alleged discriminatory practices.

F. Progress Report on Systemic Initiative

1. Key Procedural Developments

The 2016 Systemic Report pointed to the EEOC's success in *EEOC v. Mach Mining*⁴⁸ as the reason that "Circuit courts addressing these procedural challenges have returned the focus of the cases to the merits of the discrimination claims."⁴⁹ The Report highlights the Second Circuit's decision *EEOC v. Sterling Jewelers*,⁵⁰ which reportedly "explicitly rejected" the Eighth Circuit's ruling in *EEOC v. CRST Van Expedited, Inc.*,⁵¹ "holding that a court may not review the sufficiency of EEOC's systemic investigation, citing the Supreme Court's *Mach Mining* decision."⁵² The Report also cites a recent favorable ruling from the Ninth Circuit's in *State of AZ and EEOC v. Geo Group*,⁵³ which ruled that in class claims the EEOC is not required to identify specific class members and it is sufficient if the EEOC has conciliated on behalf of the "identified class." The Fifth Circuit adopted the view of the Ninth Circuit in *Geo Group* and reached a similar decision.⁵⁴

The Ninth and Fifth Circuit decisions are at odds with the above-referenced Eighth's Circuit's *CRST* decision, which held that "the issue in *Mach Mining* was to what extent a court may inquire into the EEOC's conciliation process," and "[t]he class definition was not a contested issue." Because there was no investigation of 67 claims, "dismissal could still be an appropriate remedy even in light of *Mach Mining*."⁵⁵

While not cited in the Report, in *EEOC v. College America*,⁵⁶ a district court in an ADEA case also reviewed the impact of *Mach Mining* and held that the failure to ever engage in conciliation regarding certain separation agreements also barred the EEOC from proceeding on such claims.

48 *EEOC v. Mach Mining*, 135 S. Ct. 1645 (2015). Therein, The Supreme Court described the EEOC's conciliation obligation as a "barebones review" that gives the EEOC "expansive discretion . . . to decide how to conduct conciliation efforts and when to end them." Any failure by the EEOC would require merely staying the action and requiring the EEOC to meet its conciliation obligation.

49 See 2016 EEOC Systemic Report at 33.

50 *EEOC v. Sterling Jewelers*, 2015 U.S. App. LEXIS 15986 (2d Cir. Sept. 9, 2015).

51 *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

52 See 2016 EEOC Systemic Report at 33. While not cited in the Report, the Northern District of Illinois took a similar view in *EEOC v. Autozone, Inc.*, 2015 U.S. Dist. LEXIS 149849 (N.D. Ill., Nov. 4, 2015), *citing*, in relevant part, the *Sterling Jewelers* decision.

53 *State of AZ and EEOC v. Geo Group*, 816 F.3d 1189 (9th Cir. 2016).

54 2016 U.S. App. LEXIS 11031 (5th Cir. June 17, 2016).

55 *CRST Van Expedited, Inc.*, 679 F.3d at 657.

56 *EEOC v. College America*, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015).

As significantly, the EEOC's 2016 Systemic Report completely omits any reference to the Seventh Circuit's opinion in *EEOC v. CVS*,⁵⁷ which rejected the EEOC's view that it was excused from any conciliation required when pursuing pattern-or-practice claims under Section 707 of Title VII.

One final procedural issue worth mention is that the U.S. Supreme Court has granted certiorari in *EEOC v. McLane Co., Inc.*,⁵⁸ and the Court will address "(w)hether a district court's decision to quash or enforce a subpoena should be reviewed *de novo*, which only the Ninth Circuit does, or should be reviewed deferentially, which eight other circuits do."⁵⁹

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

Over the past year, the EEOC has continued its focus on systematic investigations and related litigation based on the EEOC's Strategic Enforcement Plan.⁶⁰ In the 2016 Systemic Report, the EEOC focuses on its efforts and achievements in the following areas: (1) Recruitment and Hiring; (2) Systemic Harassment; (3) Pay and Promotion; (4) Policies Failing to Accommodate Individuals with Disabilities; (5) Access to the Legal System; (6) Protecting Immigrant, Migrant and Other Vulnerable Workers; and (7) Mandatory Retirement and Benefits. These various topics and other priority issues are discussed below.

a. Eliminating Barriers in Recruitment and Hiring

The EEOC's 2016 Systemic Report places special emphasis on EEOC investigations and litigation involving hiring barriers. From the EEOC's perspective, "[b]ecause most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination."⁶¹ Thus, the EEOC believes that it is "uniquely situated to identify hiring and recruitment issues and to address and remedy" such discriminatory practices either through conciliation or lawsuits filed by the agency.⁶²

The EEOC reviewed a substantial number of EEOC settlements over the past the past 10 years involving hiring-related claims, both through conciliation and litigation, in which it achieved favorable results for a broad range of workers involving challenges based on race, sex, national origin, age or absence of disability. (See chart below). The EEOC also highlighted its impact on removing hiring barriers, particularly focusing on criminal conviction background screens, which included issuing updated guidance on criminal history in 2012,⁶³ and asserting in its Criminal History Guidance:

For example, as the agency was investigating numerous charges alleging discrimination from background screens, EEOC issued an updated policy statement in 2012 on the use of criminal conviction background screens. The updated guidance brought heightened attention to the issue and contributed to significant changes in employer policies and state and local laws limiting the use of such screens. A year after EEOC issued this guidance, a survey of nearly 600 HR professionals reported that just 32 percent of their organizations had applied EEOC's updated guidance to their hiring process. After extensive outreach by EEOC and the filing of two lawsuits in June 2013 challenging the use of background screens as discriminatory, the same survey of HR professionals conducted one year later reported that 88 percent of employers had adopted EEOC's guidance.⁶⁴

Over the past fiscal year, the EEOC also has added a new dimension to its litigation involving criminal background checks, asserting that an employer violates Title VII based on the failure to maintain records disclosing the adverse impact based on race, sex or ethnic group in using criminal history as a screening tool in the hiring process.⁶⁵ Further, although the EEOC favorably settled one major lawsuit involving a challenge to the use of background checks in *EEOC v.*

57 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, (7th Cir. 2015).

58 *EEOC v. McLane Co., Inc.*, Docket No. 15-1248, available at <http://www.scotusblog.com/case-files/cases/mclane-co-v-eeoc/>.

59 *Id.* See *Petition for a writ of certiorari* (Questions Presented, Question 1) (Apr. 4, 2016) and ruling (Sept. 29, 2016), "Petition GRANTED limited to Question 1 presented by the petition."

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

61 See 2016 EEOC Systemic Report at 20.

62 *Id.* at 20.

63 *Id.* at 6.

64 *Id.*

65 See *EEOC v. Crothall Servs. Grp.*, 2016 U.S. LEXIS 83520 (E.D. Pa. June 28, 2016), in which the district court denied the employer's summary judgment motion and concluded that the employer "is required to maintain records relating to selection procedures under §709(c) of 29 C.F.R. 1607.4(A), and merely concluded that there was a factual issue whether the employer maintained sufficient records to comply with the EEOC's Uniform Guidelines that require such adverse impact analysis.

BMW Mfg. Co.,⁶⁶ based on a \$1.6 million settlement and related injunctive relief, the EEOC continues to be embroiled in similar litigation in federal court in Chicago, which initially was filed on the same day as the *BMW* lawsuit.⁶⁷

While the EEOC highly publicizes its successes in its 2016 Systemic Report, it omits reference to the fact that it has suffered stinging losses in most of its key disparate impact litigation challenging the use of background checks by employers. In *EEOC v. Peoplemark*,⁶⁸ the Sixth Circuit affirmed the district court's assessment of more than \$750,000 in attorneys' fees and costs for continuing to pursue a lawsuit challenging criminal background checks, despite failing to timely produce an expert report supporting its claims. In *EEOC v. Freeman*,⁶⁹ the Fourth Circuit affirmed summary judgment for an employer where the EEOC challenged background and credit checks based on a disparate impact theory, agreeing with the district court's exclusion of the EEOC's expert's report to support its claims. The district court later awarded \$900,000 in attorney's fees to the employer.⁷⁰ The loss in *Freeman* was on the heels of a similar loss by the EEOC in *EEOC v. Kaplan Higher Learning Education Corp.*,⁷¹ in which the EEOC relied on the same expert in a disparate impact challenge to an employer's reliance on credit history in the hiring process.

Most of the EEOC's successes attacking hiring barriers have involved large-scale systemic disparate treatment claims, as cited below. Some of the EEOC's pending lawsuits also involve similar claims attacking hiring barriers, including lawsuits alleging discrimination based on race and national origin,⁷² gender,⁷³ and age.⁷⁴ It is anticipated that the EEOC will continue to focus on hiring barriers, and expand its reach by closely reviewing pre-employment testing practices and potentially challenging any reliance on "big data" in the hiring process.⁷⁵

As shown below, some of the EEOC's significant settlements arose over the past fiscal year, which involved large-scale litigation spanning a period of many years. Except as indicated below, each of these settlements was based on consents decrees after litigation was initiated by the EEOC.

DATE	NATURE OF COMPANY	BASIS OF ALLEGED DISCRIMINATION	FOCUS OF CLAIMS AND SETTLEMENT AMOUNT
6/16/05	Car Manufacturer ⁷⁶	Race Discrimination	Aptitude Tests \$8.55 million
8/8/06	Trucking Company ⁷⁷	Sex Discrimination	Truck Driver and Dockworker Jobs \$2.4 million
4/2/07	Automotive Dealership Company ⁷⁸	Sex Discrimination	Sales Positions \$2.3 million
12/20/07	Car Manufacturer ⁷⁹	Race Discrimination	Aptitude Test for Skilled Trade Apprenticeship Program \$2.3 million
4/15/08	Staffing Company ⁸⁰	Race and Age Discrimination	Alleged Failure to Refer to Temporary Jobs \$575,000

66 See *EEOC v. BMW Mfg. Co.*, No. 13-CV-1583 (D.S.C.) (filed June 11, 2013; settled Sept. 8, 2015).

67 See *EEOC v. Dolgencorp*, 1:13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

68 *EEOC v. Peoplemark*, 2013 U.S. Appx. 2048 (6th Cir. Oct. 7, 2013).

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

70 *EEOC v. Freeman*, 2015 U.S. Dist. LEXIS 118307 (D. Md. 2013).

71 *EEOC v. Kaplan Higher Learning Education Corp.*, 748 F. 3d 749 (6th Cir. 2014).

72 See, e.g., *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4-11-cv-03425 (S.D. Tex.) (filed Sept. 21, 2011) (race and national origin discrimination).

73 *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination).

74 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).

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

76 *EEOC v. Ford Motor Co.*, No. 04-CV-845 (S.D. Ohio).

77 *EEOC v. Pitt Ohio Express*, No. 06-CV-747 (N.D. Ohio).

78 *EEOC v. Jeff Wyler Chevrolet, Inc.*, No. 03-CV-662 (S.D. Ohio).

79 *EEOC v. Ford Motor Co.*, No. 07-CV-703 (S.D. Ohio).

80 *EEOC v. Renhill Staffing*, No. 08-CV-82 (N.D. Ind.).

DATE	NATURE OF COMPANY	BASIS OF ALLEGED DISCRIMINATION	FOCUS OF CLAIMS AND SETTLEMENT AMOUNT
9/14/09	Insurance Company ⁸¹	Age Discrimination	Reorganization Plan Barring Reemployment \$4.8 million
3/1/10	Big Box Store ⁸²	Sex Discrimination	Order-Filler Jobs at Distribution Center \$11.7 million
3/10/10	Tire Company ⁸³	Sex Discrimination	Tire-Changing Jobs \$2 million
8/19/10	Staffing Company ⁸⁴	Race Discrimination	Alleged Preferential Hiring of Hispanics over African Americans for Temp Jobs \$585,000
1/11/12	Beverage Company ⁸⁵	Race Discrimination (Conciliation Agreement)	Criminal Background Checks Disproportionately Excluded African Americans \$3.13 million
4/30/13	Metal Forging Company ⁸⁶	Sex Discrimination	Entry Level Laborer Jobs \$700,000
9/12/14	Restaurant ⁸⁷	Race Discrimination	Front of the House Positions \$1.3 million
12/5/14	Staffing Company ⁸⁸	Race Discrimination	Alleged Preferential Treatment to Hispanic Workers over African America Workers \$580,000
5/6/16	Staffing Company ⁸⁹	Sex and Disability Discrimination	Alleged Exclusion Based on Gender (Female) and Unlawful Medical Inquiries \$800K
8/24/15	Big Box Store ⁹⁰	Race, Sex and Disability Discrimination (Conciliation Agreement)	Employment Assessments Screening out Applicants \$2.8 million
9/8/15	Car Manufacturer ⁹¹	Race Discrimination	Criminal Background Checks \$1.6 million
11/8/15	Uniform Delivery ⁹²	Sex Discrimination	Uniform Delivery Driver Jobs \$1.5 million
3/4/16	Sales Company ⁹³	Age and Sex Discrimination	Sales Positions \$1.02 million
3/24/16	Tire Company ⁹⁴	Sex Discrimination	Managers, Mechanics and Tire Changer Positions \$2.1 million

81 *EEOC v. Allstate Insurance Co.*, No. 04-CV-1359 (E.D. Mo.).

82 *EEOC v. Wal-Mart Stores, Inc.*, No. 01-CV-339 (E.D. Ky.).

83 *EEOC v. Les Schwab Tire Centers*, No. 06-CV-45 (W.D. Wash.).

84 *EEOC v. Paramount Staffing*, No. 06-CV-2624 (W.D. Tenn.).

85 *EEOC v. Pepsi Beverages* – EEOC Charge, Press Release, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Jan. 11, 2012).

86 *EEOC v. Presrite*, No. 11-CV-260 (N.D. Ohio).

87 *EEOC v. McCormick & Schmicks*, No. 08-CV-984 (D. Md.).

88 *EEOC v. Real Time Staffing Corp.*, No. 13-CV-2761 (W.D. Tenn.).

89 *EEOC v. Source One Staffing, Inc.*, No. 15-CV-1958 (N.D. Ill.).

90 *EEOC v. Target* – EEOC Charge, Press Release, *Target Corporation to Pay \$2.8 Million to Resolve EEOC Discrimination Finding* (Aug. 24, 2015).

91 *EEOC v. BMW Mfg. Co.*, No. 13-CV-1583 (D.S.C.).

92 *EEOC & Serrano v. Cintas*, No. 04-CV-40132 (E.D. Mich.).

93 *EEOC v. PMT Corp.*, No. 14-CV-00599 (D. Minn.).

94 *EEOC v. Mavis Discount Tire, Inc.*, No. 12-741 (S.D.N.Y.).

DATE	NATURE OF COMPANY	BASIS OF ALLEGED DISCRIMINATION	FOCUS OF CLAIMS AND SETTLEMENT AMOUNT
4/22/16	Commercial Bakery ⁹⁵	Race Discrimination	Alleged Exclusion of African Americans as Commercial Bakery Workers \$1.042 million
5/27/16	Trucking Company ⁹⁶	Sex Discrimination	Same-Sex Training Policy for Drivers \$3.1 million

b. Systemic Harassment

The 2016 Systemic Report highlights the EEOC's efforts in addressing systemic harassment, including discussion of the EEOC's recent Task Force on Harassment in the Workplace. From the EEOC's perspective, "[h]arassment based on race, sex, disability, age, national origin, and religion continues to be a persistent problem in the workplace, which is why addressing systemic harassment through systemic enforcement and targeted outreach is a national priority for the agency."⁹⁷ The Report sends a very strong message that attacking harassment remains an important priority at the EEOC.⁹⁸

In January 2015, shortly after Jenny Yang was appointed EEOC Chair, the EEOC held a Commission meeting that focused on harassment.⁹⁹ This was followed by the March 2015 announcement of the "EEOC Select Task Force on the Study of Harassment in the Workplace,"¹⁰⁰ in which it was further explained, "[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."

The EEOC announced the findings of a "panel of experts" in October 2015 and referred to a "multi-prong strategy essential to preventing workplace harassment," which included "[p]lacing 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."¹⁰¹ These findings were followed by issuance of the EEOC's Task Force Report on Harassment, issued in June 2016, which was authored by Commissioners Victoria Lipnic and Chai Feldblum.¹⁰²

The Task Force Report, as referenced in the 2016 Systemic Report, is comprehensive in nature and underscores the importance of "top down" leadership and key components for an effective anti-harassment policy and appropriate training to prevent harassment in the workplace.¹⁰³ Employers need to be mindful of the findings and recommendations of the Task Force Report, particularly because it includes the recommendation that the "EEOC should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined [in the Report]."¹⁰⁴

Notwithstanding, the Task Force Report attempts balance based on its finding that in any anti-harassment training, the substance of the training can also address the conduct that does not constitute harassment in the workplace, particularly focusing on actions by managers and supervisory personnel:

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

⁹⁵ *EEOC v. Lawler Foods, Inc.*, No. 14-3588 (S.D. Tex.).

⁹⁶ *EEOC v. New Prime Trucking, Inc.*, No. 6:11-CV-03367.

⁹⁷ See 2016 Systemic Report at 23.

⁹⁸ *Id.*

⁹⁹ 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>.

¹⁰⁰ 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>.

¹⁰¹ See EEOC, *Select Task Force Meeting of October 22, 2015 - Workplace Harassment: Promising Practices to Prevent Workplace Harassment*, and Press Release, EEOC, *Multi-Prong Strategy Essential to Preventing Workplace Harassment* (Oct. 23, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-23-15.cfm>.

¹⁰² See EEOC's *Select Task Force on the Study of Harassment in the Workplace*, issued in June 2016, at https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 44.

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.¹⁰⁵

The 2016 Systemic Report also highlights significant exposure for employers when faced with systemic harassment claims, relying on EEOC lawsuits that resulted in significant settlement payments by employers:

- A \$21 million dollar settlement in 2015 based on an EEOC lawsuit alleging that African Americans, Native Americans, Hispanics, Asian Americans, and biracial individuals at an oil drilling company were subjected to racial and ethnic slurs, assigned to the lowest level jobs, denied training and promotions, disproportionately disciplined and demoted, and were retaliated against;¹⁰⁶
- An \$11 million settlement in a race harassment case against a trucking company on behalf of 309 African American employees, who reportedly were subjected to racially hostile displays such as nooses and racist graffiti, as well as being disciplined more severely than their peers of other races;¹⁰⁷
- A similar race harassment case settled with a trucking company for \$10 million for 250 African American, which included new anti-harassment policies, and consultants to examine discipline and assignment procedures;¹⁰⁸
- Settlement payment of \$2.5 million, plus significant revisions to company policies, affecting 79 female employees based on alleged sexual harassment of teenagers employed at a fast food chain;¹⁰⁹ and
- Settlement payment of \$2 million, plus similar revisions to policies, on behalf of 79 female employees involving another fast food chain.¹¹⁰

Recent harassment litigation by the EEOC continues to underscore the risks of such claims, as evidenced by a recent \$1.4 award based on alleged egregious harassment of numerous female farm workers by two supervisors¹¹¹ and a settlement of over \$1 million in early 2016 against a condominium complex based on allegedly allowing a housekeeping manager to sexually harass a group of female employees, which included attempted rape.¹¹²

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*.¹¹³ This 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 EEOC's pattern-or-practice claim was dismissed by the district court, the EEOC continued to seek relief on a class basis of 270 employees. Ultimately, and after many years of wrangling and favorable judgments in favor of the employer, except for two claimants, the EEOC dropped the claim of one claimant and was 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.

c. Pay and Promotion

In its 2016 Systemic Report, the EEOC referred to its systemic efforts dealing with "pay and promotion practices," but the focus of the discussion was on EEOC litigation and settlements dealing with promotion claims. Even so, recent

105 *Id.* at 50.

106 *EEOC v. Patterson-UTI Drilling Company LLC*, No. 15-cv-600 (D. Colo.) (Consent decree entered Apr. 15, 2015). See 2016 Systemic Report at 23.

107 *EEOC v. Yellow Freight Sys., Inc.* No. 09-CV-7693 (N.D. Ill.) (Consent decree entered Sept. 25, 2012). 2016 Systemic Report at 23.

108 *EEOC v. Roadway Express, Inc.*, No. 06-CV-4805 (N.D. Ill.) (Consent decree entered Dec. 20, 2010); see 2016 Systemic Report at 23.

109 *EEOC v. Carrols Corp.*, No. 98-CV-1772 (N.D.N.Y.) (Consent decree entered Jan. 10, 2013, provided \$2.5 million for 79 women); see 2016 Systemic Report at 23.

110 *EEOC v. Sonic Drive In*, No. 09-CV-953 (D.N.M.) (Consent decree entered June 14, 2011); see 2016 Systemic Report at 23.

111 See *EEOC v. Z Foods*, Case No. 1:13-at-00698 (E.D. Cal.) (Announced in EEOC Press Release, *Federal Judge Awards \$1,470,000 in EEOC Sexual Harassment and Retaliation Case Against Z Foods* (July 22, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-22-16a.cfm>).

112 See *EEOC v. Vail Run Resort Community Association, Inc. d/b/a Vail Run Resort, et al*, Civil Action No. 1:15-cv-01592 (D. Colo.) (Announced in EEOC Press Release, *Vail Condo Association Will Pay Over \$1 Million to Settle EEOC National Origin Discrimination and Sexual Harassment Lawsuit* (Feb. 12, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/2-12-16.cfm>).

113 See *CRST Van Expedited, Inc. v. EEOC*, No. 14-1375, 2016 U.S. LEXIS 3350, 578 U.S. ____ (2016).

events make it abundantly clear that pay discrimination, including Equal Pay Act issues, will receive significantly increased attention by the EEOC.

The 2016 Systemic Report highlights: (1) a \$21.3 million conciliation agreement, which included denial of promotion claims impacting over 200 African American employees;¹¹⁴ (2) a \$19 million systemic settlement involving a national restaurant chain impacting 3,000 female workers that included denial of promotion claims;¹¹⁵ (3) payment of \$25.3 million to settle a lawsuit involving denial of promotions at a national retail pharmacy involving 10,000 African American management and pharmacy employees;¹¹⁶ and (4) a \$5 million settlement of a systemic lawsuit against an Illinois manufacturing operation impacting 259 African American workers that included alleged denial of promotional opportunities.¹¹⁷

Not surprisingly, the 2016 Systemic Report makes no mention of any recent EEOC recent successes in pursuing systemic Equal Pay Act claims because the EEOC's efforts in this area have been limited, and the agency has suffered stinging setbacks on this issue. One of the more highly publicized losses involved *EEOC v. Port Auth. Of N.Y. & N.J.*,¹¹⁸ in which the EEOC asserted that female attorneys were paid less than male attorneys for "jobs the performance of which requires equal skill, effort, and responsibility." In ultimately dismissing the Complaint, following limited discovery, the court took sharp exception with the EEOC's mere "conclusory allegations...despite a three-year investigation—to state an EPA claim upon which relief may be granted." On appeal to the Second Circuit, the EEOC did not fare any better, and in a sharply worded opinion, the appeals court stated, "[w]e conclude that the EEOC's failure to allege any facts concerning the attorneys' actual job duties deprives the Court of any basis from which to draw a reasonable inference that the attorneys performed 'equal work,' the touchstone of an EPA claim."¹¹⁹

The EEOC suffered another setback in *EEOC v. True Oil LLC*,¹²⁰ in which the district court in Wyoming struck down an EPA claim in a summary judgment ruling and rejected the view that female accounting clerks were paid less than male employees performing "substantially equal work." The court found that the employees performed distinctly different duties at the subsidiary companies, essentially finding that similar job titles were not dispositive of an EPA claim. Although the EEOC filed a notice of appeal on September 16, 2016, the appeal was dropped on October 12, 2016.¹²¹

The EEOC's recently published Strategic Enforcement Plan (SEP) for 2017-2021, as announced on October 17, 2016, makes clear that pay discrimination claims will not be limited to equal pay claims under the EPA, explaining:¹²²

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.¹²³

During FY 2016, the EEOC also announced revisions to the annual EEO-1 Report to collect pay data as part of a joint effort with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), which monitors equal employment efforts of federal government contractors. Announcement of this planned change initially occurred on January 29, 2016, as part of a White House Equal Pay event, during which former Chair Yang stated, "the EEOC is taking a significant step forward to address pay inequality in the workplace."¹²⁴ Former Chair Yang explained that the EEOC "will use this data to more effectively focus investigations, assess complaints of discrimination and identify existing pay

114 See 2016 Systemic Report at 24.

115 *Id.* at 24. See *EEOC v. Outback Steakhouse of Florida, Inc.*, No. 06-CV-1935 (D. Colo.) (Consent decree entered Dec. 29, 2009).

116 *Id.* at 24. See also *EEOC v. Walgreen Co.*, No. 07-CV-172 (S.D. Ill.) (Consent decree entered Mar. 24, 2008).

117 *Id.* at 24. See also *EEOC v. Woodward Governor*, No. 06-CV-50178 (N.D. Ill.) (Consent decree entered Feb. 16, 2007).

118 *EEOC v. Port Auth. Of N.Y. & N.J.*, Case No. 10 Civ. 7462 (NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012), *aff'd*, 2014, 2014 U.S. App. LEXIS 18533 (2d Cir. Sept. 29, 2014). The lawsuit included both ADEA and EPA claims.

119 *Port Authority*, 2014 U.S. App. LEXIS 18544, at *4.

120 See *EEOC v. True Oil, LLC*, Case No. 15-cv-74 (D. Wyo., May 15, 2016).

121 *EEOC v. True Oil LLC*, 0:16-cv-08109 (10th Cir.) (Notice of Appeal Filed Sept. 16, 2016); (Notice of Termination Filed Oct. 12, 2016).

122 See Press Release, EEOC, *EEOC Updates Strategic Enforcement Plan* (Oct. 17, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-17-16.cfm>. The updated SEP is available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

123 See 2017-2021 SEP at 8.

124 See Press Release, EEOC, *EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports* (Jan. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm>.

disparities that may warrant further investigation.” Employers also were encouraged to use this data to “help evaluate their own pay practices.”¹²⁵

As most employers are aware, the final announcement of the updated EEO-1 form occurred on September 29, 2016, at which time the EEOC stated that starting March 2018, it will collect pay data from employers covered by the EEO-1 reporting requirements.¹²⁶ This change would affect government contractors and employers with over 100 employees.

In view of the recent federal election, it is now unclear whether the announced change to the EEO-1 forms will remain in effect. Notwithstanding, employers should anticipate that the EEOC will continue to focus on pay discrimination as part of its updated Strategic Enforcement Plan.

d. Policies Failing to Accommodate Individuals with Disabilities

In recent years, the EEOC consistently has brought more ADA lawsuits than any other claim.¹²⁷ While a substantial number of the EEOC’s ADA lawsuits have involved failure-to-accommodate claims, a key focus of the EEOC’s systemic initiative has involved challenging employer leave policies, including both leave policies with maximum caps and no-fault attendance plans that failed to make reasonable accommodations for employees with disabilities.

First, in dealing with leave policies, the EEOC has repeatedly challenged employers that are viewed as having inflexible maximum leave policies and failing to provide reasonable accommodations to employees seeking to return from leave, taking the view such policies violate the ADA. As an example, for the past several years, the EEOC has been deeply entrenched in a nationwide ADA pattern-or-practice lawsuit in *EEOC v. United Parcel Service*,¹²⁸ pending in the Northern District of Illinois.

The EEOC’s 2016 Systemic Report also highlights a recent \$8.6 million settlement involving a national retail home improvement and appliance chain involving similar allegations in which the employer allegedly failed to provide reasonable accommodations to individuals with disabilities and terminating their employment when their medical leaves of absence exceeded the employer’s maximum leave policy. As part of the May 2016 settlement, the employer agreed to retain a consultant with ADA experience to review and revise company policies, implement effective training for both supervisors and staff on the ADA, develop a centralized tracking system, and regularly report compliance to the EEOC.¹²⁹ The 2016 Systemic Report also points to the EEOC’s issuance of a May 2016 resource guide to assist employers dealing with leave policies¹³⁰ that describes numerous successful settlements involving similar challenges to inflexible leave policies.¹³¹

The EEOC has taken a similar approach in its attack on no-fault attendance policies. Aside from a pending lawsuit in the Northern District of Illinois,¹³² the 2016 Systemic Report points to a \$1.7 million settlement in November 2015 based on a conciliation agreement with an employer that had a nationwide policy of issuing attendance points for medical-related absences and not excusing points based on absences stemming from disability-related absences. The significant risk of

125 *Id.*

126 See Press Release, EEOC, *EEOC to Collect Summary Pay Data* (Sept. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.

127 Based on the EEOC’s FY 2016 PAR, 35 out of 86 merits lawsuits (40%) involved ADA claims, and 11 of the 18 systemic lawsuits filed by the EEOC during FY 2016 involve ADA claims. There has been a similar pattern in prior years; (1) in FY 2015, 53 of the 142 merits lawsuits (37%) filed by the EEOC involved ADA claims; (2) in FY 2014, there were 49 ADA lawsuits among the 167 lawsuits (29%) filed by the EEOC.; and (3) in FY 2013, there were 51 ADA (lawsuits among the 148 lawsuits (34%) filed by the EEOC. See EEOC, *Litigation Statistics*, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

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

129 See 2016 Systemic Report at 25. Also see EEOC Press Release, *Lowe’s to Pay \$8.6 Million to Settle EEOC Disability Discrimination Suit* (May 13, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-13-16.cfm>.

130 See Press Release, EEOC, *EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability* (May 9, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm>; See also 2016 Systemic Report at 26.

131 *Id.* at 26, citing *EEOC v. Interstate Distributor Co.*, Civil Action No. 12-CV-2591 (D. Colo.) (Consent decree entered Nov. 8, 2012) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free requirement; consent decree provided \$4.9 million for 427 individuals with disabilities, revised leave and ADA policies); *EEOC v. Supervalu, Inc. et al.*, Civil Action No. 09-CV-5637 (N.D. Ill.) (Consent decree entered Jan. 14, 2011) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible leave policy and 100% restriction-free policy; consent decree provided \$3.2 million to 110 individuals with disabilities and extensive injunctive relief). In the *Supervalu* case, the court later held the company in contempt for violating the consent decree, by failing to provide accommodations to several employees who attempted to return to work from medical leaves of absence, and awarded additional damages. See also *EEOC v. Sears Roebuck & Co.*, No. 04-7282 (N.D. Ill. Sep. 29, 2009) (alleging large-scale denial of reasonable accommodation and discharge based on inflexible workers’ compensation leave exhaustion policy; consent decree provided \$6.2 million for around 400 individuals with disabilities).

132 See *EEOC v. AutoZone, Inc.*, 14-cv-3385 (N.D. Ill.).

such no-fault policies was also underscored based the EEOC's highlighting a \$21 million nationwide settlement based on a 2011 consent decree entered into between the EEOC and a telecommunications firm.¹³³

Key provisions in the 2011 consent decree,¹³⁴ coupled with statements by the EEOC in guidance issued by the agency,¹³⁵ underscore that any no-fault attendance policy requires reference to reasonable accommodation under the ADA and (generally) not receiving an adverse action stemming from an absence based on a protected disability. Both the consent decree and EEOC guidance make clear that an employer is required to approach such accommodations on an individualized basis, but limits can be placed on such accommodations to the extent that an employee's absences would be "unreasonably unpredictable, repeated, frequent or chronic."

While not addressed in the 2016 Systemic Report's discussion of the EEOC's systemic initiative, an important ADA issue the EEOC has focused on involves "voluntary" participation in wellness plans. Aside from issuing rules to address the EEOC's view in this area,¹³⁶ the EEOC also has initiated broad-based litigation, although the EEOC's results to date have been mixed.¹³⁷ However, in an unusual turn of events, the U.S. Chamber of Commerce recently joined forces with the EEOC in filing an Amicus Brief to support the EEOC's opposition to a motion for a preliminary injunction to enjoin implementation of the EEOC's recent wellness rules in *AARP v. United States Equal Employment Opportunity Commission*.¹³⁸

e. Access to the Legal System

The EEOC's stated priority involving "preserving access to the legal system" has involved challenges to employer practices that "target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts." Based on the 2016 Systemic Report, the EEOC referred to these employer "barriers" as taking many forms, "including widespread retaliatory employment actions against those who take the step of reporting unlawful discrimination, threats of harm against individuals who act as witnesses in EEOC proceedings, or employment agreements that interfere with the right to file a charge or communicate with EEOC."¹³⁹

Most employers are aware that retaliation claims are closely scrutinized by the EEOC, and the agency recently outlined the specific types of concerns that create employer risk, as reviewed in the EEOC's *Enforcement Guidance on Retaliation and Related Issues*, issued on August 25, 2016.¹⁴⁰ Topics covered include: (1) the scope of employee activity protected by the law; (2) legal analysis to be used to determine if evidence supports a claim of retaliation; (3) remedies available for retaliation; (4) rules against interference with the exercise of rights under the ADA; and (5) detailed examples of employer actions that may constitute retaliation.¹⁴¹

133 *EEOC v. Verizon Maryland, Inc.*, No. 11-CV-1832 (D. Md.) (Consent decree entered Jul. 6, 2011) (alleging large-scale denial of reasonable accommodation, discipline and discharge based on inflexible attendance policies; three-year consent decree provided \$20 million to 800 individuals with disabilities and revised policies to require accommodation). See 2016 Systemic Report at 25.

134 *Id.* See Consent Decree, Section 20.03.

135 See *EEOC Guidance: Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities* (Sept. 3, 2008) (See Questions 19 and 20) at <https://www.eeoc.gov/facts/performance-conduct.html>; *EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (Oct. 17, 2002) (See Question 17) at <https://www.eeoc.gov/policy/docs/accommodation.html>; EEOC Resource on *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016). See EEOC, Press Release, *EEOC Issues New Resource Document Addressing Issues Related to Leave and Disability* (May 9, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-9-16.cfm> and publication at <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

136 See EEOC's wellness rules, as discussed in EEOC Press Release, *EEOC Issues Final Rules on Employer Wellness Programs* (May 16, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm>.

137 See *EEOC v. Flambeau*, 131 F. Supp. 3d 849 (W.D. Wis. 2015) (summary judgment for employer striking down EEOC challenge based on "safe harbor" provision of ADA). *But see EEOC v. Orion Energy Sys.*, 2016 U.S. Dist. LEXIS 1127292 (E.D. Wis. Sept. 19, 2016) (rejected adoption of "safe harbor" defense in part based on EEOC regulations, but viewed participation as voluntary; notwithstanding, question of fact regarding retaliation claim based on concerns raised regarding wellness program).

138 See *AARP v. United States Equal Employment Opportunity Commission*, Case No. 16-cv-2113 (D.D.C.), in which AARP has challenged the "incentives" permitted by the EEOC wellness rules, arguing that they are improper "financial penalties." On December 29, 2016, the federal district court for the District of Columbia denied the AARP's motion for a preliminary injunction.

139 2016 Systemic Report at 26-27.

140 See Press Release, EEOC, *EEOC Issues Final Enforcement Guidance on Retaliation and Related Issues after Public Input Process* (Aug. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/8-29-16.cfm>.

141 *Id.*

As significantly, the EEOC's 2016 Systemic Report underscores that systemic retaliation claims also create significant risk for employers. As an example, 14 percent of successful conciliations and 22 percent of successful lawsuit resolutions involve retaliation claims.¹⁴² The Report focused on several significant settlements:¹⁴³

- In one suit against a nationwide grocery store, the EEOC found a pattern of retaliation against employees who complained of discrimination, including harder assignments, denials of promotion, and discharge. The EEOC settled the case and obtained \$8.9 million for 168 employees, plus intensive training for company employees and four years of monitoring to ensure compliance.¹⁴⁴
- In another case, the EEOC obtained a judgment that a labor contractor's repeated threats to deport guest farmworkers constituted a pattern-or-practice of unlawful retaliation.¹⁴⁵
- In two other cases, the EEOC obtained preliminary injunctive relief after discovering that the employer was instilling extreme fear among charging parties or witnesses through acts such as bribes, vandalism, solicitation to commit criminal acts, and death threats.¹⁴⁶

One of the most controversial issues based on the EEOC's reported effort to "preserve access to the legal system" has involved the EEOC filing suit in the absence of a discrimination charge or allegations of retaliatory conduct in which the EEOC has challenged releases and arbitration agreements (collectively referred to as "employment agreements"). Recent EEOC lawsuits have relied on the authority of Section 707(a) of Title VII involving an alleged "pattern-or-practice of resistance to the full enjoyment of any of the rights" secured by Title VII.¹⁴⁷ The 2016 Systemic Report referred to "the use of employment agreements that materially interfere with the right to file a charge or participate in an EEOC proceeding as an unlawful pattern-or-practice of resistance to Title VII rights," specifically relying on *EEOC v. Doherty Enterprises, Inc.*¹⁴⁸

In *Doherty*, the EEOC focused on applicants and employees being required to sign an arbitration agreement that prohibited filing of discrimination charges with the EEOC and instead required the parties to resolve their disputes through arbitration.¹⁴⁹ The employer moved to dismiss based on the EEOC suing without an underlying charge of discrimination and the EEOC's failure to engage in conciliation prior to suing the employer. The employer also submitted that the EEOC could proceed against the employer only if the EEOC was asserting an "unlawful employment practice" covered within the prohibitions of Title VII (*i.e.*, discriminatory employment practices and/or retaliatory conduct).

In rejecting the employer's arguments, the court in *Doherty* broadly interpreted Section 707(a) and the "resistance" language. Aside from ruling that the EEOC could sue absent a discrimination charge, the court in *Doherty* ruled that Section 707 was not limited to claims involving "unlawful employment practices," explaining:

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

142 2016 Systemic Report at 2.

143 *Id.* at 26-27.

144 See *EEOC v. Albertsons, Inc.*, No. 06-CV-1273 (D. Colo.) (Consent decree entered Dec. 14, 2009) (alleging widespread race harassment and retaliation).

145 See *EEOC v. Global Horizons*, 2014 WL 1118009 (D. Haw. Mar. 19, 2014).

146 See *EEOC v. Pitre Inc.*, No. 11-CV-875 (D.N.M.) (Order issued Jan. 26, 2012) (granting preliminary injunction in systemic harassment suit based on testimony of numerous witnesses of extreme fear of being blacklisted in car dealership industry, evidence that charging party lost a subsequent job after employer spoke to defendant, and evidence of vandalism and death threats); *EEOC v. Evans Fruit*, 2010 WL 2594960 (E.D. Wash. June 24, 2010) (granting temporary restraining order in systemic harassment suit based on employer's offer to pay witnesses, threats and intimidation tactics, and solicitation of accomplices to commit criminal acts against charging parties and witnesses).

147 See 42 U.S.C. §2000e-6(a).

148 See 2016 Systemic Report at 27 and *EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) (in denying motion to dismiss, court found EEOC had stated a viable claim under Section 707 of Title VII).

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

In *Doherty*, the court also held that the procedures in Section 706 were not required for “resistance” claims, and neither a charge nor conciliation was required prior to suing.¹⁵⁰

It should also be noted, aside from the discussion of the *Doherty* case and the EEOC’s challenge to the employer’s arbitration agreement in that case, the 2016 Systemic Report included critical comments on mandatory arbitration agreements. In the view of the EEOC, “[b]y taking discrimination claims out of the public view, forced arbitration can prevent employees from learning about similar concerns shared by others in their workplace and can impede development of the law.”¹⁵¹ The EEOC further outlined its concern that “[f]orced arbitration can also deter workers from bringing discrimination claims to the EEOC, leaving significant violations in entire segments of the workforce unreported.”¹⁵²

While the EEOC has pointed to its harsh view of both arbitration agreements and release agreements as interfering with “access” to the EEOC’s legal processes,¹⁵³ the EEOC’s 2016 Systemic Report failed to even mention the Seventh Circuit’s December 2015 opinion, *EEOC v. CVS Pharmacy, Inc.*,¹⁵³ which took strong exception with the EEOC’s approach in challenging an employer’s release.

The *CVS* case involved the EEOC’s challenge to a severance agreement that included a general release in circumstances where the underlying charge involved alleged sex and race discrimination, but involved no attack regarding the severance agreement. The lawsuit arose after the EEOC became aware of the severance agreement and general release and thereafter dismissed the underlying charge, but advised the employer there was “reasonable cause” to believe that based on the severance agreement, the employer was engaged “in a pattern-or-practice of resistance to the full enjoyment of rights secured by Title VII.”¹⁵⁴ The EEOC then sued without engaging in conciliation.

To support its motion to dismiss or for summary judgment,¹⁵⁵ the employer in *CVS* focused on the express terms of the severance agreement, which expressly provided that the agreement did not “interfere with [an] Employee’s right to participate in a proceeding with any . . . government agency enforcing discrimination laws” and did not “prohibit [an] Employee from cooperating with any such agency.”

The employer challenged the EEOC’s basis for its “pattern-or-practice” claim in *CVS* and asserted that a lawsuit could only be pursued where there was a claim of a “pattern of discrimination,” and the EEOC had conceded that it was not asserting any claim of discriminatory or retaliatory conduct. In granting the employer’s motion to dismiss in *CVS*, the district court did not address the substance of the employer’s claim involving the EEOC’s challenge to the separation agreement.¹⁵⁶ Instead, the court focused on the procedural issues leading to the lawsuit and dismissed the lawsuit based on the EEOC’s failure to conciliate prior to suing. As significantly, the district court rejected the EEOC’s attempt to expand the meaning of the term “resistance” in Section 707(a) of Title VII beyond discrimination and retaliation.¹⁵⁷ In the district court’s view, based on review of applicable authority, while Congress in 1972 may have transferred authority from the Justice Department to the EEOC to institute pattern-or-practice lawsuits, the EEOC was granted authority “to bring charges of a pattern-or-practice of discrimination and not as creating a separate cause of action.” The district court concluded that the 1972 Amendment to Title VII “did not authorize the EEOC to forego the procedures in Section 706,” including conciliation, and the EEOC was thus “not authorized to file this suit against [the employer] and [the employer] is entitled to judgment as a matter of law.”¹⁵⁸

In affirming the district court’s dismissal of the EEOC’s lawsuit in *CVS*, the Seventh Circuit rejected the EEOC’s view of Section 707(a) and held that: (1) the EEOC could not proceed with a lawsuit in the absence of a charge of discrimination; (2) the EEOC could not circumvent the EEOC’s obligation to engage in conciliation prior to filing suit; and (3) the EEOC

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

151 See 2016 Systemic Report at 35-37.

152 *Id.*

153 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, (7th Cir. 2015), *reh’g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).

154 *Id.*

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

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

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

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

could not pursue a “pattern-or-practice” claim based on Section 707(a) in the absence of claim of unlawful discriminatory or retaliatory conduct in violation of Title VII. The Seventh Circuit further emphasized that Section 707(a) did not “create a broad enforcement power of the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII [involving unlawful discrimination or retaliation] in one consolidated proceeding.” On January 28, 2016, the EEOC filed a Petition for Rehearing or Rehearing En Banc, but on March 9, 2016, the Seventh Circuit issued an Order denying the EEOC’s Petition.

In the EEOC’s 2016 Systemic Report, in discussing its priority of “Access to the Legal System,” the EEOC also omitted any discussion of the release that was upheld by the Third Circuit in *EEOC v. Allstate Insurance Company*.¹⁵⁹ In *Allstate*, based on changing the way it sold insurance, the company reorganized and shifted to an independent contractor model and terminated the at-will employment of its sales agents, offering them the opportunity to work as independent contractors on the condition of waiving their legal claims against the employer, including claims arising under Title VII, the ADEA and the ADA. The EEOC argued that a requirement to execute a release constituted unlawful discrimination on various grounds, including the contention that withholding a privilege of employment (*i.e.*, the conversion option) in exchange for the release was “per se retaliatory,” and the refusal to waive discrimination claims constituted “protected opposition activity.”

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

f. Protecting Immigrant, Migrant and Other Vulnerable Workers

One area where the EEOC has devoted significant time and resources has involved looking after the interests of immigrant, migrant and other vulnerable workers, particularly because this group of workers has historically received limited support from the private plaintiff’s bar.

The 2016 Systemic Report highlights several cases to dramatize the plight of vulnerable workers and the EEOC’s efforts on their behalf:¹⁶⁰

- The Report reviews the EEOC’s suit against *Henry’s Turkey Service*¹⁶¹ seeking relief for 32 intellectually disabled men at a turkey evisceration plant in Iowa, who reportedly were subjected to years of confinement, abuse, deplorable conditions, and reduced pay after the sister of one of the men filed a charge of discrimination on his behalf. After going to trial in 2013, a jury awarded them \$240 million, although the award was dramatically reduced based on the “damages cap” under Title VII.¹⁶²
- The Report also refers to the EEOC prevailing in cases seeking relief for hundreds of Indian¹⁶³ and Thai¹⁶⁴ workers recruited to work in the United States who were subjected to unfavorable work conditions, and threats of violence and deportation.

¹⁵⁹ *EEOC v. Allstate Insurance Company*, 2015 U.S. App. LEXIS 2330 (3d Cir. Feb. 13, 2015).

¹⁶⁰ See 2016 Systemic Report at 27-28.

¹⁶¹ *EEOC v. Hill Country Farms, Inc., d/b/a Henry’s Turkey Serv.*, No. 11-CV-41 (S.D. Iowa) (Judgment upon jury verdict entered June 11, 2013) (Jury verdict reduced due to statutory caps on damages; judgments provided \$3.4 million for 32 men).

¹⁶² *Id.*

¹⁶³ *EEOC v. Signal Int’l, LLC*, No. 12-CV-557 (E.D. La.) (Order entered Dec. 18, 2015) (Indian nationals recruited to work at Mississippi and Texas shipbuilding plant; order provides approximately \$5 million to 476 men, and CEO letter of apology). Related private litigation demonstrates the complexity of the issues involved in dealing with immigrant workers. In a related private lawsuit filed in Louisiana on behalf of various Indian workers, the jury returned a verdict of over \$14 million in favor of the workers based on factual allegations similar to those in the EEOC lawsuit. In the related litigation, various claims were asserted, including: (1) alleged violations of the Trafficking Victims Protection Act; (2) alleged violations of the Racketeer Influence and Corrupt Organizations (RICO) Act; (3) misrepresentation; (4) breach of contract and promissory estoppel; (5) false imprisonment; and (6) intentional infliction of emotional distress. See *Kurian David et al v. Signal International, LLC*, Case No. 08-cv-01220-SM-DEK, Docket No. 2299 (Plaintiff’s Memorandum in Support of Motion for Entry of Judgment, Feb. 24, 2015).

¹⁶⁴ *EEOC v. Global Horizons*, No. 11-CV-257 (D. Haw.) (Judgment entered Dec. 19, 2014 and consent decrees entered against co-defendants) (Thai nationals recruited to work on Hawaii farms under H-2A visa program; judgment and series of decrees provided \$12.8 million for 546 employees, multiple job offers, and revised contracts with labor contractors). See also Press Release, EEOC, *Federal Judge Awards EEOC \$7,658,500 in Case Against Farm Labor Contractor Global Horizons* (May 2, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-2-16.cfm>.

- In another case,¹⁶⁵ the Report refers to the EEOC securing increases in wages, benefits and promotion opportunities for 149 Hispanic warehouse workers in New York City who had been denied equal pay and opportunities.
- In one final case scenario, the EEOC refers to having sought relief for EEOC “farmworker women,” who alleged sexual harassment and retaliation by their employer.¹⁶⁶

While not mentioned in the EEOC’s 2016 Systemic Report, the above awards and settlements are in stark contrast to one lawsuit by the EEOC on behalf of vulnerable workers in circumstances where the EEOC’s tactics to protect such workers led the agency to inappropriately expand the scope of its lawsuit, at least in the view of one court. In *EEOC v. Global Horizons et al*,¹⁶⁷ although a default judgment was entered against defendant Global Horizons (the employer of the workers), the district court judge took strong exception with the EEOC’s including the defendant growers in the lawsuit, finding “the evidence and documentation pertaining to the parties’ pre-lawsuit communications and the EEOC’s investigation (or lack thereof) ... shows that the EEOC was not prepared to allege plausible, reasonable, or non-frivolous Title VII claims against the Grower Defendants.”

In challenging the EEOC’s approach to that litigation, the court referred to EEOC investigation notes in which Thai workers provided information that the grower defendants did not treat them unfairly in terms of compensation or in any other manner and treated them the same as Latino workers. In the court’s view, the EEOC was left with a “joint-employer” theory without legal or factual support. In an opinion extremely critical of the EEOC’s approach to the lawsuit, the court awarded legal fees against the EEOC for its conduct and stated:

In summary, this is an exceptional cases where the EEOC failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants.¹⁶⁸

g. Mandatory Retirement and Benefits/Age Discrimination

Finally, although mandatory retirement and related age discrimination claims were not included among the EEOC’s list of priorities in its Strategic Enforcement Plan, the 2016 Systemic Report demonstrates that the EEOC has been closely scrutinizing such charges for a number of years. Based on many members of the “baby boom” generation approaching the traditional retirement age, employers need to carefully review proposed actions that increase the risk of large-scale age discrimination claims and policies that may have an adverse impact against older workers, particularly hiring and termination practices.

The 2016 Systemic Report, however, focused solely on cases in which the EEOC has successfully challenged retirement and benefit systems that allegedly discriminate based on age.¹⁶⁹

- The Report referred to *EEOC v. Sidley Austin*¹⁷⁰, in which the EEOC challenged the law firm’s policy of forcing out older partners based on age. Based on a consent decree settling the case, the firm paid \$27.5 million to 32 former partners.
- *EEOC v. Baltimore County*¹⁷¹ also was cited in which the Fourth Circuit upheld a district court finding that the Maryland county’s pension system treated older new-hires less favorably because of their age by requiring them to make larger contributions than younger new-hires for the same benefits.
- The Report next refers to *EEOC v. Minnesota Dep’t of Corrections*,¹⁷² in which the Eighth Circuit affirmed a summary judgment ruling that an early retirement incentive plan that included an age 55 “cliff”—in which a retirement incentive was not available to individuals once they reached age 55—was inconsistent with the purposes

¹⁶⁵ *EEOC v. B & H Foto*, No. 07-CV-9241 (S.D.N.Y.) (Consent decree entered Mar. 17, 2009) (decree provided \$4.3 million for 149 workers, wage equalization).

¹⁶⁶ *EEOC v. Evans Fruit Co.*, Nos. 10-CV-3033, 11-CV-3093 (E.D. Wash.) (Settlement agreement entered Jan. 28, 2016) (sexual harassment and retaliation of 20 female farmworkers). See also Press Release, EEOC, *Evans Fruit Settles Sexual Harassment and Retaliation Lawsuits With EEOC, NW Justice Project* (Jan. 28, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/1-28-16.cfm>.

¹⁶⁷ See *EEOC v. Global Horizons et al*, Case No. CV-11-3-45EFS, Docket No. 667 (E.D. Wash.) (Notice of Default Judgment entered Sept. 28, 2015).

¹⁶⁸ *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 37674 (E.D. Wash., Mar. 18, 2015).

¹⁶⁹ See 2016 Systemic Report at 28-29.

¹⁷⁰ *EEOC v. Sidley Austin*, No. 05-CV-208 (N.D. Ill.) (Consent decree entered Oct. 5, 2007).

¹⁷¹ *EEOC v. Baltimore Cty.* 747 F.3d 267 (4th Cir. 2014).

¹⁷² *EEOC v. Minnesota Dept. of Corrections*, 648 F.3d 910 (8th Cir. 2011).

of the ADEA. According to the EEOC brief, as cited with approval by the appeals court, “[t]he age 55 cliff meant that, in order to obtain this benefit, employees must retire at 55, or forever lose the opportunity to obtain the benefit. Employees hired after age 55 never could obtain the early retirement benefit.” The court held that the plan “arbitrarily discriminate(s) on the basis of age.” Following that decision, the EEOC resolved a series of similar suits against other Minnesota state agencies.¹⁷³

- The Report highlights a series of lawsuits against New York municipal volunteer fire departments. The EEOC successfully challenged the denial of service credit for volunteer firefighters who worked past the entitlement age for retirement benefits, as evidenced by numerous consent decrees striking down the policy.¹⁷⁴
- Similarly, the EEOC refers to conciliation agreements in four systemic ADEA investigations alleging that employers stopped allowing volunteer firefighters to accrue points for performing certain duties when they reached age 55 or 60.¹⁷⁵

The EEOC Report points out that in each of the above-referenced cases, the retirement benefits plans discriminated against older workers because the plans reduced the employees’ retirement benefits based solely on age. As explained in the Report, “EEOC secured agreements that increased monthly benefits at retirement, provided awards of monetary benefits for current retirees and family members of deceased retirees, and required the employers to change their policies to bring them into compliance with the ADEA.”

Recent EEOC litigation also shows that the agency has increased its focus on a broad range of litigation impacting older workers. This includes litigation attacking hiring barriers to older workers¹⁷⁶ as well as large-scale workforce reductions that impact older workers.¹⁷⁷

G. Concluding Remarks and Anticipated Trends for FY 2017

While the above discussion is intended to provide an update on the EEOC’s systemic initiative over the past year as well as review key milestones and other noteworthy developments in recent years, it is difficult to predict with certainty what employers can expect moving forward. Even so, while there may be some changes in EEOC policy, it is unlikely the agency will dramatically shift gears during the coming fiscal year. The following are some of the anticipated trends for FY 2017.

1. The EEOC Will Continue to Focus on Systemic Investigations and Related Litigation.

Despite the new administration, during the coming fiscal year it is unlikely there will be any significant change in the agency’s continued focus on systemic investigations and related litigation. The recently adopted Strategic Enforcement Plan for 2017-2021 clearly shows that the agency will continue to be strategic based on its limited resources,¹⁷⁸ but the EEOC may be even more careful in cases selected for litigation to limit criticism of the agency, which could have a direct impact on funding and staffing levels. It also is anticipated that the agency will maintain the “new normal” of a reduced case load. As an example, during FY 2016, the EEOC filed the smallest number of lawsuits in recent years, and despite a general decrease in the number of suits filed over the past five years,¹⁷⁹ there was an approximate 35% decrease in

173 *EEOC v. Minnesota Board of Public Defense*, Civil Action No. 12-cv-205 (D. Minn.) (Consent decree entered Apr. 26, 2012); *EEOC v. Minnesota Dep’t of Commerce*, Civil Action No. 11-cv-2746 (D. Minn.) (Consent decree entered Nov. 9, 2011); *EEOC v. Minnesota Dep’t of Natural Res.*, No. 11-cv-2745 (D. Minn.) (Consent decree entered Nov. 7, 2011).

174 *EEOC v. Bayville Fire Co.*, No. 07-cv-4472 (E.D.N.Y.) (Consent decree entered Apr. 8, 2010); *EEOC v. Brentwood Fire Dep’t*, No. 09-cv-3298 (E.D.N.Y.) (Consent decree entered Mar. 14, 2011); *EEOC v. Village of Minneola*, No. 08-cv-973 (E.D.N.Y.) (Consent decree entered Jan. 20, 2010); *EEOC v. Selden Fire Dist.*, No. 08-cv-3974 (E.D.N.Y.) (Consent decree entered Apr. 16, 2010); *EEOC v. Eaton’s Neck Fire Dist.*, No. 08-cv-5089 (E.D.N.Y.) (Consent decree entered Oct. 30, 2009); *EEOC v. Oyster Bay Fire Dep’t*, No. 09-cv-3297 (E.D.N.Y.) (Consent decree entered Sep. 16, 2011); *EEOC v. Amityville Fire Dep’t*, No. 09-cv-3742 (E.D.N.Y.) (Consent decree entered Mar. 15, 2011); *EEOC v. Village of N. Syracuse*, No. 12-cv-1465 (N.D.N.Y.) (Consent decree entered Apr. 3, 2013).

175 See EEOC Systemic Report at 29.

176 See *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No. 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015) (EEOC nationwide pattern-or-practice lawsuits alleging age discrimination involving front- and/or back-of-house positions at hospitality companies).

177 See *EEOC v. Tepro, Inc.*, Case No. 4:12-cv-75 (E.D. Tenn.) and Press Release, EEOC, *Tepro, Inc. To Pay \$600,000 to Settle EEOC Age Discrimination Suit* (Dec. 17, 2015) available at <https://www.eeoc.gov/eeoc/newsroom/release/12-17-15.cfm>. (Consent Decree involving \$600,000 settlement affecting 25 class members following reclassification, which resulted in loss of seniority and subsequent layoff).

178 See EEOC SEP for FY Fiscal Years 2017 – 2021, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

179 Since FY 2011, when 261 “merits” lawsuits were filed, there has been a dramatic decrease in the number of lawsuits filed, and the number ranged from 122 suits to 142 suits, which was the number filed in FY 2016. See *Little’s Annual Report on EEOC Developments: Fiscal Year 2015*, available at <https://www.littler.com/publication-press/publication/annual-report-eeoc-developments-%E2%80%93-fiscal-year-2015>.

the number of lawsuits filed between FY 2015 and FY 2016 (*i.e.*, decrease from 142 to 86 lawsuits). Even so, the EEOC increased the number of systemic lawsuits filed during the past two fiscal years (*i.e.*, from 16 to 18 systemic lawsuits), and the percentage of pending multiple victim suits¹⁸⁰ in the federal courts increased from 40% to 48%,¹⁸¹ which included an increase in the percentage of pending systemic lawsuits from 22% (*i.e.*, 48 out of 218) to 28.5% (*i.e.*, 47 out of 165).

2. The EEOC will Continue to Focus on Attacking Hiring Barriers.

The EEOC has taken the view that because most employers do not overtly express discrimination during the selection process, most applicants are unaware when they have been denied hire because of discrimination.¹⁸² Thus, the EEOC believes that it is “uniquely situated” to address hiring and recruitment issues. The EEOC’s largest pending lawsuits primarily involve “failure-to-hire” claims, including lawsuits alleging discrimination based on race and national origin,¹⁸³ gender,¹⁸⁴ and age.¹⁸⁵ Disparate impact claims challenging hiring practices, including the ongoing litigation involving criminal background checks, will continue.¹⁸⁶ However, the agency may also challenge an employer’s failure to maintain appropriate recordkeeping in determining whether certain hiring practices, such as the use of background checks, have an adverse impact on those in a protected group.¹⁸⁷ Based on the EEOC’s recent meeting that discussed the increased use of data-driven selection devices, such as “big data,” the agency may more closely review reliance on such selection practices.¹⁸⁸

3. The EEOC Will Continue to More Closely Review Alternative Work Arrangements.

As discussed in the EEOC’s recently adopted Strategic Enforcement Plan, the EEOC has announced that it will closely monitor various alternative work arrangements for securing workers, such as reliance on staffing firms, independent contractor relationships and the “gig economy.” The EEOC already has been closely reviewing staffing firm arrangements, as explained in the EEOC’s July 2016 Systemic Report:

As a result of systemic investigations and lawsuits, staffing agencies have agreed to discontinue the practice of referring applicants based on client preferences for employees of a certain race, color, sex, national origin, age or absence of disability, and to provide job placement and resume assistance for persons who had not been previously referred for employment.¹⁸⁹ Employment by staffing agencies has grown seven times more rapidly than overall employment growth, which makes compliance by staffing agencies critical to ensuring equal opportunity for all workers.¹⁹⁰

While efforts to more closely monitor staffing firms most likely will continue, it is less clear whether the EEOC will follow the lead of the NLRB and U.S. Department of Labor based on efforts during the last administration in broadly defining independent contractor relationships in the “gig economy.” There certainly is a possibility that any expansion of

180 This includes both non-systemic multiple victim suits (*i.e.*, impacting fewer than 20 individuals) and systemic discrimination suits.

181 Compare FY 2015 PAR at 35 and FY 2016 PAR at 36.

182 See 2016 EEOC Systemic Report at 20.

183 See, e.g., *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4-11-cv-03425 (S.D. Tex.) (filed Sept. 21, 2011) (race and national origin discrimination).

184 *EEOC v. Performance Food Group, Inc.*, Case No. 1:13-cv-01712-MJG, (D. Md.) (filed June 13, 2013) (sex discrimination).

185 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).

186 See *EEOC v. Dolgencorp*, 1:13-cv-04307 (N.D. Ill.) (filed June 11, 2013).

187 See *EEOC v. Crothall Servs. Grp.*, 2016 U.S. LEXIS 83520 (E.D. Pa. June 28, 2016).

188 See 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>. See also *Meeting of October 13, 2016 - Big Data in the Workplace: Examining Implications for Equal Employment Opportunity Law* (Oct. 13, 2016), available at <https://www.eeoc.gov/eeoc/meetings/10-13-16/>.

189 See 2016 Systemic Report at 22, citing *EEOC v. Source One Staffing, Inc.*, Civil Action No. 15-cv-1958 (N.D. Ill.) (Consent decree entered May 6, 2015) (alleging failure to refer applicants for “temp to hire” jobs based on sex, unlawful pre-employment medical inquiries; resolved for \$800K for more than 7300 individuals); *EEOC v. Renhill Staffing*, No. 08-cv-82 (N.D. Ind.) (Consent decree entered Apr. 15, 2008) (alleging failure to refer to temp jobs based on race and age, resolved for \$575,000 for 764 individuals); *EEOC v. Paramount Staffing*, No. 06-cv-2624 (W.D. Tenn. Aug. 19, 2010) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$585,000 for 800 individuals); *EEOC v. Real Time Staffing Corp.*, No. 13-cv-2761 (W.D. Tenn.) (Consent decree entered Dec. 5, 2014) (alleging failure to refer black applicants and preferential referrals of Hispanic applicants for temp jobs, resolved for \$580,000 for 60 individuals).

190 2016 Systemic Report at 22, citing Cynthia Poole, *Steady Growth Continues*, American Staffing Association (2015), available at <https://americanstaffing.net/posts/2015/10/22/steady-growth-continues>.

the EEOC's view of the employer-employee relationship may be subject to closer review, and most likely, some narrowing in the new administration.¹⁹¹

4. The EEOC Most Likely Will Pay Increased Attention to Particular Industries.

Based on today's focus on technology, the EEOC has sent a clear signal that it may more closely review the technology industry. On May 18, 2016, the EEOC held a special meeting on "Advancing Opportunity for All in the Tech Industry."¹⁹² This was one of the first EEOC meetings that ever focused on a particular industry. During the session, the EEOC highlighted a report on *Diversity in the Tech Industry*. The EEOC's director of the research project stated:

The results were stark—in most job categories, the representation of women, African Americans and Hispanics were significantly less than their representation in the overall workforce. For women, Asian Americans, African Americans, and Latinos, their representation diminished markedly at higher levels in the organization, such as Executives and Managers as compared to Professionals and Technicians.

Certain speakers also addressed age discrimination. A representative from the AARP was cited in the press release reporting on the May 18, 2016 EEOC meeting as stating, "[a]ge discrimination in the technology sector is perhaps most evident in companies' hiring policies and practices, which are designed to attract and hire younger employees. 'Job postings declaring a preference for new or recent graduates are common and some companies have actually specified which graduating class they are seeking.'"¹⁹³ Thus, employers should expect that the EEOC will more closely review technology companies, including both the limited number of minorities in the industry as well as limited opportunities for older workers.

5. Challenges to Unlawful Harassment, Including Systemic Harassment, Will Remain a Key Priority.

There is little doubt that sexual and other forms of harassment in the workplace will continue to be vigorously investigated and create potential legal risks for employers that do not promptly investigate and address harassment in the workplace. In the EEOC's recently updated Strategic Enforcement Plan for 2017-2021, in which the EEOC stated that "Preventing Systemic Harassment" remained one of its key priorities, the Commission explained, "[h]arassment 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."¹⁹⁴

The EEOC's Task Force Report on Harassment, issued in June 2016 and authored by Commissioners Lipnic and Feldblum,¹⁹⁵ is comprehensive in nature and underscores the importance of "top down" leadership and key components for an effective anti-harassment policy and appropriate training to prevent harassment in the workplace.¹⁹⁶ Employers need to be mindful of the findings and recommendations of Task Force Report, particularly because it includes the recommendation that the EEOC:

should, as a best practice in cases alleging harassment, seek as a term of its settlement agreements, conciliation agreements, and consent decrees, that any policy and any complaint or investigative procedures implemented to resolve an EEOC charge or lawsuit satisfy the elements of the policy, reporting system, investigative procedures, and corrective actions outlined [in the Report].¹⁹⁷

191 See Michael J. Lotito, et al., *Littler Report, With the Election (Mercifully) Behind Us, What Will a Trump Administration Mean for Employers?* (Nov. 9, 2016) at 5 and 7, available at <http://www.littler.com/publication-press/publication/election-mercifully-behind-us-what-will-trump-administration-mean>.

192 See Press Release, EEOC, *Advancing Opportunity for All in the Tech Industry* (May 18, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-18-16.cfm>.

193 The issue of alleged age discrimination in the technology industry has continued to get increased attention, as shown by a feature article in *USA Today* on November 22, 2016, which included discussion of a report from the California Department of Fair Employment and Housing, explaining, "Since 2012, 90 age-related lawsuits have been filed against a dozen top tech companies in Silicon Valley." See Jon Swartz, *90 age-discrimination suits reflect growing issue for tech*, *USA Today* (Nov. 22, 2016) available at <http://www.usatoday.com/story/tech/news/2016/11/22/90-age-discrimination-suits-reflect-growing-issue-tech/93110594/>.

194 See EEOC Strategic Enforcement Plan, 2017-2021 at 9, available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

195 See EEOC's *Select Task Force on the Study of Harassment in the Workplace*, issued in June 2016, at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686314.

196 *Id.* at 31.

197 *Id.* at 44.

6. Disability Discrimination and Related Litigation Will Remain Front and Center.

In recent years, ADA lawsuits have been the most frequent type of lawsuit the agency has filed, and FY 2016 was no different: 35 out of the 86 merits filings (40%) involved ADA claims, which included 11 out of the 18 systemic lawsuits (61%) filed by the EEOC.¹⁹⁸ In its updated Strategic Enforcement Plan for 2017-2021, the EEOC included among its priorities “developing and emerging issues” that the agency will focus on, and expressly includes “qualification standards and inflexible leave policies that discriminate against individuals with disabilities.”¹⁹⁹

Employers should expect the agency to continue to focus on ADA claims. In order to minimize risk, employers need to ensure that qualification standards are tied to the essential functions of a job, which an individual can perform with or without reasonable accommodations. As significantly, there is little doubt that employers maintaining maximum leave policies will be vulnerable based on the failure to provide reasonable accommodations for employees with disabilities by extending such leaves based on an individual review of the circumstances involved. Similarly, no-fault attendance policies that fail to accommodate absences based on an employee’s disability will create similar risks for an employer as shown by recent ADA litigation. Notwithstanding, the EEOC has provided guidance to address attendance and leave policies to minimize risk in dealing with attendance-related issues. In short, an employer may limit its risk by having in effect a policy in which an individual’s disability is reviewed on an individualized basis. An employer generally does not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often without advance notice.²⁰⁰ Thus, an employee who is chronically, frequently, and unpredictably absent may not be able to perform one or more essential functions of the job, or the employer may be able to demonstrate that any accommodation would impose an undue hardship, thus rendering the employee unqualified.²⁰¹

7. The EEOC will Carefully Scrutinize Pay Equity.

Although the Republican members of the Commission opposed the proposed changes to the EEO-1 forms to include pay data, and the required implementation of the revised EEO-1 form may now be subject to serious question based on the outcome of the election, pay equity will remain an important agency priority. The EEOC’s updated Strategic Enforcement Plan for 2012-2017 expressly provides:

EEOC will continue to focus on compensation systems and practices that discriminate based on sex under the Equal Pay Act and Title VII. Because pay discrimination also persists based on race, ethnicity, age, and for individuals with disabilities, and other protected groups, the Commission will also focus on compensation systems and practices that discriminate based on any protected basis, including the intersection of protected bases, under any of the federal anti-discrimination statutes.²⁰²

Based on the Equal Pay Act, employers need to be mindful of the risk of a directed investigation in which the EEOC can make broad-based requests for information. Notwithstanding, the EPA is limited to differences in pay based on gender where the individuals are performing jobs involving equal skill, effort and responsibility under similar working conditions *within the same establishment*.²⁰³ An employer can justify pay differentials where the differences are based on: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.²⁰⁴

In dealing with pay claims based on gender in which Title VII is involved, the same defenses are available, but the EEOC investigation, and any subsequent litigation, may be far broader than the applicable facility, as shown by the EEOC’s current nationwide lawsuit in *EEOC v. Sterling Jewelers*.²⁰⁵ A similar approach may be taken with any pay discrimination based on Title VII.

198 See 2016 PAR at 36 and 94-97.

199 See 2016 SEP at 7.

200 See *The Americans With Disabilities Act: Applying Performance And Conduct Standards To Employees With Disabilities* Q’s and A’s, Nos. 19 and 20 (Sept. 3, 2008), available at <https://www.eeoc.gov/facts/performance-conduct.html>.

201 *Id.*

202 See 2017-2021 SEP at 8.

203 See 29 U.S.C. § 206(d) and 29 CFR Part 1620; also see 29 CFR 1620.9.

204 29 U.S.C. § 206(d)(1).

205 *EEOC v. Sterling Jewelers*, Case No. 8-cv-0706 (W.D.N.Y., filed Sept. 23, 2008) - Nationwide sex discrimination lawsuit challenging pay and promotion practices involving female retail associates.

8. Increased Attention Will Be Placed on Age Discrimination Claims.

Employers also face the risk of broad-based directed investigations under the Age Discrimination in Employment Act. Two of the EEOC's largest failure-to-hire cases in the hospitality industry involve failure-to-hire claims.²⁰⁶ Certain industries, such as the technology industry, are vulnerable to systemic age discrimination claims. The scope of systemic age discrimination claims also remains an issue based on a recent ruling by the Eleventh Circuit in *Villarreal v. R. J Reynolds*,²⁰⁷ which held that disparate impact claims cannot be filed on behalf of applicants when challenging a neutral employment policy (e.g., employment guidelines to target candidates who are "2-3 years out of college" and to "stay away from" candidates with "8-10 years" of sales experience). A recent decision by the Third Circuit in *Karlo v. Pittsburgh Glass Works, LLC*²⁰⁸ permitted rejected applicants in their 50s to carve out a class alleging that a 2009 reduction-in-force had a disparate impact on them but did not similarly hurt impacted workers in their 40s. It remains unsettled whether other circuits will permit subgroups of workers over 40 to carve out class claims. It should be noted that the EEOC filed briefs to support the plaintiff's position in both *Villarreal* and *Karlo*.

9. LGBT Coverage Under Title VII will Continue to be Vigorously Debated.

Modifying an employer's EEOC policies to prohibit discrimination or harassment in the workplace on the basis sexual orientation or sexual identity is a recommended practice. Yet, Congress has failed to take action to amend Title VII to provide protection under our federal discrimination laws. Based on the lack of clarity in the law, coverage of sexual orientation and gender identify has been one of the most hotly debated issues over the past several years and will continue over the coming year. The EEOC's current position that coverage falls within the express terms of Title VII may shift based on the change in administration, but regardless of the EEOC's view, the courts will continue to wrestle with this issue, since Congress probably will not extend coverage in the immediate future.

The EEOC's current position stems from a July 15, 2015, federal sector decision, *Baldwin v. Department of Transportation*,²⁰⁹ in which the Commission, in a 3-2 decision, held that a claim of discrimination on the basis of sexual orientation "necessarily states a claim of discrimination on the basis of sex under Title VII."²¹⁰ The EEOC relied on three grounds: (1) sexual orientation discrimination involves sex stereotyping in not conforming to gender norms; (2) such discrimination amounts to gender-based associational-type discrimination; and (3) sexual orientation requires consideration of a person's sex. Republican-appointed Commissioners Barker and Lipnic voted against approval of the decision. After the Commission shifts to a 3-2 Republican majority, it remains an open question whether the Commission's current view will endure.

Notwithstanding, the debate will continue in the courts. One of the most comprehensive summaries of the various theories for and against coverage is included in the Seventh Circuit's recent panel decision in *Hively v. Ivy Tech Community College*.²¹¹ This decision outlines the history of Title VII and including sex discrimination when Title VII was adopted, which clearly did not contemplate inclusion of sexual orientation within the meaning of sex discrimination. The court then addressed the "intervening Supreme Court case," *Price Waterhouse v. Hopkins*,²¹² which recognized gender non-conformity claims as cognizable under Title VII, and the numerous cases since that time that have distinguished sexual orientation claims, which are not. While the Seventh Circuit underscored that there may justifiable reasons for extending protection, the panel concluded that such a change only could occur based on the authority of the U.S. Supreme Court or Congress. However, during the rehearing *en banc*, held on November 30, 2016, various judges clearly gave the impression that they are giving careful consideration to reversing prior precedent. They took the view that (1) the meaning of sex discrimination is not frozen in time; and (2) the judges are not bound by what Congress thought in 1964 when Title VII was enacted.

206 *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass.) (filed Sept. 30, 2011); and *EEOC v. Darden Restaurants, Inc. et al*, Case No: 1:15-cv-20561 (S.D. Fla.) (filed Feb. 12, 2015).

207 *Villarreal v. R. J Reynolds*, No. 15-10602 (11th Cir. Oct. 5, 2016).

208 *Karlo v. Pittsburgh Glass Works, LLC*, No. 15-3435 (3d Cir. Jan. 10, 2017).

209 *Baldwin v. Foxx*, EEOC Appeal No. 0120133080 (July 15, 2015), available at <http://www.eeoc.gov/decisions/0120133080.pdf>.

210 See *What You Should Know About EEOC and Enforcement Protections of LGBT Workers*, available on EEOC website at https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm; See also Kevin McGowan and Chris Opfer, *EEOC Sexual Orientation Ruling Brings Strong Reactions*, Bloomberg BNA (July 20, 2015), available at <http://www.bna.com/eeoc-sexual-orientation-n17179933661/>.

211 *Hively v. Ivy Tech Community College*, No. 15-1720, 2016 U.S. App. LEXIS 13746 (7th Cir. July 28, 2016).

212 *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989).

This issue continues to be vigorously debated in the courts, and while one recent district court decision adopted the EEOC's view,²¹³ appeals are also pending before both the Second and Eleventh Circuits.²¹⁴

10. Claims Involving Access to the Legal System May Be More Limited.

The EEOC's restated priority involving "preserving access to the legal system" focuses on "policies and practices that limit substantive rights, discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or impede EEOC's investigative or enforcement efforts."²¹⁵ The EEOC has taken an expansive view of Title VII and challenged practices, with mixed success, that it believes interfere with the EEOC's processes, such as arbitration policies and severance agreements.²¹⁶ During a Republican administration, there clearly will be more pressure from Congress to focus on the EEOC's backlog ear, rather than "pursuit of novel cases unsupported by law."²¹⁷ A Republican-appointed Chair coupled with a 3-2 Republican majority on the Commission and a new Republican-appointed General Counsel clearly may shift the direction of the agency away from more novel theories and return to more traditional retaliation theories under Title VII.

This opening section should highlight significant developments involving the EEOC's systemic initiative, looking back over the past year and beyond. This section also provides a preview of anticipated trends over the coming year. The remaining sections of this *Annual Report on EEOC Development* are devoted to a detailed review, update and analysis of regulatory developments, EEOC investigations and key developments in EEOC-related litigation over the past fiscal year.

213 *EEOC v. Scott Medical Health Ctr.*, 2016 U.S. Dist. LEXIS 153744 (W.D. Pa. Nov. 4, 2016).

214 *Christiansen v. Omnicom Grp., Inc.*, No. 16-748 (2d Cir.) (filed June 21, 2016), *Zarda v. Altitude Express, Inc.*, No. 15-3775cv. (11th Cir.) (filed Nov. 20, 2015; oral argument set for Jan. 5, 2017).

215 See 2016 SEP.

216 See e.g. *EEOC v. Doherty Enterprises*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015) and *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335, (7th Cir. 2015), *reh'g denied*, No. 14-3653 (7th Cir. Mar. 9, 2016).

217 See Senate Alexander Report on EEOC and Press Release, HELP Committee, *Alexander Report Finds EEOC Missteps Costing Taxpayers and Victims of Workplace Discrimination* (Nov. 24, 2014), available at <http://www.help.senate.gov/chair/newsroom/press/alexander-report-finds-eEOC-missteps-costing-taxpayers-and-victims-of-workplace-discrimination>.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

As discussed in this Report's opening section, the EEOC announced the publication of its FY 2016 Performance and Accountability Report (FY 2016 PAR) on November 15, 2016. In 2016, the EEOC states that it has "pursued a targeted and coordinated effort to more effectively address persistent retaliation, pay discrimination, and harassment."²¹⁸ The FY 2016 PAR notes the Commission received 91,503 private-sector charges.²¹⁹ This figure represents a 2.37% increase from FY 2015 and continues the upward swing beginning in 2015 after a three-year period of decreases. As shown by the following chart, the 91,503 charges filed in FY 2016 is still 9% lower than the highest amount of charges recorded in FY 2011 (99,947):

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%

The EEOC states that it "has made significant progress...despite substantial budgetary and human capital challenges."²²⁰ The EEOC resolved 97,443 charges in FY 2016, a 5.1% increase from the 92,641 charges resolved in FY 2015.²²¹ For the first time since 2012, the EEOC's inventory of charges (*i.e.*, its charge backlog or "pending workload") decreased from the previous year, and now stands at 73,508. The EEOC credits the efforts of additional front-line staff that was hired late in FY 2015 with this reduction.²²²

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%

²¹⁸ EEOC FY 2016 PAR at 7.

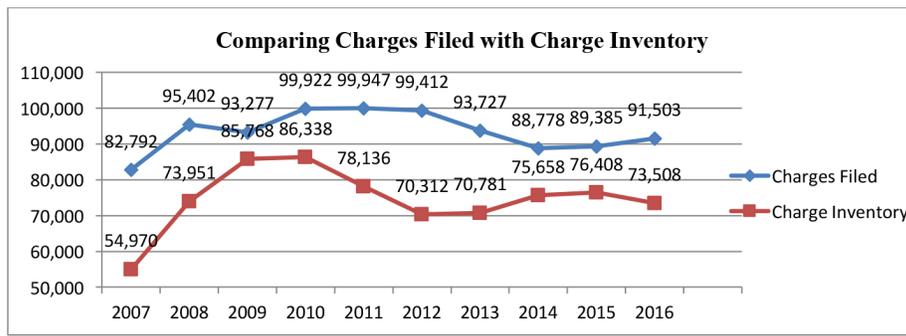
²¹⁹ *Id.* at 12.

²²⁰ *Id.* at 7.

²²¹ *Id.* at 34.

²²² *Id.*

However, the EEOC notes that some of new staff added in FY 2015 is offset by staff losses in FY 2016.²²³ Accordingly, it remains to be seen whether the EEOC will be able to sustain the reduction in charge inventory beyond FY 2016.



B. Continued Focus on Systemic Investigations and Litigation

In March 2006, as part of the EEOC's Systemic Task Force Report, the Commission reported that "combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency's daily work."²²⁴ 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."²²⁵ While the EEOC had been involved in systemic investigations long before the Task Force was formed, the Commission clearly has been committed to expanding this initiative since 2006. Indeed, the EEOC specifically prioritized systemic cases as one of the three major categories of cases in its National Enforcement Plan.²²⁶

In addition, on September 30, 2016, the Commission modified its Strategic Enforcement Plan for Fiscal Years 2017 through 2021 ("Strategic Plan"). Under the prior Strategic Plan for Fiscal Years 2012-2016, the EEOC's aimed to "identify and attack discriminatory policies and other instances of systemic discrimination."²²⁷ In its recently-approved Strategic Plan, the EEOC "reaffirm[ed] its commitment to a nationwide, strategic and coordinated systemic program as of [the] EEOC's top priorities."²²⁸

In 2012, the EEOC established a baseline for systemic cases of 20% of active litigation.²²⁹ Looking ahead to FY 2018, the EEOC increased its systemic case performance target to "22-24% of the cases in the agency's litigation docket."²³⁰ Last fiscal year, the EEOC met that goal with 48 of 218 cases on its docket (*i.e.*, 22%) being systemic cases.²³¹ Concerning FY 2016, the EEOC *exceeded* its target of 22-24% with 28.5% of the active docket being systemic cases.²³² Out of the 165 active cases on the EEOC's docket, 47 of them were systemic.²³³

In FY 2016, the EEOC published "Advancing Opportunity: A Review of EEOC's Systemic Program, ten years after the 2006 Systemic Task Force Report." Over this ten-year period, the EEOC claims to have increased the success rate for conciliation of systemic matters from 21% to 57%, and has a 92% litigation success rate in its systemic cases.²³⁴ The EEOC

²²³ *Id.*

²²⁴ EEOC Systemic Task Force Report (March 2006), at 2

²²⁵ EEOC FY 2016 PAR at 23.

²²⁶ See EEOC, EEOC National Enforcement Plan, *available at* <https://www.eeoc.gov/eeoc/plan/nep.cfm> (last visited Dec. 7, 2016) (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.").

²²⁷ EEOC Strategic Enforcement Plan for FY 2012-2016, at 17.

²²⁸ EEOC Strategic Enforcement Plan for FY 2017-2021, at 5.

²²⁹ EEOC FY 2016 PAR at 23.

²³⁰ *Id.*

²³¹ EEOC FY 2015 PAR at 22.

²³² EEOC FY 2016 PAR at 23.

²³³ *Id.*

²³⁴ *Id.* at 37.

likewise boasts that through its systemic efforts, “more than 70,000 workers have obtained jobs, wages, and benefits.”²³⁵ The EEOC believes that its results stem directly from its hiring of more lead systemic investigators in FY 2016 compared to FY 2015, as well as the training these lead systemic investigators received, including an EEOC-sponsored Advanced Systemic Institute for lead systemic investigators and coordinators.²³⁶

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

In FY 2016, the EEOC reports a departure from the return to the high monetary recovery trend seen in FY 2015. As shown in the chart below, FY 2016 dropped back down to lower monetary recovery levels, but has not dropped as low as the monetary recovery level seen in FY 2014. Nonetheless, this drop may indicate a return to lower levels, or at least a trend away from increasing monetary recoveries in coming years.

SYSTEMIC INVESTIGATIONS	2012	2013	2014	2015	2016
Number Completed	240	300	260	268	273
Settlements or Conciliation Agreements ²³⁷	65	63	78	70	71
Monetary Recovery	\$36.2 million	\$40 million	\$13 million	\$33.5 million	\$20.5 million
Reasonable Cause Findings	94	106	118	109	113
Systemic Lawsuits Filed	12	21	17	16	18

Despite the dedication of personnel resources, and the long-term success highlighted in “Advancing Opportunity: A Review of EEOC’s Systemic Program,” a comparison of the last five fiscal years shows inconsistent monetary recovery, and little-to-no growth in the number of systemic investigations completed, number of settlements or conciliation agreements, reasonable cause findings, and systemic lawsuits filed.

D. EEOC Litigation and Systemic Initiative

For FY 2016, consistent with the EEOC’s current focus on “strategic law enforcement,” the EEOC filed 86 “merits” lawsuits, 56 fewer than in FY 2015, which included 55 individual suits, 13 non-systemic class suits and 18 systemic suits.²³⁸ FY 2016 may signal a continuation in the decrease in the number of merits lawsuits filed since FY 2005 – with increases in FY 2014 and FY 2015.²³⁹ Overall, however, there has 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” LAWSUITS ²⁴⁰
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ As stated in the EEOC FY 2016 PAR, “EEOC field offices resolved 273 systemic investigations and obtained \$20.5 million in remedies in those resolutions. Seventy-one of the fiscal year 2016 resolutions resulted from successful conciliations. In addition, the agency issued reasonable cause determinations finding discrimination in 113 systemic investigations.” EEOC FY 2016 PAR at 37. The EEOC FY 2015 PAR states, “[The 268 resolutions] included voluntary conciliation agreements following 70 systemic investigations in which the Commission had found reasonable cause to believe that discrimination occurred.” EEOC FY 2015 PAR at 36. As stated in the EEOC FY 2014 PAR, “[i]n FY 2014, the agency obtained pre-determination settlements in 34 systemic investigations and conciliation agreements in 44 systemic investigations. EEOC FY 2014 PAR at 29. According to the EEOC FY 2013 PAR, 63 of the agency’s systemic investigations were resolved through the EEOC’s conciliation process. EEOC FY 2013 PAR at 32. In FY 2012, there were 46 successful conciliations of investigations and pre-determination settlements in 19 systemic investigations. EEOC 2012 PAR at 28.

²³⁸ EEOC 2016 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 lawsuits or by intervention involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

YEAR	INDIVIDUAL CASES	"MULTIPLE VICTIM" CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC "MERITS" LAWSUITS ²⁴⁰
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

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, 2016 and September 30, 2016, the EEOC filed 48 lawsuits, which was 56% of the lawsuits filed during the entire fiscal year.²⁴¹ Similarly, during FY 2015, of the 142 lawsuits filed, 81 suits (56%) were filed during the last two months of the fiscal year.

In reviewing all new court filings, the EEOC lawsuits included 46 Title VII claims, 35 Americans with Disabilities Act (ADA) claims, five Age Discrimination in Employment Act (ADEA) claims, and two Genetic Information Non-Discrimination Act (GINA) claims.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	35
Multiple Claims	22
Retaliation	34
Sex Discrimination or Related Harassment	35
Pregnancy Discrimination	8
Racial Discrimination or Related Harassment	10
Age Discrimination	2
Religious Discrimination or Related Harassment	6
National Origin Discrimination or Related Harassment	5

The top 13 states for EEOC lawsuits filed over the past fiscal year are as follows:²⁴³

STATE	NUMBER OF LAWSUITS
North Carolina	11
Maryland	9
Texas	8
Colorado	7

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 2016 is based on the firm's tracking.

²⁴² EEOC 2016 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.

STATE	NUMBER OF LAWSUITS
California	6
Illinois	6
Florida	4
Mississippi	4
Nevada	4
Alabama	3
Arizona	3
Michigan	3
New York	3

With respect to the Commission's efforts on behalf of non-systemic class suits and its systemic initiative, the FY 2016 PAR described active EEOC lawsuits as follows:

- Among the 165 lawsuits on its active docket at the end of FY 2016, 32 (19.4%) were non-systemic class cases and 47 (28.5%) involved challenges to systemic discrimination, thus showing that 48% of all pending matters involve claims on behalf of more than one purported victim.²⁴⁴
- In FY 2016, the Commission filed 18 systemic lawsuits.
- The Commission resolved 139 merits lawsuits during FY 2016 and recovered \$52.2 million.²⁴⁵

Based on the EEOC's new Strategic Plan, a central aim is "combat[ing] employment discrimination through strategic law enforcement."²⁴⁶ A key performance measure has been the establishment of a "baseline" by examining the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against that baseline. For FY 2012, the Commission established a baseline of 20%; the FY 2016 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 2016, the EEOC "reported that 47 out of 165, or 28.5%, 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 2016, the Commission reported that of the 86 merit lawsuits filed, 46 of those claims implicated Title VII, 35 contained ADA claims, 2 contained ADEA claims, 24 filings included retaliation claims, and 2 contained a GINA claim.²⁵⁰ The EEOC also points out that 13 of its filings involved non-systemic multiple victims while 18 lawsuits were systemic cases.²⁵¹

²⁴⁴ EEOC 2016 PAR at 36.

²⁴⁵ *Id.* at 36.

²⁴⁶ *Id.* at 18.

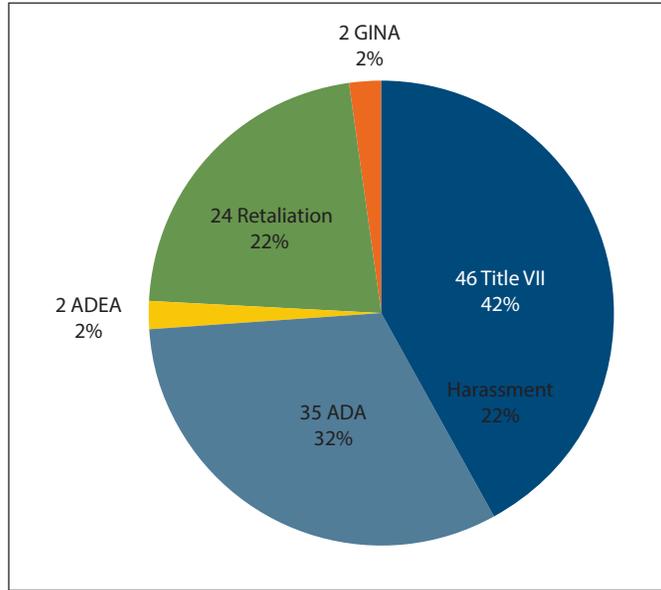
²⁴⁷ *Id.* at 23.

²⁴⁸ *Id.*

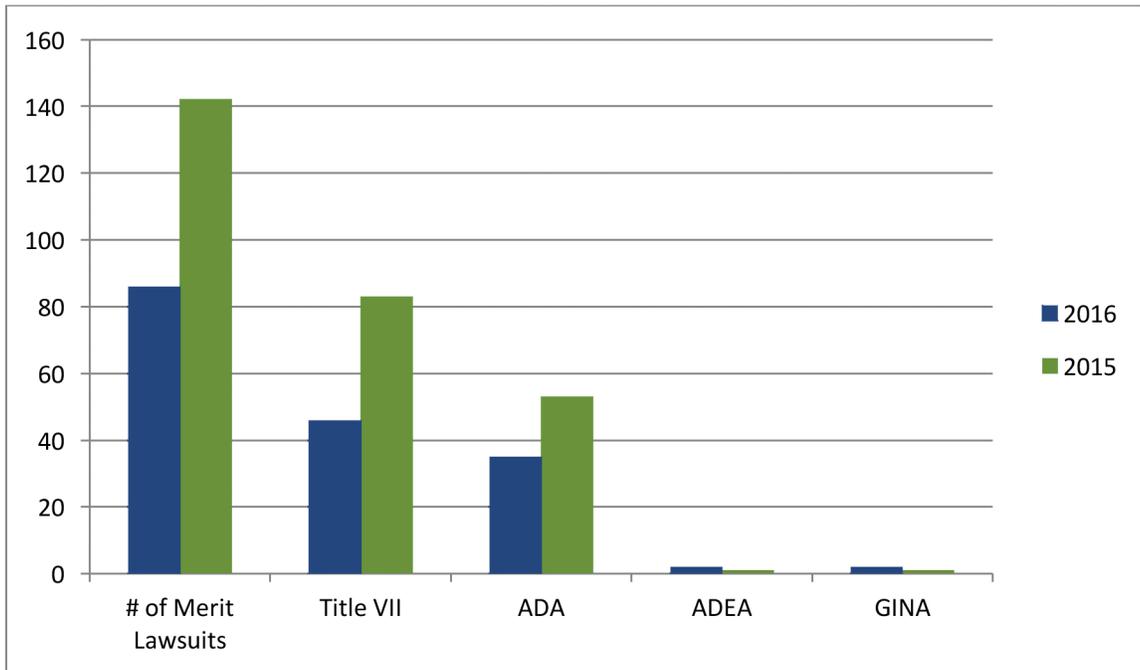
²⁴⁹ *Id.*

²⁵⁰ EEOC 2016 PAR at 36.

²⁵¹ *Id.*



With the exception of ADEA and GINA claims, the EEOC’s litigation statistics show an overall decrease in the number of merit filings and corresponding claims in FY 2016 compared to FY 2015.



This significant dip in the overall total of lawsuits filed is surprising when taking into account the increase in the number of charges filed, the increased focus on systemic investigator recruitment and hiring, as well as the relatively negligible difference in net cost to operate the Commission’s enforcement efforts.²⁵²

²⁵² EEOC FY 2016 PAR, at 67.

CONSOLIDATED STATEMENTS OF NET COST

for the Years Ended September 30, 2016 and 2015 (in dollars)

	<u>2016</u>	<u>2015</u>
COMBATTING EMPLOYMENT DISCRIMINATION THROUGH STRATEGIC LAW ENFORCEMENT		
Private Sector:		
Enforcement	\$ 183,692,493	\$ 184,214,788
Mediation	25,581,933	24,750,547
Litigation	72,126,839	73,190,904
Intake information	3,553,046	8,839,481
State and Local	<u>31,135,424</u>	<u>35,130,250</u>
Total Program Costs—Private Sector	\$ 316,089,735	\$ 326,125,970
Revenue	<u>(318,201)</u>	<u>(78,210)</u>
Net Cost—Private sector	\$ 315,771,534	\$ 326,047,760

However, this may be due to the fact that the Commission's recently approved FY 2017-2021 Strategic Plan makes it a point to move away from pursuing litigation to pad its overall litigation totals. Specifically, the EEOC states, "[m]eritorious cases raising [Strategic Enforcement Plan] substantive area priorities should be given precedence in case selection... Neither the Commission nor the General Counsel will establish rigid goals as to the number of cases, priority or otherwise, that should be filed."²⁵³

F. Mediation Efforts

In its FY 2016 PAR, the "EEOC's mediation, settlement and conciliation efforts serve as prime examples of an investment in strategies to resolve workplace disputes early, efficiently, and with lasting impact."²⁵⁴ Out of a total of 10,461 mediations conducted, the EEOC was able to obtain 7,989 mediated resolutions (76%). Moreover, the Commission secured \$163.5 million in monetary benefits for complainants through its mediation program. Comparatively, the number of mediated resolutions has decreased slightly since FY 2015 in which there were a total of 8,243 mediated resolutions out of 10,579 conducted.²⁵⁵

G. Significant EEOC Settlements and Monetary Recovery

As reiterated in the Commission's updated Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021, one of the "fundamental premises" of the agency's Priority Charge Handling Procedures (PCHP) "is to empower staff to make prompt decisions about whether to take further investigative or settlement actions, taking into account the agency's resources."²⁵⁶ To that end, the agency continued to place a high priority on systemic charges of discrimination, in which agency resources could be marshaled to seek redress for a larger number of claimants in an industry, profession, company, or geographic area. The types of settlement agreements the EEOC entered into in FY 2016 reflect that goal.

During FY 2016, the EEOC entered into at least 21 agreements in which the employer agreed to pay at least \$500,000. At least 17 of these agreements were for \$1 million or more. Most of the settlements involved claims of race (7 settlements), sex (6 settlements), and national origin (5 settlements) discrimination. The remaining agreements settled claims based on disability or age discrimination, or claims of harassment based on sex or race.

The largest settlement was for \$8.6 million, and involved a claim that a home improvement, appliance and hardware company violated the Americans with Disabilities Act and engaged in a pattern or practice of disability discrimination by failing to provide reasonable accommodations when their medical leaves of absence exceeded the company's 180-day (and, subsequently, 240-day) maximum leave policy. The EEOC also claimed the company violated the ADA by

²⁵³ EEOC Strategic Enforcement Plan for FY 2017-2021, at 15.

²⁵⁴ EEOC 2016 Annual Report at 34.

²⁵⁵ *Id.*

²⁵⁶ EEOC, Strategic Enforcement Plan For Fiscal Years 2017-2021 (Oct. 17, 2016), available at <https://www.eeoc.gov/eeoc/plan/sep-2017.cfm>.

terminating employees “regarded as” disability, those with a record of disability, and/or those who were associated with someone with a disability. The four-year consent decree provides funds for a nationwide class.

In another notable settlement, a trucking company agreed to settle claims that it engaged in a pattern or practice of sex discrimination by denying employment opportunities to women through its same-sex trainer policy. As a result of this policy—which was implemented to avoid instances of sexual harassment—the low number of female drivers meant fewer women could be trained and thus be eligible for hire. Following a consent order, the company agreed to pay \$250,000 to a female claimant to resolve her claims. The company also agreed through a consent decree to pay more than \$2.8 million in lost wages and damages to 63 other women who were affected by this policy.

There were some high-dollar judgments and jury verdicts as well in FY 2016. In one long-running case, a district court judge granted default judgment in favor of a group of Thai farmworkers in Washington State, and ordered a farm labor contractor to pay \$7,658,500 for allegedly engaging in a pattern or practice of subjecting the workers to a hostile work environment, harassment and discrimination. According to the EEOC, each Thai farmworker who was detained by the police because the company withheld his or her passport would receive an enhanced award of \$2,500.

More recently, a jury found in favor of the EEOC, which brought suit on behalf of an insulin-dependent diabetic cashier who was fired for drinking orange juice at her work station before paying for it. The employee purportedly took the juice to prevent a hypoglycemic attack, and had told her supervisor she was diabetic and had asked to keep juice on hand in case of an emergency. Her supervisor allegedly told her that the store did not allow employees to keep food or drink at the register, although the store did maintain an accommodation policy that would have allowed the employee to do so. Following a loss prevention audit, the employee admitted purchasing the juice after drinking it, and was found in violation of the store’s “grazing” policy. The jury agreed with the EEOC that the termination was in violation of the ADA, and therefore unlawful, awarding her \$27,565 in back pay and \$250,000 in compensatory damages.

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

H. Appellate Cases

1. Significant Wins for the EEOC

The EEOC has broad powers to investigate potential violations of federal discrimination laws, such as Title VII, the Americans with Disabilities Act (ADA), and the Age Discrimination in Employment Act (ADEA). Included in this investigative power is the authority to issue an administrative subpoena and bring an enforcement action to compel compliance.²⁵⁷ The EEOC has had significant wins in enforcing subpoenas against employers that contend the Commission exceeded its statutory authority.

*EEOC v. McLane Company, Inc.*²⁵⁸ was a subpoena enforcement action brought by the EEOC, arising from an administrative charge of sex discrimination by a former employee terminated for failing to achieve the minimum required score on an isokinetic strength examination upon her return to work.²⁵⁹ During the course of the EEOC’s investigation of the charge, a dispute arose based on the EEOC’s request for “pedigree information” for each test-taker – name, social security number, last known address, and telephone number. Despite the district court’s refusal to grant the EEOC’s request for “pedigree information,” the Ninth Circuit reviewed the matter “de novo” and upheld the EEOC’s view that the requested information was “relevant” because this information would enable the EEOC to “assess whether use of the [examination] has resulted in a ‘pattern or practice’ of disparate treatment,”²⁶⁰ despite the fact that the charge did not allege disparate treatment. The employer thereafter filed a petition for certiorari with the U.S. Supreme Court, focusing, in relevant part, on the Ninth Circuit’s use of a “de novo” standard of review, which is at odds with other circuits around the country that have applied a more deferential standard in reviewing district court opinions involving EEOC subpoena enforcement actions, either based on an “abuse of discretion” or “clear error” by the district court.²⁶¹ On September 29, 2016, the Court granted the petition.²⁶² Oral argument on this case is scheduled for February 21, 2017.

²⁵⁷ 42 U.S.C. §2000e-9.

²⁵⁸ *EEOC v. McLane Company, Inc.*, 804 F.3d 1051 (9th Cir. 2015).

²⁵⁹ *Id.* at 1053-1054.

²⁶⁰ *Id.* at 1057.

²⁶¹ *McLane Co. v. EEOC*, Petition for a Writ of Certiorari (filed Apr. 4, 2016).

²⁶² *EEOC v. McLane Company, Inc.*, 804 F.3d 1051 (9th Cir. 2015), cert. granted, *McLane Co. v. EEOC* (U.S. Sept. 29, 2016) (No. 15-1248).

The EEOC also prevailed in *EEOC v. Aerotek, Inc.* in which the Commission subpoenaed the names of over 22,000 clients of Aerotek, Inc., a temporary staffing agency that was the subject of an age discrimination investigation by the Commission.²⁶³ In the underlying investigation, the EEOC sought information regarding Aerotek's practices in recruitment, hiring, and placement of workers at Aerotek's and its client's facilities for a six-year period. It also requested information regarding Aerotek's computerized files.²⁶⁴ From this information, the EEOC identified "hundreds of discriminatory job requests" from Aerotek clients, and the Commission expanded the scope of its investigation to all of Aerotek's 22,000 clients to investigate whether there were additional discriminatory requests or employment decisions not recorded in Aerotek's files. Aerotek objected to providing the names of its clients on the grounds of relevance, and the EEOC issued an administrative subpoena for the information. On appeal from the district court's decision to enforce the subpoena,²⁶⁵ Aerotek contended that the vast majority of these companies were not related to the job requisitions that the EEOC identified as questionable, and, therefore, the identity of these clients was not relevant to the EEOC's inquiry.²⁶⁶ The EEOC defended the scope of its subpoena because it was investigating whether Aerotek's clients were making discriminatory staffing requests not otherwise maintained in Aerotek's database, and that it could not make such an inquiry without the names of Aerotek's clients. The Seventh Circuit agreed with the EEOC (and the district court), reasoning that the EEOC may investigate discriminatory activity beyond that which is recorded in Aerotek's files because the EEOC's investigatory authority "has been regularly construed to give the agency access to virtually any material that might cast light on the allegations against the employer."²⁶⁷

In *EEOC v. Maritime*, another subpoena enforcement case, the Fourth Circuit rejected an employer's objection to an EEOC subpoena because the Commission lacked jurisdiction to investigate the underlying charge.²⁶⁸ *Maritime* involved a retaliation claim by an employee who was an undocumented alien. The employee alleged he was terminated after he and other Hispanic employees complained of unequal treatment. As part of its investigation, the EEOC requested personnel records and other employment data relating to the charging party and "similarly situated" employees. The employee provided the requested data for the charging party, but not other employees. The EEOC issued an administrative subpoena for the requested information, to which the employer objected on the grounds that the request was irrelevant, overly broad, and unduly burdensome.²⁶⁹ The district court denied the EEOC's application for subpoena enforcement, but the circuit court reversed that decision, holding that the subpoena was enforceable. On appeal, *Maritime* argued that the EEOC lacked authority to investigate the charging party's claims because the charging party lacked proper work authorization and was not qualified for employment, and, therefore, lacked a cause of action under Title VII. The Fourth Circuit rejected this argument, holding that a reviewing court should not address causes of action or remedies in determining whether an agency subpoena is enforceable,²⁷⁰ explaining:

Courts are warned not to venture prematurely into the merits of employment actions that have not been brought: at the subpoena-enforcement stage, any effort by the court to assess the likelihood that the Commission would be able to prove the claims made in the charge would be reversible error. The EEOC's authority to investigate is not negated simply because the party under investigation may have a valid defense to a later suit.²⁷¹

The EEOC had a significant win in pattern-or-practice claims in *EEOC v. Bass Pro Outdoor World, LLC*.²⁷² The EEOC alleged Bass Pro violated Title VII by failing to hire black or Hispanic employees. The Commission sued Bass Pro under Title VII's Section 706, which allows complaining parties to recover compensatory and punitive damages for discrimination, and Section 707, which provides for remedial relief for patterns or practice of discrimination.²⁷³ The district court dismissed the EEOC's first Complaint because the Complaint identified none of the alleged aggrieved parties. The EEOC filed an amended Complaint, this time including the names of over 200 applicants it believed were not hired

263 *EEOC v. Aerotek, Inc.*, 815 F.3d 328 (7th Cir. 2016).

264 *Id.* at 331.

265 Aerotek produced the names of its clients pursuant to the district court's order, but requested that the circuit court reverse the district court's decision and order the return of the data. *Id.* at 332.

266 *Id.* at 331-332.

267 *Id.* at 334 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 68-69 (1984)).

268 *EEOC v. Maritime Autowash, Inc.*, 820 F.3d 662 (4th Cir. 2016).

269 *Id.* at 663-664.

270 *Id.* at 666.

271 *Id.* at 667 (citing *EEOC v. Shell Oil Co.*, 466 U.S. 54, 72 n. 26 (1984), internal quotations and other citation omitted).

272 *EEOC v. Bass Pro Outdoor World, LLC*, 82 F.3d 791 (5th Cir. 2016).

273 *Id.* at 795-798.

because of their race. The district court first dismissed the claims of the individuals not investigated nor disclosed during the administrative process. However, the district court later reversed that decision, as it was persuaded by subsequent case law that the EEOC could prove a pattern-or-practice claim under Section 706.²⁷⁴ The Fifth Circuit agreed, holding that, “Congress did not prohibit the EEOC from bringing pattern-or-practice suits under Section 706 and, in turn, from carrying them to trial with sequential determinations of liability and damages in a bifurcated framework.”²⁷⁵ As significantly, the Fifth Circuit followed the view of the Sixth Circuit in *EEOC v. Cintas Corp.*,²⁷⁶ in permitting the EEOC to pursue “pattern or practice” claims under Section 706 of Title VII, thus permitting the EEOC to seek compensatory and punitive damages based on such claims.

Arizona ex rel. Horne v. Geo Group, Inc. addressed significant issues regarding the EEOC’s pre-suit obligations before bringing a discrimination lawsuit on behalf of a class of individuals.²⁷⁷ In *Geo Group*, the EEOC (and the State of Arizona) sued Geo Group alleging claims of sex discrimination, harassment, and retaliation. Prior to the lawsuit, the parties attempted to conciliate the matter. The EEOC proposed a settlement for the named charging party and other unnamed alleged aggrieved employees. Geo made a counter offer for the charging party, but not the unidentified class members. Ultimately, the conciliation was unsuccessful, and the EEOC sued on behalf of a class of alleged aggrieved employees. Following settlements with some employees and various district court decisions involving the timeliness of claims by other employees, the case was appealed to the Ninth Circuit presenting three issues for review: (1) whether the EEOC had to conciliate on an individual basis prior to suing on behalf of a class of individuals; (2) when the 300-day period runs for employees who seek to join an agency class action; and (3) whether, in an EEOC class action, an aggrieved employee must file a new charge of discrimination for acts that occur after the Reasonable Cause Determination. The appellate court held that the EEOC satisfies its pre-suit conciliation requirement to bring a class action if it attempts to conciliate on behalf of an identified class of individuals prior to suing, and the EEOC is thus not required to identify the specific class members in the conciliation process. The Ninth Circuit further held that “the proper starting date of the EEOC and Division’s class action is 300 days prior to the charging party’s charge, not the Reasonable Cause Determination.”²⁷⁸ On the third issue on review, the Court held that “in an EEOC class action, an aggrieved employee is not required to file a new charge of discrimination if her claim is already encompassed within the Reasonable Cause Determination or if the claim is ‘like or reasonably related’ to the initial charge.”²⁷⁹ The EEOC views this case as a significant win in support of its systemic initiative based on the Ninth Circuit’s ruling that in class claims, the EEOC is not required to identify specific class members, and it is sufficient if the EEOC has conciliated on behalf of the “identified class.”²⁸⁰

In *EEOC v. PJ Utah, LLC*, the Tenth Circuit reversed a district court’s denial of a disabled employee’s motion to intervene in a disability discrimination case brought by the EEOC.²⁸¹ The EEOC sued the employer, alleging it failed to provide a reasonable accommodation for an employee, and then terminated the employee for requesting the accommodation. The employee moved to intervene in the EEOC’s lawsuit, but the district court denied the motion, determining that his claim was subject to arbitration under an agreement signed by the employee’s mother (the employee’s legal guardian). On appeal, the Tenth Circuit held that the employee “had an unconditional statutory right to intervene in the EEOC’s action; thus, the district court lacked authority . . . to deny the motion to intervene based on the arbitrability of [the employee’s] claims.”

2. Significant Employer Wins

In *EEOC v. CVS Pharmacy, Inc.*, the Seventh Circuit rejected the EEOC’s attempt to broaden its powers in initiating pattern-or-practice lawsuits under Section 707 of Title VII without first complying with pre-suit procedural requirements, including conciliation.²⁸² This case started with a former CVS employee filing a Charge of Discrimination with the EEOC. During the investigation, CVS provided the Commission with a copy of a separation agreement signed by the former employee in which she waived her claims under a federal discrimination statute. Although the EEOC dismissed the former

274 *Id.*

275 *Id.* at 800.

276 699 F.3d 884 (6th Cir. 2013).

277 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2015).

278 *Id.* at 1203.

279 *Id.* at 1204-05.

280 See 2016 Systemic Report at 33.

281 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).

282 *EEOC v. CVS Pharm., Inc.*, 809 F.3d 335 (7th Cir. 2015). As stated, Section 706 addresses individual claims of discrimination under Title VII, and Section 707 addresses pattern-or-practice claims (meaning a claim that an employer repeatedly and regularly engaged in acts prohibited by the statute).

employee's charge based on a lack of probable cause, it nonetheless determined that CVS's standard release of claims violated Title VII because its provisions interfered with employees' rights to file administrative charges and participate in EEOC investigations.²⁸³ On this basis, and without engaging in the conciliation process mandated by Section 706, the EEOC sued in the U.S. District Court for the Northern District of Illinois.²⁸⁴ The district court summarily dismissed the lawsuit, and the Seventh Circuit affirmed. Both courts rejected the EEOC's claim that pre-suit conciliation applies only to individual claims. The Seventh Circuit explained that "Section 707(a) does not create broad enforcement powers for the EEOC to pursue nondiscriminatory employment practices that it dislikes..."²⁸⁵ The court further explained that the EEOC's lawsuit was ripe for summary dismissal because the Commission's Complaint did not contend that CVS engaged in any kind of discrimination or retaliation by the mere use of its contested severance agreements: "[s]everal circuit courts have held that conditioning benefits on promises not to file charges with the EEOC is not enough, in itself, to constitute 'retaliation' actionable under Title VII."²⁸⁶

In *EEOC v. Rite Way Service, Inc.*, the Fifth Circuit rejected the EEOC's expansive view of the definition of "retaliation" under Title VII.²⁸⁷ *Rite Way* involved a janitor terminated after she corroborated a colleague's sexual harassment allegation. The EEOC filed a retaliation claim on the employee's behalf, alleging that the performance issues for which the employee was allegedly terminated were a pretext for a retaliatory motive. The district court dismissed the EEOC's claims on summary judgment, explaining that a third-party witness responding to an internal inquiry about harassment must have a reasonable belief that the harassment violated Title VII, and there was insufficient evidence from which the employee could have believed the alleged harassment was unlawful. Although the Fifth Circuit reversed the district court's summary dismissal of the retaliation claim, determining that there was a material issue of fact whether the employee could reasonably believe the harassment she corroborated was unlawful sex harassment, it rejected the EEOC's expansive definition of protected activity. Instead, it affirmed the district court's use of the "reasonable belief" standard, holding that "the opposition clause does not require opposition alone, it requires opposition of a practice made unlawful by Title VII."²⁸⁸

Employers also benefit from the Seventh Circuit's opinion in *EEOC v. AutoZone, Inc.*, a case addressing an employer's duty to reasonably accommodate an employee with permanent lifting restrictions.²⁸⁹ The employee in this case was a parts sales manager who, due to a workplace injury, was subject to a permanent lifting restriction of 15 pounds. AutoZone determined it could not accommodate this permanent lifting restriction, so it terminated her employment. The EEOC sued AutoZone, asserting that the lifting restriction was a marginal – not an essential – job function. A jury rendered a defense verdict, and the EEOC appealed. The Seventh Circuit concluded that AutoZone had presented sufficient evidence that lifting was an essential job function of a parts sales manager and that the jury's verdict should not be reversed simply because the EEOC presented evidence inconsistent with the verdict.²⁹⁰ The court further rejected the EEOC's argument that because AutoZone included a "team concept" in its performance reviews of employees (e.g., asking for help and providing help when needed), AutoZone could have reasonably accommodated this employee by allowing other employees to lift objects over 15 pounds for her. The court reasoned that it is "common practice for employers to promote cooperation and teamwork amongst their employees," and that such practice does not mandate a redistribution of labor as an accommodation under the ADA.²⁹¹

Finally, an employer was also the victor in *EEOC v. Catastrophe Management Solutions*.²⁹² In this case, a job applicant alleged an employer violated her rights under Title VII by rescinding a job offer when she refused to cut off her dreadlocks pursuant to the employer's grooming policy. The district court dismissed the EEOC's complaint on the grounds it failed to allege the employer engaged in intentional discrimination under Title VII, as hair styles, while potentially associated with culture and race, are not immutable characteristics, and therefore not protected by statute. The court also denied the Commission's motion for leave to amend on the grounds of futility.

283 *Id.* at 337-338.

284 *EEOC v. CVS Pharm., Inc.*, 70 F. Supp. 3d 937 (N.D. Ill. 2014).

285 *CVS Pharm.*, 809 F.3d at 341.

286 *Id.*

287 *EEOC v. Rite Way Service, Inc.*, 819 F.3d 235 (2016).

288 *Id.* at 240, 242.

289 *EEOC v. AutoZone, Inc.*, 809 F.3d 916 (7th Cir. 2016).

290 *Id.* at 920-921.

291 *Id.* at 922-923.

292 *EEOC v. Catastrophe Management Solutions*, 2016 U.S. App. LEXIS 16918 (11th Cir. Sept. 15, 2016).

On appeal, the Eleventh Circuit affirmed. The court agreed that dreadlocks are not immutable (and therefore protected) characteristics. Although the EEOC relied on its 2006 Compliance Manual to support its interpretation of Title VII—*i.e.*, that the statute “prohibits employment discrimination against a person because of cultural characteristics often linked to race or ethnicity, such as a person’s name, cultural dress and grooming practices, or accent or manner of speech”²⁹³—the court was not persuaded. The Eleventh Circuit pointed out that the EEOC’s Compliance Manual “contravenes the position the EEOC took in an administrative appeal less than a decade ago.”²⁹⁴ Because the EEOC did not provide justification for its revised position, the appellate court did not give the EEOC’s guidance deference in this matter.

In addition, the court explained that the EEOC “conflates the distinct Title VII theories of disparate treatment (the sole theory on which it is proceeding) and disparate impact (the theory it has expressly disclaimed).”²⁹⁵ To prevail on a disparate treatment claim, the court emphasized, a Title VII plaintiff “must demonstrate that an employer intentionally discriminated against her on the basis of a protected characteristic.”²⁹⁶ In this case, the court held that neither the EEOC’s original nor the proposed amended complaint stated a plausible claim that the employer intentionally discriminated against the applicant because of her race. Therefore, the lower court did not err in dismissing the claim.²⁹⁷

293 EEOC Compliance Manual, § 15-II, at 4 (2006).

294 *Catastrophe Management Solutions*, 2016 U.S. App. LEXIS 16918, at **31-32, *citing Thomas v. Chertoff*, Appeal No. 0120083515, 2008 EEO PUB LEXIS 3977, 2008 WL 4773208, at *1 (E.E.O.C. Office of Federal Operations Oct. 24, 2008) (concluding that a grooming policy interpreted to prohibit dreadlocks and similar hairstyles lies “outside the scope of federal employment discrimination statutes,” even when the prohibition targets “hairstyles generally associated with a particular race”).

295 *Id.* at *2.

296 *Id.* at **11, *citing Ricci v. DeStefano*, 557 U.S. 557, 577, 129 S. Ct. 2658 (2009).

297 On January 9, 2017, the NAACP Legal Defense & Educational Fund, Inc., the Legal Aid Society – Employment Law Center, and two legal professors filed a petition for rehearing en banc.

III. EEOC REGULATORY AGENDA AND RELATED DEVELOPMENTS

A. Update on the Commission

In FY 2016, the Commission operated with a full five-member panel with a Democratic majority, allowing the agency to advance an aggressive agenda, including current enforcement priorities as detailed in the 2013-2016 Strategic Enforcement Plan.²⁹⁸ With the election of Donald Trump, the composition of the Commission and its agenda are set to change significantly over his term. However, a Republican majority on the Commission will have to wait until at least July 2017, when the term of the former Chair, Democrat Jenny Yang, expires, and the 45th President has an opportunity to name her replacement. Commissioner Victoria Lipnic has been named Acting Chair. The current and recent Commissioners and their term expirations are as follows:

- Jenny Yang (D) (Former Chair) (July 1, 2017)
- Constance Barker (R) (July 1, 2016) (former Commissioner whose term expired)²⁹⁹
- Charlotte Burrows (D) (July 1, 2019)
- Chai Feldblum (D) (July 1, 2018)
- Victoria Lipnic (R) (Acting Chair) (July 1, 2020)

Constance Barker was initially nominated by President George W. Bush on March 31, 2008, and then re-nominated by President Barack Obama on May 19, 2011, for a term set to expire on July 1, 2016. Barker was confirmed unanimously by the Senate with respect to each nomination. On July 13, 2016, President Obama again nominated Barker to serve as Commissioner, for a term set to expire on July 1, 2021. On December 10, 2016, the Senate completed its last session for 2016 without confirming Commissioner Barker, which will create a vacancy for President Trump to fill, aside from appointing a new Chair.

In December 2016, David Lopez ended his service as General Counsel to the U.S. Equal Employment Opportunity Commission, a position he filled since 2010.³⁰⁰ Republican lawmakers had criticized Lopez for his aggressive enforcement agenda. His departure leaves an immediate opening for incoming President Trump to fill. Thus, for the first half of 2017, the Commission will remain under Democratic control, but the General Counsel spot could be a Republican.

In 2014, Senator Lamar Alexander (R-TN) issued a report criticizing the agency's recent activities: *EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities and Lack of Transparency Raise Concerns about Important Anti-Discrimination Agency*.³⁰¹ Senator Alexander, Chairman of the Senate Health, Education, Labor and Pensions (HELP) Committee, as well as others, have reiterated concerns, expressed in the Report, that there exists a lack of transparency regarding the agency's issuance of guidance documents without soliciting meaningful public input, and that the agency pours too much of its energy and resources into litigating "high-profile" lawsuits and not enough into addressing filed discrimination charges.³⁰²

Senator Alexander reiterated these concerns during a May 19, 2015 HELP Committee hearing examining EEOC's enforcement and litigation programs. And on March 16, 2016, Senate Bill 2693, entitled the "EEOC Reform Act," was referred to the HELP Committee.

The House Education and Workforce Committee had similarly scrutinized the EEOC's litigation and enforcement activity. Previously, we described several bills introduced by Subcommittee Chairman Tim Walberg (R-MI), including H.R. 548, "Certainty in Enforcement Act of 2015"; H.R. 549, "Litigation Oversight Act of 2015" and H.R. 550, "EEOC

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

299 Barker was re-nominated but not confirmed. See PN1625 — Constance Smith Barker — Equal Employment Opportunity Commission, available at <https://www.congress.gov/nomination/114th-congress/1625/actions?overview=closed>.

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

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

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

Transparency and Accountability Act.” None of these bills have been acted upon since 2015. Nevertheless, scrutiny of the agency is expected to continue, as Republicans were able to maintain control of the Senate following the November 2016 elections.

David Lopez’s Republican replacement, coupled with a new Republican-appointed Chair of the EEOC, most likely will have a significant impact on various agency initiatives and impact various litigation efforts by the EEOC.

B. EEOC Strategic Enforcement Plan and Updates on Strategic Plan

As discussed in Section I of this Report, on October 17, 2016, the EEOC announced adoption of its Strategic Enforcement Plan (SEP) for 2017-2021, continuing, for the most part, the original six priorities announced in its 2013-2016 SEP: (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.³⁰³

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.”

There certainly is a strong likelihood that selected priorities, identified in the 2017-2021 SEP, will be approached differently than did the Commission members who approved the most recently adopted SEP.

C. Noteworthy Regulatory Activities

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

On September 29, 2016, the EEOC announced that starting in March 2018, it will collect summary employee pay data from certain employers on revised EEO-1 Reports. The announcement was made after multiple periods of public comment.³⁰⁴ The new EEO-1 Report has been described as a cornerstone of the Obama Administration’s focus on promoting Equal Pay. Former EEOC Chair Jenny R. Yang said that, “[c]ollecting pay data is a significant step forward in addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal antidiscrimination laws.”³⁰⁵

According to former Secretary of Labor Thomas E. Perez, “[c]ollecting data is a critical step in delivering on the promise of equal pay. Better data will not only help enforcement agencies do their work, but it helps employers to evaluate their own pay practices to prevent pay discrimination in their workplaces.”³⁰⁶ On the other hand, the cost of complying with the new requirements may be both burdensome and of little value. Some experts have indicated that the new data is unlikely to be of any value to employers or practical use to the federal agencies in their efforts to enforce the laws against pay discrimination.

Starting with the 2017 report, which is currently scheduled to be due by March 31, 2018, private employers with 100 or more employees will submit summary pay data on their employees as part of their annual EEO-1 reporting. The EEOC and the U.S. Office of Federal Contract Compliance Programs (OFCCP) are charged with enforcing federal prohibitions on pay discrimination found in Title VII, the Equal Pay Act, and Executive Order 11246. Until now, however, these agencies, “they lacked the employer- and establishment-specific data needed to assess allegations of pay discrimination.” The purpose of the revised EEO-1 report, the Commission contends in a Q&A, is to “help to fill this gap.”

303 See Strategic Enforcement Plan FY 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).

304 See Press Release, EEOC, *EEOC Hears Wide Range of Views at Public Hearing on Proposed Changes to EEO-1 Form* (Mar. 16, 2016, available at <https://www.eeoc.gov/eeoc/newsroom/release/3-16-16.cfm>). See also Press Release, EEOC, *EEOC Announces Second Opportunity for Public to Submit Comments on Proposal to Collect Pay Data* (July 14, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-13-16.cfm>.

305 Press Release, EEOC, *EEOC to Collect Summary Pay Data* (Sept. 29, 2016), available at <https://www1.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm?renderforprint=1>. Chairwoman Yang made previous comments about equal pay issues during her remarks at a White House Equal Pay Event On January 29, 2016. See Remarks of Chair Jenny R. Yang at the White House Equal Pay Event (Jan. 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/chair-remarks-1-19-2016.cfm>.

306 *Id.*

The revised EEO-1 report has two new elements:

- **Summary pay data:** Employers report the total number of full and part-time employees by demographic categories in each of 12 pay bands listed for each EEO-1 job category based on W-2 wages.
- **Aggregate hours-worked data:** Employers tally and report the number of hours worked that year by all the employees accounted for in each pay band.

Hours-worked data will be reported on the EEO-1 by tallying the total number of hours worked by all the employees counted in each pay band for the W-2 reporting year. For non-exempt employees, for whom the Fair Labor Standards Act (FLSA) already requires employers to keep records of hours worked, employers will consult these records to identify the number of hours worked.

More problematic is the treatment of exempt employees. For employees who are exempt from the FLSA, employers have a choice: they may either report 20 hours per week for each part-time employee and 40 hours per week for each full-time employee, or they may report actual number of hours worked by exempt employees, full- or part-time, if they prefer to do so.

Employers have expressed concerns about the reliability of the data as an indicator of pay discrimination. They have stated that the aggregated pay data fails to account for the myriad factors involved in employee compensation. Moreover, W-2 wages do not necessarily give a complete picture of an individual's total compensation. Additionally, the EEOC likely significantly underestimates the costs to employers of collecting and reporting this data. Given the opposition to the revised EEO-1 report by Republican lawmakers and the employer community, the revisions are not likely to take effect in the wake of the November elections.

2. Retaliation

In 2016, the EEOC issued its final Enforcement Guidance on Retaliation and Related Issues.³⁰⁷ This Guidance was released following an approximately eight-month period where the EEOC sought public comments.³⁰⁸ This is the first time since 1999 that the EEOC has updated these guidelines.³⁰⁹ Although the new Guidance on Retaliation and Related Issues restate many of the same principles in the 1999 Guidance, there have been some significant revisions.

First, the new Guidance on Retaliation and Related Issues take a broad view of what constitutes “protected activity.” EEO laws delineate protected activity into two categories: (1) participation in proceedings and investigations occurring under the EEO laws (the “participation clause”), and (2) opposition to conduct made unlawful by the EEO laws (the “opposition clause”). Under the guidelines, an employee’s participation in internal discrimination complaints to company management, human resources, or other internal complaint processes are considered protected activity under the participation clause, even though language of federal EEO laws explicitly limit the participation clause to investigations, proceedings, or hearings occurring under the law, such as EEOC investigations or proceedings. Further, although EEO laws, as interpreted by the federal courts, limit protected opposition conduct to circumstances in which the employee opposes *unlawful discrimination specifically based on a protected class*, the new Guidance broadens the opposition clause to include employee complaints that “explicitly or implicitly” communicate an employee’s belief that the employer may be engaging in employment discrimination.³¹⁰ Finally, the guidelines further expand the opposition clause to include an employee’s opposition to conduct that the employee reasonably believes is unlawful under EEO laws, but which may not actually be prohibited by these laws. To the contrary, the EEO laws’ opposition clauses are specifically limited to an employee’s opposition to conduct that *is* made unlawful by the respective statute.

Second, the new Guidance on Retaliation and Related Issues seemingly complicates the “but-for” standard of causation, which is the causation standard for retaliation claims under all EEO laws. There are two prevalent causation standards under the EEO laws: the “but-for” standard and the “motivating factor” standard. Under the latter, a claimant need show only that a prohibited factor contributed to the employment decision—not that it was the “but-for” or sole

307 After a public comment period, the EEOC released new enforcement guidelines for retaliation cases. See EEOC Notice 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), available at: <https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm>; see EEOC Notice 915.004, *EEOC Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), Section I.A. (“[T]he percentage of EEOC private sector and state and local government charges alleging retaliation has essentially doubled since 1998.”).

308 Press Release, EEOC, *EEOC Seeks Public Input on Draft Proposed Enforcement Guidance on Retaliation and Related Issues* (Jan. 21, 2016) available at <https://www.eeoc.gov/eeoc/newsroom/release/1-21-16a.cfm>.

309 Kevin Kraham and Amy Ryder Wentz, *EEOC Guidelines Provide a Confusing Roadmap to Investigating Retaliation Claims*, Littler Insight, (Sep. 8, 2016), <http://www.littler.com/publication-press/publication/eeoc-guidelines-provide-confusing-roadmap-investigating-retaliation>.

310 See *Enforcement Guidance on Retaliation and Related Issues*, *supra* note 307.

cause. Although the new Guidance recites the but-for standard, it provides a confusing explanation of this otherwise straightforward burden of proof. In 2013, the U.S. Supreme Court in *University of Texas Southwestern Medical Center v. Nassar* held that retaliation claims under Title VII must satisfy the “but for” causation standard.³¹¹ The Court explained: “[i]n the usual course, this standard requires the plaintiff to show ‘that the harm would not have occurred’ in the absence of—that is, but for—the defendant’s conduct.” Stated another way, “but for” means “the real reason,” as in the employee’s alleged misconduct was the real reason for the termination. Rather than relying on the Court’s explanation, the new Guidance advises that “[t]here can be multiple ‘but-for’ causes, and retaliation need only be ‘a but-for’ cause of the materially adverse action in order for the employee to prevail.”³¹² As such, the new Guidance seemingly complicates an otherwise simple standard.

Finally, the new Guidance on Retaliation and Related Issues offers specific recommendations to employers to avoid retaliation claims. These recommendations include advice regarding written policies, employee training, and how to follow up with an employee who has engaged in protected activity.

3. Disability

In 2015, the EEOC issued two documents addressing workplace rights for individuals with HIV infection under the Americans with Disabilities Act of 1990 (ADA).³¹³ One document is entitled “Living With HIV Infection: Your Legal Rights in the Workplace Under the ADA.”³¹⁴ According to the EEOC, this document “explains that applicants and employees are protected from employment discrimination and harassment based on HIV infection, and that individuals with HIV infection have a right to reasonable accommodations at work.”³¹⁵ The other document is entitled “Helping Patients with HIV Infection Who Need Accommodations at Work.”³¹⁶ This document “explains to doctors that patients with HIV infection may be able to get reasonable accommodations that help them to stay productive and employed, and provides them with instructions on how to support requests for accommodation with medical documentation.”³¹⁷

On May 9, 2016, the EEOC issued a resource document addressing the rights of employees with disabilities who seek leave as a reasonable accommodation under the ADA.³¹⁸ Although this document did not mark a change in course from the EEOC’s positions, it did shed light on the priority the EEOC places on leave issues. More specifically, the document explains that an employee who informs her employer that a disability may cause periodic unplanned absences from work is considered to have requested a reasonable accommodation, which would trigger the employer’s duty to engage in the interactive process.

4. Wellness Programs (ADA/GINA)

In 2016, the EEOC continued to focus on employer wellness programs and their compliance with federal laws, including the ADA, Genetic Information Nondiscrimination Act (GINA), and other statutes enforced by the EEOC. Indeed, on May 20, 2016, the EEOC issued its long-awaited final rules on wellness programs.³¹⁹ According to the EEOC’s press release, these Rules will help employers operate such programs consistent with applicable provisions of the Health Insurance Portability and Accountability Act (HIPAA), as amended by the Affordable Care Act (ACA). However, the EEOC final rules have been met with criticism from both sides. Employers have expressed concerns about their inconsistencies with the ACA implementing regulations. The AARP even filed suit to block the rules, arguing that they violate employees’ privacy. On December 29, 2016, however, the federal district court for the District of Columbia denied the AARP’s motion

311 133 S. Ct. 2517, 2525 (2013).

312 See *Enforcement Guidance on Retaliation and Related Issues*, *supra* note 307.

313 Press Release, EEOC, *EEOC Issues Publications on the Rights of Job Applicants and Employees Who Have HIV Infection* (Dec. 1, 2015) available at <https://www.eeoc.gov/eeoc/newsroom/release/12-1-15.cfm>.

314 EEOC, *Living With HIV Infection: Your Legal Rights in the Workplace Under the ADA* (Dec. 1, 2015), available at https://www.eeoc.gov/eeoc/publications/hiv_individual.cfm.

315 Press Release, EEOC, *EEOC Issues Publications on the Rights of Job Applicants and Employees Who Have HIV Infection* (Dec. 1, 2015) available at <https://www.eeoc.gov/eeoc/newsroom/release/12-1-15.cfm>.

316 EEOC, *Helping Patients with HIV Infection Who Need Accommodations at Work* (Dec. 1, 2015), available at https://www.eeoc.gov/eeoc/publications/hiv_doctors.cfm.

317 *EEOC Issues Publications on the Rights of Job Applicants and Employees Who Have HIV Infection*, *supra* note 315.

318 EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), available at <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>.

319 Press Release, EEOC, *EEOC Issues Final Rules on Employer Wellness Programs* (May 16, 2016) available at <https://www.eeoc.gov/eeoc/newsroom/release/5-16-16.cfm>.

for a preliminary injunction.³²⁰ Regardless of the outcome of this litigation, the wellness rule may be subject to change under a Republican-controlled Commission.

a. Final Rules on Wellness Programs and the ADA

First, the final rule requires that an employee wellness program, including any disability-related inquiries and medical examinations that are part of such a program, be reasonably designed to promote health or prevent disease.³²¹ To satisfy this standard, the program must have “a reasonable chance of improving the health of, or preventing disease in, participating employees, and must not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, or highly suspect in the method chosen to promote health or prevent disease.”³²² The final rule makes clear that a wellness plan may not simply shift costs from the covered entity to the covered employees based on their health.

Second, the final rule provides standards to determine if a wellness program is “voluntary.” Unsurprisingly, a program cannot be considered “voluntary” if all employees are required to participate.³²³ Further, an employer may not disqualify an employee from a plan for his or her failure to participate in the program.³²⁴

Third, the final rule provides notice requirements. For any plan that asks employees to respond to disability-related inquiries and/or undergo medical examinations, the employer must provide a notice clearly explaining what medical information will be obtained, how the medical information will be used, who will receive the medical information, the restrictions on its disclosure, and the methods the employer uses to prevent improper disclosure of medical information.³²⁵

Fourth, one area of the final rule that has garnered criticism is the limit on financial incentives, particularly the inconsistencies between the final rule and the ACA requirements. Under the final rule, the total allowable incentive (financial or in-kind) cannot exceed 30 percent of the total cost of *self-only* coverage.³²⁶ In contrast, the ACA authorizes incentives of up to 30 percent of the cost of coverage in which the employee is enrolled.³²⁷ Therefore, under ACA, if an employee enrolls in family coverage, the maximum incentive limit would be 30 percent of the cost of family coverage.³²⁸ Although the EEOC acknowledged this issue, it chose not to align the two requirements because the ADA’s prohibitions on discrimination apply only to applicants and employees, not to their spouses and other dependents, the ADA wellness rule does not address the incentives wellness programs may offer in connection with dependent or spousal participation.

Finally, the final rule requires that medical information collected through an employee health program only be provided to an employer in aggregate terms that do not disclose, or are not reasonably likely to disclose, the identity of specific individuals, except as needed to administer the health plan and for other limited purposes described in the regulations.³²⁹ Further, the final rule adds an additional mandate to employers by prohibiting them from requiring an employee to agree to the sale, exchange, sharing, transfer, or other disclosure of medical information or to waive confidentiality protections available under the ADA as a condition for participating in a wellness program or receiving an incentive.³³⁰

b. Final Rules on Wellness Programs and GINA

Like the final ADA wellness rule, the final rule applicable to Title II of GINA also provides important guidance for employers. First, the final rule explains that an employer cannot offer a financial inducement for providing genetic information as part of a wellness program.³³¹ However, the final rule does not expressly address the issue of offering an

³²⁰ *AARP v. EEOC*, Civil Action No. 16-2113 (D.D.C. Dec. 29, 2016).

³²¹ 29 CFR 1630.14(d)(1).

³²² *Id.*

³²³ 29 CFR 1630.14(d)(2).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ 29 CFR 1630.14(d)(3).

³²⁷ Ilyse Schuman, Judith Wethall and Russell Chapman, *EEOC Issues Final Rules on Wellness Programs*, Littler Insight (May 20, 2016), <http://www.littler.com/publication-press/publication/eeoc-issues-final-rules-wellness-programs>.

³²⁸ 29 CFR 1630.14(d)(3).

³²⁹ 29 CFR 1630.14(d)(4).

³³⁰ *Id.*

³³¹ 29 CFR 1635.8(2).

incentive for a spouse of an employee to provide information about the spouse's current or past health status.³³² Further, the rule clarifies that an employer may offer a limited incentive (in the form of a reward or penalty) to an employee whose spouse receives health or genetic services offered by the employee—including as part of a wellness program—and provides information about his or her current or past health status.³³³ Further, consistent with the ADA final rule, the maximum share of the inducement attributable to the employee's participation in an employer-sponsored wellness program (or multiple employer-sponsored wellness programs that request such information) is 30 percent of the cost of *self-only* coverage.³³⁴ Finally, the final rule prohibits inducements for information about children of employees.³³⁵

5. National Origin Discrimination

On June 2, 2016, the EEOC released Proposed Guidance on National Origin Discrimination for public comment.³³⁶ Final enforcement guidance on this topic was released on November 18, 2016.³³⁷ 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."³³⁸

This formulation of the joint employment standard is borrowed from the controversial National Labor Relations Board (NLRB) decision of *Browning-Ferris Industries of California*.³³⁹ 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.

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.'"³⁴⁰ 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."³⁴¹ 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.³⁴²

³³² *Id.*

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ Press Release, EEOC, *EEOC Seeks Public Input on Proposed Enforcement Guidance on Nation Origin Discrimination* (June 2, 2016) available at <https://www.eeoc.gov/eeoc/newsroom/release/6-2-16a.cfm>.

³³⁷ 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>.

³³⁸ *Enforcement Guidance on National Origin Discrimination*, Section III.A.

³³⁹ 362 NLRB No. 186 (2015), *appeal docketed*, No. 16-1028 (D.C. Cir. Jan. 20, 2016).

³⁴⁰ *Enforcement Guidance on national origin discrimination*, at Section V.A.

³⁴¹ *Id.*

³⁴² *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.”³⁴³ Contrary to this formulation, many courts have held lack of fluency is a legitimate, nondiscriminatory reason for an adverse employment action.³⁴⁴ 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. . .”³⁴⁵ 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.³⁴⁶ However, as the Guidance acknowledges, this policy has been expressly rejected by many courts.³⁴⁷

In addition to the Guidance on National Origin Discrimination, the EEOC also addressed national origin discrimination in late 2015 by issuing a press release on behalf of former EEOC Chair Yang addressing workplace discrimination against individuals who are, or are perceived to be, Muslim or Middle Eastern.³⁴⁸ This press release began by stating that “[i]n the wake of tragic events at home and abroad, EEOC urges employers and employees to be particularly mindful of instances of harassment, intimidation, or discrimination in the workplace against vulnerable communities,” which is a likely reference to the tragic events in San Bernardino in December 2015. Along with this press release, the EEOC release two documents: (1) “Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern,”³⁴⁹ and (2) “Questions and Answers for Employees: Workplace Rights of Employees Who Are, or Are Perceived to Be, Muslim or Middle Eastern.”³⁵⁰ Both of these documents are designed to help employers dealing with issues specifically related to workplace discrimination against individuals who are, or are perceived to be, Muslim or Middle Eastern.

6. Federal Sector

In FY 2016, the EEOC published a Notice of Proposed Rulemaking that requires “affirmative action” with respect to federal employers and individuals with disabilities. The EEOC issued its final rule on January 3, 2017.³⁵¹ The rule, effective March 21, 2017, will require federal agencies to adopt the goal of achieving a rate of 12 percent employment for individuals with disabilities, and a 2 percent rate for individuals with “targeted” disabilities. These are severe disabilities that pose significant barriers to employment. The goals apply at both higher and lower levels of federal employment. Hiring efforts are to focus on recruitment efforts and simplified access to disability hiring programs and services.

In addition to setting numerical goals and promoting recruitment, the rule requires agencies to provide personal assistance services to employees who, because of a disability, need these services to help with activities such as eating and using the restroom while at work. The rule collects into a single rule several longstanding requirements found in a variety of sources, including management directives and executive orders. This will provide clarity for federal agencies for the development of their affirmative action plans. The rule does not impose any obligations on private businesses or state and local governments.

343 *Enforcement Guidance on national origin discrimination*, at Section V.B.1.

344 *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).

345 *Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 (9th Cir. 1987).

346 *Enforcement Guidance on National Origin Discrimination*, at Section V.C.

347 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).

348 Press Release, EEOC, *EEOC Issues a Statement by Chair Jenny R. Yang to Address Workplace Discrimination Against Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern* (Dec. 23, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-13-15.cfm>.

349 EEOC, *Questions and Answers for Employers: Responsibilities Concerning the Employment of Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern* (Dec. 23, 2015), available at https://www.eeoc.gov/eeoc/publications/muslim_middle_eastern_employers.cfm.

350 *Id.*

351 EEOC, *Affirmative Action for Individuals With Disabilities in Federal Employment*, 82 Fed. Reg. 654-681 (Jan. 3, 2017).

7. EEOC's Digital Charge System

On May 6, 2015, the EEOC began implementing a digital charge system by rolling out an electronic pilot program.³⁵² The program uses a platform entitled "ACT Digital," which allows employers to electronically review and respond to charges. The EEOC said that the move to electronic filing was necessary because "[a]s a federal agency, the EEOC has a responsibility to streamline and make more efficient its service delivery to better serve the public."³⁵³

Use of the electronic platform was available only in select cities initially, but has expanded rapidly, and on March 23, 2016, the EEOC announced the launch of its online charge status system. For charges filed after September 2, 2015, charging parties and respondents will be able to check the status of their charge online. Additionally, businesses can receive and upload documents and communicate with the EEOC through the online system.³⁵⁴

Separately, the EEOC has launched a process to allow charging parties to review and respond to a Position Statement filed by a Respondent.³⁵⁵ Charging parties will have 20 days after receiving a Respondent's Position Statement to file a reply with the EEOC. A Respondent, however, will not be able to review or respond to that reply.

D. Current and Anticipated Trends

Had Hillary Clinton won the election as many expected, the EEOC was set to continue on its current path, pursuing initiatives related to recruiting and hiring procedures and practices, religious accommodation, retaliation, workplace harassment, and sexual orientation and gender identity, disability, race and national origin discrimination. The Commission has come under attack by Republican lawmakers for devoting resources to initiatives unrelated to processing the significant backlog of discrimination claims. Indeed, lawmakers have proposed legislation to force the EEOC to "prioritize its staffing and resources towards reducing the number of current and outstanding unresolved private sector pending charges and public sector hearings,"³⁵⁶ and to solicit public input before taking any potential action on proposed guidance. Although an independent agency, the EEOC under the Trump Administration and with a Republican-controlled Congress will likely re-direct their priorities and resources to addressing existing discrimination claims rather than pursuing broader policy changes.

1. Religious Accommodations

On July 22, 2016, the EEOC issued a press release regarding its new efforts to address religious discrimination.³⁵⁷ As a part of its effort, the EEOC released a Fact Sheet "designed to help young workers better understand their rights and responsibilities under the federal employment anti-discrimination laws prohibiting religious discrimination."³⁵⁸ Additionally, the EEOC announced that it was collaborating with Combating Religious Discrimination Today, a community engagement initiative coordinated by the White House and the U.S. Department of Justice, Civil Rights Division to address religious discrimination.

As a part of its efforts to address religious discrimination, the EEOC also announced that it will implement new procedures designed to collect more precise information about the religion of individuals who file charges of discrimination. Further, the EEOC announced that it plans to address workplace religious discrimination specially in regards to federal contractors and subcontractors by partnering with the Department of Labor's Office of Federal Contract Compliance Programs. Finally, the EEOC signaled in this press release that it plans to continue to focus its efforts on ensuring that employer's grooming and appearance policies do not interfere with "an employee's or applicant's

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

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

354 Press Release, EEOC, *EEOC Launches Online Charge Status System* (Mar. 23, 2016), available at: <https://www.eeoc.gov/eeoc/newsroom/release/3-23-16.cfm>

355 Press Release, EEOC, *EEOC Implements Nationwide Procedures for Releasing Respondent Position Statements and Obtaining Responses from Charging Parties* (Feb. 18, 2016), available at: https://www.eeoc.gov/eeoc/newsroom/release/position_statement_procedures.cfm.

356 Press Release, Senate HELP Committee, *Alexander: Appropriations Committee Advances Bill Directing EEOC to Focus on "Massive" Backlog of 76,000 Unresolved Workplace Discrimination Cases* (Apr. 21, 2016), available at <http://www.help.senate.gov/chair/newsroom/press/alexander-appropriations-committee-advances-bill-directing-eeoc-to-focus-on-massive-backlog-of-76000-unresolved-workplace-discrimination-cases>.

357 Press Release, EEOC, *EEOC Issues Resource Document, Announces Plans to Improve Data Collection and Outreach on Religious Discrimination* (July 22, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/7-22-16.cfm>.

358 EEOC, Fact Sheet: Religion & Your Job Rights (July 22, 2016), available at https://www.eeoc.gov/youth/fact_sheets.html.

sincerely held religious beliefs or practices about certain garb or grooming, such as a headscarf for Muslims, Pentecostal women requesting to wear skirts, or beards worn by Orthodox Jews or Sikhs.”³⁵⁹

2. Workplace Harassment

The EEOC has continued its focus on the issue of workplace harassment and reiterated its commitment to educating employers and employees as a strategy to deter future violations, consistent with the EEOC’s priorities in the SEP. On October 22, 2015, the EEOC held the second public meeting of the Select Task Force on the Study of Harassment in the Workplace, which was “designed to explore innovative steps to prevent workplace harassment.”³⁶⁰ In this meeting, individuals from the academic, legal, and business communities voiced their concerns relating to workplace harassment. This Task Force met again on December 7, 2015, this time discussing the use of social media to address harassment in the workplace.³⁶¹

In June 2016, the Select Task Force on the Study of Harassment in the Workplace held a meeting announcing the release of its Report on Harassment.³⁶² This 130-page Report contained 45 specific recommendations and identified 12 “risk factors” concerning workplace harassment and its prevention.³⁶³ The Report is divided into four sections: (1) Introduction, (2) What We Know about Harassment in the Workplace, (3) Preventing Harassment in the Workplace, and (4) Summary of Recommendations.

The Report notes that “[r]oughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.”³⁶⁴ Further, the Report stated that it “wanted to find ways to help employers and employees prevent such conduct before it rose to the level of illegal harassment.”³⁶⁵ To promote this goal, the Report identified the following “risk areas:”

- *Homogeneous workforce.* Harassment is more likely to occur where there is a lack of diversity in the workplace.
- *Workplaces where some employees do not conform to workplace norms.*
- *Cultural and language differences in the workplace.* Workplaces that are extremely diverse also pose a risk factor for harassment.
- *Coarsened social discourse outside the workplace.* Events outside a workplace may pose a risk factor that employers need to consider and proactively address.
- *Young workforces.* Workers in their first or second jobs may be less aware of laws and workplace norms.
- *Workplaces with “high value” employees.* Senior management may be reluctant to challenge the behavior of their high-value employees.
- *Workplaces with significant power disparities.*
- *Isolated workplaces.*
- *Workplaces that tolerate or encourage alcohol consumption.*
- *Decentralized workplaces.* Workplaces where corporate offices are far removed from front-line employees or first-line supervisors.³⁶⁶

According to the Report, the purpose of identifying these factors is to help employers prevent harassment by increasing their “situational awareness.”³⁶⁷ The Report also focuses on improving employer compliance by recommending

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

360 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>.

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

362 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>.

363 EEOC, *Select Task Force on the Study of Harassment in the Workplace Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (June 2016), available at https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.

364 *Id.* at v.

365 *Id.* at 25.

366 *Id.* at 25-29.

367 *Id.* at 30.

improvements for workplace prevention and training. In particular, the Report identifies interactive delivery as the preferred method of providing harassment prevention training.³⁶⁸ Further, the Report also suggests that employers include “Workplace Civility Training” and “Bystander Intervention Training.”³⁶⁹ The Report implores employers to develop training messages and delivery models that go “beyond compliance” by including these two training methods.³⁷⁰ Additionally, the Report makes several other recommendations to employers regarding training, such as offering executive training, dedicating sufficient resources to train middle-management, and reevaluating training methods to ensure that they are effectively communicating its policy to employees in all levels at their organization.³⁷¹

3. Equal Pay And Pregnancy Discrimination

On June 14, 2016, the EEOC participated in the White House United State of Women Summit.³⁷² The Summit was intended to gather experts and business leaders, among others, to discuss key issues affecting women and girls. To coincide with the Summit, the EEOC released three “resource documents” that are intended to address the rights of women in the workplace:

- Equal Pay and the EEOC’s Proposal to Collect Pay Data
- Legal Rights for Pregnant Workers under Federal Law³⁷³
- Helping Patients Deal with Pregnancy-Related Conditions and Restrictions at Work³⁷⁴

The second of these documents provides women with basic, clear descriptions of their rights and how to proceed if they believe their rights have been violated. The third of these documents provides healthcare providers such as doctors with information about their patient’s pregnancy-related rights, and the provider’s ability to provide documentation. The EEO-1 revisions were the cornerstone of the Commission’s approach to promoting equal pay. Had Hillary Clinton won in November, equal pay was expected to be among her priority issues. With federal efforts to promote equal pay through the revised EEO-1 report or Paycheck Fairness Act legislation now unlikely, employers may face a growing number of states advancing pay equity legislation in Washington’s absence.

4. Race and National Origin

With the release of the Guidance on National Origin Discrimination in 2016, the EEOC has signaled that it will pay close attention to these issues in 2017. Further, in wake of the perceived increase in hostility towards Muslims and Middle Eastern individuals in the United States, the EEOC has signaled that it plans to pay particular attention to workplace discrimination against individuals who are, or are perceived to be, Muslim or Middle Eastern.³⁷⁵

5. Human Trafficking

On January 1, 2016, former Chair Yang addressed an issue that has been garnering more attention in recent years—human trafficking in the United States.³⁷⁶ Yang delivered her remarks at the White House announcing the EEOC’s ongoing efforts to combat human trafficking. In particular, Yang noted that “[l]aws enforced by the EEOC—particularly those prohibiting discrimination based on race, national origin, and sex—can be crucial tools in combatting trafficking and obtaining compensation for victims.”³⁷⁷ Further, Yang announced that the EEOC has updated its charge data systems to improve their ability to research and track human trafficking charges. As an example of the EEOC’s efforts to address human trafficking, Yang also announced that the EEOC settled a race and national origin discrimination case against one

368 *Id.* at 52.

369 *Id.* at 54.

370 *Id.* at 61.

371 *Id.* at 67.

372 Press Release, EEOC, *EEOC Issues New Resource Documents for White House United State of Women Summit* (June 14, 2016), available at: <https://www.eeoc.gov/eeoc/newsroom/release/6-14-16.cfm>.

373 EEOC, *Legal Rights for Pregnant Workers under Federal Law*, available at: https://www.eeoc.gov/eeoc/publications/pregnant_workers.cfm.

374 EEOC, *Helping Patients Deal with Pregnancy-Related Limitations and Restrictions at Work*, available at: https://www.eeoc.gov/eeoc/publications/pregnancy_health_providers.cfm.

375 Press Release, EEOC, *EEOC Issues a Statement by Chair Jenny R. Yang to Address Workplace Discrimination Against Individuals Who Are, or Are Perceived to Be, Muslim or Middle Eastern* (Dec. 23, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-13-15.cfm>.

376 Press Release, EEOC, *EEOC Chair Jenny R. Yang Delivers Remarks at the Annual Meeting of the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons* (Jan. 5, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/chair-remarks-1-5-2015.cfm>.

377 *Id.*

company for \$5 million for operating two labor camps staffed by 476 Indian workers who were trafficked to the United States from India.³⁷⁸

6. Tech Industry

In 2016, the EEOC turned its attention to promoting more diversity in the technology industry by holding a public meeting on May 18, 2016.³⁷⁹ According to the EEOC, the purpose of this public meeting was “to highlight the significant challenges that remain in advancing opportunity for women, workers over 40, and other groups in the tech industry.”³⁸⁰

Although this discussion focused largely upon promoting education and employment opportunities for groups that are underrepresented in the technology field, there was also a discussion about the EEOC’s role in promoting diversity in this field. In particular, the EEOC mentioned improving EEO-1 forms to track the age of those filing charges of discrimination.

7. Small Businesses

Although not widely publicized, the EEOC commissioned a Small Business Task Force, which focuses on providing information to small businesses who lack human resources professionals.³⁸¹ In 2016, this Task Force published a Fact Sheet “to address the need to provide small businesses ready access to plainly written, easily understood information, through the use of the internet, social media and other sources.”³⁸² Aside from publishing this Fact Sheet, this Task Force has not publicized any specific initiatives aimed at enforcing EEO laws with respect to small businesses.

8. EEOC Transparency

On October 1, 2015, the EEOC announced the launch of the “FOIAXpress software,” which replaces the Commission’s Freedom of Information Act (“FOIA”) Tracking System.³⁸³ The FOIAXpress software is designed to “speed up the processing of FOIA requests by allowing EEOC staff and FOIA requesters the ability to electronically exchange pertinent documents.”³⁸⁴ This software will allow those who file a FOIA request with the EEOC to monitor their requests online via the Public Access Link, known as “PAL.”

The next fiscal year promises to be an interesting one for the EEOC, as it restructures and re-prioritizes in light of the November 2016 election.

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

379 Press Release, EEOC, *Advancing Opportunity for All in the Tech Industry* (May 18, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/5-18-16.cfm>.

380 *Id.*

381 Press Release, EEOC, *EEOC Issues New Fact Sheet for Small Businesses* (Mar. 3, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/3-3-16.cfm>.

382 *Id.*

383 Press Release, EEOC, *EEOC Launches FOIAXpress to New Automated Program for FOIA Requests* (Oct. 1, 2015), available at <https://www.eeoc.gov/eeoc/newsroom/release/10-1-15.cfm>.

384 *Id.*

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Investigations

1. Scope of EEOC's Investigative Authority

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."³⁸⁵ The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,³⁸⁶ 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."³⁸⁷ 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."³⁸⁸

Challenges to subpoenas typically turn on two related issues: (1) relevance and (2) burdensomeness. Although relevance for EEOC subpoenas is broader than Federal Rule of Evidence 402, courts have refused to enforce administrative subpoenas that would result in a "fishing expedition."³⁸⁹ This is not just because of "relevance," but also because of burdensomeness. Generally, there is an inverse relationship between the points; the less relevant the sought information, the more burdensome the request becomes. And conversely, the more relevant the request, the less likely a court will find it unduly burdensome.³⁹⁰ In either case, the employer may generally prove an undue burden only through two different standards: (1) that the burden of production would substantially outweigh the probative value of the requested information, or (2) that "compliance would threaten the normal operation of a respondent's business."³⁹¹ Finally, as digital borders become ever more porous and digital thieves ever more sophisticated, some courts continue to address whether and to what extent privacy should inform decisions of relevance and burdensomeness.

2. 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.³⁹² The EEOC has recently taken an aggressive stance on the "waiver" issue when dealing with employers that have generally failed to respond to the EEOC's requests for information and subpoenas. Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena, unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.³⁹³

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*,³⁹⁴ discussed in Littler's FY 2013 Annual Report, in

385 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.

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

387 *Id.* at 59.

388 *Id.*

389 See *EEOC v. United Airlines*, 287 F.3d 643 (7th Cir. 2002); See also *EEOC v. Sterling Jewelers Inc.*, 2013 U.S. Dist. LEXIS 141489, at *20 (W.D.N.Y. Sept. 23, 2013).

390 See, e.g., *EEOC v. Groupon, Inc.*, 2016 U.S. Dist. LEXIS 128641, at *13 (N.D. Ill. Sept. 21, 2016); *EEOC v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071, at *13 (E.D. Ky. Mar. 29, 2016).

391 *United Airlines*, 287 F.3d at 653. Some courts treat this category as more "illustrative, than categorical." See, e.g., *EEOC v. Groupon, Inc.*, 2016 U.S. Dist. LEXIS 128641, at *12 (N.D. Ill. Sept. 21, 2016).

392 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).

393 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).

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

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."³⁹⁵

But what an employer may provide to excuse its procedural failing does not, in some cases, appear to be especially demanding. 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.³⁹⁶ 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*.³⁹⁷ There, the 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.³⁹⁸ 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."³⁹⁹ 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 cited "extraordinary" postal circumstances, (4) the delay was only a day, and (5) the employer tried to comply with the requirements.⁴⁰⁰ The court therefore ruled against the EEOC.

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.

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

A 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*,⁴⁰¹ 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.

³⁹⁵ *Id.* at 648.

³⁹⁶ *EEOC v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016).

³⁹⁷ *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).

³⁹⁸ *Id.* at 959.

³⁹⁹ *Id.*

⁴⁰⁰ *EEOC v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071, at *7 (E.D. Ky. Mar. 29, 2016).

⁴⁰¹ *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 148431 (E.D. Cal. Oct. 15, 2013).

4. Review of Recent Cases Involving Broad-Based Investigations by the EEOC⁴⁰²

a. Court of Appeals Decisions

A broad-based request for “pedigree information” (name, social security number, last-known address, and telephone number) was the focus in *EEOC v. McLane Co.*⁴⁰³ The EEOC expanded the scope of an individual charge to a nationwide investigation because the same isokinetic examination was used at other locations. The privacy and relevance issues converged based on the EEOC’s request for nationwide “pedigree information” for each test-taker at facilities around the country. The district court held that the pedigree information was not relevant or “necessary” at that stage.⁴⁰⁴ On appeal, the Ninth Circuit made a “de novo” finding, reversed the district court, broadly interpreted the “relevancy” limitation of *EEOC v. Shell Oil*,⁴⁰⁵ and held that the EEOC was entitled to such pedigree information based on an expansive view of relevance. The U.S. Supreme Court has agreed to decide whether the district court’s decision to quash or enforce the subpoena should be reviewed de novo.⁴⁰⁶

An extensive request for client information was the focus in the Seventh Circuit decision in *EEOC v. Aerotek*, involving an investigation of alleged age discrimination and purportedly “hundreds of discriminatory job requests.”⁴⁰⁷ During the EEOC investigation, the employer declined to produce the names of more than 22,000 clients on the ground that most were not related in any way to the hundreds of job requisitions the EEOC identified as “potentially problematic.” Notwithstanding, the appeals court held that the identification of these clients would allow the EEOC to “investigate discriminatory activity that ha[d] not been recorded in the [employer’s] database,” and that this information was “clearly relevant to the investigation.”⁴⁰⁸ While the court acknowledged that harmed business relationships may establish undue burden, it found that the employer had provided no evidence for this “fear and speculation.”⁴⁰⁹

The courts have even permitted broad-based requests for information when the validity of the charge is in issue. *EEOC v. Maritime Autowash*⁴¹⁰ suggests that the EEOC’s subpoena power may not even depend on the merits of the charge or the standing of the charging party. In *Maritime*, an undocumented-alien employee filed a charge, supported by other Latino employees, alleging discrimination on the basis of race. In responding to the charge, the EEOC requested and eventually subpoenaed personnel files, wage records, and other employment data related to the charging parties and similarly situated employees. In opposing enforcement of the subpoena, the employer argued that a valid charge of discrimination is a jurisdictional prerequisite to judicial enforcement. Because, it argued, the charging party was an undocumented alien, he lacked standing. And because he lacked standing, the charge was invalid.

The court disagreed. Under the Fourth Circuit’s standard, all the EEOC must show, the court said, is that an “arguable” or “plausible” basis for its jurisdiction exists and that its investigative authority is “not plainly lacking.” Reviewing Title VII’s provisions, the court found nothing that “explicitly bars undocumented workers from filing complaints.”⁴¹¹ The court therefore held that there was a plausible or arguable basis for the EEOC’s subpoena in this case. According to the court, the only jurisdictional prerequisites are those found in Section 706 of Title VII, which set technical guidelines for the form, content, and timeliness of the EEOC charge. That a party may have a valid defense to a later suit is not within Section 706 and does not “negate” the EEOC’s authority to investigate. If it could, then it would, said the court, “serve not only to place the cart before the horse, but to substitute a different driver [the district court] for the one appointed by Congress [the EEOC.]”⁴¹² In its strongly worded penultimate paragraph, the court rebuked the employer’s challenge for “envision[ing] a world where an employer would impose all manner of harsh working conditions upon undocumented

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

403 *EEOC v. McLane Co.*, 804 F.3d 1051 (9th Cir. 2015).

404 *Id.* at 1054-55.

405 466 U.S. 54 (1984).

406 *EEOC v. McLane Company, Inc.* 804 F. 3d 1051 (9th Cir. 2015), cert. granted, *McLane Co. v. EEOC* (U.S. Sept. 29, 2016) (No. 15-1248).

407 *EEOC v. Aerotek*, 815 F.3d 328, 331 (7th Cir. 2016).

408 *Id.* at 334.

409 *Id.*

410 *EEOC v. Maritime Autowash*, 820 F.3d 662 (4th Cir. 2016).

411 *Id.* at 666 (“Title VII allows any ‘person claiming to be aggrieved to file charges with the EEOC.’” 42 U.S.C. § 2000e-5(b)). Later in the opinion, the court distinguished *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) on the ground that the *Hoffman* Court did not consider the relevant agency’s subpoena authority or “how it related to the relief available to undocumented aliens.” The court also noted that the *Hoffman* Court awarded non-monetary relief, which for the *Maritime* court indicated that the “whole field is more nuanced and less categorical than *Maritime* suggests.” *Maritime Autowash*, 820 F.3d at 667-68.

412 *Maritime Autowash*, 820 F.3d at 667.

aliens, and no questions could be asked, no charges filed, and no agency investigation even so much begun.” It then accused the employer of asking for “carte blanche to both hire illegal immigrants and then unlawfully discriminate against those it unlawfully hired.”⁴¹³

Concurring in the result, Judge Niemeyer wrote separately to challenge the majority opinion’s narrow view of jurisdictional prerequisites. Fourth Circuit precedent, said Judge Niemeyer, requires courts to engage in a “serious consideration of the agency’s potential encroachment . . . when the subpoena seeks to facilitate the investigation of alleged employment practices that are categorically excluded from Title VII.”⁴¹⁴ Citing *Shell Oil*, Judge Niemeyer maintained that the court has insisted that lower courts not “thwart” Congress’ desire to prevent the Commission from exercising unconstrained investigative authority. As for the majority’s condemnation of what world the employer’s challenge supposedly envisioned, Judge Niemeyer rejoined that the challenge “simply recognizes that an investigation of the employer’s alleged civil and criminal violations of the immigration laws may fall more appropriately under the purview of other agencies”⁴¹⁵ Nevertheless, Judge Niemeyer concurred because he found Fourth Circuit precedent did not dictate an outcome where, as there, the undocumented alien was actually working for a covered employer.⁴¹⁶

b. District Court Cases

While the above appellate decisions cast greater light on relevance, those from the district courts this year have done more to flesh out burdensomeness. Though the decisions below are also notable for their treatment of privacy and relevance, they tend show the interdependency of relevance and burdensomeness. Like relevance, burdensomeness is a difficult standard for employers to meet, especially if the court finds the sought information relevant.

Such was the case in *EEOC v. Groupon, Inc.*⁴¹⁷ There, the charge alleged discrimination on the basis of race in selecting the Vice President of Merchandising for the defendant’s Chicago office. After receiving information it requested for that office, EEOC sought and eventually subpoenaed the identity of all the employer’s “systems” used to advertise or recruit prospective candidates, a database of all employees and information on who referred them, a database of the 192 applicants for the VP position, and all documents relating to the defendant’s hiring and recruitment processes.⁴¹⁸

On review, the court rejected the defendant’s argument that the requested information was overbroad. Citing Seventh Circuit precedent articulated in *United Air Lines*, the court found it irrelevant that the charge did not allege anything more than a single case of non-selection disparate treatment: “racial discrimination is by definition class discrimination, and information concerning whether an employer discriminated against other members of the same class for the purposes of hiring or job classification may cast light on whether an individual person suffered discrimination.”⁴¹⁹ The court went on to suggest that, in the Seventh Circuit, charges of racial discrimination merit special solicitude in the context of the EEOC’s subpoena power. According to the court, the Seventh Circuit has “uniformly enforced subpoenas seeking broad employment information in race discrimination cases”⁴²⁰ Indeed, the court maintained that there is a “presumption” that “compliance should be enforced to further the agency’s legitimate inquiry into matters of public concern.”⁴²¹ For the court, race discrimination continues to be a matter of “grave public concern” and therefore enjoyed such a presumption.

Though it would be difficult to overcome such a presumption by showing an undue burden, the defendant nevertheless tried on the basis that compliance would consume considerable resources. It argued that it would take four months and require hiring three to five new employee and five to ten hours per week from a current employee to assist with the effort. The court held, however, held that such effort had to be “weighed against the likely relevance of the requested material” and the “resources” the defendant has available.⁴²² For the court, both weighed in favor of enforcement. The court found that the information sought was “very likely to cast light” on the allegations and that the defendant had failed to offer enough evidence to make a “conclusive evaluation” about its resources. On the information

413 *Id.* at 668.

414 *Id.*

415 *Id.* at 669.

416 *Id.* at 670.

417 *EEOC v. Groupon, Inc.*, 2016 U.S. Dist. LEXIS 128641 (N.D. Ill. Sept. 21, 2016).

418 *Id.* at **3-4.

419 *Id.* at *10 (citing *EEOC v. United Air Lines, Inc.*, 287 F.3d 643, 653 (7th Cir. 2002)).

420 *Id.* at *11.

421 *Id.* at *14.

422 *Id.* at *13.

it had, the court found that hiring three to five new employees did not appear “unconscionable.”⁴²³ It therefore enforced the subpoena.

But what if the EEOC wants to obtain wide-ranging information not through a subpoena duces tecum, but through an in-person, on-site inspection without a warrant? This was more or less the issue presented in *EEOC v. Nucor Steel Gallatin*.⁴²⁴ There, the charging party alleged that the defendant rescinded his job offer after discovering his record of disability. The charging party further suggested that his interviewer told him the job would require only “hands off” work.⁴²⁵ After some initial investigation, the EEOC requested to conduct an on-site visit to interview employees and examine the facility. The defendant declined the request, offering instead for the EEOC to interview any employees at an off-site location. The EEOC then issued a subpoena for on-site access, which the defendant challenged.

On review, the court ultimately held that the EEOC does have power to conduct warrantless searches, but only after judicial review of a subpoena for such a search and only by limiting its spatial and substantive scope. Before reaching that conclusion, however, the court had to discuss the EEOC’s search powers generally and its warrantless search powers in particular. Rejecting the argument that EEOC has no statutory authority to conduct *any* on-site examination of commercial property, the court held that historical practice and statutory text belied this position. If, supposed the court, EEOC in fact lacked authority to conduct any on-site examinations, then it is unlikely Congress would have “remained silent in the face of the Commission’s habitual and pervasive exercise of that right for many decades.”⁴²⁶ And although the statute does not expressly grant this right, the court held that it “plainly follow[ed]” from the grant of “access to . . . any evidence of any person” that the Commission may enter private commercial property.⁴²⁷

A more difficult and novel question for the court was whether a warrant is required to exercise this right. The leading case, of course, is *Marshall v. Barlow’s, Inc.*,⁴²⁸ where the Supreme Court struck down an OSHA provision that authorized the Secretary of Labor to conduct warrantless, non-consensual searches of private commercial property. There, the Court held that, without a recognized exception, the Fourth Amendment prohibits administrative agencies from conducting such nonconsensual inspections. The Court qualified, however, that its holding did not mean other “warrantless-search provisions” in other regulatory statutes were also “constitutionally infirm.” Indeed, held the Court, the OSHA provision was unconstitutional only “insofar as it purported to authorize inspections without a warrant or *its equivalent*.”⁴²⁹

For the *Nucor Steel Gallatin* court, the EEOC’s subpoena-enforcement process is just that equivalent. Though a novel question in the Sixth Circuit, the court relied on Fifth Circuit decision that held a statutory scheme that provides pre-inspection “resort to federal courts” does “not [itself] run afoul of the Fourth Amendment.”⁴³⁰ The court therefore decided that to determine the constitutionality of the EEOC warrantless searches it would have to compare the “probable cause” standard for administrative warrants with the EEOC’s subpoena-enforcement scheme. That is, to be constitutional, the EEOC’s request for access would have to “flow” from “specific evidence of an existing violation” and bear an “appropriate relationship to the violation alleged in the complaint.” The court concluded that judicial enforcement of the subpoena and EEOC’s internal procedure met both criteria and “closely track[ed] the inquiry made under a traditional warrant process”⁴³¹ In doing so, the court found that relevance is limited by reasonableness. If it were not, as the defendant argued, then judicial enforcement would not be the equivalent of a warrant. But the court concluded that the inquiry in the EEOC’s statutory authority and the balancing of relevance with the burden of production “plainly carri[ed] a consideration of the reasonableness of the agency’s request.”⁴³²

With the constitutionality settled, the court turned to the scope of the subpoena at issue. Though the court found the EEOC’s request to “examine the facility” to be “nebulous” and “overbroad,” it rejected the defendant’s request that

423 *Id.* at *14.

424 *EEOC v. Nucor Steel Gallatin*, 2016 U.S. Dist. LEXIS 56406 (E.D. Ky. Apr. 28, 2016).

425 *Id.* at *2.

426 *Id.* at *6.

427 *Id.* (citing 42 U.S.C. § 2000e-8(a)). Despite the court’s finding that the statutory text is “clear,” it suggested that, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), it would defer to the EEOC’s interpretation of its own enabling statute. The court, however, cited no regulation through which the EEOC has interpreted its enabling statute to permit on-site investigations. See *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001) (holding that Chevron deference is generally withheld when an agency’s interpretation was not produced through a formal process like notice-and-comment rulemaking).

428 *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

429 *Id.* at 325.

430 *Nucor Steel Gallatin*, 2016 U.S. Dist. LEXIS 56406, at *12 (quoting *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981)).

431 *Id.* at *16.

432 *Id.* at *16, n.7.

the subpoena “state with specificity what is being sought.” Instead, the court required the EEOC to confine its search to those areas of the facility that it “reasonably believes” to be “relevant to the charges filed” and to “focus” its “inquiry” on “those items of evidence” “directly relevant” to the position for which the charging party applied.⁴³³ It further cautioned that, in cases of searches premised on individual complaints, there is an “increased danger of abuse of discretion and intrusiveness”⁴³⁴ Thus, under *Nucor Steel Gallatin*, there is a spatial and substantive dimension to the search. Where the EEOC may physically search is bounded by what it “reasonably believes” to be relevant to the charges filed. And *what* the EEOC may search for is limited to what is “directly relevant” to the job position at issue.

Finally, the court addressed and rejected the defendant’s undue-burden challenge. The defendant argued that, even with these restrictions, the allegedly varied, complex, dangerous, and irregular nature of the job and business would mean that the time needed to gain a “reliable understanding” of the job would be unduly burdensome. The court found, however, that the defendant misplaced the focus of the burden. For the court, the burden imposed by the scope of the subpoena and the burden imposed by the “peculiarities of the position” are distinct questions.⁴³⁵ While the latter is not irrelevant, it “cannot alone support denial of on-site access.” As for the duration of the search, the court concluded that the limits it set would “significantly reduce the amount of time.” And as for any danger posed by “industrial equipment machinery,” the court found the EEOC “well-equipped to take reasonable precautions.”⁴³⁶

The other subpoena-enforcement case this year from the U.S. District Court for the Eastern District of Kentucky is as notable for, if not the novelty of its issues, the outcome of its decision. For it is one of the few decisions this year to agree with an employer that an EEOC’s request would be unduly burdensome.⁴³⁷ In this case, the charge alleged that a large retailer’s “Physical Abilities Test” (“PAT”) had a disparate impact on women as a class. Investigating the charge, the EEOC subpoenaed applicant data, including pedigree information, from all of the retailer’s 40 nationwide distribution centers. The retailer challenged the subpoena on relevance and burden grounds and represented that compliance would require perusing through about 1 to 1.2 million applicants. The EEOC countered that the nationwide PAT data was “critical” to completing its investigation and “necessary for gender identification, witness interviews, as well as the EEOC conciliation process.” On the merits of the charge, the retailer conceded PAT’s disparate impact and sought to justify the test on the basis of business necessity.

On review, the court acknowledged that, despite the retailer’s concession, the information the EEOC sought was “not . . . irrelevant.”⁴³⁸ But, the court said, it was relevant to only an uncontested issue. Citing Eleventh Circuit precedent and the advisory committee notes for Federal Rule of Evidence 401, the court found that this raised two problems. First, to support a subpoena, it was not enough to show that the information sought was relevant to an uncontested issue. If not relevant to a contested and determinative issue, then a different standard applied and the EEOC would have to show a “necessity.”⁴³⁹ Second, and relatedly, the more searching standard was necessary because of the increased risk of, in the court’s view, wasted time and undue burden: “whereas significant need might justify imposition of a very substantial burden, the same cannot easily be said where the information requested, although generally relevant . . . is wholly unlikely to resolve the dispute.”⁴⁴⁰ Other than what the court characterized as the EEOC’s “bald assertion” that the data was “critical” to its investigation, the EEOC’s argument for relevance rested on conciliation. The court held, however, that, because conciliation occurs only once the investigation is complete and reasonable cause found, “the EEOC’s subpoena power does not attach to its conciliation efforts and even if it did, . . . [it] would be premature before” reasonable cause was found.⁴⁴¹ Therefore, because the retailer had already conceded the issue for which the information would be relevant—disparate impact—the court denied the subpoena, holding that enforcing the EEOC’s subpoena would “place an ‘excessive’ and ‘unwarranted’ burden” on the retailer.⁴⁴² Thus, the court’s decision depended not on the theory of liability, but on the retailer’s conceding a disparate impact.

Indeed, as with the Ninth Circuit court of appeals in *EEOC v. McLane*, district courts have generally not cabined

433 *Id.* at **21-22.

434 *Id.* at *13.

435 *Id.* at *23.

436 *Id.* at *26.

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

438 *Id.* at *12.

439 *Id.* at *13 (citing *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757, 761 (11th Cir. 2014)).

440 *Id.* (citing *Dow Chem. Co. v. Allen*, 672 F.2d 1262, 1270 (7th Cir. 1982)).

441 *Id.* at *16.

442 *Id.* at *14.

relevance by the legal theory of the charge. In *EEOC v. Ulta Salon*,⁴⁴³ the charging party alleged that the employer denied her a reasonable accommodation and discharged her during her medical leave of absence. During its investigation, the EEOC supposedly learned from the employer's managers that the employer did not "under any circumstances" allow employees to extend leave taken under the Family and Medical Leave Act and did not allow employees to return with medical restrictions. The EEOC thereafter subpoenaed information about employees who sought reasonable accommodations and medical leaves. The EEOC also sought job descriptions for positions at the company's Illinois facilities. On review, the employer argued that EEOC lacked adequate security protection for the sought information and that the sought information had no relevance to the "investigation into a solitary charge of disability discrimination."

The court disagreed. Extending Seventh Circuit precedent on how an EEOC charge determines the scope of judicial relief, the court held that the EEOC "may pursue all cognizable claims of discrimination 'that are like or reasonably related to the allegations of the charge and growing out of such allegations.'"⁴⁴⁴ Under this standard, the court concluded that the sought information was relevant because whether the employer had an unlawful reasonable-accommodation procedure related to the EEOC's investigation of the charge. As for the security issues, the court contrasted the requested information—addresses and phone numbers—from social-security numbers. According to the court, the former did not require "extraordinary protection,"⁴⁴⁵ and, regardless, the EEOC must keep this information confidential. Although its comparison suggested that the court could be sympathetic to the risk posed by security breaches, its observation that the EEOC is bound by confidentiality suggests that the court was not thinking about third-party bad actors.

In any event, the *Ulta Salon* decision shows that employers continue to raise security risks and that some courts may be giving them greater consideration. The same cannot be said for relevance, however. Though employers often argue that the charging theory of liability should inform or determine what is relevant, courts continue to treat that relationship as attenuated.

Some courts, in fact, construe relevance's breadth to the point where not only does it not depend on the theory of liability, but it also does not depend on the basis of discrimination. Such was the case in *EEOC v. American Coal Company*,⁴⁴⁶ where a female miner alleged she had been discriminated against on the basis of her gender. After an initial investigation, the EEOC requested and then subpoenaed gender and racial information within a three-year period of employees and applicants. Opposing the subpoena, the defendant argued that the burden imposed by the subpoena would be undue and that racial information was irrelevant to a charge of gender discrimination.

On both issues, the court found otherwise. Rejecting Fifth Circuit precedent unfavorable to the EEOC's position, the U.S. District Court for the Southern District of Illinois noted that the Seventh Circuit has held that "evidence concerning employment practices other than those specifically charged by complainants may be relevant."⁴⁴⁷ The court therefore concluded that "practices" was broad enough to include different bases of discrimination not alleged in the charge: "information pertaining to the race of applicants and employees may shed light on possible discriminatory hiring practices and, thereby, lead to the discovery of admissible evidence."⁴⁴⁸ In a similar manner, the court disposed of the defendant's burden argument. Though the company had only one human-resource employee, the court found that the company had provided no reason why it could not hire temporary staff to assist.⁴⁴⁹

5. Confidentiality

While employers were unsuccessful in persuading courts that security risks posed by third-party actors presented undue burdens, they were more successful in getting some courts to limit what the EEOC can do with sensitive material.

Last year's Little Report discussed *EEOC v. A'Gaci*,⁴⁵⁰ which arose from the defendant's petitioning the court to seal the EEOC's motion for enforcement and the parties' related briefing. It did so on the grounds that the documents sought by the EEOC contained confidential business, personnel, and payroll information. The court noted that filings under seal are disfavored under its local rules, but found the EEOC was prohibited under Title VII from making public the charge and information obtained in the course of its investigation. The court therefore sealed the pleadings and issued a

443 *EEOC v. Ulta Salon*, 2015 U.S. Dist. LEXIS 148486 (N.D. Ill. Oct. 29, 2015).

444 *Id.* at *4.

445 *Id.* at *7.

446 *EEOC v. American Coal Company*, 2016 U.S. Dist. LEXIS 55362 (S.D. Ill. Apr. 26, 2016).

447 *Id.* at *13.

448 *Id.*

449 *Id.* at *14.

450 *EEOC v. A'Gaci*, 2015 U.S. Dist. LEXIS 14319 (W.D. Tex. Feb. 5, 2015).

protective order.

Some eight months later, on motion for reconsideration, the court reached the same conclusion.⁴⁵¹ The decision turned on whether a certain Fifth Circuit decision should control.⁴⁵² The EEOC argued that, because the decision addressed whether a party may sue for breaching an alleged oral contract reached during conciliation, it did not control a pre-conciliation issue. The court disagreed. It noted that the Fifth Circuit decision discussed two prohibitions within Title VII's Section 2000e-5(b). The first is a prohibition against disclosure of filed charges, the second against disclosure of what was said and done during conciliation. The court then said that, according to the legislative history, the purpose of the ban on making charges public is to prevent "the making available to the general public of unproven charges."⁴⁵³ The court thus found that the EEOC failed to demonstrate any manifest error of law and that it was therefore not entitled to reconsideration.

The issue of confidentiality is, however, more than just a question of what is confidential. It can also turn on who exactly is the "public" to whom the information must not be disclosed. The answer, it turns out, depends on what information is being disclosed. In *EEOC v. City of Long Branch*,⁴⁵⁴ the EEOC investigated an African American police officer's charge that the department discriminated against him on the basis of race and requested all disciplinary records for the charging party's six white comparators. The city agreed to produce the information only on condition that the EEOC agree it would not disclose the information to the charging party. When the EEOC refused, so too did the city. The EEOC then issued its subpoena.

On review of the magistrate judge's order in favor of the city, the EEOC argued that the Supreme Court's decision in *EEOC v. Associated Dry Goods Corp.* compelled the conclusion that the charging party was not a member of the "public" with respect to the information of his six comparators. In that decision, the Court held that, because the charging party "is obviously aware of the charge he has filed," they cannot be a member of the "public" "to whom disclosure is forbidden under Title VII."⁴⁵⁵ But, as the City of Long Branch court noted, the Court then held that, "[the charging party] must be considered a member of the public with respect to charges filed by other people. With respect to all files other than his own, he is a stranger."⁴⁵⁶ Applying this holding, the Court found that the magistrate judge's order was not contrary to the law and was instead "consistent with the narrow reading that is afforded to the non-disclosure provision in Title VII."⁴⁵⁷

B. Conciliation Obligations Prior to Bringing Suit

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.⁴⁵⁸ Only after "[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer."⁴⁵⁹ 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.⁴⁶⁰ 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*,⁴⁶¹ 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

451 *EEOC v. A'Gaci*, 2015 U.S. Dist. LEXIS 144732 (W.D. Tex. Oct. 26, 2015).

452 *EEOC v. Philip Services Corp.*, 635 F.3d 164, 166-67 (5th Cir. 2011).

453 *A'Gaci*, 2015 U.S. Dist. LEXIS 144732, at *5.

454 *EEOC v. City of Long Branch*, 2016 U.S. Dist. LEXIS 36006 (D.N.J. Mar. 18, 2016).

455 *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 603 (1981).

456 *Id.* at 603.

457 *City of Long Branch*, 2016 U.S. Dist. LEXIS 36006, at *7.

458 42 U.S.C. § 2000-e5(b).

459 *EEOC v. Global Horizons, Inc.*, 2012 Dist. LEXIS 35915, at *12 (D. Haw. Mar. 16, 2012).

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

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

substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review.”⁴⁶² 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.⁴⁶³ The Seventh Circuit had held that the EEOC’s conciliation efforts were not judicially reviewable at all.⁴⁶⁴

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.⁴⁶⁵ 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).⁴⁶⁶ 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.’”⁴⁶⁷ The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.⁴⁶⁸

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.⁴⁶⁹ 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.”⁴⁷⁰ 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.”⁴⁷¹ The court reasoned that this holding was “consistent

462 *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).

463 *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).

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

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

466 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).

467 *Id.* at 635-636.

468 *Id.* at 635.

469 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).

470 *Id.* at 1200.

471 *Id.*

with the Supreme Court's broad interpretation of the EEOC's enforcement powers.⁴⁷² 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.⁴⁷³

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.⁴⁷⁴ The District of Maryland held that the EEOC met its conciliation obligations by submitting a declaration in which the Director of the agency's Baltimore Field Office noted the EEOC had "engaged in communications with the [Employer] . . . including sending [the Employer] a conciliation proposal."⁴⁷⁵ 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."⁴⁷⁶

In *EEOC v. East Columbus Host, LLC*,⁴⁷⁷ 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."⁴⁷⁸

In *EEOC v. Amsted Rail Co.*,⁴⁷⁹ 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.⁴⁸⁰ 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.⁴⁸¹

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.⁴⁸² 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

472 *Id.* at 1201.

473 *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791, 805 (5th Cir. 2016).

474 *EEOC v. Dimensions Healthcare System*, 2016 U.S. Dist. LEXIS 70126 (D. Md. May 27, 2016).

475 *Id.* at **13-14.

476 *Id.* at *16.

477 *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016).

478 *Id.* at *33.

479 *EEOC v. Amsted Rail Co.*, 2016 U.S. Dist. LEXIS 6466 (S.D. Ill. Jan. 20, 2016).

480 *EEOC v. Lawler Foods*, 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015).

481 *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016).

482 *EEOC v. College America of Denver, Inc.*, 75 F. Supp. 3d 1294, 1302-03 (D. Colo. Dec. 2, 2014).

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."⁴⁸³ This ruling was upheld on a motion for reconsideration.⁴⁸⁴

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.⁴⁸⁵ 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 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.⁴⁸⁶

In *EEOC v. Sensient Dehydrated Flavors Co., et al.*, the Eastern District of California relied on *CRST* in upholding an employer challenge to discovery demands served by the EEOC that went well beyond the scope of the allegations in the charge in issue.⁴⁸⁷ 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.⁴⁸⁸

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

In *EEOC v. CVS Pharmacy, Inc.*,⁴⁸⁹ 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.⁴⁹⁰ 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."⁴⁹¹ 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).⁴⁹² 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.⁴⁹³

483 *Id.* at 1302-03.

484 *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.

485 *EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).

486 *Id.* at *8.

487 *EEOC v. Sensient Dehydrated Flavors Co., et al.*, 2016 U.S. Dist. LEXIS 109479 (E.D. Cal. Aug. 17, 2016).

488 *Id.* at *21.

489 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).

490 *Id.* at 340-41.

491 *Id.* at 341-42.

492 *Id.* at 342.

493 *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. Amending Complaint

Results were varied in FY 2016 on the EEOC's motions to amend complaints. In a cautionary tale for plaintiffs seeking to amend their complaint to add claims that did not arise until after the lawsuit was initially filed, the U.S. District Court for the Northern District of California denied the EEOC's motion to amend as untimely.⁴⁹⁴ The EEOC did not move to amend until more than seven months after certain acts occurred, and seven weeks after other acts occurred. To grant the EEOC's motion would have required modification of the scheduling order's deadline for amendment of pleadings by almost two years, required the reopening of discovery six months after it closed, and necessitated continuance of the dispositive motions deadline, pretrial conference, and trial date. The EEOC did not provide a justification for its delay. In denying the motion to amend, the court held that the EEOC did not meet either the standard under Rule 16 that the scheduling order may be modified only on a showing of good cause or the portion of the test under Rule 15(a) finding that amendment should be allowed unless it would create undue delay.

In the U.S. District Court for the Southern District of Illinois, the EEOC sought to amend its complaint to include two sets of entities related to the original defendant: 1) entities named in the EEOC's initial determination, which the EEOC contended had notice and an opportunity for conciliation; and 2) entities that did not have actual notice or an opportunity for conciliation but which the EEOC contended were "single employers" of the aggrieved employees, and, therefore did not need to be separately noticed.⁴⁹⁵ Under Rule 15(a), the court allowed amendment as to the entities named in the EEOC's initial determination, provided the agency could demonstrate the notice and conciliation requirements were met, but denied amendment as to the other entities because the EEOC failed to demonstrate that those entities exercised a sufficient level of control over the original defendant's hiring or firing procedures sufficient to be a "single employer."

In a long-running class lawsuit under the ADA, the District of Nebraska dismissed the EEOC's pattern-or-practice claims in "Phase I" of the case, and the parties proceeded to litigate the individual claims in "Phase II."⁴⁹⁶ A number of intervenors who sought to have their claims heard in Phase II did not file their own administrative charges, and the defendant moved for dismissal for failure to exhaust administrative remedies. The "single-filing" or "piggyback" rule provides that once a single plaintiff has filed an administrative charge, other plaintiffs may join the suit without filing separate charges by "piggybacking" on the original charge. However, piggybacking is permissible only when the original charge places the administrative agency and employer on notice that class claims may follow. Here, the court applied the piggybacking rule and declined to dismiss the claims for which no charge was filed because the employer received several charges alleging similar discriminatory behavior on the same day, and the text of the charges—although not filed on behalf of themselves and those similarly situated—provided some factual allegations indicating that the alleged discriminatory behavior affected individuals other than the charging parties.

2. Attacking Complaint Based on Lack of Specificity

In FY 2016, the District of Colorado denied the EEOC's motion for reconsideration of the court's dismissal of a claim alleging the employer's separation agreement denied employees their rights under the ADEA.⁴⁹⁷ After denying the EEOC's motion as untimely, the District of Colorado proceeded to address the merits, finding that the EEOC failed to provide the employer with clear notice that its separation agreements were part of the EEOC's investigation or to conciliate regarding those agreements. The court further held that the EEOC's claim regarding the separation agreement failed as a matter of law because the EEOC failed to identify any instance in which the waiver provisions in the severance agreements affected the agency's ability to enforce the ADEA or were used to justify interfering with an employee's right to file an EEOC charge or participate in an EEOC investigation or proceeding.

3. Key Issues in Class-Related Allegations

In FY 2016, the EEOC prevailed on pleadings issues in class litigation under Title VII, the ADEA, and the ADA.

494 *EEOC v. Peters' Bakery*, 2016 U.S. Dist. LEXIS 45519 (N.D. Cal. Apr. 4, 2016).

495 *EEOC v. Mach Mining, LLC*, 2016 U.S. Dist. LEXIS 111461 (S.D. Ill. Aug. 22, 2016).

496 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).

497 *EEOC v. CollegeAmerica Denver, Inc.*, 2015 U.S. Dist. LEXIS 144302 (D. Colo. Oct. 23, 2015).

FY 2016 saw the Fifth Circuit, in the *Bass Pro* case, become the second federal appellate court to hold that the EEOC may bring a civil action on a pattern-or-practice theory under Section 706,⁴⁹⁸ following the Sixth Circuit's 2012 decision in *Serrano v. Cintas Corp.*⁴⁹⁹ This holding is significant because it provides the EEOC with two avenues for pursuing claims under Section 706: (a) presenting circumstantial evidence under *McDonnell Douglas's*⁵⁰⁰ familiar burden-shifting analysis; or (b) meeting a heightened *prima facie* case standard to establish pattern or practice of discrimination under *International Brotherhood of Teamsters v. United States*.⁵⁰¹ While under *McDonnell Douglas* the burden of proof at all times remains on the EEOC, under the *Teamsters* framework, once the EEOC establishes a pattern or practice of discrimination, the burden of proof is shifted to the defendant on the question of individual liability. In addition, permitting a pattern-or-practice claim under Section 706 allows the EEOC potentially to recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

In *Bass Pro*, the Fifth Circuit also held that because the EEOC could bring pattern-or-practice claims under Section 706, the EEOC's conciliation efforts were sufficient even though the EEOC did not provide the names of any specific victims. Under the Supreme Court's *Mach Mining* precedent, the Court held that the EEOC's identification during conciliation of the class the employer had allegedly discriminated against—in this case, African American, Hispanic, and Asian applicants—sufficiently put the employer on notice of the class of employees allegedly discriminated against.⁵⁰²

However, the U.S. District Court for the Middle District of Florida denied the EEOC's renewed request to lift the stay of its disparate impact litigation against a city's firefighters' association and the firefighters' union, finding that discovery would be premature until a decision was reached in a related lawsuit brought by the Department of Justice as to whether the city's promotion practices are unlawful.⁵⁰³

In ADEA litigation accusing a national restaurant operator of having a centralized hiring practice denying employment to applicants age 40 and over, the Southern District of Florida denied the employer's motion to dismiss pattern-or-practice claims, holding that the Supreme Court's decision in *Gross v. FBL Financial Services* establishing a "but-for" standard to prove age discrimination claims did not change the application of the pattern-or-practice standard to ADEA claims.⁵⁰⁴ The court found the EEOC's anecdotal evidence from two applicants from the same restaurant, combined with allegations of a statistical disparity in a sampling of hiring data across restaurants nationwide, sufficient to state a claim.

In an ADA case alleging a national delivery company engaged in a pattern or practice of discrimination against deaf and hard-of-hearing individuals who worked in, and applied for, a package handler position, the Western District of Pennsylvania denied the employer's motion to dismiss.⁵⁰⁵ The employer argued that the case should not proceed on a classwide basis because whether each claimant is a "qualified individual with a disability" – a predicate to claims under the ADA – is a fact-specific inquiry inappropriate for any form of collective litigation. However, the court distinguished case law regarding Rule 23 class actions from litigation brought by the EEOC, which is not subject to Rule 23's requirements. The court further noted that the relief sought was for a narrow class of individuals who shared a common disability and worked in or applied for a common position. On these facts, the court found that the EEOC's pattern or practice claims could go forward, and the employer's motion to dismiss was denied.

4. Who is the Employer?

In FY 2016, the courts granted significant leeway to employees to keep employers in litigation, at times allowing discovery to identify evidence of a joint-employer relationship.

In Mississippi, a district court denied a motion to dismiss, asserting the wrong defendant was named.⁵⁰⁶ In that case, through an "asset only partial purchase," the defendant had acquired the entity previously named in the EEOC's complaint leading to the lawsuit. The defendant contended the type of purchase left it with no liability for Title VII violations committed by the other entity. However, the court inferred that the relationship between the entity and

498 *EEOC v. Bass Pro Outdoor World, L.L.C.*, 2016 U.S. App. LEXIS 11031 (5th Cir. June 17, 2016).

499 *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012).

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

501 *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

502 *Bass Pro*, 2016 U.S. App. LEXIS 11031, (citing *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649-50, 191 L. Ed. 2d 607 (2015)).

503 *EEOC v. Jacksonville Ass'n. of Firefighters, et al.*, 2015 U.S. Dist. LEXIS 137651 (M.D. Fla. Oct. 8, 2015).

504 *EEOC v. Darden Restaurants, Inc.*, 143 F. Supp. 3d 1274, 1282 (S.D. Fla. Nov. 9, 2015).

505 *EEOC v. FedEx Ground Package System, Inc.*, 2016 U.S. Dist. LEXIS 8219 (W.D. Pa. Jan. 25, 2016).

506 *EEOC v. Resource Employment Solutions, LLC*, 2016 U.S. Dist. LEXIS 23765 (N.D. Miss. Feb. 23, 2016).

defendant was a close one. Citing to the lack of supporting authority in defendant's motion, the court then stated that if it was the defendant's position that its acquisition of the other entity meant there was no one to answer for the alleged employment discrimination, such was a position the court was highly reluctant to accept. The court denied the motion and referred the case back to the magistrate to determine whether an amended complaint should be filed to add the other entity. The court went one step further to suggest that discovery may be ordered to make that determination. In a South Carolina case also involving a motion to dismiss, the district court took a similar approach, refusing to grant the motion asserting failure to include an indispensable party.⁵⁰⁷ The court there allowed discovery so the EEOC could determine the respective roles of the defendant and a third-party entity.

With respect to liability for a subsidiary, the District Court for West Virginia upheld a jury verdict against a parent company, finding there was substantial evidence that the parent company made employment decisions regarding the company.⁵⁰⁸ For example, the subsidiary's progressive discipline procedure was created by the parent company, the employee's request for accommodation was considered and denied by the parent company's human resources department, the employee's retirement and benefit documents were issued by the parent company's human resources department and his employment records were maintained by the parent company. However, one defendant used a joint-employer theory to its advantage in a trial when the court allowed the defendant to introduce evidence that a third-party entity was a co-employer or joint employer.⁵⁰⁹

The courts also criticized corporations for lack of action to correct proceedings. In Florida, the district court indicated it may issue sanctions against both the plaintiff and defendant when the parties failed to correct the inclusion of a defendant that was improperly named.⁵¹⁰ There, the plaintiff filed suit against two related corporations, but one was a fictitious d/b/a entity for a corporation not named in the complaint. In addition to faulting the plaintiff, the court took issue with defense counsel who had appeared or filed papers on behalf of the fictitious entity. In a case involving successor liability, a California district court granted default judgment against a successor corporation that was served with the complaint and never appeared.⁵¹¹ Although the majority of the discrimination allegedly occurred prior to the successor corporation's acquisition and the predecessor was also named and settled the case against it for \$300,000, the court still defaulted the successor.

5. EEOC Motions - Challenges to Affirmative Defenses

Employers experienced mixed success overcoming the EEOC's motion to strike its affirmative defenses. In Illinois, the district court granted the EEOC's motion to strike an affirmative defense asserting that the EEOC failed to comply with its administrative prerequisite to engage in good-faith efforts to conciliate the underlying charge.⁵¹² Reasoning the Supreme Court confirmed that the obligation to conduct conciliation efforts in good faith is not a component of that requirement, the court found the defense insufficient as a matter of law. However, in Mississippi, an employer was successful in overcoming a motion to strike its affirmative defenses. The district court there reasoned that while some of the affirmative defenses could have been phrased better, they fell within the scope of acceptable pleading practices. The court also noted that it rarely encounters motions to strike affirmative defenses because parties generally understand the initial pleadings are "merely the opening salvos in a lawsuit and that ample time exists to flesh out the issues raised therein."

6. Miscellaneous - Unique Issues

Various other pleadings-related issues arose in cases litigated by the EEOC in FY 2016.

In a case alleging denial of religious accommodation, the District of Nebraska applied the doctrine of *res judicata* to preclude the EEOC from litigating on behalf of 18 claimants who were previously dismissed from the case for failure to prosecute.⁵¹³ The court held that: 1) the dismissal order was a final judgment on the merits; 2) there were no allegations of jurisdictional deficiencies; 3) there was privity between the EEOC and the dismissed individuals; and 4) the EEOC and the

507 *EEOC v. DHD Ventures Mgmt. Co., Inc.*, 2016 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).

508 *EEOC v. Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475 (N.D. W. Va. Feb. 9, 2016).

509 *Court of Common Pleas of Allegheny County*, 2016 U.S. Dist. LEXIS 83002 (W.D. Pa. June 27, 2016).

510 *EEOC v. The Doherty Group, Inc.*, 2016 U.S. Dist. LEXIS 292321 (S.D. Fla. Mar. 2, 2016).

511 *EEOC v. Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 41656 (E.D. Cal. Mar. 29, 2016).

512 *EEOC v. Rosebud Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 138343 (N.D. Ill. Oct. 7, 2015).

513 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).

dismissed claimant's allegations were based on the same claims or causes of action. Therefore, all four elements of *res judicata* were met, barring the EEOC from continuing to litigate on behalf of the dismissed claimants.

Where the EEOC entered into a consent decree with the employer defendant, the U.S. District Court for the Western District of North Carolina declined to retain supplemental jurisdiction over the employer's third-party complaint against an insurance carrier.⁵¹⁴ Although neither party challenged the court's jurisdiction, because the third-party complaint alleged only ancillary state law claims and an amount in controversy insufficient to establish diversity jurisdiction, the court found that it could only retain the case by exercising supplemental jurisdiction. Although the insurance carrier's motion for summary judgment was pending, the court found no overriding interest of judicial economy or convenience justified the continued exercise of federal jurisdiction and that the employer would not be prejudiced by re-filing in state court. Therefore, the district court dismissed the third-party complaint and denied the third-party defendant's motion for summary judgment as moot.

In a case challenging an employer's attendance policy for allegedly penalizing employees for disability-related absences, the U.S. District Court for the Northern District of Illinois denied the employer's motion to limit the scope of the EEOC's case to only the three stores where the named claimants worked.⁵¹⁵ The employer claimed that the EEOC never conducted an investigation beyond the three stores prior to bringing suit and that the EEOC modified its findings to include additional unnamed aggrieved individuals without providing an explanation to the employer. However, under binding Seventh Circuit precedent, the court found that it could not inquire into the sufficiency of the EEOC's pre-suit investigation in order to limit the scope of the litigation.⁵¹⁶ Moreover, the court found that the Supreme Court's *Mach Mining* decision supported this result by holding that judicial inquiry is limited to whether conciliation occurred, not the sufficiency of the process.⁵¹⁷ Analogizing from the conciliation to the investigation process, because the court could determine that the EEOC conducted the investigation required by statute, the court was not permitted to inquire further.

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

In FY 2016, the EEOC continued its focus on litigating higher-impact class claims pursuant to Section 707, which allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in Section 706.⁵¹⁸ Section 707 incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.⁵¹⁹ There has yet to be a court of appeals decision on whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge.⁵²⁰ Most district courts have held that the 300-day period applies.⁵²¹ There were no new cases on point in 2016; however, in the past few years, a minority of district courts have persisted in holding that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day period.⁵²²

In *EEOC v. New Prime*, a district court in Missouri observed that a "few" district courts have applied the 300-day period to pattern-or-practice cases and then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.⁵²³ In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 district court case, that held, "[a]fter careful

514 *EEOC v. Greenhouse Enterprise, Inc.*, 2016 U.S. Dist. LEXIS 48987 (W.D.N.C. Apr. 12, 2016).

515 *EEOC v. Autozone, Inc.*, 141 F. Supp. 912 (N.D. Ill. Nov. 5, 2015).

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

517 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1649-50, 191 L. Ed. 2d 607 (2015).

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

519 42 U.S.C. § 2000e-5(e)(1). If a jurisdiction does not have its own enforcement agency, then the charge-filing requirement is 180 days.

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

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

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

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

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 706.⁵²⁴ 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.⁵²⁵ 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.”⁵²⁶ Of course, as described above, other courts have disagreed, finding that the statute’s plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC’s charge.⁵²⁷

More recently, in the background check case *EEOC v. Freeman*, the EEOC included last-minute submissions in support of its view that the 300-day limitations period did not apply to pattern-or-practice litigation initiated by the EEOC.⁵²⁸ The Fourth Circuit, however, declined to address this issue, focusing solely on the exclusion of the EEOC’s expert reports.

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

Generally, the 300-day limitations period is triggered by the filing of a charge (the court will count back 300 days from the date of filing and require that the discriminatory act occur within that timeframe).⁵²⁹ 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 termination.⁵³⁰ In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts will be encompassed in the lawsuit.⁵³¹ Although by no means settled law, some courts have held that, for the purposes of “expanded claims” (charges initially involving only one charging party that are broadened to include others during the EEOC’s investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.⁵³² This is helpful to employers because it shortens the time period during which the EEOC can reach back to draw in additional claimants. An employer should 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.⁵³³

In an effort to resurrect cases barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period, 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

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

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

526 *Id.* at 1087.

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

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

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

530 *EEOC v. Orion Energy Sys. Inc.*, 2015 U.S. Dist. LEXIS 153216, at *5 (E.D. Wis. Nov. 12, 2015) (Date plaintiff overheard employer planned to terminate her employment was not unequivocal notice of final termination decision).

531 *EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).

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

533 *EEOC v. Orion Energy Sys. Inc.*, 2015 U.S. Dist. LEXIS 153216, at *3 (E.D. Wis. Nov. 12, 2015) (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).

frame and similar conduct as a timely filed claim.⁵³⁴ 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.⁵³⁵ To counter the EEOC’s reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on some district court decisions holding that the continuing violation doctrine does not apply to discrete acts of discrimination, such as terminations of employment.⁵³⁶ Moreover, some courts have held that even in the context of an “unlawful employment practice” claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the “300-day window.”⁵³⁷ In other words, where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *U.S. 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.⁵³⁸

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

C. Intervention

This section examines intervention by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys intervention-related issues decided by courts during FY 2016, including allowing intervention by individuals who have not exhausted their administrative remedies, 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-and-practice claims.⁵³⁹

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.”⁵⁴⁰ Courts generally accord a great deal of deference to the EEOC’s determination that a matter

534 *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server’s claims against the harasser’s coworker permitted 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); *Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *10 (where the employer’s conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093, n.5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *8 (E.D. Wash. Nov. 12, 2012); *EEOC v. Pitre, Inc.*, 2012 U.S. Dist. LEXIS 179145, at *3 (D.N.M. Nov. 30, 2012).

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

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

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

538 *EEOC v. Baltimore Cty.*, 2016 U.S. Dist. LEXIS 112731, at **65-66 (D. Md. Aug. 24, 2016).

539 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, see Barry A. Hartstein, et. al., *Annual Report on EEOC Developments: Fiscal Year 2013*, Littler Report (Jan. 22, 2014).

540 42 U.S.C. § 2000e-5(f)(1).

is of “general importance” and usually will not require any proof of public importance beyond the EEOC’s conclusory declaration.⁵⁴¹ The same approach is followed in dealing with intervention in ADA actions.⁵⁴²

Federal Rule of Civil Procedure 24(b) generally addresses “permissive intervention” in civil cases, and provides that anyone may intervene who “(A) is given a conditional right to intervene by a federal statute [such as Title VII’s grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or fact in common.”⁵⁴³ 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.⁵⁴⁴

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

1. whether the EEOC has certified that the action is of “general importance”; and
2. whether the request is timely.⁵⁴⁵

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.⁵⁴⁶ The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA or EPA, the charging party’s right to intervene or commence his/her own lawsuit terminates.⁵⁴⁷

With respect to intervention in a Title VII or ADA lawsuit filed by the EEOC, Rule 24 sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene. Under Rule 24, intervention is either a *matter of right* (Rule 24(a)) or *permissive* (Rule 24(b), discussed above).

Rule 24(a) provides:

(a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its interest, unless existing parties adequately represent that interest.

Given Title VII’s and the ADA’s language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party’s motion to intervene under Rule 24(a). If, however, pendent claims are involved (e.g., tort claims or claims arising out of state statutes), those claims are analyzed under Rule 24(b).⁵⁴⁸ Rule

541 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).

542 42 U.S.C. § 12117.

543 FED. R. CIV. P. 24(b) (as amended Dec. 1, 2007).

544 *Id.*

545 See *Ramirez v. Cintas Corp.*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005) (Order Granting EEOC’s Motion for Leave to Intervene) (citing *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int’l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975); See also *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 1958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated “the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exists; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties.”

546 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.”).

547 See 29 U.S.C. § 626(c)(1); See also *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014) (explaining the differences between Title VII and the ADEA and specifically noting that the right of any person to bring suit under the ADEA is terminated when suit is brought by the EEOC); *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 149897 (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”).

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

24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit⁵⁴⁹ or the movant is a governmental entity other than the EEOC.⁵⁵⁰

This year, courts were again permissive in granting individuals' requests to intervene in lawsuits brought by the EEOC, even in the face of argument that the proposed intervenors failed to exhaust their administrative remedies with respect to their claims in the lawsuit.

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. Stony Pony Pizza, Inc.*,⁵⁵¹ 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 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*,⁵⁵² 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.

Turning to the impact of a mandatory arbitration agreement on an individual's right to intervene, in *EEOC v. PJ Utah, LLC*,⁵⁵³ 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 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.

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

550 *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)).

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

552 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).

553 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).

For example, in *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,⁵⁵⁴ 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 with 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.⁵⁵⁵ Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the variance in proof schemes.

In *EEOC v. JBS USA, LLC*,⁵⁵⁶ 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.

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 held the 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. Class Discovery Issues in EEOC Litigation

1. Bifurcation in EEOC Litigation

In the past fiscal year, bifurcation has continued to become more prevalent in EEOC cases. The EEOC's standard practice is to seek bifurcation of liability and damages both regarding discovery and trial in pattern-or-practice cases. For instance, in a recent court decision involving a bifurcation motion in an ADEA lawsuit, the EEOC moved to bifurcate discovery and trial, which the employer opposed.⁵⁵⁷ Initially, the court in *EEOC v. Darden Restaurants* denied the EEOC's motion to bifurcate discovery, and stated:

Defendant's most convincing arguments against bifurcation are that: (1) the EEOC's speculative statement that bifurcation would put off "hundreds" or "thousands" of "mini trials" is unsupported by any factual basis; and (2) that the bifurcation scheme unduly prejudices defendants because it allows the EEOC to limit discovery to only a small number of individuals selected by the EEOC.⁵⁵⁸

The court also temporarily rejected bifurcation for trial subject to re-filing at a later date. However, after a motion for reconsideration filed by the EEOC, the court reversed its decision. In its decision, the court held that the EEOC had since discovered over 150 additional claimants who allegedly suffered discrimination.⁵⁵⁹ The court agreed with the EEOC in

⁵⁵⁴ *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).

⁵⁵⁵ *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).

⁵⁵⁶ *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).

⁵⁵⁷ *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 151742 (S.D. Fla. Nov. 9, 2015).

⁵⁵⁸ *Id.* at *6.

⁵⁵⁹ *EEOC v. Darden Restaurants, Inc.*, No. 1:15-cv-20561-JAL (S.D. Fla. May 20, 2016).

considering the pace of discovering new claimants at a preliminary stage of discovery, and the likelihood the EEOC would discover hundreds more individuals. Relying on the *Teamsters* framework,⁵⁶⁰ the court reversed its prior decision and granted the EEOC's renewed motion to bifurcate discovery and trial.

The court divided the case into two stages: (1) discovery and trial to address liability; and (2) discovery and trial to address individual claims of discrimination. *Darden* is an example of a court ruling for bifurcation, despite its prior ruling denying bifurcation.

2. Identification of Class and/or Communication with Class

Courts continue to address the issue of identification of class members in EEOC-led class actions. In a recent decision, a court addressed whether it should revise the terms of an order to reduce the number of potential class members for whom the EEOC must illustrate the nature and terms of termination when the EEOC made a mistaken representation of a class.⁵⁶¹ In *EEOC v. J&R Baker Farms*, the EEOC initially alleged there were 2,000 class members.⁵⁶² The defendant company sought to limit the scope of discovery and moved to compel discovery responses from the plaintiff.⁵⁶³

The court limited discovery by "taking into account both Defendants' need to gather pertinent information regarding Plaintiff's discharge claims and Plaintiff's concern that producing information for the entirety of the class would be impose an undue hardship on Plaintiff."⁵⁶⁴ Therefore, the court asked the EEOC to set forth the circumstances surrounding the discharge of a representative portion of the class, specifying that the EEOC must compile: (1) a list of all known class members who allege they were involuntarily terminated and when the termination occurred; (2) a list of all known class members who allege they were constructively discharged and when the discharge occurred; and (3) detailed anecdotal information for a representation portion of the class members, which the court finds to be at least 250 individuals.

The EEOC then asked the court to revise the terms of its order to reduce the number of potential class members for whom it must illustrate the nature and terms of termination, and stated it initially made a mistake in its estimate of the potential class size. According to the plaintiff, the class size is more accurately measured at 332 members. The EEOC argued that to be required to provide anecdotal information for what would amount to 75 percent of the class would impose an injustice and a hardship. The court however, was "disinclined to revise its previous ruling."⁵⁶⁵ The court stated:

It is Plaintiff's responsibility to review its own documentation diligently and to be prepared to provide accurate information to the Court. Additionally, there is no evidence that the information Plaintiff used to arrive at the revised number was somehow unavailable to Plaintiff at the time of the hearing. Plaintiff's inability to manage its case is an error of its own making, not the Court's. Plaintiff's motion to reconsider the Court's ruling on Defendants' motion to compel is thus denied.⁵⁶⁶

3. Other Class Discovery in Pattern-or-Practice Claims

In the past year, the EEOC has attempted to seek the identity of individuals after notice of failure to conciliate.⁵⁶⁷ In *EEOC v. Sensient Dehydrated Flavors*, the EEOC served discovery requests in an attempt to identify current employees after the EEOC's reasonable cause determination, to which the defendant company objected. The court found the EEOC's discovery requests that attempted to seek the identity of currently employed individuals were "not relevant to a claim or defense and [were] not proportional to the needs of the case" as the case concerned the alleged wrongful discharge of terminated employees.⁵⁶⁸

The court addressed the parties' arguments on whether the scope of the EEOC's requests should "be narrowed to exclude employee information for the post-reasonable cause period."⁵⁶⁹ The court explored Ninth Circuit precedent where the court considered a district court's dismissal of the claims of 15 individuals who were not identified during the

⁵⁶⁰ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

⁵⁶¹ *EEOC v. J&R Baker Farms*, No. 7:25-CV-136, 2015 U.S. Dist. LEXIS 153469 (M.D. Ga. Nov. 13, 2015).

⁵⁶² *Id.* at *1.

⁵⁶³ *Id.*

⁵⁶⁴ *Id.*

⁵⁶⁵ *Id.*

⁵⁶⁶ *Id.*

⁵⁶⁷ *EEOC v. Sensient Dehydrated Flavors*, No. 1:15-cv-01431-DAD-BAM, 2016 U.S. Dist. Lexis 109479 (E.D. Cal. Aug. 17, 2016).

⁵⁶⁸ *Id.* at **6-7.

⁵⁶⁹ *Id.* at *7.

EEOC's investigation or reasonable cause determination. In *Arizona ex rel. Horne v. Geo Group, Inc.*,⁵⁷⁰ the Ninth Circuit, in rejecting the district court's holding that the EEOC "must identify and conciliate on behalf of each individual aggrieved employee during the investigation process prior to filing a lawsuit seeking recovery on behalf of a class," held the EEOC satisfied its pre-suit conciliation requirements to bring a class action by attempting to conciliate on behalf of an identified class prior to bringing suit.⁵⁷¹ The Ninth Circuit found it unreasonable to require the EEOC pursue individual conciliation on behalf of every aggrieved employee, as it would essentially be barred from seeking relief on behalf of any unnamed and unidentified members of a class.⁵⁷² The Ninth Circuit found the district court's holding as having an effect of limiting the EEOC's ability to seek class-wide relief to a point narrower than private action litigants. Thus, the Ninth Circuit vacated the district court's holding and remanded the action to determine whether an aggrieved employee's claim was already encompassed in the reasonable cause determination or if it could be "like or reasonably related" to the initial charge.

In contrast to *Geo Group Inc.*, the court compared another case that ruled in the employer's favor that unknown claims should be barred. *CRST Van Expedited, Inc. v. EEOC*⁵⁷³ addressed whether an employer could be a prevailing party and entitled to attorneys' fees for the dismissal of claimants the EEOC failed to adequately investigate or conciliate prior to filing suit. In *CRST*, the district court dismissed all but 67 out of 250 individuals the EEOC had identified as aggrieved. Regarding the remaining 67 individuals, the district court barred the EEOC's claims of relief because the EEOC had failed to satisfy its Section 706 pre-suit requirements to investigate and conciliate before suing. The district court dismissed the case and awarded the employer attorneys' fees.⁵⁷⁴ The Ninth Circuit affirmed the district court's holding, but vacated the attorneys' fees award due to the reversal of claims on behalf of two individuals for unrelated reasons.⁵⁷⁵ The Supreme Court granted certiorari in response to the Ninth Circuit's preclusion of attorneys' fees, which created a circuit split.⁵⁷⁶ The Supreme Court did not question the district court's determination that the EEOC had not met its pre-suit requirements to investigate and conciliate the claims in discovery, but rather held a defendant needs no favorable judgment on the merits of a case to be a "prevailing party."

In analyzing this case, the court in *Sensient Dehydrated Flavors* stated:

By leaving that determination undisturbed, the Supreme Court's decision in *CRST* lends support to [the employer's position] in this action that the EEOC's discovery should be limited, and the information sought by the EEOC for the post-reasonable cause period should not be deemed relevant to any party's claim or defense because those claims would be barred.⁵⁷⁷

Accordingly, the court denied the EEOC's motion to compel discovery responses, but extended the EEOC's request for an extension of the deadline to identify any potential claimants.⁵⁷⁸

Additionally, the Southern District of Florida is expected to decide on the parties' concerns relating to *ex parte* communications with current and former employees and managers. In another case,⁵⁷⁹ the company defendant moved to limit the EEOC's outreach to individuals who can bind the company rather than *ex parte* communication with current and former non-managerial employees, and to seek the application of ethical safeguards. The EEOC, on the other hand, argued that it was entitled to engage in *ex parte* communication with former employees and, moreover, that it followed ethical safeguards. Following a lengthy hearing, the magistrate judge allowed the EEOC to interview former non-managerial employees, subject to the parties' agreed-upon ethical protocol, without disclosing the identities of each former employee and other details about the interview. The EEOC remained obligated under Rule 26, however, to disclose any of those interviewed witnesses, to the extent they had relevant information about the case.⁵⁸⁰ The court reached the

570 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1197 (9th Cir. 2016).

571 *Id.* at 1197.

572 *Id.* at 1200.

573 *CRST Van Expedited, Inc.*, 136 S.Ct. 1642 (2016).

574 *Id.* at 1649.

575 *Id.*

576 *Id.* at 1651.

577 *EEOC v. Sensient Dehydrated Flavors*, No. 1:15-cv-01431-DAD-BAM, 2016 U.S. Dist. Lexis 109479, at *10 (E.D. Cal. Aug. 17, 2016).

578 *Id.* at **11-12.

579 *EEOC v. Darden Restaurants, Inc.*, No. 1:15-cv-20561-JAL (S.D. Fla. June 24, 2016).

580 *Id.*, slip op. at 2; See also Transcript of 6/23/16 Oral Arg. at 17-20, *Darden Restaurants, Inc.*, No. 1:15-cv-20561-JAL (S.D. Fla. Aug. 1, 2016) (Dkt. No. 140).

same conclusion with respect to former managers, allowing the EEOC to interview them *ex parte* if it complied with the designated ethical protocol and supplemented its discovery responses with any new, relevant information.⁵⁸¹

In an ADA case involving pattern and practice, a district court decided whether the magistrate judge erred by granting the employer's discovery requests seeking medical and work histories. In *EEOC v. Amsted Rail Company*,⁵⁸² the employer employs individuals as "chippers," who use hammers or grinders to remove metal protrusions from steel castings. The employer required applicants who wanted to be chippers to pass a nerve conduction test. The EEOC filed suit under the ADA, claiming that the employer violated the ADA when it denied the claimant and a class of 43 other job applicants' employment (1) because it regarded them as disabled based on the results of a nerve conduction test or (2) because they had a record of disability, carpal tunnel syndrome. The pending dispute involves the adequacy of the EEOC's response to certain discovery requests propounded by the employer regarding medical records and prior employment of the job applicants the EEOC is representing in this case.⁵⁸³ In general, the employer's discovery requests sought medical information and medical records of claimants going as far back as 2005, approximately five years before the alleged discriminatory conduct.⁵⁸⁴ The requests also sought employment/unemployment and income information and records of claimants beginning before their applications to work at the employer. The EEOC claimed that the production should be limited. The magistrate disagreed with the EEOC and ordered the production.⁵⁸⁵

With respect to the medical information, the district court found the magistrate judge considered the appropriate factors in applying the scope of discovery in this case, including the importance of the discovery to the claimants' emotional distress claims, the fact that the employer had little access to this information in any other way, the burden of production compared to its benefit, and the possibility that privileged information may need to be protected from disclosure by redaction.⁵⁸⁶

As for the work history, the employer argued and the magistrate judge agreed such information related to his or her ability to find comparable work following the alleged discriminatory conduct and to an after-acquired evidence defense to limit its damages.⁵⁸⁷ The court found that because the magistrate judge's rulings were not clearly erroneous or contrary to law as mitigation and the ability to get another job may depend on prior work and earned income history.⁵⁸⁸

E. 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. A proponent of expert testimony must prove it is scientifically reliable using the standard articulated in *Daubert v. Merrell*, 509 U.S. 579 (1993). In FY 2016, in the disability case of *EEOC v. Placer Arc*,⁵⁸⁹ the court denied the defendant's Motion in Limine to exclude the EEOC's expert who was retained to offer an opinion about the defendant's former employee's functional ability to communicate in American Sign Language and in English.

In *Placer Arc*, the defendant argued that the expert's testimony was inadmissible for three reasons: (1) the expert's 2014 testing could not establish the former employee's communicative and cognitive skills during the time she worked for the defendant, between 2005 and 2010; (2) the expert's opinions regarding the reasonableness of the defendant's accommodations were speculative because the expert lacked facts and data regarding the former employee's cognitive and language abilities between 2008 and 2010; and (3) the expert's opinions regarding Deaf culture were inadmissible because they failed to account for the former employee's immigration from Iran nor the differences between the Deaf cultures in Iran and America.⁵⁹⁰ In denying the defendant's request to exclude the expert's testimony, the court noted that, with respect to the time difference argument, there was no evidence suggesting that the former employee's communicative and cognitive abilities were transformed between 2005 and 2014, but to the extent the defendant

581 *Id.*, slip op. at 2-3; See also Transcript of 6/23/16 Oral Arg. at 20-26, *Darden Restaurants, Inc.*, No. 1:15-cv-20561-JAL (S.D. Fla. Aug. 1, 2016) (Dkt. No. 140). Neither party objected to the magistrate's rulings as permitted by Federal Rule of Civil Procedure 72(a).

582 *EEOC v. Amsted Rail Company*, No. 14-cv-1291, 2016 U.S. Dist. LEXIS 6116 (S.D. Ill. May 9, 2016).

583 *Id.* at *2.

584 *Id.* at **3-4.

585 *Id.*

586 *Id.* at **4-6.

587 *Id.* at **6-7.

588 *Id.* at *7.

589 *EEOC v. Placer Arc*, 147 F. Supp. 3d 1053 (E.D. Cal. 2015),

590 *Id.* at 1060.

believes there have been changes, then it may raise those differences during its cross-examination.⁵⁹¹ As for defendant's contention regarding Deaf culture, the court began by observing that "most laypersons have little or no first-hand experience with the Deaf community. [The expert] has years of experience, research, and formal education at her disposal. Her testimony about Deaf culture will likely be helpful to the jury."⁵⁹² The court then noted that the defendant offered no evidence to illustrate the difference between Deaf culture in Iran and the United States. The court reiterated that any prejudice that may arise from this opinion could be mitigated in cross-examination and during closing argument.

In an age discrimination case, a federal court in Nevada denied the EEOC's Motion to Strike the Defendant's Rebuttal Expert's Testimony in which the plaintiff raised issues regarding the rebuttal expert's qualifications and reliability of his methodology.⁵⁹³ The court began by noting that an expert's lack of specialization affects the weight – not the admissibility – of the expert's testimony.⁵⁹⁴ The court found that the rebuttal expert was qualified to render the proffered opinion based on his education and experience, and made clear that his lack of specialization does not disqualify him as an expert.⁵⁹⁵ The court next found that the rebuttal expert's opinion will assist the trier of facts in determining possible non-discriminatory explanations for the defendant's allegedly discriminatory employment practices, noting that the rebuttal expert's analysis condensed vast amounts of employment data into an easily understood form. The court emphasized that although defendant's expert and plaintiff's expert relied on different data sets and reached opposite conclusions, that mere fact did not demonstrate that defendant's rebuttal expert's opinion was based on insufficient facts or data. The court next determined that the defendant's rebuttal expert's opinion was a proper rebuttal expert opinion because it addressed every facet in the plaintiff's expert report and provided an alternative explanation for the defendant's conduct during the period of alleged discrimination. The court concluded that the defendant's rebuttal expert could testify regarding the defendant's lack of economic incentive to discriminate against its older, more experienced employees, and held that such testimony as to lack of motivation to discriminate did not equate to testimony that the defendant did not in fact discriminate, the ultimate issue.⁵⁹⁶

In *EEOC v. JetStream Ground Services, Inc.*, a case regarding alleged disparate impact, failure to accommodate the religious practice of wearing hijabs and long skirts, and retaliation, the parties filed a Joint Motion for Leave to File Proposed Amended Final Pretrial Order.⁵⁹⁷ The parties had reached a final agreement whereby the plaintiffs stipulated to withdraw their skirt accommodation claims. The parties stated that as a result, there would be no need for the four safety experts (two for the plaintiffs and two for the defendant), and, therefore, the plaintiff's two pending Fed. R. Evid. 702 motions to exclude the defendant's experts' testimony would be rendered moot.

In its opinion, the court noted that in its ruling on summary judgment, it determined "that the question of whether the skirt accommodation was an undue hardship remained a question for the jury."⁵⁹⁸ The court noted that after the ruling, the plaintiff filed two Fed. R. Evid. 702 motions seeking to exclude defendant's two experts who were going to opine on safety hazards, specifically safety hazards associated with loose clothing and potential dangers of wearing long skirts while using the aircraft's stairs.⁵⁹⁹ After reviewing the terms of the parties' Joint Motion, the court held that amendment of the pretrial order was warranted as the parties' proposed amendments would streamline and shorten the trial.⁶⁰⁰ The court therefore granted the parties' Joint Motion for Leave to File Proposed Amended Final Pretrial Order and Withdraw the EEOC's Fed. R. Evid. 702 Motions to Exclude the Opinions of Two of Defendant's Experts.⁶⁰¹

A few months later, the same court issued its opinion on plaintiffs' Motion to Strike Opinions by Defendants' second expert.⁶⁰² During the expert's direct examination, he testified that he reviewed certain payroll records in arriving at the conclusion that plaintiffs held part-time status.⁶⁰³ Counsel for the plaintiffs moved to strike his testimony regarding part-time status on the grounds that his expert report did not list the payroll records as documents or data that he reviewed

591 *Id.*

592 *Id.* at 1061.

593 *EEOC v. Mattress Firm, Inc.*, 2016 U.S. Dist. LEXIS 17048, **2-3 (D. Nev. Feb. 11, 2016).

594 *Id.* at *4.

595 *Id.* at **4-5.

596 *Id.* at **11-13.

597 *EEOC v. JetStream Ground Services, Inc.*, No. 13-cv-02340-CMA-KMT (D. Colo. Feb. 26, 2016).

598 *EEOC v. JetStream Ground Services, Inc.*, 2016 U.S. Dist. LEXIS 37832, at *3 (D. Colo. Mar. 23, 2016).

599 *Id.* at *3.

600 *Id.* at *6.

601 *Id.*

602 *EEOC v. JetStream Ground Services, Inc.*, 2016 U.S. Dist. LEXIS 54846 (D. Colo. Apr. 25, 2016).

603 *Id.* at *2.

in preparation of his report as required by Fed. R. Civ. P. 26(a)(2)(B).⁶⁰⁴ The defendant argued that its failure to disclose the reliance on the payroll records was “substantially justified” because the expert’s testimony was only offered to rebut the plaintiff’s expert’s testimony concerning the new basis for his opinion.⁶⁰⁵ The court noted, however, that the defendant offered “no authority for its assertion that, despite Rule 26’s strict disclosure requirements, it may effectively supplement the testimony of its own expert at trial in order to impeach the testimony of the other party’s expert.”⁶⁰⁶ The court noted that the defendant’s counsel could have cross-examined the plaintiff’s expert regarding the basis for his opinion, but had not done so.⁶⁰⁷ The court then held that the testimony was not harmless because plaintiffs had already presented the testimony of their expert and rested their case before hearing from the defendant’s expert, and there was no ability to cure the prejudice as the trial had almost concluded. The court held that defendant’s actions “smacks of a kind of gamesmanship and surprise that Rule 26(a) is designed to prevent.”⁶⁰⁸ The court granted plaintiff’s motion and struck the testimony of defendant’s expert under Fed. R. Civ. P. 37(c)(1).⁶⁰⁹

In another case, a federal court in Colorado addressed defendant’s Motion to Strike an Expert’s Supplemental Report in a case involving allegations of national origin, religion, and ethnicity discrimination.⁶¹⁰ Here, there were “two timely-filed expert reports filed by the parties” and “four additional expert reports . . . filed past the deadlines for affirmative and rebuttal expert reports,” although no motions requesting leave to file those reports had been filed.⁶¹¹ The defendant filed a motion requesting the court to strike the third plaintiff’s expert report. The court noted that the last four reports were all untimely based on the Scheduling Order, and that in any event, Fed. R. Civ. P. 26(a)(2) does not permit parties to further rebut rebuttal expert reports. The court then concluded that the last four reports violated Rule 26(a). However, the court denied the motion. The court held that the untimely disclosure would not disrupt the trial based on the procedural posture of the case; the defendant had waived all Rule 26 objections for purposes of the Motion for Summary Judgment since it had not raised the issue in its Response; the fact that the defendant filed its third expert report after the fact mitigated any prejudice; and there was no evidence of bad faith on the part of plaintiff, especially given the defendant’s actions in filing such reports.⁶¹²

2. Background Check Litigation

Background check litigation continues to be a hot topic for the EEOC. In *EEOC v. Dolgencorp, LLC*,⁶¹³ in which the EEOC was challenging the use of background checks on defendant’s potential employees, the court addressed objections by the defendant to discovery rulings made by the magistrate judge. The defendant objected to the magistrate judge’s ruling on plaintiff’s discovery seeking information on pre-employment checks or tests that the defendant gives to potential employees during the hiring process on the grounds of relevancy.⁶¹⁴ The court found that the magistrate judge’s order requiring production was not contrary to law or clearly erroneous. The court noted that the defendant may have the opportunity to prove that the criminal background checks are job-related and thus a business necessity, but that if so, the plaintiff has a right to rebut that business necessity defense by showing that similar tests and checks are in place which have similar purposes such that the criminal background checks are not a business necessity. The court also addressed an objection to an order finding that certain documents sought by the defendant are protected by the deliberative process privilege.⁶¹⁵

The court found that the magistrate judge’s decision did not commit clear error nor was contrary to law because the documents at issue each included or referenced statistical analysis regarding whether the defendant’s use of background checks had a disparate impact on the hiring of African Americans, which the court held were pre-decisional in nature as they arose in the determination of whether or not to sue the defendant.⁶¹⁶ Nevertheless, the court held that while

604 *Id.* at **3-4.

605 *Id.* at *6.

606 *Id.* at *7.

607 *Id.* at **7-8.

608 *Id.* at **8-9.

609 *Id.* at *9.

610 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 76110, **40-41 (D. Colo. May 6, 2016).

611 *Id.* at *43.

612 *Id.* at *52.

613 *Dolgencorp, LLC*, 2015 U.S. Dist. LEXIS 154842 (N.D. Ill. Nov. 17, 2015).

614 *Id.* at *4.

615 *Id.* at *12.

616 *Id.* at *14.

the magistrate judge properly analyzed the nature of the withheld documents, she needed to consider whether the defendant sufficiently demonstrated a particularized need for the materials that would exceed the plaintiff's need for confidentiality.⁶¹⁷

In *EEOC v. Crothall Services Group*,⁶¹⁸ the plaintiff brought suit against the defendant for purportedly violating recordkeeping requirements imposed by Section 709(c) of Title VII and 29 C.F.R. § 1607.4, a provision in the EEOC's Uniform Guidelines on Employee Selection Procedures.⁶¹⁹ Specifically, the plaintiff claimed that the defendant's use of criminal history assessments constituted a selection procedure and the defendant failed to maintain records relating to those selection procedures as required by Section 709(c) and 29 C.F.R. § 1607.4.⁶²⁰ The parties filed cross-motions for judgment on the pleadings regarding certain threshold legal issues. The defendant challenged the plaintiff's standing to sue and the plaintiff's claim that the defendant was required to maintain records. With respect to the standing argument, the court found that the plaintiff has standing because "a federal government agency has standing to sue based on an alleged violation of a federal statute."⁶²¹ The court then found that the defendant is required to maintain records under Section 709(c) and 29 C.F.R. § 1607.4. First, the court held that the plaintiff had statutory authority to promulgate 29 C.F.R. § 1607.4 because Section 709(c) is a source for the plaintiff's authority to promulgate recordkeeping regulations. The court next held that 29 C.F.R. § 1607.4 imposes mandatory, and not permissive, recordkeeping requirements, based on the context in which the language is used, Supreme Court precedent, and the plaintiff agency's interpretation of its own regulation. Finally, the court held that § 709(c) is not unconstitutionally vague as applied to the defendant. The court explained that a "reasonable person of ordinary intelligence would be able to reconcile the lack of a general recordkeeping requirement in § 1602.12, with the language of § 709(c) and the specific recordkeeping obligation imposed by 29 C.F.R. § 1607.4(A)."⁶²² In sum, the court held that the plaintiff does have authority to bring the lawsuit, the defendant is required to maintain records relating to its selection procedures, and the case would proceed. In December 2016, however, the parties entered into a consent decree to resolve the matter.⁶²³

F. 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 of 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. GGNHC Holdings, LLC*,⁶²⁴ the court granted the employer's motion to compel the EEOC to produce representatives to testify regarding the factual bases supporting various allegations in the complaint, as well as EEOC policies regarding reasonable accommodations and the interactive process under the ADA. The EEOC objected, unsuccessfully, on the grounds that the information sought is subject to the attorney-client, work-product and/or deliberative process privileges. The court also ordered that the EEOC produce the Director of the Milwaukee Area Office for deposition, limited to the factual bases underlying the statements contained in her declaration in support of the EEOC's motion for partial summary judgment.

Similarly, in *EEOC v. AZ Metro Distributors, LLC*,⁶²⁵ an ADEA case, the magistrate judge's ruling to allow the employer to depose four EEOC officials involved in the investigations and two other officials whom the EEOC represented had no personal knowledge of the investigations, was upheld. Noting that the EEOC is not exempt from Rule 30 depositions,

617 *Id.* at **17-18.

618 *Crothall Servs. Group*, 2016 U.S. Dist. LEXIS 83520 (E.D. Pa. June 28, 2016).

619 *Id.* at **2-3.

620 *Id.* at *4.

621 *Id.* at *8.

622 *Id.* at *23.

623 See Press Release, EEOC, *Consent Decree Entered In EEOC Record-Keeping Suit against Crothall Services Group* (Dec. 16, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/12-16-16a.cfm>.

624 *EEOC v. GGNHC Holdings, LLC*, 2016 U.S. Dist. LEXIS 79819 (E.D. Wis. June 20, 2016).

625 *EEOC v. AZ Metro Distribs., LLC*, 2016 U.S. Dist. LEXIS 124009 (E.D.N.Y. Sept. 6, 2010).

the district court judge affirmed the magistrate's rulings because the scope of the depositions was limited to factual matters only and the employer was precluded from delving into the areas of opinions, analysis or anything related to the deliberative process.

However, a different result occurred in *EEOC v. National Railroad Passenger Corporation*.⁶²⁶ The court in that case issued a protective order barring the Rule 30(b)(6) deposition of the EEOC noticed by the employer. Although the employer argued that the deposition should be permitted because it intended to explore facts only, the court believed that given the topics listed in the notice, the employer was either seeking cumulative information that it already had, or information regarding the sufficiency of the EEOC's pre-suit investigation, which is prohibited. In reaching its conclusion, the court accepted the EEOC's representation at face value that "all factual, non-privileged information" in its investigation file had already been turned over to the employer, as well as the agency's argument that it would therefore be cumulative to have a witness sit for a deposition to merely recite information that the employer already has in its possession.

2. Employer Request for Medical Records

In *EEOC v. Amsted Rail Co., Inc.*,⁶²⁷ an ADA discrimination case, the court ordered the EEOC to comply with the employer's interrogatories and document requests for medical information and records of the class members dating back to five years before they applied for jobs with the employer. The case involved class claims for disability discrimination based on a failure to hire. Reasoning that the mental health or medical treatment provided to class members before the failure to hire was relevant to the issues of causation and severity of their alleged emotional distress, the magistrate judge ordered the EEOC to provide all of the requested information and records and found the five-year period pre-dating the failure to hire was reasonable.

The court also granted the employer discovery regarding each claimants' pre-application employment/unemployment and income information and records, concluding that the requested information was relevant to evaluating what each claimant would have been able to earn after the employer's failure to hire and therefore to mitigation of damages. Additionally, the employer was entitled to information pertaining to third-party benefits (e.g., disability benefits or workers' compensation) because the court held that whether a claimant received third-party benefits due to an inability to work is relevant to whether the claimant could perform essential functions of the position to which he or she applied.

3. Independent Medical Examinations

In *EEOC v. Costco Wholesale Corp.*,⁶²⁸ the employee reported to her supervisors that a customer stalked and harassed her. The employer investigated the employee's allegations but the results of its investigation were inconclusive. After taking a one-year medical leave pursuant to company policy, the employee provided documentation from her health care provider stating that she could not return to work for another one to two years and was subsequently terminated.

The EEOC argued that the employee's inability to work and need for treatment for emotional distress were all caused by the employer's failure to prevent and remedy the customer's harassment. The employer sought discovery regarding the employee's pre-employment mental health treatment, including further depositions of the employee's parents and a deposition of the employee's psychiatrist. Noting that the evidence before the court indicated the employee had "a history of significant health issues," the court concluded that the employer "must be given the opportunity to conduct discovery into the impact of the . . . pre-existing issues may have had on the events giving rise to this case."

The employer also requested, and was granted, an Independent Medical Examination (IME) of the employee. The court rejected the EEOC's argument that an IME was unnecessary because the employee was not claiming that she was still suffering from emotional distress and held that the employer was entitled to an independent assessment of the employee's health problems and their potential impact on the issues of liability, causation and damages.

⁶²⁶ *EEOC v. National Railroad Passenger Corporation, d/b/a Amtrak*, No. 15-cv-1269 (W.D. Wash. July 8, 2016).

⁶²⁷ *EEOC v. Amsted Rail Co., Inc.*, 2016 U.S. Dist. LEXIS 61116 (S.D. Ill. May 9, 2016).

⁶²⁸ *EEOC v. Costco Wholesale Corp.*, 2015 U.S. Dist. LEXIS 168187 (N.D. Ill. Dec. 15, 2015). The case went to trial, where the jury found in favor of the EEOC. Judgment on the jury's verdict was entered on Dec. 21, 2016. *EEOC v. Costco*, Case No. 14-C6553.

4. Third-Party Subpoenas

As noted above, in *EEOC v. Amsted Rail Co., Inc.*,⁶²⁹ the court ordered the EEOC to comply with the employer's discovery requests for pre-application employment/unemployment and income information and records, finding that the information was relevant to the issue of mitigation. The same reasoning should be grounds for enforcing subpoenas issued directly to prior third-party employers.

5. Confidentiality Orders

In *EEOC v. Resource Employment Solutions*,⁶³⁰ the court accepted the parties' stipulated protective order covering confidential documents produced in the case and entered it as an order of the court. Under the terms of the protective order, documents designated as "confidential" could only be used in the case at hand and disclosed to certain individuals specified in the order.

G. General Discovery by EEOC/Intervenor

1. 30(b)(6) Depositions

The Southern District of Florida addressed a number of discovery disputes in an FY 2016 case.⁶³¹ In a recent noteworthy development, the court considered whether the EEOC could be required to produce a representative to submit for deposition under Federal Rule of Civil Procedure 30(b)(6). The defendants argued that the EEOC must be treated like any other plaintiff in discovery and, moreover, that they were entitled to question the EEOC for details about its pre-suit investigation and investigatory file. The EEOC, on the other hand, contended that a Rule 30(b)(6) deposition was unnecessary, because it had already disclosed its non-privileged files to defendants. In evaluating the dispute, the court noted that "[t]he EEOC, as the party who filed the suit, is not immune from discovery."⁶³² The court further explained that the defendant could explore "some narrowly-tailored topics . . . in a Rule 30(b)(6) deposition . . . which would not implicate the Government's deliberative process, its analysis, the sufficiency of its investigation, or whether it conciliated the case."⁶³³ The court did not order a deposition immediately because the deposition notice was too vague, but it authorized a deposition of an EEOC representative if defendants issued a revised notice, directed at a narrow set of topics.⁶³⁴

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 *EEOC v. Office Concepts*,⁶³⁵ the employer terminated the charging party in part because of emails that it discovered between the charging party and other coworkers deemed inappropriate. The EEOC alleged that the defendant terminated the charging party due to her pregnancy, rather than because of inappropriate emails she had sent to colleagues on her work computer. The employer preserved the emails that played a factor in the company's decision to terminate the charging party, but deleted the charging party's profile and other emails two weeks after her replacement was hired according to its standard procedure. The EEOC sought sanctions in the form of an adverse inference against the employer or, alternatively, that the employer be precluded from using the emails that it did retain for purposes of summary judgment or trial, arguing that the employer spoliated evidence by failing to preserve all of the charging party's emails and subsequently discarding the computer and hard drive that she used to work on.

Applying a "two-part inquiry" to determine the propriety of sanctions, the court first set out to determine whether the employer had a duty to preserve evidence when it deleted the charging party's profile and emails. The court noted

629 *Amsted Rail Co., Inc.*, 2016 U.S. Dist. LEXIS 61116 (S.D. Ill. May 9, 2016).

630 *EEOC v. Res. Empl. Solutions, LLC*, 2016 U.S. Dist. LEXIS 72127 (N.D. Miss. May 17, 2016).

631 No. 1:15-cv-20561-JAL (S.D. Fla. June 24, 2016). Indeed, the presiding magistrate judge observed that, with few exceptions, the case "generated the most discovery disputes of any case [he] ha[s] handled, and . . . generated a veritable mountain of background paperwork for each discovery hearing." *Darden Rests., Inc.*, No. 1:15-cv-20561-JAL, endorsed order (S.D. Fla. Oct. 28, 2016) (Dkt. No. 156).

632 *Darden Rests., Inc.*, No. 1:15-cv-20561-JAL, slip op. at 2 (S.D. Fla. Nov. 4, 2016).

633 *Id.*, slip op. at 2-3.

634 *Id.*, slip op. at 3-4.

635 *EEOC v. Office Concepts, Inc.*, 2015 U.S. Dist. LEXIS 170587 (N.D. Ind. Dec. 22, 2015).

that a duty to preserve was triggered when the employer received notice of the EEOC charge pursuant to 29 C.F.R. § 1602.14 because that notice explicitly stated that the employer must preserve all “personnel records relevant to the charge.” But because the entirety of a former employee’s emails did not meet the definition of “personnel records relevant to the charge,” their deletion did not violate the duty imposed by Section 1602.14. The court also noted that the emails were not material because the EEOC had an alternate way to prove the same points through direct testimony. Still, the employer should have preserved all of the emails, the court found, because a duty to preserve relevant and potentially discoverable evidence arises separate and apart from the Section 1602.14 notice when the employer receives notice of a potential claim.

Turning to the second prong, the court held that there was no showing of bad faith on the part of the employer that warranted sanctions. The court observed that the charging party’s computer was reassigned after she was terminated, and that her emails were deleted in accordance with the company’s standard policy because of limited hard drive space as well as a limited number of email accounts allotted to the employer by its email provider. Therefore, although the employer had a duty to preserve all of the charging party’s emails, the court declined to impose any sanctions against the employer due to the absence of bad faith.

3. General Limits on Discovery

Several courts this year considered challenges to the scope of discovery sought by the EEOC. In *EEOC v. Sensient Dehydrated Flavors Company*, for example, the court addressed the EEOC’s motion to compel in a class action that alleged the employer had discharged employees in violation of the ADA.⁶³⁶ There, the defendant objected to and refused to answer the EEOC’s discovery requests, which sought discovery into all employees working at the relevant location after the EEOC had concluded its investigation and conciliation.⁶³⁷ The requests broadly sought “information regarding all employees separated from service, regardless of the reason, and all requested accommodations.”⁶³⁸ The court denied the EEOC’s motion to compel because, as propounded, the agency’s requests concerned “information regarding employees and reasonable accommodations well beyond the scope of its allegations related to the discrimination against and subsequent discharge of employees.”⁶³⁹ The EEOC’s requests thus targeted information “unrelated to the charges that would have been conciliated” prior to the lawsuit. The court granted the EEOC time to revise and reissue its requests.

The court in *EEOC v. East Columbus Host, LLC* addressed the breadth of a subpoena issued by the EEOC to one of the franchisee restaurant defendants.⁶⁴⁰ The lawsuit alleged that a restaurant manager sexually harassed and retaliated against female employees at multiple locations.⁶⁴¹ The EEOC’s subpoena sought documents concerning general employee complaints against the manager as well as complaints of discrimination. It also requested various correspondence between the defendants, documents related to the franchise relationship, and documents concerning sexual harassment policies or procedures. Defendants moved to quash the subpoena as overly broad and unduly burdensome. The court agreed in part. While it narrowed the document requests to focus on the manager’s treatment of women, it permitted discovery for all locations where he worked—and not just the location where the charging party had worked with him. The court allowed discovery into harassment complaints made against other employees as well, beyond the manager, but it tailored the scope of that inquiry to the claimant’s location.⁶⁴²

The employer’s attempt to limit the scope of discovery was unsuccessful, however, in *EEOC v. Autozone, Inc.*⁶⁴³ There, the EEOC issued determinations as to three employees who alleged disability discrimination, at three different store locations. The agency also asserted that the defendant’s attendance policy discriminated against other employees throughout the country. After conciliation failed, the EEOC’s subsequent lawsuit brought claims on behalf of the three individuals and alleged that the policy aggrieved other unnamed employees. The defendant moved to limit the scope of the litigation to the three stores identified during the EEOC’s investigatory phase. The defendant argued that the EEOC’s investigation had not sufficiently focused on a nationwide claim and, therefore, it could not pursue such a theory in court.

636 *EEOC v. Sensient Dehydrated Flavors Co.*, 2016 U.S. Dist. LEXIS 109479, at *2 (E.D. Cal. Aug. 17, 2016).

637 *Id.* at *4–14.

638 *Id.* at *14.

639 *Id.* at **21–22.

640 *EEOC v. East Columbus Host, LLC*, 2015 U.S. Dist. LEXIS 151081, at **3–11 (S. D. Ohio Nov. 6, 2015).

641 *Id.* at **2–3.

642 *Id.* at **12–20. The court also reminded defendants that, to the extent they objected to the document requests on privilege grounds, they could withhold documents if they submitted a privilege log. *Id.* at **20–21.

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

Relying in part on the Supreme Court's opinion in *Mach Mining, LLC v. EEOC*,⁶⁴⁴ the court explained that, as long as the EEOC showed that it had conducted an investigation into and attempted to conciliate both the individual and nationwide charges, it could pursue both theories in litigation.⁶⁴⁵ In other words, the court held that it was not in a position to question the agency's investigatory techniques, where the EEOC undertook an investigation and put the employer on notice of its potential claims.

4. Miscellaneous Discovery Issues

EEOC cases spawned a number of other assorted discovery disputes this year. One Maryland court dealt with a redaction question in *USA v. Performance Food Group, Inc.*⁶⁴⁶ The EEOC sought un-redacted versions of documents memorializing employee hotline complaints that related to the underlying claims of sex discrimination and harassment. The defendant redacted one particular entry, which it argued was irrelevant because it did not directly assert hostile, sex-based misconduct. The court concluded that the entry was responsive, under the broad interpretation of relevancy embodied in Rule 26, and must be redacted.

The court in *EEOC v. CollegeAmerica Denver, Inc.* resolved a motion to compel filed by the EEOC challenging the sufficiency of the defendant's discovery responses.⁶⁴⁷ The EEOC had sued the employer for allegedly violating the ADEA by filing a retaliatory lawsuit against an employee who had complained of discrimination. The parties disputed the scope of the discovery sought; the EEOC had requested information related to other employees who had complained of any type of discriminatory conduct, other lawsuits filed by the defendant against any employees, and any other employees bound by a non-disparagement clause. They disputed the appropriate timeframe as well, and the employer argued that discovery should not cover time prior to the filing date of its allegedly unlawful complaint. The court largely agreed with the employer and found that it had responded appropriately to most of the EEOC's overly broad requests. While the court granted the motion in part and subsequently reviewed certain materials *in camera*, it was satisfied with the defendant's tailored responses.

The judge in *EEOC v. Resource Employment Solutions, LLC*, however, ruled in favor of the EEOC on a different motion to compel.⁶⁴⁸ The EEOC contested nine interrogatory responses submitted by the defendant, a temporary staffing agency that allegedly discriminated against African American workers, and fired an employee in retaliation for her complaint about the unfair selection process. The defendant attempted to narrow the temporal scope of discovery and, on the whole, provided merely generic objections and responses. The court readily rejected the defendant's position on each of the discovery disputes. Indeed, the court observed that the EEOC's interrogatories were "very simple and straightforward" and that the defendant's responses represented "a blatant attempt to complicate discovery and prevent plaintiff from deposing the individuals necessary to prove its claims."⁶⁴⁹

An employer in a Massachusetts federal case successfully raised privilege to "claw back" several documents mistakenly disclosed in discovery. The court in this case explained the principles underlying both the attorney-client and work product privileges.⁶⁵⁰ It reviewed the pertinent documents *in camera* and ultimately agreed with the employer on most of the materials. The court found that many of the documents—such as data analysis and emails concerning public relations strategies—were privileged because they were generated at the request of counsel, constituted communications with counsel about legal matters, and/or were created in preparation for litigation. The EEOC prevailed on one document, however, because it had been authorized for release to all employees and therefore lost any privilege that might have otherwise attached.

H. Summary Judgment

Employers and the EEOC fared about equally in their motions for summary judgment at the federal district court level in FY 2016.⁶⁵¹ The EEOC had more favorable outcomes when pursuing discriminatory claims based on race and/or national origin, while employers were slightly more successful in cases involving religious discrimination and

644 135 S. Ct. 1645 (2015).

645 *Autozone, Inc.*, 2015 U.S. Dist. LEXIS 149849, at **6-14 (holding that the court need not review the agency's files or delve into the specifics of the investigation if one was conducted).

646 *USA v. Performance Food Group, Inc.*, 2016 U.S. Dist. LEXIS 33064 (D. Md. Mar. 15, 2016).

647 *EEOC v. CollegeAmerica Denver, Inc.*, 2015 U.S. Dist. LEXIS 163816, at *2 (D. Colo. Dec. 3, 2015).

648 *EEOC v. Resource Employment Solutions, LLC*, 2016 U.S. Dist. LEXIS 72126 (N.D. Miss. May 17, 2016).

649 *Id.* at *6.

650 *EEOC v. Texas Roadhouse, Inc.*, 2015 U.S. Dist. LEXIS 161929, at **3-9 (D. Mass. Dec. 2, 2015).

651 A discussion of key appellate court cases can be found in Section II. H and in Appendix B to this Report.

accommodation. The majority of summary judgment motion decisions issued in FY 2016, however, involved claims of disability discrimination. On these claims, courts favored employers and the EEOC about evenly, often providing mixed rulings on the parties' motions.

The following discusses some notable summary judgment decisions issued in FY 2016.⁶⁵²

1. Courts Addressed EEOC's Challenges to Employee Wellness Programs

The legality of an employer's wellness program came under fire in two FY 2016 summary judgment decisions.

In *EEOC v. Flambeau*,⁶⁵³ the first FY 2016 case to review an employer's wellness program, the EEOC alleged a plastics manufacturer's wellness plan, which required employees to complete a health risk assessment (HRA) and biometric testing in order to be eligible for participation in the company's group health plan, violated the ADA's prohibition against medical questions or examinations. The EEOC claimed that because the biometric test and HRA were required for employees to continue receiving normal employee health insurance, they were not voluntary as a matter of law.

The employer countered that conditioning enrollment in its benefit plan on completion of the wellness program is protected by the ADA's "safe harbor" for insurance benefit plans. The ADA's safe harbor provision provides, in relevant part, that the ADA "shall not be construed to prohibit or restrict" an employer from establishing or administering "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks."⁶⁵⁴

A Wisconsin district court agreed, finding that the wellness program fell within the ADA's safe harbor provision, and granted the employer's motion for summary judgment. According to the court, the "wellness program requirement constituted a 'term' of its health insurance plan and that this term was included in the plan for the purpose of underwriting, classifying and administering health insurance risks."⁶⁵⁵ The court also agreed with the employer that the wellness program was not a subterfuge for discrimination, as there was no evidence that the company used the information from its health-related tests and assessments "to make disability-related distinctions with respect to employees' benefits."⁶⁵⁶

By contrast, eight months later—and, significantly, *after* the EEOC issued its final wellness regulations under the ADA and GINA—another Wisconsin district court did not hand the employer a complete victory. In *EEOC v. Orion Energy Systems*,⁶⁵⁷ the employer offered a self-insured group health plan that included a wellness program. A component of the wellness program required employees to complete an HRA consisting of a health history questionnaire, biometric screening and a blood draw. Employees who completed the HRA and health screen could eliminate their monthly premiums entirely; employees who did not complete this requirement paid the entire cost of health insurance coverage.

An employee who objected to the HRA requirement was terminated. The employer alleged her termination about three weeks after she opted out of the program was due to legitimate non-discriminatory and non-retaliatory reasons. The EEOC, however, alleged that the employer violated Section 12112(d)(4)(A) of the ADA, which bars employers from requiring medical examinations of employees or making medical inquiries that could involve potential disabilities. The EEOC also alleged that the termination just weeks after she opted out of the wellness program constituted unlawful retaliation.

As in *Flambeau*, the employer in *Orion* argued its wellness program was lawful under the safe harbor provision of the ADA relating to insurance, and that the program was voluntary within the meaning of Section 12112(d)(4)(B).

Contrary to the holding in *Flambeau*, the district court in *Orion* rejected the safe harbor claim, finding that a broad reading of the "safe harbor" provision conflicts with the ADA's remedial purpose. The court found that the wellness program in question simply did not fall under the "safe harbor" because it was not used by the employer to underwrite, classify, or administer risk. And while it did not find the EEOC's final rule dispositive, the court appeared to be persuaded by the EEOC's own interpretation of it. In its final rule, the EEOC takes the position that the ADA's safe harbor provisions "do not apply to wellness programs, even if such plans are part of a covered entity's health plan."⁶⁵⁸ The court in *Orion*

652 For more information on FY 2016 summary judgment decisions, see Appendix D to this Report.

653 *EEOC v. Flambeau*, 2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 30, 2015); No. 16-1402 (7th Cir. Dec. 31, 2017) (upholding employer wellness program).

654 *Id.* at *7, citing 42 U.S.C. § 12201(c)(2).

655 *Id.* at *15.

656 *Id.* at *19.

657 *EEOC v. Orion Energy Systems*, 2016 U.S. Dist. LEXIS 127292 (E.D. Wis. Sept. 19, 2016).

658 EEOC, *Regulations Under the Americans With Disabilities Act*, 81 Fed. Reg. at 31143 (May 17, 2016).

noted that the question of whether the ADA's "safe harbor" applies to wellness programs presented an ambiguity that could be resolved under the EEOC's regulatory authority.⁶⁵⁹

However, the court agreed with the employer regarding the program's voluntariness, holding it was voluntary because it was *optional*. The court thus rejected the EEOC's position that shifting 100 percent of the premium cost rendered the program involuntary.⁶⁶⁰

The court denied the employer's motion for summary judgment as to the EEOC's retaliation claim.⁶⁶¹ The court held that the complaining employee's concern about the confidentiality of the wellness initiative was legitimate and, moreover, that her objection appeared to be protected. The court concluded that a jury must decide the fact issues surrounding her termination, including the timing of the termination.

2. Religious Accommodation Cases Remain a Contested Issue

Unlike failure-to-accommodate disability claims under the ADA, a failure to accommodate an employee's religion does not amount to a standalone Title VII violation, a Colorado federal district court held. The court in *EEOC v. JetStream Ground Services, Inc.*,⁶⁶² reasoned that while Title VII's language could mean an employer has a "purported affirmative duty" to accommodate an employee's or applicant's religion-related requests, it does not "necessarily follow" that Title VII creates an independent, separate cause of action based on the failure to accommodate. In other words, a claimant must show that the alleged failure to accommodate resulted in some adverse action.

In this case, a female Muslim airplane cabin cleaner alleged she was given part-time work after she asked to wear a hijab. In opposing the company's motion for summary judgment, the EEOC failed to claim the employee suffered an adverse action on account of her religious accommodation request. Thus, in asking the court to reconsider its motion, the EEOC was unable to show extraordinary circumstances to overturn the court's ruling.⁶⁶³

A district court also denied the EEOC's motion for summary judgment in *EEOC v. United Cellular, Inc.*⁶⁶⁴ In this case, the EEOC claimed the employer discriminated against a Seventh-day Adventist when it ordered him to work on his Sabbath and gave him reduced work hours in retaliation when he requested an alternative schedule. The court, however, held that there were too many factual questions at issue, rendering summary judgment inappropriate. Such questions included the sincerity of the employee's beliefs, the reasons for the reduced schedules, and whether the employee communicated the reason for walking off the job when he was ordered to work on the Sabbath.

The EEOC prevailed, however, in a motion for summary judgment on the sole question of whether the employer's practice of "Onionhead" or "Harnessing Happiness" constituted a religion. In *EEOC v. United Health Programs of America*,⁶⁶⁵ employees claimed the employer's "multi-purpose conflict resolution tool" was instead a religion, and that they were forced to subscribe to this practice despite its religious nature. In support of their claims, the claimants presented company e-mails which included references to God, spirituality, demons, Satan, divine destinies, purity, blessings, and miracles, among others.

Each of the claimants opposing Onionhead was terminated. The EEOC pursued both traditional discrimination claims—arguing that because claimants subscribed to other religions, they could not adhere to Onionhead—as well as reverse religious discrimination claims. The court readily agreed that Onionhead was religious in nature. The court did not delve into the sincerity of the company's beliefs, stating instead that a reasonable trier of fact could conclude the company was sincere because it invited, authorized, and paid to use Onionhead in the workplace. This, combined with the more clearly established religious elements of Onionhead, was sufficient for the district court to conclude that Onionhead was a religion as a matter of law. Therefore, the company was held potentially liable under Title VII for seeking to impose its own religious beliefs on employees.

659 *Orion*, 2016 U.S. Dist. LEXIS 127292, at *15.

660 *Id.* at *27.

661 *Id.* at *30.

662 *EEOC v. JetStream Ground Services, Inc.*, 2016 U.S. Dist. LEXIS 29500 (D. Colo. Mar. 8, 2016).

663 *Id.* at *21.

664 *EEOC v. United Cellular, Inc.*, 2015 U.S. Dist. LEXIS 174885 (N.D. Ala. Nov. 13, 2015).

665 *EEOC v. United Health Programs of America*, 2016 U.S. Dist. LEXIS 136625 (E.D.N.Y. Sept. 30, 2016).

3. EEOC Prevailed More Often than not in Race and National Origin Cases

In *EEOC v. Wisconsin Plastics*,⁶⁶⁶ the EEOC filed suit against the employer for race and national origin discrimination after the employer laid off a large group of Hmong and Hispanic employees who did not speak English. The employer moved for summary judgment on the grounds that while the plaintiffs were members of a protected class and suffered an adverse employment action, they provided no evidence of prohibited discrimination, and that an inability to speak English (the stated reason for termination) is not a protected class.

The court denied the employer's motion. Among other reasons, the court pointed out the employer acknowledged the ability to speak English had no bearing on job performance. Moreover, while an employer's preference for English proficiency could be a legitimate consideration, the court noted, this position "does not mean a court can conclude, as a matter of law, that the ability to speak English is necessarily a legitimate, nondiscriminatory reason."⁶⁶⁷ In this case, the employer did not provide substantial justification for that reason, so the employer was unable to establish, as a matter of law, that its policy of favoring English-speakers was a legitimate, non-discriminatory reason.

Moreover, the plaintiffs could make a case that termination based on language fluency was a pretext for unlawful discrimination. While English proficiency is not a protected class, language "can sometimes serve as a proxy, or stalking horse, for discrimination against a protected class."⁶⁶⁸ Notably, in this case, during the same period of terminations the employer hired 88 new employees, 62 of whom were Caucasian. Therefore, the racial composition of the workforce resulted in a lower percentage of Asian and Hispanic employees. Thus, "a reasonable jury, faced with this evidence, might draw the conclusion that the company was reconstituting itself by race or national origin—particularly if that jury heard that language ability . . . did not affect job performance."⁶⁶⁹

Thus, a fact-finder could reasonably conclude that race and national origin, and not language ability, were the true reason for the layoffs. As such, the employer's motion for summary judgment was denied.

In another FY 2016 case,⁶⁷⁰ the employer's reasons for its hiring selections at the EEOC stage were stated more broadly and in less detailed fashion than they were in litigation. That is not unusual, as the reasoning in a position statement is considerably simpler than what might arise in a deposition or a summary judgment motion. However, in this case, the employer's failure to provide the EEOC with a full and complete response to the initial charge of discrimination doomed its ability to win on summary judgment. Other courts might have disagreed. Although the court found that the employer was able to articulate legitimate, non-discriminatory reasons for only promoting white employees, it found that the plaintiffs could set forth sufficient evidence to show pretext, particularly because the employer presented the court with more detailed and specific reasons for not selecting a plaintiff than it presented to the EEOC in response to the plaintiff's initial charge of discrimination.

The court noted: "[w]e have recognized that an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext. . . . This principle applies when a defendant in litigation offers reasons it did not offer the EEOC."⁶⁷¹ Therefore, "a properly functioning jury could find that the defendant's articulated reasons for not promoting [one plaintiff] were not its true reasons for not promoting him. The court further concludes that, should the jury make such a finding, it could properly make the additional finding that race was the true reason for the promotion decision."⁶⁷²

Moreover, relying on the "me too" doctrine, the court determined evidence of pretext could be used to show discriminatory intent regarding the remaining plaintiffs.⁶⁷³

These are just a sampling of the FY 2016 summary judgment decisions. See Appendix D for additional opinions.

I. Default Judgment

In the last year, courts have granted motions for default judgment in two Title VII cases brought by the EEOC. In each case, the courts allowed substantial damages for emotional distress under 42 U.S.C. § 1981a.

666 *EEOC v. Wisconsin Plastics*, 2016 U.S. Dist. LEXIS 59931 (E.D. Wis. May 5, 2016).

667 *Id.* at *5.

668 *Id.* at *7.

669 *Id.* at *8.

670 *EEOC v. Outokumpu Stainless USA, LLC*, 2016 U.S. Dist. LEXIS 121143 (S.D. Ala. Sept. 8, 2016).

671 *Id.* at *14.

672 *Id.* at *16.

673 *Id.* at *17.

A federal magistrate in California recommended default judgment totaling \$1.47 million in *EEOC v. Zoria Farms*.⁶⁷⁴ The EEOC filed suit in 2013 against Zoria Farms, a dried fruit processor, and its successor, Z Foods. The complaint alleged that a Zoria Farms supervisor sexually harassed several female employees prior to Zoria Farms' acquisition by Z Foods. Several employees, male and female, participated in a meeting with management and complained about the harassment. All of the complaining employees were terminated shortly thereafter, when Z Foods failed to rehire them upon its takeover of Zoria Farms. Z Foods retained most Zoria Farms employees, however, including the previous owner and the plant manager. According to the complaint, a Z Foods supervisor, who also had worked for Zoria Farms, sexually harassed numerous additional female employees. After one female employee complained about this conduct, Z Foods fired her brother. And after he filed a charge with the EEOC, his brother-in-law was also fired.⁶⁷⁵

In response to the action, Zoria Farms answered and eventually settled the claims for \$330,000. Z Foods, on the other hand, failed to answer and further neglected to respond to the EEOC's motion for default judgment.⁶⁷⁶ In that motion, the EEOC sought \$1.47 million, which included an offset for the amount of the Zoria Farms settlement.

The court initially questioned the sufficiency of the allegations as to Z Foods' successor liability, as well as the evidence supporting the damages calculation.⁶⁷⁷ The court explained that, while successor liability is available in Title VII cases, the appropriateness of such relief turns on three factors: "(1) the continuity of operations and work force of the successor and predecessor employers, (2) the notice to the successor employer of its predecessor's legal obligation, and (3) the ability of the predecessor to provide adequate relief directly."⁶⁷⁸ The court requested supplemental briefing on the third factor, particularly since Zoria Farms had already settled the claims against it. The EEOC was also asked to more adequately demonstrate the size of Zoria Farms' workforce at the relevant time to determine the applicable maximum statutory damages under 42 U.S.C. § 1981a.⁶⁷⁹

In a lengthy opinion dated May 13, 2016, the court concluded that the EEOC had persuasively pled both its Title VII claims and the claim for successor liability against Z Foods. The court noted that Z Foods retained largely the same personnel, including upper management, "continued operations at the same facility, performed the same type of business . . . and employed substantially the same employees as Zoria Farms."⁶⁸⁰ It further found that Z Foods had notice of this potential liability and actually continued the discriminatory conduct of its predecessor.⁶⁸¹ As for the third successor liability factor, the court held that Z Foods was in a better position to provide full relief to the employees than Zoria Farms, which had ceased operations and dissolved.⁶⁸²

In addition to the sufficiency of the allegations, the court evaluated whether the EEOC's motion satisfied the other discretionary factors relevant to the entry of a default judgment. Pursuant to the Ninth Circuit's guidance in *Eitel v. McCool*,⁶⁸³ the court thus considered: (1) the possibility of prejudice to the EEOC absent an entry of default; (2) "the amount of money at stake in the action"; (3) the possibility of the existence of a dispute of material fact; (4) the likelihood that excusable neglect caused the default in question; and (5) whether the federal policy favoring decisions on the merits weighed against a default judgment.⁶⁸⁴ The court found that, on balance, these factors supported a grant of default in this case. It therefore entered the default and turned to consider the appropriate remedy.⁶⁸⁵

The court assessed the evidence submitted by the EEOC in support of its request for the maximum statutory damages for each affected employee. Based on the detailed declarations of numerous employees, the court found that compensatory damages for emotional distress were warranted due to the defendants' egregious conduct, along with

674 *EEOC v. Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 64328 (E.D. Cal. May 13, 2016); *EEOC v. Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 41656 (E.D. Cal. Mar. 29, 2016).

675 *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 64328, at **2-6; *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 41656, at **2-6.

676 *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 64328, at *6; *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 41656, at **1, 6.

677 *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 41656, at **7-12.

678 *Id.* at **7-8 (quoting *Bates v. Pac. Maritime Assoc.*, 744 F.2d 705, 709-10 (9th Cir. 1984)).

679 *Id.* at **10-12. The court also asked the EEOC to show how its service of process on Z Foods complied with the federal rules.

680 *Zoria Farms, Inc.*, 2016 U.S. Dist. LEXIS 64328, at **11-14.

681 *Id.* at **11-12.

682 *Id.* at **12-14.

683 782 F.2d 1470, 1471-72 (9th Cir. 1986).

684 *Zoria Farms*, 2016 U.S. Dist. LEXIS 64328, at **9-10, 24-27.

685 *Id.* at *27; See also Press Release, EEOC, *Federal Judge Awards \$1,470,000 in EEOC Sexual Harassment and Retaliation Case Against Z Foods* (July 22, 2016), available at: <https://www.eeoc.gov/eeoc/newsroom/release/7-22-16a.cfm> (commenting that "[t]he court's findings vindicate the courage it took for these workers to stand up and demand a workplace free of sexual harassment").

punitive damages. The court ultimately awarded \$200,000 in damages to each charging party, for a total of \$1.8 million. It discounted the amount of the Zoria Farms settlement and held Z Foods jointly liable for the remaining \$1.47 million.

In another case, out of the Southern District of Mississippi, the court entered default judgment against a temporary staffing agency that flatly refused to consider several female applicants for open jobs as residential trash collectors.⁶⁸⁶ According to the complaint, the staffing agency informed female applicants that the only positions available were “industrial jobs that are usually for men.”⁶⁸⁷ As a result, several women decided not to apply for the collection positions. The staffing agency also rejected applications submitted by several women. The EEOC sought default judgment after the staffing agency failed to answer or defend the action.

The court explained that, although the defendant had admitted all well-pled factual allegations included in the complaint, its default did not prove the amount of damages conclusively. The court therefore looked to the EEOC’s prove-up in fashioning a remedy. The EEOC introduced evidence of the hourly wage for the collection position, how long the open positions lasted, and how many hours per week the hired collectors worked. Based on that information, the court held that each of the six claimants was entitled to \$1,500 in back pay.⁶⁸⁸

The court also awarded damages under 42 U.S.C. § 1981a for the pecuniary losses and emotional distress suffered by the claimants. Based on their individual circumstances, each claimant received \$20,000, \$25,000, or \$30,000 in compensatory damages.⁶⁸⁹

The court additionally held that the staffing agency had acted with reckless indifference to the rights of the claimants. It therefore also awarded each claimant \$5,000 in punitive damages. In total, the court ordered the staffing agency to pay \$179,000 to the six female claimants.⁶⁹⁰

J. Bankruptcy and/or Garnishment

In an unusual factual scenario, a federal district court strongly supported the EEOC’s request for a writ of garnishment in *EEOC v. Northern Star Hospitality*.⁶⁹¹ There, the EEOC had prevailed in a jury trial brought on behalf of an individual claimant against his employer, a restaurant. The court concluded that the restaurant was operated by three entities and deemed them a single employer, along with their sole shareholder. The jury awarded \$65,000, which the EEOC then unsuccessfully attempted to recover.⁶⁹²

The defendants were alleged to have “repeatedly” dodged the EEOC’s collection efforts, including discovery and the garnishment of bank accounts. In its November 13, 2015 decision, the court addressed the EEOC’s request to garnish an account from yet a third bank, which held \$14,908.18 belonging to the defendants.⁶⁹³ The defendants contended that these funds could not be used to satisfy the judgment because they actually belonged to a separate third-party corporation (though one also controlled by the same sole shareholder). In rejecting this argument, the court recounted the defendants’ recalcitrance in responding to discovery requests and in offering reasonable explanations for the movement of funds between entities and accounts. The court reasoned that, even if the funds belonged to the third party, and even if the defendants had standing to assert the rights of that third party, the EEOC nonetheless had “the stronger claim to the funds.”⁶⁹⁴

The court relied on the Federal Priority Statute, 31 U.S.C. § 3713, in entering the garnishment. Pursuant to that statute, claims asserted by the federal government “shall be paid first” where owed by an insolvent debtor, if that “debtor without enough property to pay all debts makes a voluntary assignment of property.”⁶⁹⁵ The court found that the defendants fell squarely under the statute because they “maintained consistently that they are without property to satisfy plaintiff’s judgment, despite making repeated voluntary assignments of property in violation of the statute.”⁶⁹⁶ For example, the

686 *EEOC v. Workplace Staffing Solutions*, 2016 U.S. Dist. LEXIS 88083 (S.D. Miss. July 7, 2016).

687 *Id.* at **2-3.

688 *Id.* at **4-5.

689 *Id.* at **5-8.

690 *Id.* at **9-10; See also Press Release, EEOC, *Federal Judge Awards EEOC \$179,000 Default Judgment Against Workplace Staffing Solutions for Sex Discrimination* (July 18, 2016), available at: <https://www.eeoc.gov/eeoc/newsroom/release/7-18-16.cfm>.

691 2015 U.S. Dist. LEXIS 153655 (W.D. Wis. Nov. 13, 2015).

692 *Id.* at **1-2.

693 *Id.* at *2.

694 *Id.* at **7-9.

695 31 U.S.C. § 3713(a)(1)(A)(i); see *EEOC v. Northern Star Hospitality*, 2015 U.S. Dist. LEXIS 153655, at *9.

696 *EEOC v. Northern Star Hospitality*, 2015 U.S. Dist. LEXIS 153655, at *9.

defendants insisted under oath on September 23, 2015 that they had no balances, yet the balance pursued by the EEOC grew from zero to nearly \$15,000 within a few weeks. In sum, the court found that the funds in the account were owed to the EEOC “because they were deposited in a bank account in defendant[s] . . . name at a time when defendant was insolvent and owed money to” the EEOC.⁶⁹⁷ The court entered the final writ of garnishment in favor of the EEOC and also suggested that the sole shareholder would likely be found individually liable for the remainder of the judgment.⁶⁹⁸

K. Trial

1. Spotlight on Trials

A number of cases brought by the EEOC went to trial in FY 2016. *EEOC v. St. Joseph’s Hospital, Inc.*,⁶⁹⁹ in the U.S. District Court for the Middle District of Florida, involved a nurse who used of a cane. The employer terminated her, contending that the essential functions of her job entailed being ready to restrain patients acting violently, and injecting medication immediately into patients who are ill or acting dangerously. While the court agreed that the plaintiff had a disability and may have been entitled to a reasonable accommodation, it agreed that restraining and injecting dangerous patients with medications was an essential function of the job that the plaintiff could not perform: “The EEOC has not demonstrated that [the plaintiff] could use the cane safely . . . The Hospital does not have an obligation to eliminate or reallocate an essential job function to accommodate a disabled employee.”⁷⁰⁰ Thus, the court agreed the use of a cane would not be a reasonable accommodation, but found that it was up to a jury to determine whether the hospital could have placed her in one of the alternative positions for which she applied as a reasonable accommodation.

The jury subsequently found in favor of the EEOC on its claim that the defendant did not provide a reasonable accommodation when it failed to assign the claimant to a different position, but determined that the defendant did make good-faith efforts to identify and make a reasonable accommodation. Although judgment was initially entered in favor of the defendant, the plaintiff subsequently filed a motion to alter the judgment and for equitable relief, which the court granted, *in part*, after determining that the plaintiff was the prevailing party based on the jury’s finding that the defendant failed to reassign the employee to another position. The judgment was amended and entered in favor of the plaintiff.

The employer hospital appealed to the Eleventh Circuit. The question before the appellate court was whether the ADA requires noncompetitive reassignment. On December 7, 2016, the appeals court answered in the negative, finding the employer was not required to reassign the nurse to the preferred vacant position as a reasonable accommodation.⁷⁰¹ The Eleventh Circuit held that a disabled employee in need of an accommodation must still compete with other qualified employees for the position—the ADA does not require preferential treatment. The court relied on the statutory language that includes “reassignment to a vacant position” as part of a non-exhaustive list of items that the term reasonable accommodation “may include.” According to the court, the use of the word “may” implies that reassignment will be reasonable in some circumstances but not others.⁷⁰² Moreover, the court held that the purpose of the ADA is to provide meaningful but equal employment opportunities for the disabled; it was not intended to require discrimination against the non-disabled.⁷⁰³

In *EEOC v. Placer Arc*,⁷⁰⁴ the EEOC brought claims on behalf of the claimant, a former employee, alleging that the defendant discriminated against her because she is deaf. It further claimed that the employer retaliated after she requested sign-language interpreters by forcing her to quit, in violation of the ADA. The defendant moved for summary judgment on the retaliation claim, which the court granted. The trial proceeded on the remaining claims.

Although the jury found that the claimant was qualified to perform the essential functions of her position and that she had a disability, the jury ultimately found that the defendant neither discriminated against the claimant nor forced her to quit her employment. The court noted that the EEOC relied too heavily on timing to establish the defendant’s discriminatory intent, and that questions of circumstantial evidence rarely lend themselves to predictable answers. However, the court further noted that in retrospect, the defendant’s evidence may appear stronger, but the court could

697 *Id.* at *11.

698 *Id.* at **12-14 (granting the shareholder an opportunity to brief the issue of his personal liability under 31 U.S.C. § 3713(b)).

699 *EEOC v. St. Joseph’s Hosp., Inc.*, 2015 U.S. Dist. Lexis 19272 (M.D. Fla. Feb. 18, 2015).

700 *Id.* at *17.

701 *EEOC v. St. Joseph’s Hosp., Inc.*, 2016 U.S. App. LEXIS 21768 (11th Cir. Dec. 7, 2016). *But see EEOC v. United Airlines*, 673 F.3d 543 (7th Cir. 2012).

702 *Id.* at *23.

703 *Id.* at *26.

704 *EEOC v. Placer Arc*, 2016 U.S. Dist. LEXIS 75995 (E.D. Cal. June 10, 2016).

not rely on hindsight to find that the EEOC's case was frivolous, foundationless, or unreasonable. As such, the court denied the defendant's motion for attorneys' fees, but awarded nearly \$20,000 in costs.

2. Pre-Trial Scheduling Orders

In *EEOC v. JBS*,⁷⁰⁵ a multi-claimant case, the district court reviewed the magistrate judge's order granting the defendant's motion to amend the scheduling order to permit listing of 103 additional witnesses for good cause. The EEOC argued that, when examining the defendant's justifications for the untimely disclosure of each individual witness – as opposed to examining its justifications in the aggregate – the defendant's showing was insufficient to establish good cause.⁷⁰⁶

The defendant provided five principal justifications for the late disclosure of each additional witness, but the primary argument was that it had difficulty identifying witnesses by their first and last names. The court disagreed with the defendant, noting that challenges of the case were or should have been apparent at the case's outset, and the defendant did not seek relief earlier to account for these challenges. The court was also not convinced that the defendant demonstrated diligence by waiting until an individual was squarely identified through deposition testimony before investigating whether that individual should be designated as a witness, citing to the timing of the defendant's additional disclosures.

Moreover, in determining whether the defendant established good cause to justify the modification of a scheduling order, the district court applied the *Burks*⁷⁰⁷ factors: (1) the prejudice or surprise to the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in court, and (4) bad faith or willfulness in failing to comply with the court's order.⁷⁰⁸ The court found that the EEOC would suffer prejudice to its ability to fully defend against the testimony of the 103 additional witnesses, and further found that reopening discovery to allow the EEOC to depose the additional witnesses would delay trial in a case where pretrial proceedings had already stretched for more than five years. The court also noted, however, that the EEOC could cure some of the prejudice if the defendant was permitted to disclose additional witnesses, and that it lacked sufficient facts to conclude definitively that the defendant acted willfully.

In view of the defendant's lack of diligence in disclosing additional witnesses, the *Burks* factors, and the fact that the number of additional witnesses was disproportionate to the number of witnesses timely designated in the amended witness list, the court found good cause to amend the scheduling order and granted the defendant leave to designate 30 additional witnesses of its choosing. The court ordered the defendant to select the 30 witnesses from the 103 listed witnesses.

3. Voir Dire

In *EEOC v. JetStream Ground Services*,⁷⁰⁹ five female Muslim claimants alleged that the defendant failed to hire them after they requested to cover their heads and wear long skirts for religious purposes. As trial approached, the EEOC and the plaintiff-intervenors jointly requested that a jury questionnaire be mailed to the venire in advance of *voir dire*. The plaintiffs proposed an 11-page questionnaire comprising 43 questions which, in addition to standard questions about a potential juror's background, contained case-specific questions to elicit any potential anti-immigrant and/or anti-Muslim bias. The EEOC argued that because the plaintiff-intervenors are Muslim immigrants bringing a religious discrimination claim, they faced a greater degree of prejudice and/or bias from potential jurors than the average civil plaintiff, particularly in light of recent news events, including terrorist attacks (in Paris, the United States, and elsewhere), and the anti-Muslim and anti-immigrant rhetoric surfacing during the U.S. presidential election. The plaintiffs further argued that the court's standard *voir dire* procedures would be insufficient to uncover such prejudice and/or bias because jurors "will likely respond more candidly to questions about sensitive past events or their prejudices via a private, confidential written questionnaire, than by answering orally in open court before strangers."⁷¹⁰

⁷⁰⁵ *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 33983 (D. Colo. Mar. 16, 2016).

⁷⁰⁶ *Id.* at *12.

⁷⁰⁷ *Burks v. Okla. Publ'g Co.*, 81 F.3d 975 (10th Cir. 1996).

⁷⁰⁸ *JBS*, 2016 U.S. Dist. LEXIS 33983, at *12.

⁷⁰⁹ *EEOC v. JetStream Ground Services, Inc.*, 2016 U.S. Dist. LEXIS 36869 (D. Colo. Mar. 22, 2016).

⁷¹⁰ *Id.* at **5-6.

The court agreed generally that, given the nature of the claims, the *voir dire* examination will require the venire be questioned carefully and fully regarding any potential anti-immigrant and/or anti-Muslim bias. Yet, it noted that juror questionnaires are enormously time-consuming, including for the potential jurors who must answer them, and ultimately found that the benefits of such a questionnaire did not justify the costs in light of the circumstances presented in the case. Specifically, the court reasoned that although the proposed questionnaire could “flag” potential biased jurors for the attorneys, it found that it would be highly unlikely that any juror would provide the level of detail necessary in his or her responses for a party to make an adequate challenge for cause based on the questionnaire alone.

The court further addressed the plaintiffs’ concerns over whether jurors will be forthright in discussing the sensitive issues implicated in the case, and agreed to modify its standard oral *voir dire* procedures by (1) emphasizing (repeatedly) that the jurors are under oath in answering the court’s and the attorneys’ questions truthfully and fully; (2) making every reasonable effort to create an environment that encourages and enables prospective jurors to speak openly, including by instructing jurors that they should feel free to discuss any potentially embarrassing or sensitive topics privately at the bench; (3) conducting a basic examination of the panel, and then allowing the parties’ counsel 45 minutes each to supplement the court’s examination; and (4) permitting the attorneys to request to speak at the bench with a potential juror who they believe would be more candid in a more private setting.

4. Witnesses

In FY 2016, several district court opinions addressed motions concerning untimely witness designations on the eve of trial.

In *EEOC v. JetStream Ground Services*,⁷¹¹ discussed above, the EEOC and the plaintiff-intervenors brought a motion to compel the defendant to produce a certain witness at trial or, in the alternative, either allow the plaintiffs to depose the witness in advance of trial or to order the witness to testify via remote, contemporaneous transmission. Specifically, the motion provided that just a little over one month before a jury trial was set to commence in the case, the defendant informed the plaintiffs that it could not guarantee the attendance of the witness at trial, despite the fact that he was included in the defendant’s pretrial submission as a “will-call” witness and who would be present at trial.

The court noted that although the parties contested the actual extent of the witness’ role in hiring and decision-making, “crucial facts” were not in dispute: (1) he was the vice president and co-owner of the defendant, and still owned and worked for the defendant; (2) the defendant’s attorneys noted that “the central dispute in the instant case” was the defendant’s motives for its decision not to hire the plaintiffs; (3) the plaintiffs wore headscarves during their interviews; (4) this witness interviewed at least three of the plaintiffs who were not hired; (5) the witness was alleged to have made derogatory comments to multiple employees about Muslim women who wore hijabs; (6) the plaintiffs did not depose him about the derogatory statements, in part, because they found out about the alleged statements after his deposition; (7) the witness lived in Florida (not Colorado, where the case was tried) and had lived there continuously throughout the course of the litigation; and (8) the defendants had not sought leave to amend the final pretrial order to remove him as a “will-call” witness.

The court followed the Tenth Circuit principles guiding proposed amendments to pretrial orders: (1) prejudice or surprise to the party opposing trial of the issue; (2) the ability of that party to cure any prejudice; (3) disruption to the orderly and efficient trial of the case by inclusion of the new issue; and (4) bad faith by the party seeking to modify the order, in addition to whether amendment to the pretrial order was formally and timely requested. Applying these factors, the court found that all factors weighed against the defendant.

Specifically, the court found that the plaintiffs were “extremely prejudiced” by the late-breaking development, as the witness had information about an important aspect of the plaintiffs’ case, the discovery deadline had passed, and the plaintiffs were surprised by this development in view of defendant’s implicit assurances that it would produce him at trial. The court also found that the plaintiffs’ ability to cure the prejudice was limited, and that the trial would be disrupted by the witness’ absence. The court reasoned that although the plaintiffs could use his prior videotaped deposition in lieu of live testimony, crucial “building blocks” of the plaintiffs’ circumstantial case on employer’s discriminatory motive included the witness’ allegedly discriminatory statement about Muslims—about which he was not questioned during his deposition. Although the court could not definitively opine on the bad faith factor, it noted that: (1) the defendant only informed the plaintiffs’ counsel that the witness may decline to appear for trial just over a month before trial was set to commence, and (2) the defendant did not formally move for an amendment to the final pretrial order. The court found

711 *EEOC v. JetStream Ground Services, Inc.*, 2016 U.S. Dist. LEXIS 40277 (D. Colo. Mar. 28, 2016).

that this was the kind of conduct that Rule 16(e) was specifically designed to prevent.⁷¹² Accordingly, the court held that amending the final pretrial order to remove the witness was not in the interest of justice, and granted, in part, the plaintiffs' motion to compel the defendant to produce him at trial. The court further ordered that if the defendant refused to assure his presence at trial, the plaintiffs would be permitted to take another, pre-trial deposition of the witness.

In the same case, the plaintiffs brought a second motion requesting that the court amend the final pretrial order 11 days prior to trial. They sought leave to add two former managers of the defendant to the witness list. Both of the former managers had filed subsequent EEOC charges against the defendant. Their charges alleged that they were fired in retaliation after complaining about discriminatory comments made by the defendant's human resources director—including her alleged statement that all Muslim employees are liars. The plaintiffs alleged that the EEOC's counsel immediately notified both the defendant and the court after learning about the witnesses, and asserted that their testimony was relevant to the anti-Muslim animus alleged in the case.

Although both witnesses were included as "will call" witnesses on the amended final pretrial order, the defendant argued that permitting their testimony would require it to elicit responsive testimony from three additional witnesses who were not included in the pretrial order, and would further require the admission of "numerous amounts" of new exhibits.

The court denied the plaintiffs' motion. It concluded that the two additional witnesses' testimony would be inadmissible under as a "stray remark."⁷¹³ The court further noted that the personnel decisions at issue in the case related to entirely different individuals, and that the alleged statement offered by one of the witnesses occurred approximately six years after the personnel decisions in the case. As such, the court determined that it would be "fruitless" to add either witness to the final pretrial order because the testimony they would offer would be inadmissible in any case.

The court also denied the plaintiff's motion because the testimony would significantly disrupt the orderly and efficient trial of the case, and thus, prejudice the defendant. For instance, the court reasoned that if the witnesses were added, the defendant would be required to engage in a "mini side trial" about the circumstances surrounding their terminations, and that the "mini side trial" posed a significant risk of distracting or confusing the jury from the actual claims being tried. Finally, given that the witnesses did not appear on the final pretrial order, there would have been no reason for the defendant to have prepared for the "mini side trial."⁷¹⁴ Accordingly, the prejudice from adding these witnesses 11 days before trial could not be ameliorated.

In *EEOC v. Mattress Firm*,⁷¹⁵ the defendant moved to strike untimely-designated witnesses after the EEOC served a supplemental list of 29 additional witnesses—two years after submitting its initial witness disclosures, and after discovery closed. The court divided the additional witnesses into two lists: (1) current or former EEOC employees, and (2) current and former employees of the defendant.

The EEOC argued that late disclosure of its employees was substantially justified because the defendant was already made aware of these employees during the administrative proceedings, and because the employees were identified in the EEOC's discovery responses. Citing Civil Rule 26(a), the court disagreed, explaining that the rule placed an affirmative obligation on the EEOC to disclose the names of its witnesses. A passing reference to a witness in a separate discovery response does not provide a substantial justification for an untimely disclosure. It further found that the increased cost of deposing the EEOC witnesses rendered the untimely disclosure harmful. Yet, the court did allow one of the witnesses to testify in a limited capacity, as the court previously allowed the witness's Federal Rule of Evidence 1006 summary to support the EEOC's motion for summary judgment. As such, the court permitted that witness to testify only as a Rule 1006 summary witness.

The EEOC argued that its late disclosure of the defendant employee witnesses was substantially justified because the defendant frustrated its discovery efforts and did not produce the names of its employees until late in the case, and did so only after the court granted the EEOC's motion to compel. The EEOC then identified the witnesses one year later in its supplemental disclosure. The court found that even if the defendant's discovery conduct was improper, the EEOC was not excused from complying with Rule 26(e)'s requirement that supplemental disclosures be made in a "timely manner." It further noted that the EEOC did not explain why it waited an entire year to disclose the witnesses. As such, the EEOC's untimely disclosures were not substantially justified.

712 *Id.* at **15-16.

713 *Id.* at *5.

714 *Id.* at *8.

715 *EEOC v. Mattress Firm, Inc.*, 2016 U.S. Dist. LEXIS 79131 (D. Nev. June 16, 2016).

The EEOC also argued that its late disclosure of the defendant witnesses was harmless in view of the defendant's "superior access" to information about its own employees. It argued that the defendant should have known that the EEOC would designate those witnesses. The court found that, although the defendant knew of its employees, it likely did not anticipate the need to depose those employees until the EEOC served its untimely disclosure. The court further noted that even though a trial date had not yet been set, the increased cost and delay in reopening discovery at a late juncture rendered the EEOC's untimely disclosure harmful. The court, however, allowed one witness to testify at trial because that witness was identified in the EEOC's initial disclosures, albeit with his name misspelled.

The court held that the EEOC may use the other 27 witnesses at trial for impeachment only, since Rule 26's disclosure requirements do not apply to impeachment witnesses.

5. Evidence Issues and Post-Trial Motions

In *EEOC v. Placer Arc*,⁷¹⁶ the defendant sought to introduce trial testimony from witnesses other than the claimant, as evidence that the claimant had made certain hearsay out-of-court statements while employed with the defendant. These statements were also reported in letters and memos the defendant sought to introduce into evidence. The defendant argued that the claimant's statements were not hearsay because she was effectively a party opponent for purposes of Federal Rule of Evidence 801(d)(2). The EEOC objected on the grounds that the claimant was not an "opposing party" within the meaning of the rule, and argued that the EEOC was the opposing party in the action.

The court overruled the objection, and allowed the claimant's out-of-court statements to be admitted. The court found that although the claimant was a witness and not a named plaintiff, she was not an ordinary witness but rather a "witness plus," whose statement was analogous to a party admission, given the practical justifications for the hearsay rule and its exceptions. The court further noted that several of the statements would likely be admissible as evidence of the claimant's present-sense impression, an excited utterance, or a statement of her then-current mental or emotional state.

*EEOC v. Consol Energy, Inc.*⁷¹⁷ 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."⁷¹⁸ The defendants, a parent company and its subsidiary, denied the employee a religious accommodation to their policy requiring employees to clock-in and clock-out using a biometric hand scanner. The jury returned a verdict in favor of the EEOC in the religious discrimination case and awarded the claimant \$150,000 in compensatory damages. The defendants renewed a motion for judgment as a matter of law under Rule 50(b), moved for a new trial under Rule 59, and moved to amend the court's findings and conclusions under Rule 59. The grounds for defendants' renewed motion for judgment as a matter of law were: (1) that the EEOC failed to present sufficient evidence to state a *prima facie* case of religious discrimination; and (2) that there was insufficient evidence to support the jury's finding that the parent company was the claimant's employer.

Specifically, the defendants argued that there was insufficient evidence to support the jury's finding that the hand scanner policy conflicted with the claimant's sincere religious belief, and that the claimant was constructively discharged. Upon review of the record, the court found that there was sufficient evidence that the claimant believed the hand scanner policy was immoral because it was part of an identification system and collection of personal information that would be used by the Christian Antichrist, and that participation in this system of identification was a showing of allegiance to the Antichrist.

Moreover, the court found the evidence showed that the claimant requested an accommodation to the hand scanner policy, which the defendants denied, even though they had developed a way to bypass the hand scanner for employees physically unable to scan their hands.

The defendants further argued that the EEOC failed to prove that the defendant parent company was the claimant's employer. The court found that there was ample evidence in the record to support the jury's finding that the defendant parent company was also the claimant's employer, noting that (1) the hand scanner policy and progressive discipline procedure were created by the parent and given to its subsidiaries for implementation, (2) the claimant's request for accommodation was also considered and denied by the parent company's human resources personnel, and (3) the

716 *EEOC v. Placer Arc*, 2016 U.S. Dist. LEXIS 1947 (E.D. Cal. Jan. 7, 2016).

717 *EEOC v. Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475 (N.D. W. Va. Feb. 9, 2016).

718 *Id.* at *2.

claimant's retirement and benefits documents and employment records were issued and maintained by the parent. As such, the court denied the defendants' renewed motion for judgment as a matter of law.

Turning to the defendants' motion for a new trial, the court reviewed the exclusion of evidence regarding the collective bargaining agreement's grievance and arbitration procedures.⁷¹⁹ Prior to trial, the EEOC successfully moved to exclude all evidence regarding the labor agreement's grievance process, which allowed the claimant to file a grievance and seek arbitration before he could be discharged. The court granted the EEOC's motion, denied the defendants' motion for a mistrial, and instructed the jury to disregard all mention of the grievance process because it was irrelevant.

In finding that the grievance process was not relevant, the court explained that (1) the EEOC showed that the defendants constructively discharged the claimant, not that he was actually discharged because of his religious objection to the hand scanner; (2) the claimant's constructive discharge was complete before the grievance process would have applied to an attempt to discharge the claimant; (3) the collective bargaining agreement did not require arbitration of Title VII claims, and even if it did, the claimant's claim would be ripe only after the defendants failed to provide a reasonable accommodation; (4) the fact the claimant could have filed a grievance before being threatened with discharge did not affect whether he felt the need to retire in the face of defendants' denying him a reasonable accommodation regarding the hand scanner policy; (5) the EEOC was not required to object to any portion of the claimant's testimony mentioning the grievance process because it had already filed a motion *in limine* to exclude that evidence; and (6) any probative value of the grievance process evidence was substantially outweighed by the risk of confusing the issues and misleading the jury.

The court further concluded that a curative jury instruction adequately prevented unfair prejudice to the defendants, and that its instruction to the jury to disregard all mention of the grievance process as irrelevant, was not, by itself, grounds for a mistrial. The court's curative instruction was found to be neutral and appropriate, and the defendants did not demonstrate that they were unfairly prejudiced by the court's exclusion of the grievance process evidence.

The defendants also requested that the court order a new trial *nisi remittitur*, arguing that the award of \$150,000 in compensatory damages was unsupported by the evidence. The court found that the jury's award was supported by the claimant's and his wife's testimony about the effect of his retirement on him and their household. The claimant testified about being angry and desperate to find another job to support his family. His wife testified about how the family's relationship was detrimentally affected by the financial and emotional strain of the claimant's early retirement—specifically that the claimant had become depressed and lost 30 to 35 pounds. Accordingly, the court found that the award was adequately supported by the evidence.

The defendants further contended that the court's findings regarding the claimant's efforts to mitigate damages were not supported by the evidence. Specifically, they argued that the court did not give enough weight to evidence that coal mining jobs were available to the claimant and that he took a job in a different industry.

To the contrary, the court found that the claimant reasonably mitigated his damages by accepting a lower-paying position in the construction or heavy equipment industries. The court noted that although the claimant took a lower-paying position outside of the mining industry, the claimant searched for mining jobs, attended job fairs in the mining industry, and applied for a mining job. After those attempts failed, the claimant reasonably took a position in a different industry with lower pay to obtain some income when he had none. The court further found that the job openings at the defendant parent company's mine were not available until after the claimant found steady employment. Accordingly, the court found that the defendants failed to carry their burden to show that the claimant failed to mitigate his damages.

Moreover, the defendants argued that the court's inclusion of lost pension benefits in front pay damages was erroneous for two reasons: (1) the pension benefits that the claimant had already received since his retirement were from a collateral source and should not offset damages; and (2) the court's front pay damages award resulted in a windfall for the claimant. The court relied on the standard set by *Sloas v. CSX Transportation, Inc.*⁷²⁰ in determining that the pension benefits the claimant received after retiring were from a collateral source because the pension was a term of the claimant's employment with the defendants. The court further found that the claimant was entitled to his pension benefits regardless of whether he retired early, and therefore, the same was not a windfall.

719 *Id.* at *12.

720 *Sloas v. CSX Transportation, Inc.*, 616 F.3d 380, 389 (4th Cir. 2010).

6. Jury Instruction

Finally, the defendants in *EEOC v. Consol Energy, Inc.* argued that the court erred in denying some of its proposed jury instructions.⁷²¹ Specifically, the defendants argued that the court should have given proposed instruction numbers 2, 5, 8, and supplemental instruction number 4, because the defendants offered evidence from which the jury could draw a reasonable inference as to their theory of the case regarding each instruction. The proposed jury instructions and instructions provided by the court were as follows:

NUMBER	PROPOSED INSTRUCTION	THE COURT'S INSTRUCTION
No. 2	"An employer need not provide an employee with his preferred accommodation, and there is no legal requirement that an employer choose any particular reasonable accommodation. So long as the employer has offered a reasonable accommodation, it has satisfied its duty under Title VII." ⁷²²	"If you find by a preponderance of the evidence that the employer provided a reasonable accommodation to Mr. Butcher, your verdict shall be for the defendant employer. An employer need not provide an employee with his preferred accommodation, and there is no legal requirement that an employer choose any particular reasonable accommodation. So long as the employer has offered a reasonable accommodation, it has satisfied its duty under Title VII." ⁷²³
No. 5	"In reaching your verdict on the EEOC's religious discrimination claim, you should keep in mind that the law requires only that an employer not discriminate against an employee based on his religion. The law does not require an employer to use good judgment, to make correct decisions, or even to treat its employees fairly. Title VII is not violated by the exercise of erroneous or even illogical business judgment. Therefore, in deciding the Plaintiff's discrimination claim, it is not your function to second-guess the employer's business decisions or act as a personnel manager, unless you find that the decisions were motivated, in whole or in part, by illegal religious discrimination." ⁷²⁴	"In reaching your verdict on the EEOC's religious discrimination claim, you should keep in mind that the law requires only that an employer not discriminate against an employee based on his religion. The law does not require an employer to make correct or fair decisions. Therefore, in deciding the plaintiff's discrimination claim, it is not your function to substitute your judgment for that of the employer." ⁷²⁵
No. 8	"If you return a verdict for the plaintiff, but find that the Plaintiff has failed to prove that Mr. Butcher suffered any damages, then you must award the plaintiff the nominal amount of \$1.00." ⁷²⁶	"If you reach a certain point in the verdict, there is a line for you to state, if applicable, the amount of compensatory damages that you have found." ⁷²⁷

⁷²¹ *Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475, at *19.

⁷²² *Id.* at **20-21.

⁷²³ *Id.* at 21.

⁷²⁴ *Id.* at **21-22.

⁷²⁵ *Id.* at **22-23.

⁷²⁶ *Id.* at *23.

⁷²⁷ *Id.* at *24.

NUMBER	PROPOSED INSTRUCTION	THE COURT'S INSTRUCTION
Supplemental No. 4	<p>“As employee may not be unreasonably sensitive to his working environment. Every job has its frustrations, challenges and disappointments; these are inherent in the nature of work. An employee is protected from a calculated effort to pressure him into resignation through the imposition of unreasonably harsh conditions, in excess of those faced by his coworkers A reasonable employee should pursue all internal grievance procedures before making the decision to resign. Constructive discharge is difficult to show if the alleged intolerable conditions lasted only for a short time. An employee is expected to remain employed while seeking redress of a grievance.”⁷²⁸</p>	<p>“Intolerability of the working conditions is assessed by the objective standard of whether a reasonable person in the employee’s position would have felt compelled to resign. An employee is not guaranteed a working environment free from stress. It is the obligation of an employee not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.”⁷²⁹</p>

The court disagreed, finding that each instruction was legally correct and substantially covered the defendants’ proposed instructions.

L. Remedies

1. Punitive Damages

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 of an aggrieved individual.”⁷³⁰ Courts continue to follow the Supreme Court’s three-part framework for determining whether an award of punitive damages is proper under Title VII.⁷³¹ 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.”⁷³²

In *EEOC v. Global Horizons, Inc.*,⁷³³ the district court calculated compensatory and punitive damages owed to the claimants. It considered the criteria described in *BMW of North America, Inc. v. Gore*,⁷³⁴ which found that the most significant element underlying punitive damages was the “degree of reprehensibility of the defendant’s conduct.”⁷³⁵ The factors to consider when determining such reprehensibility included whether: (1) the harm caused was physical or economic; (2) the tortious conduct evinced an indifference to or reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was isolated; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.⁷³⁶ Applying these factors, the district court found that the defendant’s conduct was both malicious and with reckless indifference to the federally protected rights of each of the 67 claimants. The court awarded \$7,658,500 in damages.⁷³⁷

⁷²⁸ *Id.* at *27.

⁷²⁹ *Id.* at *28.

⁷³⁰ *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).

⁷³¹ *Id.* at *14 (citing *Kolstad v. American Dental Ass’n*, 527 U.S. 526, 535 (1999)).

⁷³² *Id.* (internal quotation omitted).

⁷³³ *EEOC v. Global Horizons, Inc.*, 2016 U.S. Dist. LEXIS 55630 (E.D. Wash. Apr. 26, 2016).

⁷³⁴ *Id.* at *5 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), as clarified in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003)).

⁷³⁵ *Id.* (citing *Gore*, 517 U.S. at 575).

⁷³⁶ *Id.* (citing *Gore*, 517 U.S. at 576-577).

⁷³⁷ *Id.* at **12, 14.

2. Additional Remedies

a. Injunctive Relief

EEOC v. New Prime, Inc., involved a policy that required driver-trainees to train under a same-gender trainer. Following summary judgment in favor of the plaintiff and a joint report to the court resolving any questions of monetary relief, the only remaining issue was whether injunctive relief was appropriate and, if so, its parameters.⁷³⁸ The district court narrowly tailored the injunctive relief because it did not find that the defendant's motive for the policy was "evil" or "malicious."⁷³⁹ The district court refused to appoint an outside monitor to report on the defendant's compliance with the injunction because it would be overly broad and unnecessarily intrusive where the discriminatory policy had already been suspended and replaced – and the monetary relief, time, expense, and negative publicity associated with the case served as sufficient deterrents against future similar policies. The district court also rejected the plaintiff's request for the defendant to provide notices stating that federal law prohibited sex discrimination to all applicants and employees because the defendant's application already provided such notice and all employees received a copy of, and training on, its non-discrimination and anti-harassment policy. Additional notices would be duplicative of procedures already in place. Instead, the district court ordered generally that the defendant shall not discriminate on the basis of sex, shall not implement a same-sex trainer policy or any other policy that creates a barrier to entry or advancement based on gender, and that the defendant shall notify each class member of priority hiring consideration if they submitted a new application.⁷⁴⁰

In *EEOC v. Grane Healthcare Co.*, the district court determined that illegally conducted pre-offer medical examinations of prospective employees denied certain individuals employment because of actual or perceived disabilities.⁷⁴¹ The EEOC commenced an action against a healthcare employer, alleging that the pre-offer examinations violated the ADA. The district court granted the EEOC's partial motion for summary judgment requesting injunctive relief enjoining the employer from violating prohibitions against pre-offer medical examinations. The district court, however, denied such injunctive relief against a separate but related entity. After a subsequent trial, the district court found that the employer and the separate entity were a single employer, that some of the pre-offer tests were proper and did not constitute medical examinations, and that the EEOC failed to establish a prima facie case of disability discrimination and could not recover damages or back pay. The EEOC moved to amend the judgment. In rejecting the motion to amend the judgment, the district court determined that the injunction did not automatically cover the separate entity even though the employer and the separate entity were a "single employer."⁷⁴² Instead, it found that the issue was moot regarding the separate entity. At trial, the district court had found that the individual who hired employees for the separate entity did not know that conducting physical exams prior to making an employment offer violated the ADA, although she now knew of the prohibition at the time of trial. There was no evidence that the separate entity was intentionally performing medical examinations the plaintiff sought to enjoin. The factual findings at trial did not find an intentional violation by employees of the separate entity nor that injunctive relief against it would be appropriate. Thus, the district court denied the plaintiff's motion for injunctive relief as against the separate entity.⁷⁴³

b. EEOC's Unreasonable Delay in Prosecuting Prevents Damages

In *EEOC v. Baltimore County*,⁷⁴⁴ the district court first found that neither retroactive nor prospective monetary relief is mandatory under the ADEA.⁷⁴⁵ Significantly, even if such damages were mandatory, the district court reasoned that it would not have awarded damages due to the EEOC's unreasonable delay in prosecuting its claims. The district court held that the doctrine of laches barred recovery of damages (even where liability was found) where the EEOC unreasonably delayed prosecution and the delay prejudiced the defendant.⁷⁴⁶ The district court found that the EEOC's eight-year delay was unreasonable and demonstrated a lack of diligence. According to the court, the delay prejudiced the defendant

738 *EEOC v. New Prime, Inc.*, 2016 U.S. Dist. LEXIS 74962, **3-4 (W.D. Mo. May 26, 2016).

739 *Id.* at *5.

740 *Id.* at **8-9.

741 *EEOC v. Grane Healthcare Co.*, 2016 U.S. Dist. LEXIS 77912, *2 (W.D. Pa. June 15, 2016).

742 *Id.* at **7-8.

743 *Id.*

744 *EEOC v. Baltimore Cty*, 2016 U.S. Dist. LEXIS 112731 (D. Md. Aug. 24, 2016).

745 *Id.* at **6, 22-23, 26-27, 32.

746 *Id.* at *32. The district court previously granted summary judgment to the EEOC on the issue of liability. Thus, this proceeding was limited to the amount of damages to award.

because it continued to accrue liability under its allegedly unlawful policies while the EEOC delayed prosecution. The court explained that the potential for increased backpay is “highly ‘prejudicial.’”⁷⁴⁷

c. Prejudgment Interest

In *EEOC v. New Prime, Inc.*,⁷⁴⁸ in an order related to the case discussed in Section 2(a) above, the district court addressed the use of prejudgment interest in damages calculations. Prejudgment interest is calculated “at a rate equal to the coupon issue yield equivalent ... of the average accepted auction price for the last auction of fifty-two week United States Treasury bills.”⁷⁴⁹ In this case, the district court determined that the correct interest rate was the weekly average one-year constant maturity Treasury yield instead of the IRS underpayment tax penalty rate advocated by the plaintiff’s expert.⁷⁵⁰

The district court then applied that interest rate to both “but for” earnings the claimants could have earned working for the defendant and the interim earnings (mitigation) the claimants could have earned through other employment. The district court held that the appropriate calculation was to apply the interest rate to the difference of the “but for” earnings less the interim earnings.⁷⁵¹

3. Offsetting Damages

In *EEOC v. Consol Energy, Inc.*, a jury found that the defendant failed to accommodate an employee’s religious beliefs by requiring the use of a hand scanner to clock in and out. The employee associated the scanning with followers of the Antichrist and the “mark of the beast.”⁷⁵² Finding that the defendant had an alternative to the hand scanner available but did not offer it as an accommodation, the district court awarded back pay and front pay damages of \$436,860.74, including lost pension benefits.⁷⁵³ The district court did not offset the damages with the pension benefits the employee had received since his retirement in 2012.⁷⁵⁴

Under the “collateral source rule,” compensation from a collateral source may not offset damages.⁷⁵⁵ A defendant may, however, offset damages with compensation received by a plaintiff for the injury. If a benefit is specifically provided to compensate a plaintiff for an injury and indemnify the employer, it does not constitute a collateral source and may offset damages. If the benefit does not compensate for the injury, it is from a collateral source and cannot offset damages. Pension benefits – such as those paid to the claimant here – are generally considered a term of employment rather than an attempt to indemnify. Thus, they are from a collateral source and cannot offset damages.⁷⁵⁶

4. Recovery of Costs

“Under Federal Rule of Civil Procedure 54(d)(1), costs other than attorneys’ fees are to be awarded to the prevailing party unless the court directs otherwise.”⁷⁵⁷ A party is the “prevailing party” under Rule 54 if the party has “received at least some relief on the merits.”⁷⁵⁸ “The losing party bears the burden of overcoming the presumption that the prevailing party is entitled to costs.”⁷⁵⁹

Under 28 U.S.C. § 1920, a judge or clerk of the court may tax:

1. Fees of the clerk and marshal;
2. Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
3. Fees and disbursements for printing and witnesses;

⁷⁴⁷ *Id.* at **59, 64.

⁷⁴⁸ *EEOC v. New Prime Inc.*, 2015 U.S. Dist. LEXIS 166656 (W.D. Mo. Dec. 14, 2015).

⁷⁴⁹ *EEOC v. Old Dominion Freight Line, Inc.*, 2015 U.S. Dist. LEXIS 81977, *40 (W.D. Ark. June 24, 2015) (citing 28 U.S.C. § 1961).

⁷⁵⁰ *New Prime*, 2015 U.S. Dist. LEXIS 166656, at **10-11.

⁷⁵¹ *Id.* at *14.

⁷⁵² *EEOC v. Consol Energy, Inc.*, 2016 U.S. Dist. LEXIS 15475, **2-3 (N.D. W. Va. Feb. 9, 2016).

⁷⁵³ *Id.* at **4-5.

⁷⁵⁴ *Id.* at *39.

⁷⁵⁵ *Id.* at *40.

⁷⁵⁶ *Id.* at *41.

⁷⁵⁷ *EEOC v. JBS USA, LLC*, 2015 U.S. Dist. LEXIS 61368, *5 (D. Neb. May 11, 2015) (citing *Janis v. Biesheuvel*, 428 F.3d 795, 801 (8th Cir. 2005)).

⁷⁵⁸ *Id.* at *7 (citing *Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010)).

⁷⁵⁹ *Id.* at *5 (citing *168th and Dodge, LP v. Rave Reviews Cinemas, LLC*, 501 F.3d 945, 958 (8th Cir. 2007)).

4. Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
5. Docket fees under Section 1923 of this title;
6. Compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under Section 1828 of this title.⁷⁶⁰

Following this standard, the district court in *EEOC v. St. Joseph's Hospital, LLC* awarded costs of \$17,691.24 to the EEOC to cover copy costs, service fees, witness fees, and transcript fees after the EEOC prevailed on an ADA claim.⁷⁶¹

5. Individual Liability to EEOC

In *EEOC v. Northern Star Hospitality*, the EEOC sought to enforce a prior unpaid judgment against the defendants.⁷⁶² The district court found the sole shareholder of the defendants liable for the judgment.⁷⁶³ The defendants had sold personal property belonging to one defendant for \$219,000 and transferred those funds to the mortgagee of another defendant. The Federal Priority Statute requires that a claim to the United States government be paid first when (1) a person indebted to the government is insolvent, (2) the debtor without enough property to pay all debts makes a voluntary assignment of property, and (3) that a representative of a person paying any part of a debt of the person before paying the government is liable to the extent of the payment for unpaid claims to the government. Here, the EEOC is the government, the defendants claim to be insolvent and are the debtors, the defendants made a voluntary assignment of property at a time when they claimed to be without funds to pay their debts, and the sole shareholder is a representative of the defendants (a "person" for purposes of this Statute). Thus, the sole shareholder became liable for the debts to the government when he paid the mortgagee before the government.

M. Settlements

In recent years and with varying results, the EEOC has shown it will seek enforcement and sanctions where it believes an employer has not complied with a consent decree.⁷⁶⁴ In one FY 2016 pattern-or-practice case, a consent decree required a temporary services agency to provide a list of employees, their gender, and their assignments to a third-party monitor, who would study whether the assignments were distributed neutrally with respect to gender. The employer contended the requirement to report the gender of such employees was limited to those employees who volunteered their gender, since the employer could not force employees to report that information. The monitor's recommendation was that full compliance with the decree required the employee to affirmatively determine and report the gender of each employee regardless of whether the employee volunteered this information. After the employer declined to do so, the EEOC sought enforcement, claiming the employer's failure to file an objection to the recommendation within 10 days waived the issue pursuant to the terms of the consent decree. Although the court agreed with the monitor and the EEOC that the decree imposed an affirmative gender reporting requirement, it declined to find the issue waived because of the "early point in the life of the Decree." The court also declined to award sanctions because the employer had merely misunderstood the language of the decree and because the EEOC had rejected the employer's proposal to file a joint motion for clarification.⁷⁶⁵ The court also refused to award the EEOC attorneys' fees, noting that the language of the decrees did not provide for an award of attorneys' fees for a motion for relief.⁷⁶⁶

Employers are not always successful in opposing EEOC's efforts to demand compliance with the consent decree, attorney fees, and even sanctions. Where the employer's noncompliance is viewed as extensive and willful, the court may award the EEOC attorney fees incurred in bringing a contempt motion.⁷⁶⁷ In another recent case, the court awarded \$82,000 in back pay, extended the consent decree for one year and awarded attorneys' fees and costs to the EEOC where it found the employer had failed to return three individuals to work after their disability leaves, in contempt of the

760 *Id.* at **5-6.

761 *EEOC v. St. Joseph's Hospital, Inc.*, 2015 U.S. Dist. LEXIS 152568, *2-5.

762 *EEOC v. Northern Star Hospitality*, 2015 U.S. Dist. LEXIS 169261 (W.D. Wis. Dec. 17, 2015).

763 *Id.* at *3.

764 A consent decree is both a contract and an enforceable judicial order. *EEOC v. Univ. of La. At Monroe*, 2016 U.S. Dist. LEXIS 29882, at *6 (W.D. La. Mar. 8, 2016) (citing *United States v. Alcoa, Inc.*, 533 F.3d 278, 283 (5th Cir. 2008)).

765 *EEOC v. Source One Staffing, Inc.*, 2015 U.S. Dist. LEXIS 152853, at **7-9 (N.D. Ill. Nov. 9, 2015).

766 *Id.* at *9.

767 *EEOC v. New Indianapolis Hotels, LLC*, 2015 U.S. Dist. LEXIS 152171 (S.D. Ind. Nov. 9, 2015); *See also EEOC v. Univ. of La. at Monroe*, 2016 U.S. Dist. LEXIS 29882, at **15-17 (W.D. La. Mar. 8, 2016) (no sanctions awarded where noncompliance was not willful and employer brought into compliance; however, court extended coverage of the consent decree as a remedy for the earlier noncompliance).

consent decree.⁷⁶⁸ These cases show that employers must carefully comply with consent decrees and affirmatively seek court intervention where terms are unclear.

A more detailed breakdown of settlements involving the EEOC can be found in Appendix A to this Report.

N. Misconduct by Parties

In the past year, courts have addressed two instances of misconduct by the parties involved in EEOC litigation. The alleged misconduct, in both cases, arose from an employer's arguable failure to comply with the terms of injunctive relief imposed or approved by the district court.

In the first case, *EEOC v. Peters' Bakery*, the court had issued an order to show cause for civil contempt against an employer who allegedly was not complying with the terms of a preliminary injunction.⁷⁶⁹ The preliminary injunction had forbidden the employer from terminating a complaining employee while the lawsuit was pending.⁷⁷⁰ Nonetheless, the employer cancelled the employee's upcoming shifts and ceased scheduling her for future shifts. The EEOC argued that this behavior amounted to a constructive discharge, but the employer persuaded the court otherwise. The employer clarified that, although the employee was no longer scheduled shifts, she would continue to receive her regular wages on a weekly basis and would retain her medical insurance. In light of this explanation, the court found that the injunction had not been violated and discharged the order to show cause.⁷⁷¹

The second case concerning misconduct stemmed from an employer's breach of obligations imposed by a consent decree. In *EEOC v. New Indianapolis Hotels, Inc.*, the EEOC sued the defendants for race discrimination and retaliation against African-American housekeeping employees and applicants, in violation of Title VII.⁷⁷² Although the parties entered into a consent decree in 2012, the EEOC sought a contempt order in 2014 for alleged violations of the decree. The court granted the motion for contempt in part, based on the employers' failure to comply with certain provisions, including requirements governing posting, training, and reinstatement. The court also permitted the EEOC to seek attorneys' fees and costs associated with the contempt motion. The court awarded the EEOC \$50,515 in fees and \$6,733.76 in costs. The defendants then sought to alter or amend that award, arguing that the terms of the consent decree limited such recovery to only costs.⁷⁷³ On September 9, 2016, the court denied the motion, however, because the defendants had neglected to raise the point in earlier briefing.⁷⁷⁴

O. 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."⁷⁷⁵ By its terms, this provision allows either a prevailing plaintiff or a prevailing defendant to recover attorneys' fees. However, the award of attorneys' fees to a prevailing plaintiff involves different considerations than an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."⁷⁷⁶

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 attorney generals" to bring claims.⁷⁷⁷ 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."⁷⁷⁸ Importantly,

768 *EEOC v. Supervalu, Inc.*, 2014 U.S. Dist. LEXIS 169215 (N.D. Ill. Dec. 2, 2014).

769 *EEOC v. Peters' Bakery*, 2016 U.S. Dist. LEXIS 1966, at *1-2 (N.D. Cal. Jan. 7, 2016).

770 *Id.* at *2.

771 *Id.* at *3.

772 *EEOC v. New Indianapolis Hotels, LLC*, 2016 U.S. Dist. LEXIS 122779, at *2 (S.D. Ind. Sept. 9, 2016).

773 *Id.* at **2-3.

774 *Id.* at **2-4.

775 42 U.S.C. § 2000e-5(k).

776 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416-17 (1978).

777 *Id.* at 422.

778 *Id.*

however, this standard does not require a plaintiff to have acted in bad faith.⁷⁷⁹ A decision to award fees is committed to the discretion of the trial judge who is “one the scene” in the best position to assess the considerations relevant to the conduct of litigation.⁷⁸⁰

On May 19, 2016, the U.S. Supreme Court further clarified the standard for awarding fees to a prevailing defendant, in *CRST Van Expedited, Inc. v. EEOC*.⁷⁸¹ In that case, the district court awarded \$4,694,442 in attorneys’ fees, expenses, and costs to the defendant following the parties’ settlement of the one remaining claim, out of 154 individual claims asserted by the EEOC.⁷⁸² The district court had granted summary judgment as to a significant number of the claims, largely on non-merits grounds. For example, 67 of the individual claims were dismissed due to the EEOC’s failure to comply with its own pre-suit requirements for investigation and conciliation. Upon conclusion of the case, the court held that the defendant-employer was a prevailing party on the EEOC’s pattern-or-practice claim as well as on numerous individual claims. On appeal, the Eighth Circuit held that the defendant was not a “prevailing party,” and thus not entitled to attorneys’ fees because it had not achieved a merits-based victory.⁷⁸³ Creating a circuit split, the appellate court found that fees were not recoverable for claims dismissed because the EEOC has failed to satisfy its pre-suit obligations.⁷⁸⁴

The Supreme Court took up the issue and, by unanimous decision, found in favor of the employer. The Court unequivocally explained that “a defendant need not obtain a favorable judgment on the merits in order to be a ‘prevailing party.’”⁷⁸⁵ According to the Court, both common sense and congressional policy dictated this conclusion. After considering the underlying purpose of the fee-shifting provision, the Court noted that “Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in defendant’s favor, whether on the merits or not.”⁷⁸⁶ Having addressed the primary issue, the Court nonetheless remanded the case to the Eighth Circuit for further proceedings on questions that were not adequately briefed or previously resolved by the appellate court. Specifically, the appellate court must address two additional EEOC arguments, concerning whether preclusive judgment is required for a party to prevail and whether the EEOC’s position on the adequacy of its pre-suit conduct was frivolous, unreasonable, or groundless.⁷⁸⁷ As a result, while the Supreme Court reconciled the circuit split on the legal question posed by *CRST Van Expedited, Inc.*, the saga in this case continues.

Attorneys’ fees were also addressed in several other EEOC cases this past year. We first consider two cases that resolved questions concerning the appropriate calculation of fee awards to a prevailing defendant. In *EEOC v. Global Horizons, Inc.*, the district court granted summary judgment and dismissed the EEOC’s claims brought on behalf of Thai farm workers at various orchards.⁷⁸⁸ In a decision handed down during the last fiscal year, the court found that the EEOC’s claims were baseless and frivolous.⁷⁸⁹

Thereafter, in a separate opinion, the court awarded fees in favor of the employer defendants.⁷⁹⁰ The EEOC challenged the hourly rates charged by one defense firm with lawyers located in Chicago. The firm used hourly rates from Chicago to factor its billing, rather than using rates similar to those used in the Washington venue.⁷⁹¹ The court found that the record supported the Chicago hourly rate for one of the defense lawyers but did not justify the higher rate for other attorneys or support staff. The court applied rates customary for the Eastern District of Washington for that personnel and then proceeded with the lodestar analysis.⁷⁹²

The court explained that “[u]nder the lodestar method, a two-step process is used to calculate a reasonable attorney’s fee.”⁷⁹³ As the first step, the “lodestar” is determined by “multiplying the number of hours reasonably expended

779 *Id.* at 421.

780 *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).

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

782 *Id.* at 1647–51.

783 *Id.* at 1650–51.

784 *Id.* at 1651.

785 *Id.*

786 *Id.* at 1651–52. Indeed, the seminal *Christiansburg* case “itself involved a defendant’s request for attorney’s fees in a case where the [court] had rejected the plaintiff’s claim for nonmerits reasons.” *CRST Van Expedited, Inc.*, 136 S. Ct. at 1652.

787 *CRST Van Expedited, Inc.*, 136 S. Ct. at 1653–54.

788 *EEOC v. Global Horizons, Inc.*, 100 F. Supp. 3d 1077, 1089–90 (E.D. Wash. 2015).

789 *Id.* at 1090–93.

790 *EEOC v. Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 148410, at **3–4 (E.D. Wash. Nov. 2, 2015).

791 *Id.* at **4–5.

792 *Id.*

793 *Id.* at *5.

by the reasonable hourly rate for such tasks.”⁷⁹⁴ In the second step, the court considers whether an upward or downward adjustment would be appropriate under the given circumstances, bearing in mind the “strong presumption that the lodestar is a reasonable fee.”⁷⁹⁵ The court also evaluated 11 additional factors, as required in the Ninth Circuit by *Kerr v. Screen Extras Guild, Inc.*,⁷⁹⁶ for assessing the reasonableness of the lodestar.⁷⁹⁷ Ultimately, the *Global Horizons, Inc.* court found the lodestar reasonable in light of “the complexity of the issues and the intensity of the litigation,” as well as the “time and skill required by counsel.”⁷⁹⁸ The court awarded the prevailing employer more than \$970,000 in attorneys’ fees, along with costs of nearly \$14,000.⁷⁹⁹

A fee award against the EEOC was also approved in *EEOC v. West Customer Management Group, LLC*, by the Northern District of Florida. There, a jury found in favor of the defendant-employer on the EEOC’s claims of national origin discrimination brought on behalf of an individual.⁸⁰⁰ After the verdict, the court evaluated the employer’s initial fees petition.⁸⁰¹ In granting the employer’s requested award, the court chastised the EEOC for its “decision to overly complicate matters by continuing a baseless claim at all costs through the conclusion of a jury trial after it should have been clear (by the time of the pretrial conference) that the evidence did not support the claim.”⁸⁰² The court awarded the employer \$90,541.50 in attorneys’ fees along with more than \$7,000 in expenses.⁸⁰³

The *West Customer Management Group* court next entertained the employer’s supplemental request for fees and costs. In opposition to the supplemental petition, the EEOC objected to the defendant’s addition of two attorneys to litigate the fee issues.⁸⁰⁴ The two attorneys billed 110 hours, and the EEOC contended that their work was duplicative of work performed by other attorneys staffed on the case.⁸⁰⁵ But as the court explained, awards may be granted for the work of multiple attorneys who contribute distinctly to the case, “unless ‘the attorneys are *unreasonably* doing the *same* work’ and doubling the billings.”⁸⁰⁶ There, time records revealed that the employer’s counsel carefully avoided double-billing. The court rejected the EEOC’s argument that a simple fee dispute should not require multiple attorneys, pointing out that the EEOC’s position “ignores the efficiency [defendant] achieved by billing most of the research and writing tasks at a lower rate than if the lead attorneys had done all of the work.”⁸⁰⁷

In resolving the motion, the court set out some other guiding principles applicable to fee petitions. For example, it disagreed with the EEOC’s complaint about travel time for out-of-state counsel handling the fee issue. While the EEOC contended that qualified local counsel was available, the court found that travel time was reimbursable because it was reasonable for the defendant-employer to retain experienced out-of-state counsel.⁸⁰⁸ The court also awarded 3.7 hours spent by counsel in briefing the supplemental petition for fees, despite the EEOC’s objection that it was thus awarding “fees on fees.” The court simply applied the traditional rule that “[f]ees incurred in preparing the motion for attorneys’ fees and costs are ordinarily compensable where fees are allowed to a prevailing party by statute.”⁸⁰⁹ With minor reductions for mathematical errors, the court awarded an additional \$68,779.50 in supplemental attorneys’ fees for the litigation of post-trial issues, along with more than \$1,800 in costs.⁸¹⁰

While the above two courts untangled complicated calculation disputes to award fees, three other courts this past year denied fee motions filed by prevailing defendants. In *EEOC v. Placer Arc*, the EEOC sued on behalf of a deaf

794 *Id.*

795 *Id.* at **5-6 (internal quotation omitted).

796 *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975).

797 *Global Horizons, Inc.*, 2015 U.S. Dist. LEXIS 148410, at **6-7.

798 *Id.* at *8.

799 *Id.* at **8-9.

800 *EEOC v. West Customer Mgmt. Grp.*, 2016 U.S. LEXIS 66763, at *1 (N.D. Fla. May 20, 2016).

801 *EEOC v. West Customer Mgmt. Grp.*, 2015 U.S. Dist. LEXIS 76943, at **1-8 (N.D. Fla. June 15, 2015).

802 *Id.* at *6.

803 *Id.* at **8-9.

804 *EEOC v. West Customer Mgmt. Grp.*, 2016 U.S. LEXIS 66763, at **1-2.

805 *Id.*

806 *Id.* at *2 (quoting *Johnson v. Univ. Coll. of Univ. of Ala.*, 406 F.2d 1205, 1208 (11th Cir. 1983)).

807 *West Customer Mgmt. Grp.*, 2016 U.S. LEXIS 66763, at *3.

808 *Id.* at **5-7; see *EEOC v. West Customer Mgmt. Grp.*, 2015 U.S. Dist. LEXIS 76943, at **6-8 (finding that the employer’s reliance on out-of-town counsel, “one of whom has worked on its employment matters for twenty years,” was entirely reasonable and not a grounds for reducing the billing rate).

809 *Id.* at **6-7.

810 *Id.* at *7.

employee, alleging failure to accommodate, discrimination, and retaliation under the Americans with Disabilities Act.⁸¹¹ The court granted summary judgment on the retaliation claim, and a jury found for the employer on the remaining claims.⁸¹² Although the court taxed the EEOC with more than \$19,000 in costs, it denied the employer's request for attorneys' fees.⁸¹³ In reaching this conclusion, the court applied the *Christiansburg* standard but found that the EEOC's case was not frivolous, unreasonable, or without foundation. The court pointed out that, based on the verdict form, the jury agreed with the EEOC that the claimant was a qualified individual with a disability. According to the court, the EEOC had also provided evidence from which a jury could have concluded that the employer discriminated against the claimant. Boiled down, the court reasoned that fees were not warranted because the jury had to decide legitimate questions of circumstantial evidence, even if it was not persuaded by the EEOC's case.⁸¹⁴

The court in *EEOC v. Grane Healthcare Co.* reached a similar conclusion.⁸¹⁵ There, the EEOC brought ADA claims on behalf of individuals who were subjected to pre-offer medical examinations and then allegedly denied employment because of either actual or perceived disabilities.⁸¹⁶ At the summary judgment stage, the court denied the defendants' motion but granted the EEOC's requested injunction against one of the defendant-employers. The court found that trial was necessary to determine damages, as well as whether the two defendants could be deemed a single employer. Following a bench trial, the court found that although the entities were joint employers, the medical tests conducted were not improper under the ADA and the EEOC had failed to prove discrimination. It therefore entered judgment for the defendants and assumed, for purposes of their attorneys' fees motion, that the defendants were prevailing parties.⁸¹⁷

In evaluating the defendants' fees motion, and the reasonableness of the EEOC's lawsuit, the court considered multiple factors outlined by the Third Circuit.⁸¹⁸ Those factors included:

whether the plaintiff established a prima facie case, the defendant offered to settle, the trial court dismissed the case prior to trial or the case continued until a trial on the merits . . . whether the question in issue was one of first impression requiring judicial resolution, the controversy is based sufficiently upon a real threat of injury to the plaintiff, the trial court has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and the record supports such a finding.⁸¹⁹

With those guidelines in mind, the court readily concluded that the EEOC's claims were not frivolous, unreasonable, or without foundation. Like the court in *West Customer Management Group*, the *Grane Healthcare* court emphasized that the EEOC's failure to "ultimately prevail at trial does not lead the [c]ourt to conclude that the claims were frivolous."⁸²⁰ To the contrary, the court stressed that summary judgment was denied, an injunction entered, and trial warranted, all undercutting the employers' request for fees. The court also was not convinced by the employers' argument that their \$26,000 settlement offer was "nominal" and thus weighed in favor of a fees award. And while the court agreed with the defendants that the issues raised by the complaint were not novel, it found that fees were not appropriate because the EEOC's claims were not unfounded.⁸²¹

Another Pennsylvania district court in FY 2016 rejected a fees motion brought by prevailing defendants, in *EEOC v. Dart Container Corporation*.⁸²² The EEOC had alleged race and national origin discrimination against the employer, but the claims did not withstand summary judgment.⁸²³ The defendant requested fees under Title VII as a prevailing party and also under 28 U.S.C. § 1927 as a sanction for the EEOC's allegedly vexatious litigation. In support of its motion, the employer pointed out that the EEOC's investigation and conciliation process was questionable, resulting in shifting litigation strategies. The court agreed, adding that "[t]he record shows that the EEOC identified claimants, and made conciliation demands on their behalf, before eventually dropping claimants for whom, apparently, it would later conclude

811 *EEOC v. Placer Arc*, 2016 U.S. Dist. LEXIS 75995, at **1-2 (E.D. Cal. June 10, 2016).

812 *Id.* at **1-2.

813 *Id.* at **2, 5-6.

814 *Id.* at **4-5.

815 *EEOC v. Grane Healthcare Co.*, 2016 U.S. Dist. LEXIS 77912 (W.D. Pa. June 15, 2016).

816 *Id.* at *2.

817 *Id.* at ** 16-17.

818 *Id.* at *16.

819 *Id.* at *16 (quoting *Barnes Found. v. Township. of Lower Merion*, 242 F.3d 151, 158 (3d Cir. 2001)).

820 *Id.* at *20.

821 *Id.* at **23-24.

822 *EEOC v. Dart Container Corporation*, 2016 U.S. Dist. LEXIS 9270 (E.D. Pa. Jan. 27, 2016).

823 *Id.* at *1.

it could not meet its evidentiary burden in the litigation.”⁸²⁴ Nonetheless, the court found that its grant of summary judgment for the employer did not “dictate a finding that the claims were frivolous.”⁸²⁵

In denying the defendant’s request for fees under Title VII, the court considered the above-listed factors implemented by the Third Circuit. Several factors favored the EEOC, including the fact that it set out a prima facie case and that the defendant-employer had made a settlement offer both during conciliation and prior to filing its Rule 56 motion. Several factors alternatively supported a fees award, such as the dismissal prior to trial, lack of novel issues, and lack of real threat to the underlying three claimants.⁸²⁶ On the whole, however, the court found that the employer failed to establish that the EEOC’s claims were truly groundless.

The employer’s claim for fees as a sanction under 28 U.S.C. § 1927 required a somewhat different analysis. The court explained that, “[t]o violate § 1927, an attorney must be found to have: (1) multiplied proceedings; (2) in an unreasonable and vexatious manner; (3) thereby increasing the cost of the proceedings; and (4) doing so in bad faith or by intentional misconduct.”⁸²⁷ Sanctions under § 1927, moreover, are not appropriate unless “counsel’s conduct resulted from bad faith, rather than misunderstanding, bad judgment, or well-intentioned zeal.”⁸²⁸ Pursuant to Third Circuit precedent, the district court has discretion to enter an award for fees, if it finds a litigant has acted in bad faith. The court in *Dart Container Corporation* summarily denied the employer’s request for this relief, however. In doing so, it found that the EEOC had not multiplied the proceedings unreasonably or vexatiously, even if it did add, and then remove, claimants. The court reasoned that “the scope of the litigation was not significantly changed in the same manner as if the EEOC had advanced new theories or new causes of action” while the lawsuit was pending.⁸²⁹ It therefore denied the motion for attorneys’ fees entirely.

824 *Id.* at *19 (further noting that, in the end, only three claimants remained).

825 *Id.* at *20.

826 *Id.* at *21.

827 *Id.* at *4 (internal quotation omitted).

828 *Id.* at **4–5 (internal quotation omitted).

829 *Id.* at *25.

APPENDIX A - EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS¹

SELECT EEOC SETTLEMENTS IN FY 2016

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$8.6 million	Disability Discrimination	<p>A home improvement, appliance and hardware company agreed to pay \$8.6 million under a consent decree with the EEOC to resolve a nationwide disability discrimination lawsuit. According to the agency, the company violated the Americans with Disabilities Act and engaged in a pattern or practice of disability discrimination by failing to provide reasonable accommodations when their medical leaves of absence exceeded the company's 180-day (and, subsequently, 240-day) maximum leave policy. The company also allegedly violated the ADA by terminating employees "regarded as" disability, those with a record of disability, and/or those who were associated with someone with a disability.</p> <p>Per the terms of the four-year consent decree, the employer will pay the class the monetary sum; hire a consultant with ADA experience to review and revise company policies; implement ADA training for both supervisors and staff; develop a centralized tracking system for employee requests for accommodation; maintain an accommodation log; post documentation related to this settlement; and submit regular reports to the EEOC verifying compliance with the decree.</p>	U.S.D.C. California	5/13/2016

¹ Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2016. 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 \$150,000 to plaintiffs and more than \$500,000 to defendants.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$5.26 million	National Origin Discrimination	<p>The EEOC alleged that shipbuilding and repair company subjected a class of Indian nationals to a hostile work environment and disparate terms and conditions of employment based on their national origin and race, and retaliated against some for complaining about the discrimination. According to the lawsuit, the company recruited the workers through the federal H-2B guest worker program to work at its facilities in Texas and Mississippi following hurricanes Katrina and Rita. The EEOC alleged the company subjected the men to unfavorable working conditions and forced them to pay \$1,050 a month to live in "overcrowded, unsanitary, guarded camps."</p> <p>Following a trial in a related private suit, which resulted in a \$14 million jury verdict against the company for five individuals, the employer filed for Chapter 11 bankruptcy protection. The EEOC and plaintiffs in multiple private suits negotiated a settlement in which the company established a litigation trust fund of \$20 million to resolve all litigation claims as part of the bankruptcy filing. The bankruptcy court approved the settlement, under which EEOC obtained approximately \$5.26 million for 476 Indian H-2B workers. The settlement establishes a claims process and ensures that all aggrieved individuals will receive monetary relief despite the bankruptcy proceedings.</p>	U.S.D.C. for the E.D. of Louisiana	12/18/2015
\$5.05 million	Disability Discrimination	<p>According to the EEOC, an employer failed to accommodate employees who requested the ability to sit during their shift as an accommodation. Per the terms of the conciliation agreement, the employer will provide \$5.05 million in monetary relief for the nine charging parties, 77 known class members and additional unidentified class members. The employer also agreed to provide training and restructure its accommodation process.</p>	* 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 38 of the EEOC's FY 2016 Performance and Accountability Report.
\$4 million	Race Discrimination / Hostile Environment	<p>A food manufacturing company agreed to pay \$4 million to a group of 74 African-American former employees to settle a lawsuit alleging the company maintained a racially hostile work enforcement.</p> <p>According to the EEOC, African-American employees were subjected to racist graffiti on the walls of the bathrooms and locker room. In addition, the employees alleged that they were subjected to racial slurs by supervisors and co-workers.</p> <p>Under the terms of the two-year consent decree, the company will pay the affected employees \$4 million; implement various preventative approaches regarding discrimination or harassment against any employee on the basis of race; periodically report incidents or investigations to EEOC; and provide anti-discrimination training.</p>	U.S.D.C. for the Eastern District of Texas	12/22/2015

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$3.1 million	Sex Discrimination	<p>A trucking company has agreed to settle claims that it engaged in a pattern or practice of sex discrimination by denying employment opportunities to women through its same-sex trainer policy. As a result of this policy—which was implemented to avoid instances of sexual harassment—the low number of female drivers meant fewer women could be trained and thus be eligible for hire. Following a consent order, the company agreed to pay \$250,000 to a female claimant to resolve her claims. The company also agreed through a consent decree to pay more than \$2.8 million in lost wages and damages to 63 other women who were affected by this policy.</p> <p>Under the terms of the settlement, the company will also give hiring preference to the class of women who were allegedly denied job offers on account of their sex, and make them immediately eligible for benefits without a waiting period. The company is also banned from employing its same-sex trainer policy.</p>	U.S.D.C. for the Western District of Missouri	5/31/2016
\$2.35 million	Race Discrimination	<p>According to the EEOC, a pharmaceutical company will pay \$2.35 million to resolve a series of charges alleging it denied promotion, training and equal wages to African-American workers. Per the terms of the settlement, the employer will also provide training to reaffirm its EEO policies and commitment to avoiding harassment, and will hire an independent organization to follow up on discrimination complaints.</p>	* 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 38 of the EEOC's FY 2016 Performance and Accountability Report.
\$2.1 million	Sex Discrimination	<p>A NY-based tire retailer has agreed to pay \$2.1 million to resolve a class sex discrimination lawsuit. According to the EEOC, the company engaged in a pattern or practice of sex discrimination when it allegedly refused to hire women for its field positions in over 140 stores throughout the Northeast. The EEOC also alleged the company failed to properly maintain employment records.</p> <p>Per the terms of the consent decree, in addition to paying \$2.1 million to the class of 46 women, the company has agreed to implement new hiring goals for women, recruiting protocols, and anti-discrimination policies and training.</p>	U.S.D.C. for the Southern District of New York	3/25/2016

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1.7 million	Disability Discrimination	<p>An Illinois-based provider of advanced packing solutions agreed to conciliate claims of disability discrimination filed with the EEOC. According to the EEOC, following an investigation, the agency found reasonable cause to believe the company “discriminated against individuals with disabilities by disciplining and discharging them according to its nationwide policies to issue attendance points for medical-related absences; not allowing intermittent leave as a reasonable accommodation; and not allowing leave or an extension of leave as a reasonable accommodation.”</p> <p>In addition to paying \$1.7 million, the company has agreed to take affirmative steps to prevent discrimination from occurring. According to the agreement, the company will conduct ADA training at each of its locations nationwide; .revise and distribute its ADA policy and procedures, including those related to providing reasonable accommodations to employees; and revise and distribute nationwide its new attendance policy that will not assess points for disability-related absences. In addition, the company will provide periodic reports to the EEOC regarding all accommodation requests, and post an internal notification to its employees nationwide of this conciliation.</p>	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	11/5/2015
\$1.65 million	Race and National Origin Discrimination	<p>A union and its associated apprenticeship school agreed to settle a lawsuit filed by the EEOC for allegedly discriminating against individuals on the basis of race and national origin with regard to hiring, termination and the assignment of hours and wages.</p> <p>According to the EEOC, Local 25 of the Sheet Metal Workers’ International Association discriminated against black and Hispanic journeypersons in hiring and assignments. The settlement covers violations from April 1991 through December 2002. The EEOC also alleged African-American and Hispanic workers received fewer hours of work than their white co-workers for most of the 10-year period. Prior court actions in the lawsuit resolved violations before April 1991.</p> <p>Under the terms of the decree, the union will pay a combined \$1.65 in damages to journeypersons impacted by the discrimination. In addition, the union agreed “to an injunction against thwarting, frustrating, impairing, or otherwise impeding the goals of the court’s anti-discrimination orders.”</p>	U.S.D.C. for the Southern District of New York	4/13/2016

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1.5 million	Sex Discrimination	<p>A uniform manufacturer and supplier settled a sex discrimination lawsuit filed by the EEOC for \$1,500,000. According to the EEOC, the company failed to hire women for the position of service sales representative (SSR) throughout Michigan from 1999 until March 31, 2005.</p> <p>Per the terms of the consent decree, the company will pay the class of women who applied, but were not hired, \$1,500,000 in back pay, as well as pay an additional \$50,000 to a third-party claims administrator to distribute money to the class.</p> <p>In addition to the monetary requirements, the company agreed to hire an outside expert to revalidate the criteria used to screen, interview and select SSRs; provide training to the individuals involved in the selection of SSRs in Michigan; and to provide diversity, harassment and anti-discrimination training annually to employees, including SSRs. For a 28-month period, the company must also provide to the EEOC information and materials on training programs, recruiting logs, and job descriptions.</p>	U.S.D.C. for the Eastern District of Michigan	11/30/2015
\$1.4 million	Sexual Harassment and Retaliation	<p>According to the EEOC's lawsuit, a restaurant manager verbally and physically sexually harassed 12 women and teen girls working in server, hostess and other front-of-the-house positions. The harassment allegedly lasted over a three-year period. The complaint also alleged the owner/operator and management company retaliated against those who complained about the harassment.</p> <p>Although the employees purportedly complained to high-level management and the companies' owners, the companies failed to take prompt and effective action to stop the harassment. The manager at issue was fired only when surveillance video provided evidence that he inappropriately touched a teenage employee.</p> <p>Under the five-year consent decree, the affected employees will be offered reinstatement. The companies are prohibited from re-hiring the offending manager. Additionally, the companies must institute an electronic recordkeeping system to track all gender discrimination and retaliation complaints, and includes mandatory reporting of any allegedly discriminatory or retaliatory adverse employment action, such as failure to hire or promote.</p> <p>The decree also mandates anti-harassment and anti-discrimination training, as well as training on how to respond to and process complaints. The companies must report how they handle such complaints to the EEOC, and post a notice of the settlement at all restaurants covered by the decree.</p>	U.S.D.C. for the Southern District of Ohio	9/21/2016

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1.4 million	Race Discrimination	<p>According to the EEOC, a payroll processing and human resource management outsourcing provider agreed to conciliate charges the EEOC filed in Illinois federal court. Under the terms of the conciliation agreement, the company will pay approximately \$1.4 million and enhance its recruitment, hiring and promotion of minorities at its Illinois-based operations. The company has also agreed “to periodically inform EEOC on its future efforts to expand employment opportunities for minority applicants and employees.”</p> <p>The basis of the charges was that the company discriminated against black and Hispanic individuals. The charges were resolved without the company admitting liability.</p>	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	7/29/2016
\$1.042 million	Race and National Origin Discrimination	<p>A bakery agreed to settle claims of class race and national origin discrimination. According to the EEOC, the company discriminated against three job applicants and a class of African-American and non-Hispanic applicants by failing to hire them into entry-level jobs because of their race. The company also allegedly used hiring practices, such as word-of-mouth recruiting and advertising a Spanish-language preference, that had an adverse disparate impact on black and other non-Hispanic applicants without any business justification.</p> <p>Under the four-year consent decree, the company will pay the affected individuals \$1,042,000, seek to recruit and hire black and other non-Hispanic job applicants for its production jobs; conduct an extensive self-assessment of its hiring to ensure non-discrimination and compliance with the terms of the consent decree; conduct employee training to further its non-discrimination commitment; and designate an internal leader to prioritize compliance with the requirements of the consent decree.</p>	U.S.D.C. Southern District of Texas	4/26/2016

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1.02 million	Sex and Age Discrimination	<p>A medical device and equipment manufacturer has agreed to pay \$1,020,000 and provide other equitable relief to resolve charges of age and sex discrimination. According to the EEOC, the company violated the law by refusing to hire otherwise qualified applicants for outside sales positions because they were female or over the age of 40. The alleged discrimination occurred between Jan. 1, 2007 and late 2010, when it hired more than 70 individuals as sales representatives, none of whom were female or over age 40.</p> <p>Under the terms of the four-year consent decree, the company will pay \$1.02 million to the class of rejected job applicants, be subject to monitoring by the EEOC, submit regular reports to the EEOC, conduct training for employees involved in the hiring process, and retain an external human resources consultant to review and recommend changes to their workplace policies.</p>	U.S.D.C. Minnesota	3/7/2016
\$1.02 million	National Origin Discrimination and Sexual Harassment	<p>A condominium complex and its management company agreed to pay \$1,020,000 as part of the settlement of a sexual harassment, national origin discrimination and retaliation lawsuit brought by the EEOC. According to the lawsuit, the parties allowed a housekeeping manager to sexually harass Mexican female employees, including attempted rape. The defendants also allegedly retaliated against men and women who complained about the harassment to management and the owner, including threats of job loss and deportation.</p> <p>In addition to requiring the company to pay monetary damages to the former employees, the five-year consent decree provides for a Spanish-speaking monitor to oversee the decree's implementation. The defendants also agreed to semi-annual training for managers on sexual harassment and the responsibilities of managers once a report of sexual harassment is made. The company must also translate its equal employment opportunity policies into Spanish and provide semi-annual reports to EEOC identifying complaints of retaliation or discrimination.</p>	U.S.D.C. Colorado	2/12/2016
\$1 million	Disability Discrimination	<p>According to the EEOC, an employer in the aerospace industry agreed in a negotiated settlement "to provide \$1 million in monetary relief, appoint an ADA coordinator, revise ADA/ reasonable accommodation policies and related training on new policies for management and non-management, distribute new policies, and implement a system to track and maintain information on all reasonable accommodation requests."</p>	* 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 38 of the EEOC's FY 2016 Performance and Accountability Report.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$1 million	Race and National Origin Discrimination	The EEOC alleged that a bakery employer denied employment to African-American and non-Hispanic applicants for entry-level production jobs because of their race and national origin. According to the EEOC, a consent decree provides for about \$1 million to be paid into a qualified settlement fund. Per the terms of the decree, the employer will also offer production positions to eligible claimants before hiring any other applicant unless it needs a readily available applicant to meet its production requirements.	U.S.D.C. for the Southern District of Texas	No press release was issued. The EEOC references this settlement on page 41 of the EEOC's FY 2016 Performance and Accountability Report.
\$750,000	Sex and Race Discrimination and Harassment	According to the EEOC, a company agreed to pay \$750,000 to resolve claims of systemic sexual and racial harassment, and claims stemming from the employer's conviction record screen that allegedly discriminated against African-American and Hispanic applicants. The conciliation agreement included revisions to the company's anti-harassment policies as well as revisions to its policies regarding use of conviction records as an employment screen at the employer's entire division nationwide. The EEOC also obtained a public disclosure provision in the agreement to highlight three Strategic Enforcement Plan priorities.	* 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 38 of the EEOC's FY 2016 Performance and Accountability Report.
\$600,000	Age Discrimination	A manufacturer of rubber products for the automotive industry agreed to settle a class age discrimination lawsuit for \$600,000. According to the EEOC, the company discriminated against a class of employees when it subjected the individuals to layoff because of their age. The company allegedly reclassified employees age 40 and over from "Tech II" to "Tech III" positions "through the use of misrepresentations, coercion, or threats . . . and that this reclassification resulted in the reclassified employees losing their seniority dates and ultimately being laid off." Under the terms of the two-year consent decree, the company will pay \$600,000 to the 25 class members; develop a new layoff and age discrimination policies; provide annual age discrimination training; require a high-level executive to appear at the conclusion of the training in person or via video conference to announce the company's non-discrimination age policy and the consequences for violating such policy; permit the EEOC to monitor the company's compliance with the consent decree; and post a notice of the resolution of the lawsuit in the workplace.	U.S.D.C. for the Eastern District of Tennessee	12/17/2015

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
\$582,000	Sexual Harassment	<p>A commercial laundry services company agreed to pay \$582,000 to eight former employees to settle a sexual harassment lawsuit. According to the EEOC, the manager at issue “physically and verbally sexually harassed multiple women who worked at the facility.”</p> <p>Under the terms of the four-year consent decree, the company, in addition to paying the monetary damages, agreed to institute new procedures and provide training on sexual harassment. The EEOC will also monitor the company’s compliance with these obligations.</p>	U.S.D.C. for the Eastern District of New York	12/1/2015
\$525,000	Sex Discrimination	<p>According to the EEOC, the agency resolved a systemic investigation covering nine states. The Commission alleged the employer segregated women into administrative occupations. The employer agreed to pay \$525,000 in monetary benefits, provide training to its managers and hiring officials, change its hiring procedure and invest up to \$75,000 of the settlement amount in recruitment designed to reach female applicants.</p>	* 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 38 of the EEOC’s FY 2016 Performance and Accountability Report.

SELECT EEOC JURY AWARDS OR JUDGMENTS IN FY 2016:²

JURY OR JUDGMENT AMOUNT	CLAIM	DESCRIPTION	CASE CITATION	EEOC PRESS RELEASE
\$7.66 million	National Origin and Race Discrimination, Harassment, Constructive Discharge and Retaliation	In this long-running case, a district court judge granted default judgment in favor of a group of Thai farmworkers in Washington State, and ordered a farm labor contractor to pay \$7,658,500 for allegedly engaging in a pattern or practice of subjecting the workers to a hostile work environment, harassment and discrimination. According to the EEOC, each Thai farmworker who was detained by the police because the company withheld his or her passport would receive an enhanced award of \$2,500. A worker allegedly struck on the head by a supervisor was ordered to receive an additional punitive damages award of \$16,000 for each month he worked under such abuse.	<i>EEOC v. Global Horizons, Inc., et al.</i> , Case No. 2:13-cv-03045-EFS (E.D. Wash. Apr. 26, 2016)	5/2/2016
\$1.47 million	Sexual Harassment and Retaliation	The EEOC alleged two male supervisors sexually harassed female employees and retaliated against employees who complained. On May 13, 2016, a magistrate judge issued findings and recommendations that the plaintiffs' motion for default judgment be granted. On July 21, 2016, the court adopted the magistrate's findings and recommendations, and entered judgment in favor of the plaintiffs and against the Z Foods, Inc., in the amount of \$1.47 million in compensatory and punitive damages. Each of the nine plaintiffs was awarded punitive damages in the amount of \$200,000 each, offset by a \$330,000 settlement reached by the predecessor company, Zoria Farms.	<i>EEOC v. Zoria Farms, Inc.; Z Foods Inc.</i> , No. 1:13-cv-01544-DAD-SKO (E.D. Cal. July 21, 2016)	7/22/2016
\$986,033	Race and National Origin Discrimination	The EEOC alleged the farm defendants had discriminated against Thai workers under the H-2A guest worker program. The court determined the allegations were baseless and frivolous. In granting the motion for attorneys' fees, the court explained that the EEOC "failed to conduct an adequate investigation to ensure that Title VII claims could reasonably be brought against the Grower Defendants, pursued a frivolous theory of joint-employer liability, sought frivolous remedies, and disregarded the need to have a factual basis to assert a plausible basis for relief under Title VII against the Grower Defendants." <i>EEOC v. Global Horizons Inc.</i> , No. 2:11-cv-03045 (E.D. Wash. Mar. 18, 2015). The defendants filed a motion seeking \$1.1 million, but were awarded more than \$980,000 under the lodestar method.	<i>EEOC v. Global Horizons, Inc.</i> , 2015 U.S. Dist. LEXIS 148410 (E.D. Wash. Nov. 2, 2015)	None available

² Fees and costs awarded to defendants are shaded.

JURY OR JUDGMENT AMOUNT	CLAIM	DESCRIPTION	CASE CITATION	EEOC PRESS RELEASE
\$278,000	Disability Discrimination, Failure to Accommodate	A jury found in favor of the EEOC, which brought suit on behalf of an insulin-dependent diabetic cashier who was fired for drinking orange juice at her work station before paying for it. The employee purportedly took the juice to prevent a hypoglycemic attack, and had told her supervisor she was diabetic and had asked to keep juice on hand in case of an emergency. Her supervisor allegedly told her that the store did not allow employees to keep food or drink at the register, although the store did maintain an accommodation policy that would have allowed the employee to do so. Following a loss prevention audit, the employee admitted purchasing the juice after drinking it, and was found in violation of the store's "grazing" policy. The jury agreed with the EEOC that the termination was in violation of the ADA, and therefore unlawful, awarding her \$27,565 in back pay and \$250,000 in compensatory damages.	<i>EEOC v. Dolgencorp, LLC</i> , No.3:14-CV-441 (E.D. Tenn. Sept. 16, 2016)	9/19/2016
\$240,000	Religious Discrimination, Failure to Accommodate	On October 20, 2015, a federal jury in Illinois awarded \$240,000 to two Somali-American Muslims who claimed they were fired as truck drivers when they refused to transport alcohol based on religious objections, and the company refused to accommodate their religious beliefs. The U.S. District Court for the Central District of Illinois, found in favor of the EEOC after the company admitted liability in March 2015. The October trial was held to determine compensatory and punitive damages and back pay. The jury awarded each claimant \$20,000 in compensatory damages and \$100,000 in punitive damages. The judge awarded each approximately \$1,500 in back pay.	<i>EEOC v. Star Transport, Inc.</i> , No. 13-cv-1240 (C.D. Ill. Oct. 20, 2015)	10/22/2015
\$179,000	Sex Discrimination	The EEOC alleged a staffing company violated Title VII by failing to hire six women for residential temporary trashcan collector (RTCC) positions because of their gender. Female applicants were allegedly told the RTCC was a "male-only" job. The court also found that the company denied at least five other qualified women the opportunity to apply for such positions because of their sex. The court awarded the plaintiffs default judgment after the company did not respond to the EEOC's allegations. Thus, the court found the company liable for discriminatory conduct and awarded monetary relief totaling \$179,000, including punitive damages, compensatory damages and back pay.	<i>EEOC v. Workplace Staffing Solutions, L.L.C.</i> , Case No. 1:15cv360LG-RHW (S.D. Miss. July 7, 2016)	7/18/2016

APPENDIX B - FY 2016 EEOC AMICUS AND APPELLANT ACTIVITY³

FY 2016 - APPELLATE CASES WHERE THE EEOC FILED AN AMICUS BRIEF

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Browning-Ferris v. NLRB</i>	U.S. Court of Appeals for the District of Columbia Circuit 16-1208, 16-1063, 16-1064	9/14/2016	Title VII	Joint Employment Result: Pending	<p>Background: A regional director of the NLRB found that the company was not a joint employer with one of its contractors. On review of that decision, the NLRB abandoned its then-current joint-employer standard developed in the mid-1980s, and allegedly reverted to its original standard, which states that “two or more entities are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment.”</p> <p>Issue EEOC is Addressing as Amicus: Whether the court should affirm the NLRB’s new joint employer test.</p> <p>EEOC’s Position: The EEOC argues that its joint employer test is consistent with the NLRB’s joint employment test articulated in this matter. The EEOC also argues that the NLRB’s newly enunciated test successfully identifies the entities with meaningful control over the terms and conditions of employment.</p> <p>The EEOC argues that its test appropriately looks to the totality of circumstances, including the right to control employees, and indirect control of employees. The EEOC also argues that, contrary to the employer’s argument, a fact-specific inquiry is neither vague nor unworkable.</p> <p>The EEOC argues that the Board’s articulated standard is consistent with its standard and should be accepted by the court.</p> <p>Court’s Decision: This case remains pending.</p>

³ The information included in Appendix B, including the “FY 2016 Appellate Cases Where the EEOC Filed an Amicus Brief” and “FY 2016–Appellate Cases Where the EEOC Filed as the Appellant” were pulled from the EEOC’s publicly available database of appellate activity available at <http://www1.eeoc.gov/eeoc/litigation/briefs.cfm>. Appendix B includes select cases from this database. The cases are arranged in order by Circuit.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Kennedy v. Bowser</i>	U.S. District Court for the D.C. Circuit No. 15-7143	5/2/2016 (filed) 12/9/16 (decided)	ADA	Disability Statute of Limitations Result: Pro-Employer	<p>Background: The plaintiff was employed as a firefighter for 11 years. The employer's policy requires that its firefighters are to be clean-shaven so that they can safely wear respirators. The plaintiff suffered from a skin condition for which the only treatment was to stop shaving.</p> <p>In 2008, the plaintiff's doctor recommended that he stop shaving even though he had previously been in compliance with the clean-shave policy. When the plaintiff took this recommendation to the employer's clinic, he was placed on limited duty.</p> <p>In early July 2008, the plaintiff's dermatologist advised him to maintain a beard of at least 1/8 inch. The plaintiff submitted his documentation to the employer and he was nonetheless required to submit a special report regarding his inability to shave. The plaintiff expressly requested an accommodation for his skin condition.</p> <p>The employer suspended him for his failure to comply with its clean-shaven policy and was placed on administrative leave.</p> <p>After a leave of absence for unrelated conditions, the plaintiff reiterated his request for an accommodation for his skin condition. It was recommended that the plaintiff remain on limited duty, but days later, he was informed that he was being subjected to an involuntary retirement process.</p> <p>While still employed, in 2010, the plaintiff was not permitted to participate in a fit test with his 1/8 inch of facial hair. He was charged with insubordination for not complying with the clean-shaving policy.</p> <p>The plaintiff filed charges with the EEOC, which found reasonable cause to believe that the discrimination had occurred. The plaintiff filed suit and alleged that his employer failed to accommodate his skin condition in violation of the ADA.</p> <p>The district court granted the employer's motion to dismiss. It determined that pre-ADAAA standards govern this case and, finding this, determined that the plaintiff was not substantially limited in a major life activity.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>Issue EEOC Is Addressing as Amicus: Whether the ADAAA applied to the plaintiff's requests for accommodation in 2009 and 2010, even though he first sought a reasonable accommodation for the same condition in 2008.</p> <p>EEOC's Position: The EEOC argued that the ADAAA applied to the plaintiff's 2009 and 2010 requests for accommodation. First, the EEOC argued that the 2009 and 2010 refusals to accommodate the plaintiff were each independent acts which are discrete discriminatory acts under Supreme Court precedent.</p> <p>The EEOC also argued that the district court wrongly applied precedent in determining that pre-amendment liability standards governed this matter. The EEOC argued that the employer's later refusals to accommodate the plaintiff were not the inevitable result of the initial refusal to accommodate the plaintiff's initial request for accommodation.</p> <p>The EEOC also argued that the district court's policy concerns do not support its decision. That is, the district court reasoned that future plaintiffs could circumvent the non-retroactivity of the ADAAA by simply re-requesting an accommodation. The EEOC countered that the plaintiff's failure to accommodate claim does not depend on any conduct arising before the ADAAA's enactment.</p> <p>The EEOC also argued that its guidance supports the plaintiff's position. Thus, the EEOC asserted that the plaintiff's position was supported by Supreme Court, circuit court and district court precedent and the EEOC's enforcement guidance.</p> <p>Court's Decision: Oral argument was held on October 6, 2016. On December 9, 2016, the D.C. Circuit dismissed the appeal for lack of jurisdiction.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Pippin & Parker v. Boulevard Motel Corp.</i>	U.S. Court of Appeals for the First Circuit Nos. 15-2011, 15-2012	1/6/2016 (filed) 8/31/2016 (decided)	Title VII	Retaliation Result: Pro-Employee	<p>Background: Both plaintiffs were managers that reported subordinates for sexual harassment against other employees. The plaintiffs also complained to the defendant after disagreeing with the outcome of defendant's investigation into these incidents. Defendant ultimately terminated plaintiffs for unrelated performance issues and plaintiffs filed suit under the Maine Human Rights Act ("MHRA") and Title VII. The district court granted summary judgment for defendant, holding plaintiffs did not engage in protected activity under the "manager rule" because they did not step out of their normal employment role as a manager in reporting these instances of harassment.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court erred in applying the "manager rule" to hold that managers with a duty to report discrimination are not protected under the MHRA and Title VII unless they "step outside" of their normal job duties in reporting discriminatory behavior.</p> <p>EEOC's Position: First, the EEOC objected to any application of the judicially created "manager rule" arguing that such a requirement is beyond the plain language of the statute. Specifically, the EEOC asserted that the anti-retaliation provisions of Title VII make it unlawful to retaliate against "any" employee who "opposes" any practice made unlawful under the Act and there is no exception or extra requirements for employees who have a duty to report such misconduct. Second, the EEOC argued that the "manager rule" is at odds with the remedial objectives of Title VII and therefore should be rejected.</p> <p>Court's Decision: The First Circuit reversed the order of the district court granting summary judgment, and remanded the case for further proceedings.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Christiansen v. Omnicom Group</i>	U.S. Court of Appeals for the Second Circuit No. 16-748	6/28/2016	Title VII	Sex Result: Pending	<p>Background: The 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 with a large penis and his head on the body of a bikini-clad woman, etc. Plaintiff's boss originally circulated the bikini picture in 2011, but plaintiff learned that the picture was posted on Facebook in 2014. The plaintiff repeatedly complained but the picture was not removed until January 2015. The 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 <i>Simonton v. Runyon</i>, 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. The plaintiff appealed.</p> <p>Issue EEOC is Addressing as Amicus: Whether claims of sexual orientation discrimination constitute Title VII sex discrimination.</p> <p>EEOC's Position: The 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 <i>Price Waterhouse</i>. The EEOC argues that Title VII does not suggest that it protects only heterosexual employees from same-sex harassment.</p> <p>The EEOC argues that sexual orientation discrimination is sex discrimination. <i>Price Waterhouse</i> 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.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>The EEOC argues that the court should reconsider <i>Simonton</i> because it is outdated and there is no longer support for the holding that Title VII does not prohibit sexual orientation discrimination. <i>Simonton</i> 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 <i>Baldwin v. Foxx</i>, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015); No. 1:15-cv-23825, (S.D. Fla.) (offer of judgment accepted Dec. 19, 2016). In light of more recent district court and Commission decisions, the court should hold that Title VII prohibits sexual orientation discrimination.</p> <p>Court's Decision: The case is currently pending with the court. Oral argument was held January 20, 2017.</p>
<p><i>Dunaway v. MPCC Corporation</i></p>	<p>U.S. Court of Appeals for the Second Circuit No. 15-2587</p>	<p>11/24/2015 (filed) 10/18/2016 (decided)</p>	<p>ADEA</p>	<p>Age Result: Pro-Employer</p>	<p>Background: The plaintiff was asked by the employer during interview how old he was, after stating the company was looking for someone to be in the position for 10 to 15 years. The employer ultimately selected another applicant for the role. The plaintiff sued, alleging age discrimination and retaliation. The district court granted summary judgment for the employer, reasoning that there was no evidence to dispute the hiring manager's testimony that the reason for his question was not due to age, but to ascertain whether the plaintiff intended to retire in the short term.</p> <p>Issue EEOC is Addressing as Amicus: Whether an employer who asked an applicant age-related inquiries during an interview engaged in conduct that gives rise to an inference of age discrimination for the purpose of establishing a <i>prima facie</i> case.</p> <p>EEOC's Position: The EEOC argued that burden on a plaintiff to establish his or her <i>prima facie</i> case is minimal, and that a direct question about an applicant's age is sufficient to meet this burden. Accordingly, the district court erred in failing to draw inferences in favor of the plaintiff at the summary judgment stage. This was particularly true, the EEOC argued, because the district court improperly dismissed evidence that the employer did not ask other applicants his or her age.</p> <p>Court's Decision: On December 18, 2016, the Second Circuit affirmed the district court's decision.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Kovaco v. Rockbestos-Surprenant Cable Corp.</i>	U.S. Court of Appeals for the Second Circuit No. 15-2037	11/4/2015 (filed) 8/22/2016 (decided)	ADA ADEA Title VII	Age Disability National Origin Result: Pro-Employer	<p>Background: The plaintiff was a Romanian maintenance mechanic who was allegedly subject to repeated harassment on the basis of his age and national origin. The employer ultimately terminated the plaintiff after an alleged safety violation. The plaintiff filed suit, alleging age and disability discrimination, failure to accommodate and retaliation. The district court denied summary judgment with respect to the retaliation and failure to accommodate claims, but dismissed his age and disability discrimination claims, reasoning he was not qualified given his application for Social Security Disability Insurance.</p> <p>Issue EEOC is Addressing as Amicus: (1) Whether the district court erred in ruling that the plaintiff could not establish a <i>prima facie</i> case of discriminatory discharge or hostile work environment based on national origin and/or age on the ground that the award of disability benefits demonstrated the plaintiff was not “qualified” for his job; and (2) whether the district court erred in dismissing the plaintiff’s disability discrimination claim based on his SSDI determination.</p> <p>EEOC’s Position: First, the EEOC argued that an SSDI determination of disability does not prevent a plaintiff from meeting the “qualified” requirements under a Title VII or ADA claim. Second, the EEOC asserted that the <i>prima facie</i> burden established under <i>McDonald-Douglas</i> does not apply to hostile work environment claims. Third, the EEOC argued that the plaintiff’s SSDI determination does not prevent him from being a qualified person with a disability under the ADA because there was evidence he could perform the essential functions of his position with an accommodation.</p> <p>Court’s Decision: The Second Circuit affirmed the judgment of the lower court</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Magnusson v. County of Suffolk</i>	U.S. Court of Appeals for the Second Circuit No. 15-2037	9/29/2016	Title VII	Sex Result: Pending	<p>Background: The plaintiff is a 56 year old gay woman who has worked as a custodial worker since 2000. She informed her colleagues of her sexual orientation in 2014. Throughout her employment, the plaintiff had short hair, she frequently wore jeans, she did not carry a purse, and she did not wear any makeup. The plaintiff was told by her supervisor that she needed to lose weight to look more like a woman. In 2003, the 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. The plaintiff was ultimately transferred from a position where she could earn overtime to a position with almost no overtime opportunities. The 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. The plaintiff appealed.</p> <p>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 the plaintiff was discriminated against because she did not conform to traditional feminine stereotypes.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>EEOC's Position: Regarding the first issue, the EEOC argues that the court should reconsider <i>Simonton v. Runyon</i>, 232 F.3d 33 (2d Cir. 2000) because it is outdated and incorrect. <i>Price Waterhouse</i> 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 has been taken into consideration in this case. The EEOC also argues sexual orientation discrimination is associational discrimination, which violates Title VII. Finally, the EEOC argues that the court should reconsider <i>Simonton</i> 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) <i>Simonton</i> leads to absurd results (i.e., "it is impossible to coherently parse out sexual orientation discrimination from gender stereotyping discrimination").</p> <p>With regard to the second issue, the EEOC argues that plaintiff's alleged facts constitute sufficient evidence of gender stereotyping to defeat the employer's summary judgment motion.</p> <p>Court's Decision: The case is currently pending with the court.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Wade v. The New York City Dept of Education</i>	U.S. Court of Appeals for the Second Circuit No. 14-1201	11/2/2015 (filed) 6/30/2016 (decided)	ADA	Disability Result: Pro-Employer	<p>Background: The plaintiff was employed as a probationary drama teacher for one of the employer's middle schools. The plaintiff alleges that her supervisor was uncomfortable with treatments related to her cancer diagnosis, and often presented her with a large and difficult class load. The employer terminated the plaintiff's employment after investigating and substantiating two student reports that she engaged in unprofessional conduct. The plaintiff then filed suit <i>pro se</i> alleging various claims of employment discrimination, including termination on the basis of a disability under the ADA. The district court granted summary judgment to the defendant, holding that the plaintiff presented no evidence how her cancer treatments impaired a major life activity to qualify as a disability. The employer offered legitimate, non-discriminatory reasons for the plaintiff's termination.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court erred in ruling that the plaintiff was not disabled under the amended ADA.</p> <p>EEOC's Position: The EEOC argued that in 2008 Congress amended the ADA in part to expand the scope of qualifying disability and the district court improperly relied on pre-amendment case law. The EEOC also argued that although the plaintiff's cancer is in remission, she continues to receive follow-up care which substantially limits the major life activity of normal cell growth. Further the EEOC asserted that the plaintiff has a "record of" a disability with her prior cancer diagnosis and treatment.</p> <p>Court's Decision: The Second Circuit affirmed the lower court's judgment.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Betz v. Temple Heath Systems</i>	U.S. Court of Appeals for the Third Circuit No. 16-1423	6/1/2016 (filed) 10/6/2016 (decided)	Title VII	Harassment Sex Result: Affirmed Pro-Employer on Both Claims	<p>Background: The plaintiff was a registered nurse at a hospital. The plaintiff alleged the nurses made sexually offensive comments and gestures to one another. She did not allege she was the target of that behavior. She repeatedly complained but her supervisor failed to take action, and allegedly threatened her with termination if she continued to complain. Plaintiff filed suit alleging sex harassment and hostile work environment because of sex under Title VII. The defendant moved to dismiss for failure to state a claim. The district court granted the employer's motion and the plaintiff appealed.</p> <p>Issue EEOC is Addressing as Amicus: (1) Can the plaintiff claim Title VII sex discrimination without alleging she was individually targeted? (2) Did the district court err by limiting the plaintiff to three methods of proof to prove same-sex harassment? (3) Did the plaintiff prove she experienced a hostile work environment because of her sex?</p> <p>EEOC's Position: The EEOC argued that, pursuant to the EEOC Policy Guidance and every circuit court that has addressed this issue, a plaintiff may state a sex harassment claim without being targeted for harassment if the harassment is pervasive and if the plaintiff is a member of a targeted group.</p> <p>The EEOC argued that the district court improperly limited the plaintiff to three methods of proof under <i>Bibby v. Philadelphia Coca Cola Bottling Co.</i>, 260 F.3d 257, 262 (3d Cir. 2001). Unlike <i>Bibby</i>, this case concerns a complaint, and the plaintiff has not had an opportunity to develop all of the facts. <i>Bibby</i> applied those methods in a case post-discovery, and moreover, <i>Bibby</i> agreed with <i>Oncale v. Sundowner Offshore Services</i>, 523 U.S. 75 (1998), that the three methods are not the exclusive means of proving same-sex harassment. Based on that, and because this case is at the complaint stage, the EEOC contends the plaintiff has alleged enough facts to defeat the employer's motion to dismiss.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>Court's Decision: The Third Circuit affirmed the district court's opinion. First, the appellate court stated the district court dismissed plaintiff's claim only because she failed to plead facts to show she was targeted "because of" her gender. Second, the district court did not limit the plaintiff to three methods of proof. The court noted if the plaintiff wanted to argue an evidentiary route other than those discussed in <i>Bibby</i>, the district court likely would have considered the argument. The court concluded that since there was extensive discovery on closely related claims (plaintiff included other claims in her lawsuit that were not dismissed), and an unfavorable jury verdict, reversing the district court's decision would not make sense.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Capps v. Mondelez Global, Inc.</i>	U.S. Court of Appeals for the Third Circuit No. 15-3839	3/7/2016 (filed) 1/30/2017 (decided)	ADA	Disability Result: Pro-Employee	<p>Background: The plaintiff worked as a mixing technician, who loaded ingredients into and ran a mixing machine that makes dough. He has a degenerative bone disease that necessitated a double hip replacement surgery in 2004. Following this surgery, the plaintiff required intermittent FMLA leave for periodic inflammation in his hips and this was routinely requested and granted.</p> <p>During one period of FMLA leave due to his inflammation, the plaintiff was pulled over for driving while intoxicated and was taken to jail for a "few hours." The next day, the plaintiff called off for an additional day of intermittent leave for his leg pain and then returned for his next scheduled shift.</p> <p>Upon learning of the plaintiff's DWI, the employer investigated whether the plaintiff has misused his FMLA leave. Following this investigation, the employer concluded that the plaintiff had misused his FMLA leave and terminated him for violations of the company's dishonesty policy.</p> <p>The plaintiff alleged that his FMLA leave was interfered with, that he was terminated due to his disability, that the employer failed to accommodate his disability, and retaliated against him for exercising his ADA rights.</p> <p>The district court granted the employer's motion for summary judgment in full. It rejected the plaintiff's FMLA interference claim because he was provided the requested leave. The plaintiff's FMLA retaliation claim was rejected because he could not show that the termination was causally connected to his FMLA leave or that the termination for misuse of FMLA leave was a pretext for retaliation.</p> <p>With respect to the plaintiff's disability, the district court held that the plaintiff had not requested accommodation and that "a request for FMLA leave is not alternatively a request for reasonable accommodation" under the ADA. The district court explained that a request for FMLA tells the employer that the employee's serious health condition renders the employee unable to perform the functions of the position, whereas a request for reasonable accommodation signals that the person can perform the essential functions of the position with such accommodation.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>Issue EEOC is Addressing as Amicus: Whether a request for intermittent FMLA leave precludes an accommodation request under the ADA because it constitutes an admission that an employee cannot perform an essential function of the position and, if not, whether a request for FLMA leave can simultaneously serve as a request for accommodation under the ADA.</p> <p>EEOC's Position: The EEOC argues that, contrary to established authority from other circuits, the district court in this case mistakenly held that a request for FMLA leave precludes an employee from being considered a "qualified individual" under the ADA.</p> <p>The EEOC argued the FMLA and ADA have complementary goals and qualifying for relief under one does not preclude application of relief under the other. The EEOC asserted that the district court mistakenly held that the plaintiff could not qualify for reasonable accommodation under the ADA by virtue of his request for FMLA leave. The EEOC also argues that there is nothing inherently inconsistent with simultaneously seeking leave under the ADA and the FMLA.</p> <p>The EEOC also argued that a single request for medical leave triggers an employee's rights under both statutes.</p> <p>Court's Decision: Oral argument was held July 12, 2016. On January 30, 2017, the Third Circuit affirmed the lower court's grant of summary judgment in the employee's favor. The court held that an employer's honest belief that its employee was misusing FMLA leave can defeat an FMLA retaliation claim, and confirmed that, under certain circumstances, a request for intermittent FMLA leave may also constitute a request for a reasonable accommodation under the ADA.</p>
<i>Karlo v. Pittsburgh GlassWorks, LLC</i>	U.S. Court of Appeals for the Third Circuit No. 15-3435	4/7/2016 (filed) 1/10/2017 (decided)	ADEA	Age Result: Pro-Employee	<p>Background: The plaintiffs were long-time employees of the employer before their terminations as part of a reduction in force. At the time of their reduction, the plaintiffs were at least 50 years old. They alleged that the RIF had a disparate impact on workers over 50 years of age.</p> <p>The judge originally assigned to the matter held that the ADEA authorizes disparate impact claims on behalf of subgroups of older workers. Then, a new judge was assigned who granted the employer's motion for summary judgment. In granting this motion the district court held that the ADEA did not allow a "50-year-old" subgroup. The district court further held that the ADEA prohibits discrimination on the basis of age, and not membership in the protected age category.</p>

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					<p>The district court held that to allow this subgroup claim would require that employers achieve statistical parity among groups and would require that the employer take age into account when it made employment decisions.</p> <p>Issue EEOC is Addressing as Amicus: Whether the ADEA prohibits employment practices that have a statistically significant disparate impact on subgroups of employees over the age of 40.</p> <p>EEOC's Position: The EEOC's argument is four-fold: (1) that the plain language of the ADEA authorizes disparate impact claims on behalf of subgroups of older workers; (2) Supreme Court precedent suggests that the ADEA authorizes disparate impact claims relating to subgroups of older workers; (3) circuit court decisions disallowing disparate impact claims on behalf of subgroups of older workers under the ADEA are unpersuasive; and (4) the remedial objectives of the ADEA and its legislative history authorizes claims made by subgroups of older workers.</p> <p>Court's Decision: The Third Circuit reversed and remanded in substantial part. The appellate court held that ADEA disparate-impact case may allege discrimination against a subset of the protected group. The court explained that "evidence that a policy disfavors employees older than fifty is probative of the relevant statutory question: whether the policy creates a disparate impact 'because of such individual[s]' age." The protection from age discrimination is a personal, not a collective right: the ADEA "protects individuals who are members of a protected class, not a class itself." Refusing to recognize the claims of a subgroup of a protected class "would deny redress for significantly discriminatory policies that affect employees most in need of the ADEA's protection."</p>

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<p><i>Villa v. Cavamezze Grill</i></p>	<p>U.S. Court of Appeals for the Fourth Circuit</p> <p>No. 15-2543</p>	<p>7/6/2016</p>	<p>Title VII</p>	<p>Retaliation</p> <p>Result: Pending</p>	<p>Background: The plaintiff began working at the restaurant in 2012. Another employee reported sexual harassment to her, and the plaintiff reported it to the plaintiff's supervisor. The plaintiff also told her supervisor that another employee may have left because of sex harassment, but that statement was investigated and was not substantiated. The plaintiff was discharged for making a false report. Notably, the plaintiff's supervisor never made written notes or records during his investigation, and he was not trained in investigating sex harassment complaints. The company did not have a written sex harassment policy and lacked guidelines for conducting a harassment investigation. The plaintiff filed suit, alleging retaliation under Title VII. The district court granted summary judgment to the employer on the Title VII claim because the plaintiff's supervisor genuinely (although erroneously) concluded that the plaintiff made a false statement, and there was insufficient evidence of retaliatory animus. The plaintiff appealed.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court erred in granting summary judgment on plaintiff's Title VII retaliation claim.</p> <p>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, <i>EEOC v. Total Sys. Servs., Inc.</i>, 240 F.3d 899 (11th Cir. 2001) (denying rehearing <i>en banc</i>), is in serious doubt due to three more recent Supreme Court decisions. First, <i>Burlington Northern</i> 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 <i>Faragher</i> and <i>Ellerth</i> 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.</p>

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					<p>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, the plaintiff, a supervisory employee, reported another employee's complaint. The plaintiff received no protection, although she may not know whether the report was true.</p> <p>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.</p> <p>Court's Decision: The case is currently pending with the court.</p>
<p><i>KBR Construction v. Pauley</i></p>	<p>U.S. District Court for the Southern District of Virginia (in 4th Cir.)</p> <p>No. 2:16-cv-02349</p>	<p>4/25/2016</p>	<p>ADEA</p>	<p>Age Harassment</p> <p>Result: Case Dismissed by Employer</p>	<p>Background: The employer implemented an arbitration policy for its applicants, which also applied to administrative charges.</p> <p>On March 19, 2015, the employee defendant was laid off and filed a charge alleging that he was subjected to discrimination and harassment because of his age. Upon learning that the West Virginia Human Rights Commission intended to hold a hearing regarding the charge, the employer sought to compel arbitration.</p> <p>Issue EEOC is Addressing as Amicus: The EEOC believes this case raised an important concern about the impact of private arbitration agreements on the authority and enforcement efforts of a state administrative agency. The EEOC believes that state administrative agencies should not be bound by private arbitration agreements with respect to processing and resolving charges of discrimination.</p> <p>EEOC's Position: The EEOC, as amicus, argued that private arbitration agreements should not preempt or impede the administrative processes of state agencies engaged in the investigation or adjudication of statutory discrimination claims. In making this argument, the EEOC noted that enforcement of statutes would be interfered with if private arbitration agreements were enforced in this way and that this enforcement would not preclude the EEOC from enforcing its own statute.</p> <p>Court's Decision: The case was dismissed by the employer on June 17, 2016, prior to any decision by the district court relating to the EEOC's amicus brief.</p>

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<i>Mascarella v. CPlace University</i>	U.S. Court of Appeals for the Fifth Circuit Nos. 15-30970 & 16-30146	6/10/2016	ADA	Disability Retaliation Result: Dismissed Pursuant to Stipulation of the Parties	<p>Background: The defendants are a nursing home and the entity that manages long-term care facilities, including the facility where the plaintiff worked. The plaintiff was an admissions coordinator at a long-term care facility from 2012 until her termination on August 8, 2012. The plaintiff was disabled and requested a reasonable accommodation from around March 2012 through at least June 1 (she requested an elevated toilet for her office restroom and a parking space that would accommodate her wheelchair). The elevated toilet was never installed, and the accessible parking space was eventually created a month and a half later after her request. The plaintiff was terminated because the facility did not receive enough patients. However, recruiting was not part of the plaintiff's job duties. The district court granted the plaintiff's motion for judgment as a matter of law on the issue of whether the defendants operated as an integrated enterprise. At trial, the jury found that the defendants failed to accommodate the plaintiff's disability and that she was terminated in retaliation for her accommodation requests. The jury awarded the plaintiff compensatory and punitive damages and backpay. The jury also found that plaintiff was not terminated because of her disability. The defendants filed a motion to reduce the jury's award of compensatory and punitive damages, and it was denied, along with a motion for judgment as a matter of law or new trial.</p> <p>Issue EEOC is Addressing as Amicus: (1) Whether this court should affirm the jury's verdict on Plaintiff's failure- to-accommodate and retaliation claims under the ADA; (2) Whether this court should affirm the jury's punitive damages award; (3) Whether compensatory and punitive damages are available for ADA retaliation claims; and (4) Whether the district court correctly determined that defendants operate an integrated enterprise.</p>

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					<p>EEOC's Position: The court should affirm the jury's verdict on the plaintiff's failure-to-accommodate and retaliation claims because the record supports it. First, the jury could have found that the plaintiff's toilet request was never accommodated, because (a) she never received the elevated toilet, (b) using the common restroom rather than her office restroom was not an effective accommodation (i.e., was no accommodation at all), and (c) no interactive process took place with regard to this request. Second, the jury could have found that the delay in providing an accessible parking space violated the ADA. Third, the record supports that the plaintiff was retaliated because of her requests for accommodations—the person who discharged the plaintiff knew of her requests for accommodation, and she was discharged for not performing duties that were not in her job description.</p> <p>The EEOC argued that the court should affirm the jury's award of punitive damages because there was evidence of disability-based animus (a derogatory comment was made) and misrepresentations (the toilet was never installed after plaintiff was told it would be). The EEOC also argued that compensatory and punitive damages are available for a Section 503(a) ADA retaliation claim. Although the Fifth Circuit has not addressed this issue, the EEOC said it should hold that the damages are available because they are coextensive with the available remedies under Section 107 of the ADA, 42 U.S.C. § 12117, and Title VII.</p> <p>Finally, the EEOC argued the district court correctly decided the defendants operated an integrated enterprise.</p> <p>Court's Decision: On August 10, 2016, the court dismissed the appeal pursuant to a joint stipulation.</p>

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<i>Cady v. Remington Arms Company</i>	U.S. Court of Appeals for the Sixth Circuit No. 16-5035	4/25/2016 (filed) 12/2/2016 (decided)	ADA	Disability Result: Pro-Claimant/ EEOC. The court reversed and remanded the district court's decision.	<p>Background: The plaintiff had a history of major spine disease that required multiple back surgeries. His medical records reflected severe stenosis and disc herniation, which was progressively worsening with escalating pain. The plaintiff testified that he informed an HR manager about his back issues in connection with another appointment with the plaintiff's doctor. Subsequently, the plaintiff determined that he was unable to perform assigned duties as a result of his back issues. The plaintiff was eventually terminated because he was not wanted on his team if he could not perform his duties. On July 18, 2013, the employer terminated the plaintiff's employment for "performance issues," but refused to "go into that" when questioned by the plaintiff.</p> <p>The district court granted summary judgment for the employer. It determined that the plaintiff failed to offer direct evidence of discrimination. The employer, for the purposes of the summary judgment motion, considered that the plaintiff was disabled, but disputed that it had any actual knowledge of the plaintiff's disability. The district court determined that "at most" "two moments" occurred where the plaintiff could have informed the employer of his condition. The district court also determined that the plaintiff also failed to request a reasonable accommodation for his disability and only first mentioned his concern about his disability after the employer became frustrated with the plaintiff's excuses.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court, in granting summary judgment to the employer on the plaintiff's ADA claim, erred in finding that the employer had insufficient notice of the plaintiff's disability or need for an accommodation.</p> <p>EEOC's Position: The EEOC is the appellant in this matter and sought reversal from the Sixth Circuit. The EEOC asserted that it was the agency in charge of enforcement of the ADA and sought reversal because of this reason. The EEOC's reasons for reversal were three-fold. First, the EEOC claimed that the district court applied the incorrect legal standard to the plaintiff's failure-to-accommodate claim. Rather than a <i>McDonnell-Douglas</i> burden shifting test, the EEOC argued the plaintiff must first establish a <i>prima facie</i> case by showing he is qualified for the position with or without reasonable accommodation and, if this is done, then the burden shifts to the employer to demonstrate that the proposed accommodation is an undue burden.</p>

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					<p>The EEOC argued that there was no independent requirement that an employee disclose an injury if no reasonable accommodation is necessary. The EEOC also argued that a reasonable jury could determine that the plaintiff provided a valid accommodation request by letting the employer know that an adjustment is needed for a reason related to a medical condition.</p> <p>Finally, the EEOC also argued that a reasonable jury could find that the employer refused to engage in the interactive process required by the ADA.</p> <p>Court's Decision: Oral argument was held September 29, 2016. On December 2, 2016, in an unpublished opinion, the court reversed and remanded the district court's decision. Among other findings, the court determined that a reasonable jury could find that the claimant adequately informed his employer of the limitations arising from his back problems and requested an accommodation.</p>
<i>Carlson v. Christian Brothers Services</i>	U.S. Court of Appeals for the Seventh Circuit No. 15-3807	6/9/2016 (filed) 10/27/2016 (decided)	ADA	Charge Processing Disability Result: Pro-Employer	<p>Background: The plaintiff alleged she was terminated on February 1, 2012 because of disability discrimination under the ADA. Within 300 days of the termination, plaintiff's attorney submitted a Complainant Information Sheet ("CIS"). More than a year following her termination—391 days—the plaintiff filed her Charge of Discrimination ("Charge"), containing much of the same information included in her CIS. The plaintiff's CIS stated she was terminated for having a "perceived physical disability" after being involved in a "severe car accident," and she was retaliated against for "taking time off from work and for using [her] health insurance to pay for the severe car accident." The CIS also stated "I authorize EEOC to look into the discrimination alleged above if it has jurisdiction." The EEOC issued a Dismissal and Notice of Rights form to plaintiff, and she sued. The employer moved for summary judgment, asserting Plaintiff did not timely file her charge of discrimination. The district court granted summary judgment to the employer.</p> <p>Issue EEOC is Addressing as Amicus: Whether plaintiff's CIS constituted a charge of discrimination.</p>

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					<p>EEOC's Position: The EEOC argued that the district court's decision result on a faulty premise—that the information 29 C.F.R. § 1601.12(a) suggests for inclusion in a charge is "required." The CIS states that the plaintiff was terminated, and she believes her termination was based on her perceived disability and was in retaliation for her taking leave. Also, a charge is sufficient if it "describe[s] generally the action or practices complained of." 29 C.F.R. §1601.12(b).</p> <p>The Supreme Court held that "a charge can be a form, easy to complete, or an informal document, easy to draft." <i>Federal Exp. Corp. v. Holowecki</i>, 552 U.S. 389, 403 (2008). The EEOC argues that the district court's decision clashes with <i>Holowecki</i>, decisions of the Seventh Circuit and other jurisdictions.</p> <p>The plaintiff's attorney included language on the CIS requesting the EEOC to investigate the alleged discrimination, and thus articulated a desire for agency to take remedial action.</p> <p>Finally, although the plaintiff did not sign the CIS, and the CIS was not sworn to, affirmed, or supported by an unsworn declaration, § 1601.12(b) states that a charge "may be amended to cure technical defects or omissions, including failure to verify the charge . . . the verified charge relates back to the date the charge was first received." The EEOC argues that the regulation applies to this case, because the plaintiff filed her signed charge of discrimination 391 days after her termination, but it would relate back to the date the CIS was submitted.</p> <p>Court's Decision: On October 27, 2016, the Seventh Circuit affirmed the district court's decision. The court disagreed that the CIS was equivalent to a charge, as it did not request any relief.</p>

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<p><i>Jones v. LaPorte County Sheriffs Departmentt</i></p>	<p>U.S. Court of Appeals for the Seventh Circuit No. 16-1982</p>	<p>7/28/2016</p>	<p>ADA Title VII</p>	<p>Disability Retaliation Result: Pending</p>	<p>Background: The plaintiff worked for the county jail from 1997 through July 24, 2012. He filed an EEOC charge alleging race and disability discrimination in February 2012 regarding an incident that occurred in 2010. The plaintiff later filed suit alleging Title VII retaliation and disability discrimination under the ADA. He argued that the following events constituted retaliation: (1) redundant negative performance evaluation dated February 16, 2012; (2) April 12, 2012 write-up without supporting documentation; (3) the denial of counseling after an inmate suicide; (4) the refusal to provide the plaintiff with a working radio until after the suicide occurred; and (5) management's refusal to discuss any accommodation for the plaintiff's PTSD. The plaintiff took FMLA leave for PTSD (due to the inmate's suicide) effective June 4, 2012, and his physician recommended restrictions (accommodations). The plaintiff was terminated on July 24, 2012 for not coming back to work after his FMLA leave expired, and for not submitting any medical paperwork as to why he needed additional leave. The plaintiff sued and the district court granted summary judgment to the defendants on both claims. With regard to plaintiff's Title VII retaliation claim, the passage of five months was too long to infer evidence of causality and he did not suffer adverse employment action (negative performance evaluations, write-ups and warnings did not suffice). With regard to the ADA claim, the plaintiff failed to show he was a qualified individual due to his restrictions.</p> <p>Issue EEOC is Addressing as Amicus: Whether there is sufficient evidence that the defendants retaliated against the plaintiff and that the defendants failed to engage in the interactive process pursuant to the ADA.</p> <p>EEOC's Position: The EEOC argued that plaintiff proved causation and satisfied his <i>prima facie</i> case of Title VII retaliation. Specifically, the plaintiff had sufficient evidence for a jury to conclude that his charge of discrimination set in motion a chain of events leading to his termination five months later. Also, the plaintiff had enough evidence to show that the defendants' termination reason (expiration of FMLA leave) was pretextual because he was discharged almost immediately after his physician placed him on restrictions, without an attempt to see if accommodation was possible.</p>

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					<p>Concerning plaintiff's ADA claim, the record supported a reasonable juror finding that the plaintiff could have performed the essential functions of his job with a reasonable accommodation. Also, the defendants refused to engage in the mandatory interactive process without an explanation, and this court has ruled that additional leave can be a reasonable accommodation under the ADA.</p> <p>Court's Decision: The case is currently pending with the court.</p>

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<p><i>Severson v. Heartland Woodcraft, Inc.</i></p>	<p>U.S. Court of Appeals for the Seventh Circuit No. 15-3754</p>	<p>3/15/2016</p>	<p>ADA</p>	<p>Disability Result: Pending</p>	<p>Background: The plaintiff was hired as a supervisor in 2006 and was promoted all the way to operations manager. However, his employer was dissatisfied with the plaintiff's performance as a manager and demoted him to second shift supervisor.</p> <p>At the same meeting as his demotion, the plaintiff informed the employer that that he was experiencing severe back pain, which resulted in his remaining home continuously. The 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 the plaintiff.</p> <p>The 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 the 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.</p> <p>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 the plaintiff's position 10 days before his leave was to expire.</p> <p>EEOC's Position: The EEOC asserted that the plaintiff met his burden to prove that he was a qualified individual with a disability. The EEOC argued that, when the 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.</p> <p>In this matter, the EEOC argued that the plaintiff requested a reasonable accommodation: limited leave, in advance, which was likely to allow him to perform the essential functions following this leave.</p>

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					<p>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.</p> <p>Court's Decision: Oral argument was held on September 12, 2016. A decision is forthcoming.</p>
<p><i>Golden v. Indianapolis Housing Agency</i></p>	<p>U.S. District Court for the Southern District of Indiana (in 7th Cir.)</p> <p>No. 1:15-00766</p>	<p>5/19/2016</p>	<p>ADA</p>	<p>Disability</p> <p>Result: Pro-Employer</p>	<p>Background: The plaintiff worked for the employer for 15 years before her termination on April 4, 2015. In November 2014 she was diagnosed with cancer and was granted FMLA leave. Her leave expired but she was unable to return to work due to her cancer and treatment, so she requested an extended medical leave. An additional four weeks of leave was granted, and the employer told plaintiff she would be terminated if she did not return to work after the conclusion of the four weeks. The plaintiff requested an unpaid leave of absence, and the employer denied her request. She was terminated for failing to return to work by the time her leave expired. The employer had an unwritten policy stating employees are automatically terminated if they cannot return to work after 16 weeks' medical leave. The employer also had a written policy stating unpaid leave can be granted by the Director of HR and another Director. The plaintiff filed suit under the Rehabilitation Act.</p> <p>Issue EEOC⁴ is Addressing as Amicus: Whether the employer applied the correct standard when it considered plaintiff's accommodation request for additional unpaid leave and in determining whether she was qualified under the ADA.</p> <p>EEOC's Position: The United States argues that the employer must consider an employee's request for additional, unpaid leave as a request for reasonable accommodation. The plaintiff requested an accommodation and the employer had a duty to engage in the interactive process with her. Both the Seventh Circuit and EEOC guidance state that requesting additional unpaid leave can be a form of reasonable accommodation. The EEOC also argued that although the employer has a leave policy capping the amount of leave available for medical purposes, that alone is insufficient to demonstrate undue hardship.</p> <p>The United States argues that determining whether an employee is qualified under the ADA cannot be assessed at the time the employee is on disability-related leave, but rather, at the time the employee would be able to perform the essential job functions at the end of the leave.</p>

4 Although the U.S. is the one formally submitting the brief, it was submitted in conjunction with some EEOC attorneys.

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					<p>Court's Decision: The court relied on the principle that whether or not an individual meets the definition of a qualified individual with a disability is to be determined as of the time the employment decision was made. In this case, the court found the plaintiff was not a qualified individual with a disability who was able to perform her position as Public Safety Officer with or without an accommodation, and therefore granted the employers motion for summary judgment.</p>
<p><i>Dindinger v. Allsteel, Inc.</i></p>	<p>U.S. Court of Appeals for the Eighth Circuit No. 16-1305</p>	<p>5/19/2016</p>	<p>EPA</p>	<p>Sex Result: Pending</p>	<p>Background: The plaintiffs were former managers for the employer, and even though they received promotions, they earned substantially less money than their male comparators. The 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.</p> <p>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?</p> <p>EEOC's Position: The district court properly instructed the jury and denied the employer's motion for a new trial on that basis. Here, the plaintiffs' pay disparities began <i>before</i> 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.</p> <p>Court's Decision: The case is currently pending with the court. Oral argument was heard on December 16, 2016.</p>

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<i>Guenther v. Griffin Construction Co.</i>	U.S. Court of Appeals for the Eighth Circuit No. 16-1760	5/16/2016 (filed) 1/19/2017 (decided)	ADA	Disability Result: Pro-Employee	<p>Background: The plaintiff worked as a construction superintendent for the company in 2008. He was diagnosed with cancer in 2012. He was granted three weeks of leave for treatment and returned to work. In 2013, he requested a one-month leave for cancer treatment. The company granted his request, but terminated him and his life insurance policy on that leave. The plaintiff filed a charge in September 2013 but died in 2014. The plaintiff's estate sued, alleging disability discrimination under federal and state laws. The district court ruled that plaintiff's ADA claim is not governed by 42 U.S.C. § 1988(a), but is governed by federal common law. The district court ruled that the ADA claim did not survive plaintiff's death based on state law instead of the traditional federal common-law rule.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court applied an incorrect legal standard and properly dismissed plaintiff's lawsuit.</p> <p>EEOC's Position: The EEOC agreed with the district court that the 42 U.S.C. § 1988(a) does not govern in this case, because the statute specifies which federal statutes it affects. The statute does not apply to the ADA. The EEOC argued that instead of adopting Arkansas' statute the court should have applied the traditional federal common-law rule that states that remedial claims survive, while penal or punitive claims do not. Generally, the ADA is a remedial statute and the plaintiff seeks remedial relief, so his claim should survive even in death. This conclusion furthers the purpose of the ADA, <i>i.e.</i>, eliminating disability discrimination.</p> <p>The EEOC argues <i>Kamen v. Kemper Financial Services, Inc.</i>, 500 U.S. 90 (1991), does not require application of state law in this case. <i>Kamen</i> was a shareholder derivative action, and courts following <i>Kamen</i> have adopted state law as federal common law when state law has traditionally governed the relevant legal issue. <i>Kamen</i> does not require application of state law in areas that are not traditionally governed by state law. Finally, the Supreme Court's more recent decisions interpreting <i>Kamen</i> did not alter its analysis of when federal courts should apply state law to govern a federal claim.</p>

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					<p>Court's Decision: The Eighth Circuit reversed and remanded, holding that the claim for compensatory damages under the ADA survives the death of the aggrieved party. As explained by the court, "Congress passed the ADA to eradicate discrimination against disabled persons, some of whom may be targeted precisely because of their poor health. A state law allowing claims to abate when the aggrieved party dies impedes this broad remedial purpose." <i>Guenther v. Griffin Construction Co.</i>, No. 16-1760, slip op. at 7 (8th Cir. Jan. 19, 2017). The court concluded: "we hold federal common law does not incorporate state law to determine whether an ADA claim for compensatory damages survives or abates upon the death of the aggrieved party. We join other courts that have allowed the individual's estate to bring and maintain a suit for compensatory damages under the ADA in place of the aggrieved party." <i>Id.</i> at 11.</p>
<p><i>McLeod v. General Mills</i></p>	<p>U.S. Court of Appeals for the Eighth Circuit</p> <p>No. 15-3540</p>	<p>2/16/2016</p>	<p>ADEA</p>	<p>Age</p> <p>Result: Pending</p>	<p>Background: The 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. The 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 the 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.</p> <p>Issue EEOC is Addressing as Amicus: (1) 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.</p> <p>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 <u>in a court of competent jurisdiction</u> 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.</p> <p>Court's Decision: Oral argument was heard on November 16, 2016.</p>

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<i>Anderson v. CRST International</i>	U.S. Court of Appeals for the Ninth Circuit No. 15-55556	12/22/2015	Title VII	Sex Result: Pending	<p>Background: The plaintiff worked as a long-haul truck driver. After the start of her employment, the plaintiff was assigned to operate the truck with another driver. The 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 the plaintiff's protests to stop. In another alleged incident, the plaintiff was forced to share a hotel room with this male driver while repairs were made on the truck. The plaintiff ultimately complained to her supervisor and filed a Charge with the California Fair Employment Agency. Approximately one month later, the plaintiff was terminated for failing to report to her job. The plaintiff subsequently filed suit under Title VII. The district court dismissed the plaintiff's claims, ruling that the co-worker harassment was neither severe nor pervasive, that the defendant took prompt remedial steps to resolve the harassment, and there was no evidence of retaliation because the plaintiff ignored the defendant's attempts to have her return to work.</p> <p>Issue EEOC is Addressing as Amicus: (1) Whether a reasonable jury could find that the conduct the plaintiff alleged was severe or pervasive under Title VII; (2) Whether a reasonable jury could find that the defendant's response to the plaintiff's harassment complaints was prompt remedial and effective action.</p> <p>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, the 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.</p> <p>Second, the EEOC asserted that the defendant failed to take prompt remedial and effective action because it did not discipline the harasser, did not tell the plaintiff or the harasser that the harasser was no longer allowed to drive with women, and its response effectively took work from the plaintiff.</p> <p>Court's Decision: The case is currently pending with the court.</p>

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>Taylor v. BNSF Railway Co.</i>	U.S. Court of Appeals for the Ninth Circuit No. 16-35205	8/3/2016	ADA	Disability Result: Pending	<p>Background: The defendant extended a job offer to the plaintiff for an Electronic Technician position, which was contingent on the plaintiff's successfully completing a medical screening because the Electronic Technician position was a safety-sensitive position. During the medical screening, the 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. The defendant sent the plaintiff a letter informing him that the defendant was unable to determine the plaintiff's medical qualification due to "significant health and safety risks associated with extreme obesity . . . and uncertain status of knees and back." The defendant did not hire the plaintiff. The 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) the defendant discriminated against the plaintiff because of his perceived disability; and (2) the defendant discriminated against the plaintiff based on his status as a veteran.</p> <p>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.</p> <p>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 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.</p> <p>Court's Decision: The case is before the Ninth Circuit Court of Appeals. No hearing date has been scheduled.</p>

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<i>Robinson v. Dignity Health</i>	U.S. District Court for the Northern District of California (in the 9th Cir.)	8/22/2016	Title VII	Sex Result: Pending	<p>Background: The plaintiff, a transgender man with gender dysphoria, challenged an exclusion in the defendant's employee health plan for treatment, drugs, and services for or leading to "sex transformation surgery." The plaintiff alleged that this exclusion prevented him and other transgender employees from obtaining medically necessary treatment for gender dysphoria. Because the plan did not exclude medically necessary treatment for the serious medical conditions of non-transgender employees, the plaintiff contends that it violates Title VII's prohibition on sex discrimination. The defendant moved to dismiss the complaint for failure to state a claim.</p> <p>Issue EEOC is Addressing as Amicus: First, does the plaintiff's complaint plausibly allege that discrimination against him because he is a transgender man constitutes discrimination on the basis of sex within the meaning of Title VII? Second, does the complaint state a plausible Title VII claim that the exclusion in the defendant's employee health plan for "[t]reatment, drugs, medicines, services and supplies for, or leading to, sex transformation surgery" facially discriminates against transgender employees such as the plaintiff to the extent it denies coverage for medically necessary treatment for gender dysphoria?</p> <p>EEOC's Position: First, the plaintiff alleges a plausible claim for relief under Title VII because the defendant discriminated against the plaintiff on the basis of sex by refusing to pay for medically necessary treatment for his gender dysphoria. Discrimination against an individual like the plaintiff based on the fact that, though assigned the female sex at birth, he fails to act in the way expected of a woman constitutes discrimination on the basis of sex within the meaning of Title VII. The disparate treatment in the provision of employee benefits, because of an individual's sex, may violate Title VII. Therefore, the district court should deny the defendant's motion to dismiss.</p>

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					<p>Second, the plaintiff alleges a plausible claim for relief under Title VII because the defendant discriminated against him on the basis of sex by refusing to pay for medically necessary treatment for his gender dysphoria, where the plan would cover medically necessary treatment for other serious health conditions. Discrimination against an individual like the plaintiff based on the fact that, though assigned the female sex at birth, he fails to act in the way expected of a woman, constitutes discrimination on the basis of sex within the meaning of Title VII. The disparate treatment in the provision of employee benefits, because of an individual's sex, may violate Title VII. Therefore, the district court should deny the defendant's motion to dismiss.</p> <p>Court's Decision: The district court has not yet ruled on the defendant's motion to dismiss.</p>

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<i>Hansen v. SkyWest Airlines</i>	U.S. Court of Appeals for the Tenth Circuit No. 15-8112	2/26/2016 (filed) 12/21/2016 (decided)	Title VII	Charge Processing Harassment Sex Result: Pro-Employee	<p>Background: The record demonstrated that the plaintiff endured continuous acts of harassment for over three years, including unwanted advances and inappropriate contact. The plaintiff reported this conduct to HR and, in a meeting with management, the plaintiff was threatened with termination if he did not drop his complaint.</p> <p>Thereafter, the plaintiff filed a charge of discrimination. Four months after the charge was filed, the plaintiff worked a temporary assignment and, when this ended, he returned to his prior position where the alleged harassment returned.</p> <p>Then, after a confrontation at work, the plaintiff was terminated. His appeal of this termination was unsuccessful. The plaintiff filed a second charge of discrimination.</p> <p>The district court, in considering the employer's motion for summary judgment, declined to consider any act of alleged harassment more than 300-days-old. In considering any acts less than 300-days-old, the district court found that the harassment was not sufficiently severe or pervasive to be actionable.</p> <p>Issue EEOC is Addressing as Amicus: Whether at summary judgment, the district court must consider all the related acts of sexual harassment alleged by the plaintiff, even if occurred before the filing of the administrative charge in this matter.</p> <p>EEOC's Position: The EEOC alleged that the district court erred in failing to consider that the harassment was a single hostile work environment. First, the EEOC alleged that the district erred in relying on the existence of an earlier charge of discrimination to conclude that portions of the plaintiff's claim were time-barred. The EEOC asserted that it does not matter that, for the purposes of the statute of limitations, some of the alleged hostile work environment occurred outside the statutory period. The EEOC also alleged that a reasonable jury could find that the plaintiff's allegations constituted a single employment practice.</p> <p>Court's Decision: On December 21, 2016, the Tenth Circuit reversed the grant of summary judgment and remanded the case to the lower court. The Tenth Circuit held the district court erred by failing to consider events that occurred more than 300 days before the employee's initial charge.</p>

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<i>Burrows v. The College of Central Florida</i>	U.S. Court of Appeals for the Eleventh Circuit No. 15-14554	1/6/2016	Title VII	Sex Result: Pending	<p>Background: The plaintiff claims her position was eliminated due to her sexual orientation. The district court dismissed the plaintiff's gender stereotyping Title VII claim, holding that sexual orientation is not a recognizable basis for a discrimination claim under Title VII.</p> <p>Issue EEOC is Addressing as Amicus: (1) Does sexual orientation discrimination constitute illegal gender stereotyping under Title VII; (2) Can an employer discriminate against an employee based on the sex of that employee's spouse?</p> <p>EEOC's Position: First, the EEOC argued that sexual orientation discrimination necessarily involves sex stereotyping, which has been recognized as a cause of action under Title VII. Specifically, the EEOC argued that sexual orientation discrimination necessarily results in the adverse treatment of individual because their orientation does not conform to heterosexually defined gender norms. Second, the EEOC argued that sexual orientation discrimination constituted gender-based associational discrimination, which has been routinely recognized by the courts.</p> <p>Court's Decision: The case is currently pending with the court.</p>

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<i>Evans v. Georgia Regional Hospital</i>	U.S. Court of Appeals for the Eleventh Circuit No. 15-15234	1/11/2016	Title VII	Sex Result: Pending	<p>Background: The plaintiff brought filed a <i>pro se</i> 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.</p> <p>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?</p> <p>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>i.e.</i>, 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.</p> <p>Court's Decision: This case is currently pending before the court.</p>

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<i>Rodriguez v. HSBC Bank</i>	U.S. Court of Appeals for the Eleventh Circuit No. 15-15572	2/16/2016 (filed) 5/24/2016 (decided)	ADA	Disability Result: Pro-Employer	<p>Background: The employer hired the plaintiff in 2004. When the plaintiff was promoted in 2008, he disclosed that he was HIV positive. According to the plaintiff, coworkers began a campaign of retaliation and workplace harassment against him. Eventually, the plaintiff resigned while facing an audit, which could have affected his licenses.</p> <p>Representing himself, the plaintiff sued his employer and claimed that, because of this HIV status, he suffered from a discriminatory environment and that he was constructively discharged.</p> <p>The district court granted summary judgment to the employer. The court relied upon pre-ADAAA precedent to hold that the plaintiff's HIV was not a disability. The district court determined that, even if he was disabled, he had not met his burden on any of his claims on other grounds.</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court erred in ruling that the plaintiff was not disabled under the ADA, where the district relied upon pre-amendments law and did not take into account the statutory definition of disability.</p> <p>EEOC's Position: The EEOC argued that the district court erred by failing to address the statutory additions that Congress made to the ADA in the ADAAA and by relying on pre-amendments law to hold that the plaintiff did not have a disability.</p> <p>The EEOC further argued that the plaintiff's HIV status substantially limited the function of his immune system and is a disability under the first prong of the disability definition.</p> <p>The EEOC further argued that the plaintiff could establish that he was disabled under the "regarded as" and "record of disability" prongs of the ADA's definition of disability.</p> <p>Court's Decision: On May 24, 2016, the appellate court affirmed the district court's grant of summary judgment in the employer's favor. In so holding, the Eleventh Circuit held: "[t]he district court concluded that [the plaintiff] was not disabled, but regardless, even if he was disabled, he had not met his burden on any of his claims on separate grounds. Neither [the plaintiff] nor the EEOC present any argument as to the district court's alternative holdings. Consequently, there is no substantial argument as to the outcome of the case, and [the employer]'s position is correct as a matter of law."</p>

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<i>Savage v. Secure First Credit Union</i>	U.S. Court of Appeals for the Eleventh Circuit No. 15-12704	10/16/2015 (filed) 5/25/2016 (decided)	ADA ADEA Title VII	Age Disability Retaliation Result: Pro-Employee	<p>Background: The plaintiff claimed she was discriminated against after receiving written warnings and a demotion. The district court dismissed the plaintiff's claims, holding that she failed to demonstrate that her age, sex, or disability were the "but for" cause of her constructive discharge. The district court also rejected the plaintiff's argument that she could plead in the alternative, ruling that the plaintiff could argue multiple claims requiring "but for" causation.</p> <p>Issue EEOC is Addressing as Amicus: (1) Did the district court err in holding that a plaintiff must allege and prove "but for" causation under the anti-retaliation provisions of the ADEA, ADA, and Title VII?; (2) Did the district court err in holding that a plaintiff may not plead discrimination claims in the alternative, but, instead, must choose one theory of "but for" discrimination?</p> <p>EEOC's Position: The EEOC argued that the anti-retaliation provisions of the ADEA, ADA, and Title VII do not require that a plaintiff demonstrate that retaliation was the "but for" reason for the adverse employment action. Specifically, the EEOC relied on the 11th Circuit's <i>McNely v. Ocala Star-Banner Corp.</i> decision, which held that the ADA imposes liability whenever a prohibited motivation affects the employer's decision. Further, the EEOC argued that the district court mistakenly concluded that if the standard is not "motivating factor," the only other option is "sole cause." Rather, the EEOC argued the retaliation provisions simply require the proof be sufficient to support a finding that the injury would not have occurred in the absence of protected conduct. Additionally, the EEOC argued that Rule 8 of the Federal Rules of Civil Procedure permit plaintiffs to plead multiple "but for" causes of action in the alternative.</p> <p>Court's Decision: The Eleventh Circuit reversed and remanded.</p>

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<i>Villarreal v. R.J. Reynolds Co., et al</i>	U.S. Court of Appeals for the Eleventh Circuit No. 15-10602	3/24/2016 (filed) 10/5/2016 (decided)	ADEA	Age Statute of Limitations Result: Mixed. Affirmed in Part and Remanded in Part	<p>Background: On November 8, 2007, the plaintiff applied for a position as a territory manager for the employer. He was 49 years old. He was never informed that his application had been rejected.</p> <p>Over two years later, in April 2010, lawyers contacted the plaintiff and told him the employer had discriminated against him on the basis of his age. In May 2010, the plaintiff filed his charge of discrimination and the EEOC issued notices of right to sue in April 2012.</p> <p>The plaintiff brought a collective action on behalf of “all applicants for the Territory Manager position who applied for the position since the date [the employer] began its pattern or practice of discriminating against applicants over the age of 40 . . . ; who were 40 years of age or older at the time of their application; and who were rejected for the position.” This complaint alleged two counts, including a disparate impact claim under the ADEA.</p> <p>The employer moved to dismiss the complaint because the ADEA allegedly did not provide a disparate impact remedy to applicants and also alleged that the claims based upon the 2007 application was untimely.</p> <p>The district court denied leave to amend the complaint on the ground that amendment would be futile. It explained that the plaintiff “has not alleged any misrepresentations or concealment that hindered [him] from learning of any alleged discrimination,” that he “made no attempt to contact [the employer] and ascertain the basis for his application rejection,” and that he “has not alleged any due diligence on his part.”</p> <p>Issue EEOC is Addressing as Amicus: Whether the ADEA permits an applicant for employment to bring a disparate impact claim challenging the employer’s failure to hire the applicant and whether the plaintiff successfully pleaded equitable tolling to survive a motion to dismiss.</p>

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					<p>EEOC's Position: The EEOC argued that the ADEA authorizes ADEA applicants to bring claims of age-based disparate impact. Specifically, the EEOC argued that Section 4(a)(2) of the ADEA authorizes applicants to pursue disparate impact claims. The EEOC also argues that Supreme Court rulings and the statute's purposes show that the hiring discrimination claims are viable under the disparate impact theory. The EEOC also argued that the district court should defer to the EEOC's longstanding interpretation.</p> <p>Finally, the EEOC argued that the plaintiff asserted facts sufficient to support equitable tolling of the filing of his complaint because he had no knowledge that the employer refused to hire him until one month before filing his charge.</p> <p>Court's Decision: On October 5, 2016, the court determined that the employee failed to state a claim of disparate impact. The plain text of section 4(a)(2) covers discrimination against employees. It does not cover applicants for employment. The key phrase in section 4(a)(2) is "or otherwise adversely affect his status as an employee."</p> <p>Further the court held that the plaintiff admitted facts that foreclosed equitable tolling. The party seeking equitable tolling has the burden of proof, but a plaintiff nonetheless can plead himself out of court by alleging facts that foreclose a finding of diligence or extraordinary circumstances, both of which are required for equitable tolling. Here, the plaintiff alleged facts that foreclose him from proving diligence.</p> <p>The court affirmed the dismissal on the above grounds, but remanded this matter for the lower court to consider the plaintiff's arguments that the continuing-violation doctrine makes the plaintiff's claim of disparate treatment timely.</p>

FY 2016 - SELECT APPELLATE CASES IN WHICH THE EEOC WAS A PARTY

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>CRST, Inc. v. EEOC</i>	U.S. Supreme Court No. 14-1375	5/19/2016 (decided)	Title VII	Attorneys' Fees Entitlement Result: Pro-Employer	<p>Background: The EEOC sued the employer for hostile work environment sexual harassment on behalf of a female truck driver and a class of similarly situated female employees. The district court granted summary judgment based on the EEOC's failure to reasonably investigate or engage in good-faith conciliation and granted the employer's motion for attorneys' fees and costs. The Eighth Circuit reversed the district court's award of attorneys' fees and costs and the Supreme Court granted certiorari.</p> <p>Issues on Appeal: Whether a ruling on the merits is a necessary predicate to find that a defendant is a prevailing party for purposes of awarding attorneys' fees and costs.</p> <p>EEOC's Position on Appeal: The EEOC argued it had brought only one claim and prevailed, rather than multiple claims on behalf of the numerous aggrieved women. The EEOC also argued that the district court's determination that it failed to investigate and conciliate was not a ruling on the merits and the employer did not prevail on those claims. The EEOC contends the employer must obtain a preclusive judgment in order to prevail.</p> <p>Court's Decision: The Supreme Court held that a favorable ruling on the merits is not a necessary predicate to finding that a defendant has prevailed. The defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a non-merits reason. Further, the congressional policy regarding the exercise of the district court's discretion in whether to award fees does not distinguish between merits-based and non-merits based judgments. The Supreme Court vacated the Eighth Circuit's decision and remanded.</p>

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<i>EEOC v. City of Long Branch</i>	U.S. Court of Appeals for the Third Circuit No. 16-2514	7/26/2016 (filed)	Title VII	Race Subpoena Enforcement Result: Pending	<p>Background: The claimant, an African-American Lieutenant for the police department, filed a charge of discrimination with the EEOC alleging that the respondent, as 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.</p> <p>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?</p> <p>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 <i>EEOC v. Associated Dry Goods Corp.</i>, 449 U.S. 590 (1981), is an abuse of discretion.</p> <p>Court’s Decision: The case is currently pending.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. Maritime Autowash, Inc.</i>	U.S. Court of Appeals for the Fourth Circuit No. 15-1947	10/6/2015 (filed) 4/25/2016 (decided)	Title VII	National Origin Subpoena Enforcement Result: Pro-EEOC	<p>Background: The respondent employed the claimant, an undocumented alien, at one of its two full-service carwashes. The claimant filed a complaint against the respondent with the EEOC, alleging discrimination under Title VII. The complaint alleges that Hispanic employees endured unequal employment conditions, including longer working hours, shorter breaks, lack of proper equipment, additional duties, and lower wages. As part of its investigation, the EEOC issued a subpoena seeking information from the respondent related to the claimant's charges, which the employer opposed. The district court denied the EEOC's application for subpoena enforcement.</p> <p>Issues on Appeal: Whether the EEOC's subpoena is enforceable.</p> <p>EEOC's Position on Appeal: The district court erred in refusing to enforce the EEOC's subpoena on the ground that the EEOC lacked authority to investigate the charge of discrimination because the charging party was an undocumented worker. The plain language of Title VII encompasses undocumented workers in its scope of statutory protections. This is a subpoena enforcement action designed to allow the EEOC to determine whether there is any reasonable basis to believe that the respondent engaged in national origin discrimination in violation of Title VII. In short, since coverage is not plainly lacking, the EEOC's application for enforcement should have been granted.</p> <p>Further, contrary to the district court's ruling, the EEOC's investigation was not precluded by ruling of the United States District Court, District of Maryland in <i>Egbuna v. Time-Life Libraries, Inc.</i>, 153 F.3d 184 (4th Cir. 1998), that made legal working status a prerequisite to the recovery of relief by an alien worker in a lawsuit. The Supreme Court's subsequent decision in <i>Hoffman Plastic Compounds, Inc. v. NLRB</i>, 535 U.S. 137 (2002), held that undocumented workers are covered by federal labor laws and entitled to relief. This is not a lawsuit on the merits where the standing of the individual to obtain a particular type of relief for the alleged discrimination may be a relevant inquiry.</p> <p>Court's Decision: The EEOC's subpoena, designed to investigate the claimant's Title VII charges, is enforceable. The EEOC was not required to show a viable cause of action or remedy at the subpoena enforcement stage.</p>

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<i>EEOC v. Bass Pro</i>	U.S. Court of Appeals for the Fifth Circuit No. 15-20078	8/28/2015 (Appellee brief filed) 6/17/2016 (decided)	Title VII	Charge Processing National Origin Race Result: Pro-EEOC	<p>Background: The EEOC filed a Title VII charge of discrimination alleging the employer failed to recruit and/or hire African American and Hispanic applicants. The EEOC investigated for three years, and then engaged in 11 months of conciliation efforts. During conciliation, the EEOC never divulged names of aggrieved individuals to the employer. After conciliation efforts failed, the EEOC filed suit under §§706 and 707 of Title VII, alleging pattern-or-practice discrimination. The employer moved to dismiss the complaint, alleging the EEOC could not prove a pattern or practice of discrimination under §706 using the <i>Teamsters</i> (bifurcated) method of proof. The district court granted the employer's motion. The EEOC filed a second amended complaint, including more than 200 names of aggrieved individuals. The employer moved for summary judgment on the §706 claim, alleging the EEOC failed to satisfy its presuit administrative requirements before filing suit because it did not specify the aggrieved individuals during the administrative process. The district court denied the summary judgment motion in part, holding that the claims of the recently disclosed persons could not proceed. The employer renewed its motion for summary judgment, and the EEOC requested the court to reconsider its ruling dismissing its §706 pattern or practice claim. The district court reversed its prior decision, holding that the EEOC could use the <i>Teamsters</i> framework to prove its claim when it brought suit under §706. The district court also determined that the EEOC fulfilled the administrative prerequisites to filing suit. The Fifth Circuit granted the employer leave to appeal from the district court's order.</p> <p>Issues on Appeal: (1) Whether the EEOC may rely on the burden-shifting method of proof set out by the Supreme Court in <i>International Brotherhood of Teamsters v. United States</i>, 431 U.S. 324 (1977), to prove that the employer engaged in a pattern or practice of discrimination when the EEOC brings suit pursuant to §706 of Title VII? (2) Whether the EEOC fulfilled its presuit administrative requirements?</p>

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					<p>EEOC's Position on Appeal: First, the EEOC can use the <i>Teamsters</i> proof framework when bringing suit under §706. Nothing in the plain language of §706 limits its ability to use this method of proof, and the Supreme Court recognized in <i>Gen. Tel. Co. of the Nw. v. EEOC</i>, 446 U.S. 318 (1980), that the EEOC can use the <i>Teamsters</i> method when it brings suit under §706. Also, <i>Serrano v. Cintas Corp.</i>, 699 F.3d 884 (6th Cir. 2012) held that the EEOC can file suit under §706 using the <i>Teamsters</i> framework.</p> <p>Second, the EEOC argued that §707 does not preclude it from using <i>Teamsters</i> framework to prove a pattern or practice of discrimination under §706. Section 707 authorizes the EEOC to bring actions challenging “a pattern or practice of resistance to the full enjoyment of rights.” Section 707 does not state that one can <i>only</i> bring a pattern or pattern discrimination claim under that section of Title VII.</p> <p>Third, the EEOC argued that back pay does not pose due process concerns under §707 and there is no reason why it would pose those concerns under §706.</p> <p>Fourth, the EEOC addressed the employer's concerns regarding the Seventh Amendment barring reexamination by a second jury of factual issues decided by the first jury. The EEOC argued that a jury at the liability stage only decides whether an employer has engaged in widespread pattern or practice discrimination, while the relief stage jury determines the appropriate remedy. The Seventh Amendment will not be violated by this process.</p> <p>Fifth, under §706(f)(1), the only prerequisite to a Commission suit is conciliation. The EEOC satisfied its presuit administrative requirements pursuant to <i>Mach Mining, LLC v. EEOC</i>, 135 S.Ct. 1645 (2015). That case involved pattern or practice discrimination allegations under §§706 and 707, and it held that it would perform a barebones review of the EEOC's conciliation efforts. The judicial review is limited to ensuring that the Commission putting the employer on notice of the specific allegation(s), and that it “tr[ie]d to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice.” Here, the Commission engaged in conciliation efforts for over eleven months, and it provided statistical and anecdotal evidence uncovered from its investigation. The EEOC complied.</p>

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					<p>Court's Decision: The court affirmed the district court's decision. (1) Congress "did not prohibit the EEOC from bringing pattern or practice suits under Section 706 and, in turn, from carrying them to trial with sequential determinations of liability and damages in a bifurcated framework." (2) The court's decision does not deprive the employer of due process or Seventh Amendment rights, as "pattern or practice suits characteristically involve allegations of discrimination on a large scale . . . whether they are brought under Section 706 or Section 707." (3) The EEOC may seek compensatory damages due to Title VII's 1991 Amendments. (4) The EEOC's investigation, which included producing over 230,000 pages of documents and statistical evidence of discrimination, met its statutory burden.</p>
<p><i>EEOC v. BDO USA</i></p>	<p>U.S. Court of Appeals 5th Circuit No. 16-20314</p>	<p>9/12/2016 (appeal filed)</p>	<p>EPA Title VII</p>	<p>Subpoena Enforcement Result: Pending</p>	<p>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.</p> <p>Issues on Appeal: Did the district court err when it affirmed the magistrate judge's ruling that the documents were privileged, without an <i>in camera</i> inspection and without supporting documentation supporting why the documents were privileged?</p> <p>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 <i>per se</i> 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.</p> <p>Court's Decision: The case is pending before the court.</p>

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<i>EEOC v. Koch Foods of Mississippi, LLC</i>	U.S. Court of Appeals for the Fifth Circuit No. 15-60562	10/15/2015 (filed) 9/27/2016 (decided)	Title VII	National Origin Race Retaliation Sex Result: Pro-Employee	<p>Background: The EEOC brought a public enforcement action under Title VII against the defendant. The EEOC alleged that the defendant unlawfully maintained a pattern or practice of a hostile work environment based on sex, race, and/or national origin, and retaliated against workers who engaged in protected activity. The aggrieved individuals for whom the EEOC sought relief are female and Hispanic employees who worked at the defendant's slaughter plant in Morton, Mississippi between approximately 2004 and 2008. The defendant served the EEOC and the individual plaintiffs with written discovery request seeking, <i>inter alia</i>, U-visa information because the defendants argued that the aggrieved individuals sought U-visas based on conduct alleged in the lawsuit (such as sexual assault, physical assault, and extortion), and that they fabricated their allegations to obtain visas. The defendant filed a motion to compel the U-visa information and to reconsider an existing protective order. The district court granted the defendant's motion in part.</p> <p>Issues on Appeal: Whether the district court abused its discretion by failing to bar U-visa discovery outright, by erroneously determining that U-visa discovery is relevant, and by improperly balancing factors that weigh against U-visa discovery.</p>

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					<p>EEOC's Position on Appeal: First, the district court should have prohibited U-visa discovery from the individual plaintiffs and aggrieved individuals because: (1) it circumvents the prohibition against discovery from the EEOC; (2) the district court erred in concluding that 8 U.S.C. § 1367(a)(2) does not apply to individual U-visa applicants; and (3) authorizing U-visa discovery from the individual plaintiffs and aggrieved individuals runs afoul of Congress' purpose in establishing U-visas and the U-visa confidentiality provisions (<i>i.e.</i>, the risk of U-visa disclosure will deter crime victims from coming forward). Second, the district court erred in deeming U-visa discovery relevant because immigration status information is irrelevant to Title VII liability. Third, the district court failed to properly weigh factors militating against U-visa discovery when it ignored the U-visa confidentiality mandate provided under 8 U.S.C. § 1367(a)(2), overlooked the statutory and regulatory regime assigning U-visa credibility determinations to the certifying agency and USCIS, discounted other reasons to deny U-visa discovery to assess credibility, and improperly analyzed the <i>in terrorem</i> effect of allowing U-visa discovery. Fourth, the district court's discovery rulings should be reversed because they affect the EEOC's substantial rights in that allowing U-visa discovery will significantly hinder the EEOC's ability to carry out enforcement efforts seeking relief for immigrant workers.</p> <p>Court's Decision: A Fifth Circuit panel vacated the district court's discovery orders and remanded. A rehearing en banc was held on November 15, 2016.</p>

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<i>EEOC v. Rite Way Service, Inc.</i>	U.S. Court of Appeals for the Fifth Circuit No. 15-60380	4/25/2015 (appeal filed) 4/28/2016 (decided)	Title VII	Retaliation Result: Pro-EEOC	<p>Background: The employee worked for the employer as a general cleaner at a high school. While there, she allegedly witnessed sexual harassing behavior between her female colleague and former male supervisor. The employee reported it to management as part of the employer's investigation. The former supervisor was replaced, then the employee began receiving discipline for alleged performance issues. She was discharged within weeks. EEOC filed suit on the employee's behalf and the district court entered summary judgment in favor of the employer on the retaliation claim.</p> <p>Issues on Appeal: (1) Whether the employee's report to the employer is protected opposition under Title VII's anti-retaliation provision. (2) Whether an employee who corroborates allegations of harassment in her employer's investigation must also show that she had an objectively reasonable basis to believe the harassment was unlawful for that report to constitute protected opposition. (3) Whether the record evidence would allow a reasonable jury to conclude that the employer's stated reason for firing the employee was pretextual.</p> <p>EEOC's Position on Appeal: EEOC argues the employee's report to management about sexual harassment between her colleague and former supervisor is protected activity under Title VII's anti-retaliation provision. The district court erred in concluding that the employee would only be protected under Title VII if she can separately demonstrate she had an objectively reasonable belief that the harassing conduct was unlawful, because the Fifth Circuit has not addressed the proper standard for this situation. The EEOC then gave reasons why the court should not adopt the district court's test as the standard. Even if that is the standard, the EEOC claimed the district court erred in holding that the evidence was insufficient to make that showing.</p> <p>Finally, the fact that the employee began receiving discipline only after she reported to management supports her contention that her discharge was due to retaliation for her protected activity, and that the company's reasoning is pretextual.</p>

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					<p>Court’s Decision: On April 28, 2016, the Fifth Circuit reversed and remanded. The court held that the statute, case law, and interest in uniformity and ease of application support applying the “reasonable belief” standard to retaliation cases involving both proactive and reactive opposition. The Fifth Circuit highlighted the EEOC’s argument “that requiring reactive complainants to have a reasonable belief regarding the unlawfulness of the behavior they have witnessed would ‘frustrate the ... function and purpose’ of Title VII.” Moreover, there remains a fact issue as to whether the employee could have reasonably believed that the conduct about which she chose to speak violated Title VII, and whether the reason for termination was pretextual.</p>

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<i>EEOC v. Vicksburg Healthcare, LLC</i>	U.S. Court of Appeals for the Fifth Circuit No. 15-60764	2/10/2016 (appeal filed) 10/12/2016 (decided)	ADA	Disability Result: Pro-EEOC	<p>Background: The EEOC sued the defendant under the ADA after the defendant terminated a nurse while she was recovering from surgery to repair a torn rotator cuff. After discovery, the defendant moved for summary judgment, which the court granted on the ground that the EEOC's claims were barred under <i>Cleveland v. Policy Management Systems Corp.</i>, 526 U.S. 795 (1999). The EEOC appealed the grant of summary judgment. The defendant appealed from the district court's decision to strike an exhibit filed with the defendant's reply in support of its motion for summary judgment.</p> <p>Issues on Appeal: First, whether the district court properly granted summary judgment. Second, whether the district court properly excluded an expert witness report of the EEOC's expert witness, which the defendant filed with its reply brief.</p> <p>EEOC's Position on Appeal: The district court erred in granting summary judgment to the defendant because there is sufficient evidence in the record to support a finding that the nurse was a qualified individual with a disability and that the defendant denied her a reasonable accommodation for that disability. The Supreme Court's decision in <i>Cleveland v. Policy Management Systems Corp.</i>, 526 U.S. 795 (1999) does not support the district court's decision and instead reinforces the EEOC's position that the nurse was qualified under the ADA. There is no actual or apparent inconsistency in the EEOC's claim that the nurse is qualified within the meaning of the ADA, notwithstanding assertions on her application for short-term disability benefits that she was temporarily totally disabled until a date "unknown." Even if the nurse's representations that she was temporarily totally disabled until a date "unknown" on her application could be interpreted as inconsistent with the EEOC's claim that she was a qualified individual with a disability under the ADA, the EEOC offered a "sufficient explanation" in the form of "a particularized showing that reasonable accommodations were possible," which is all that is required by <i>Cleveland</i> and the Fifth Circuit.</p>

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					<p>Court's Decision: The appellate court reversed the judgment of the district court and remanded the case for further proceedings. First, the appellate court held that, like <i>Cleveland</i> and <i>Giles</i>, the nurse's claim that she was temporarily totally disabled for the purposes of private disability benefits was not inconsistent with the claim that she could work if provided an accommodation. Nothing in the disability claim forms indicated that the nurse represented that she was unable to perform the essential functions of her job with or without accommodation. Therefore, the district court erred in granting summary judgment. Second, the appellate court held that the defendant's cross-appeal lacks merit. In seeking summary judgment, the defendant attempted to introduce a report from the EEOC's expert witness regarding the essential functions of the nurse's duties. The expert report at issue only deepens the nurse's duties. The defendant was not harmed by the district court's refusal to consider the evidence, and there is no basis to reverse the ruling.</p>

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<i>Texas v. EEOC</i>	U.S. Court of Appeals for the Fifth Circuit No. 14-10949	9/23/2016 (decided)	Title VII	Background Checks Result: Pro-Employer	<p>Background: Texas filed suit against the Chair of the EEOC and the Attorney General of the United States in their official capacities challenging the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII ("EEOC Guidance"). Specifically, Texas sought a declaratory judgment affirming its right to "absolutely bar convicted felons (or certain categories of convicted felons) from serving . . . [in] any [] job the State and its Legislature deem appropriate." Texas also argued that the EEOC Guidance was procedurally flawed, as it did not provide proper notice and comment, in violation of the Administrative Procedure Act ("APA"). The district court granted the EEOC's motion to dismiss on the grounds that Texas lacked standing to challenge the EEOC Guidance, the guidance was not a final agency action, and that Texas' claims were not ripe.</p> <p>Issues on Appeal: (1) Whether the district court correctly held that it lacked subject matter jurisdiction because the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII was not a final agency action under the APA; (2) Whether Texas has standing to challenge the EEOC's guidance.</p> <p>EEOC's Position on Appeal: First, the EEOC argued that the EEOC Guidance has no legal consequences, is not a rule and is simply, as the name connotes, "guidance" related to Title VII compliance. Texas, therefore, has no standing to challenge the law because the APA only permits judicial review of a final agency action. Second, the EEOC argued that for similar reasons, Texas lacks standing to challenge the EEOC Guidance. With any type of enforcement mechanism, Texas cannot show that it has or will suffer any injury from the EEOC Guidance. Third, the EEOC contended that Texas' claim is also not ripe for review because, similarly, the state has suffered no harm as a result of the EEOC Guidance, nor can it show that such harm is imminent.</p>

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					<p>Court's Decision: The Fifth Circuit Court of Appeals reversed and remanded the action back to the district court. The appellate court first noted that the EEOC conflated constitutional standing and standing under the APA. Texas has constitutional standing to challenge the EEOC Guidance because it is an employer, and the guidance imposes a mandatory scheme on its hiring practices. The appellate court also noted that the EEOC Guidance, at the very least, forces Texas to analyze its hiring practices agency-by-agency to determine if the likely EEOC enforcement actions that will result from the EEOC Guidance overrides the state's interest in barring felons from certain positions. Accordingly, the appellate court held that "these injuries are sufficient to confer constitutional standing, especially when considering Texas's unique position as a sovereign state defending its existing practices and threatened authority." Moreover, the court held that the EEOC Guidance is final administrative action to warrant suit under the APA. The court noted that the EEOC Guidance safe harbor provision implies that an employer's failure to follow the guidance will result in federal enforcement actions from the EEOC. The court also reasoned that the EEOC Guidance is a sufficient final agency action because it does not just repeat the relevant provisions of Title VII, but instead "purports to interpret authoritatively both the meaning of 'disparate impact' in the context of employer hiring policies regarding criminal convictions and the scope of the 'job related, business necessity' defense."</p>

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<i>EEOC v. Aerotek</i>	U.S. Court of Appeals for the Seventh Circuit No. 15-1690	7/27/2015 (appeal filed) 3/2/2016 (decided)	ADEA	Age Subpoena Enforcement Result: Pro-EEOC	<p>Background: This appeal was part of an ongoing investigation by the EEOC into whether the employer violated the ADEA. The EEOC identified open questions relating to “whether [the employer] has a practice of recruiting, hiring, or placing individuals for employment, both at its facilities and/or at the facilities owned or operated by [the employer’s] clients, using age-based criteria in violation of the ADEA.”</p> <p>To make a determination on this issue, the EEOC sought the names of the employer’s customers who seek referrals from the employer’s facilities which allegedly had “suspicious practices involving the use of age based criteria.”</p> <p>A few months later, the EEOC served a subpoena on the employer requesting from January 1, 2009, to the present: (1) certain information about all persons the employer referred from its Illinois facilities for employment at the employer’s clients; (2) certain information about all job requisition requests by clients of the employer nationwide; (3) information about individuals who were hired into certain internal positions at the employer’s Illinois facilities; and (4) documents related to the employer’s analysis of its workforce that it referenced in a prior request. When the employer refused to produce allegedly relevant information, the EEOC filed an application to enforce the subpoena. The district court granted the application, ordered the employer to produce all information requested by the subpoena, and denied the employer’s motion to alter or amend the judgment.</p> <p>On the same day it filed its opening brief in this appeal, the employer provided a subset of client names to the EEOC, but has not fully complied with the court’s order enforcing the subpoena.</p> <p>Issues on Appeal: Whether the district court properly enforced the EEOC’s subpoena.</p> <p>EEOC’s Position on Appeal: The EEOC argued that the district court properly enforced its subpoena because it seeks information relevant to its directed investigation of potential age discrimination in the employer’s staffing services business.</p>

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					<p>The EEOC argued that the employer's assertions "missed the point" in their argument that the EEOC's investigation should have been narrowed to focus only on some of the requisitions in the employer's database that may have reflected potential ADEA violations.</p> <p>The EEOC argued that the focus of its inquiry is the employer and the 62 facilities at which the EEOC already discovered requisitions problematic under the ADEA and to determine the magnitude and scope of the employer's practices, the EEOC needs to investigate further.</p> <p>The EEOC argued that the employer failed to demonstrate why client names were not relevant to the investigation or that compliance was an undue burden.</p> <p>Court's Decision: On March 4, 2016, the Seventh Circuit affirmed the district court's decision and concluded that the district court did not abuse its discretion in ordering the employer to comply with the subpoena.</p> <p>The appellate court determined that "the inquiry is within the authority of the EEOC and the information sought is clearly relevant to the agency's investigation of age-related discrimination" and "actual process of producing the data imposes little burden on [the employer] because the company maintains a database containing all of the requested information." to the agency's investigation of age-related discrimination" and "actual process of producing the data imposes little burden on [the employer] because the company maintains a database containing all of the requested information."</p>

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<i>EEOC v. AutoZone, Inc.</i>	U.S. Court of Appeals for the 7th Circuit No. 15-1753	6/8/2015 (appeal filed) 1/4/2016 (decided)	ADA	Disability Result: Pro-Employer	<p>Background: The employee was a parts sales manager at a store in Wisconsin. As part of her duties, she was required to help unload merchandise, place merchandise on shelves, and carry merchandise. The employer accommodated her lifting restrictions during the employee's two-year recovery period following her injury. At the end of her recovery period, the employee's doctor permanently restricted her from lifting more than 15 pounds with her right arm. The employer terminated her one month later because it could not accommodate the employee's permanent restriction. The EEOC sued the employer in the Eastern District of Wisconsin, alleging that the company violated the ADA by failing to make a reasonable accommodation for the employee's disability and illegally terminating her. At trial, the EEOC requested the district court instruct the jury that in a team-working environment, "[w]here there is no required manner in which employees are to divide the labor, the fact that one team member may not be able to do all the tasks assigned to the team does not mean that person is unable to perform his or her essential functions." The district court refused to give the proposed instruction. After a five-day jury trial, the jury returned a verdict for the employer. The jury found the EEOC did not prove that the employee was a qualified individual with a disability or had a record of disability at the time her employment was terminated. The EEOC moved for a new trial and for judgment as a matter of law on the issue of disability. The district court denied both motions.</p> <p>Issues on Appeal: Whether the case should be remanded for a new trial because: (1) the jury instructions did not adequately convey the law and prejudiced the EEOC; and (2) the jury's verdict is against the manifest weight of the evidence. Whether the Seventh Circuit should reverse the district court's denial of judgment was a matter of law on the issue of disability.</p>

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					<p>EEOC's Position on Appeal: The EEOC contends the Seventh Circuit should remand the case for a new trial because the district court's failure to give the EEOC's requested jury instruction confused the jury and prejudiced the EEOC. The EEOC argues that in light of evidence showing that other employees routinely helped each other with heavy lifting, the jury should have been instructed that heavy lifting was not an essential job function for each individual employee. By refusing to give the requested instruction, the EEOC contends the district court provided the jury with an incomplete and misleading statement of the law. The EEOC also argues that even when viewed in the light most favorable to the employer, no rational jury could have concluded the employee was not a qualified individual with a disability because another employee, who had a paralyzed arm, was qualified for his job. Finally, the EEOC argues the Seventh Circuit should reverse the denial of judgment as a matter of law on the issue of disability because the company relied on speculation to argue that the employee was not disabled.</p> <p>Court's Decision: On January 4, 2016, the Seventh Circuit affirmed the lower court's denial of the EEOC's motion for a new trial. The appellate court agreed that the employee could not perform the essential functions of the job.</p>

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<i>EEOC v. AutoZone, Inc.</i>	U.S. Court of Appeals for the 7th Circuit No. 15-3201	1/22/2016 (appeal filed)	Title VII	Race Result: Pending	<p>Background: The EEOC filed a Title VII action in district court alleging that the company violated Title VII by involuntarily transferring a black employee out of a predominantly Hispanic store, on the basis of his race, to limit or eliminate the number of black 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.</p> <p>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 a black employee because of his race, to segregate him from Hispanic staff and customers.</p> <p>EEOC's Position on Second Appeal: First, the defendant violated 42 U.S.C. § 2000e-2(a)(2) when it transferred the black employee because of his race for the purpose of racially segregating black employees from Hispanic employees. The transfer, which the black 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 black employee to segregate black 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.</p> <p>Court's Decision: The case is currently pending before the court.</p>

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<i>EEOC v. CVS Pharmacy, Inc.</i>	U.S. Court of Appeals for the 7th Circuit No. 14-3653	4/30/15 (appeal filed) 12/17/2015 (decided)	Title VII	Pattern/ Practice Severance Agreement Result: Pro-Employer	<p>Background: The employee was a manager who was fired in July 2011. She signed a separation agreement, then filed an EEOC charge alleging her discharge was based on her sex and race. The EEOC dismissed her charge, but found that the severance agreement was evidence of a “pattern or practice of resistance to the full enjoyment of rights secured by Title VII.” EEOC and the employer engaged in settlement negotiations but no conciliation procedure commenced. EEOC filed a lawsuit. The district court granted summary judgment to the company because it failed to secure a conciliation agreement, a prerequisite to filing suit. The court said, “[w]hen there is a reasonable belief that a person or persons has engaged in an unlawful employment practice, the EEOC ‘shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, <i>conciliation</i>, and persuasion.’ 42 U.S.C. § 2000e-5(b) (emphasis added).”</p> <p>Issues on Appeal: (1) Whether the district court erred in granting summary judgment and dismissing the case because the EEOC failed to engage in conciliation prior to bringing suit? (2) Whether a reasonable fact-finder could find that the employer’s use of a separation agreement that deters or forbids the filing of charges and/or cooperation with the EEOC constitutes a “pattern or practice of resistance to the full enjoyment of ... rights secured by” Title VII in violation of Section 707(a)?</p>

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					<p>EEOC's Position on Appeal: The EEOC argued that Section 707 of Title VII authorizes it to bring suit without a charge and without following the procedures of Section 706. Section 706 concerns unlawful employment practices and Section 707 concerns pattern or practice charges of discrimination. The EEOC argued the Seventh Circuit and other courts recognize that conciliation <i>must</i> occur with Section 706 enforcement actions, but <i>may</i> occur with Section 707 actions. The EEOC also stated that at least three other federal civil rights laws contain similar provisions that are structured similarly to Title VII—Title II of the Civil Rights Act, 42 U.S.C. §§ 2000a <i>et seq.</i>; the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601 <i>et seq.</i>; and the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997 <i>et seq.</i> In all of those statutes, one provision applies to both the government and aggrieved persons, and another solely to the government. The former restricts the plaintiffs to more specific and narrowly drawn claims, but provides for greater and more personalized remedies tailored to the injuries of individual victims. The latter allows only the government greater freedom to protect the statutory rights at issue by targeting broader patterns or practices of resistance, but provides only for such relief as may be necessary to safeguard those rights.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>Court’s Decision: On December 17, 2015, the three-judge panel rejected the EEOC’s claim that Section 707(a) allows the agency to sue without engaging in conciliation or even alleging that the employer engaged in discrimination. “Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding.” The court held further: “because there is no difference between a suit challenging a ‘pattern or practice of resistance’ under Section 707(a) and a ‘pattern or practice of discrimination’ under Section 707(e), we agree with the district court that the EEOC was required to comply with all of the pre-suit procedures contained in Section 706, including conciliation.” The court also emphasized that under Section 707(e), the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues “pattern or practice” violations. As significantly, the appellate court on its own elected to clarify a prior Seventh Circuit decision to underscore that the EEOC also cannot proceed in any matter in the absence of a charge, explaining, “The 1972 Amendments [to Title VII] gave the EEOC the power to file pattern or practice suits on its own, but Congress intended the agency to be bound by the procedural requirements set forth in Section 706, including proceeding on the basis of a charge.”</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. Flambeau</i>	U.S. Court of Appeals for the Seventh Circuit No: 16-1402	4/26/2016 (appeal filed) 1/25/2017 (decided)	ADA	Disability Result: Pro-Employer	<p>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).</p> <p>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)?</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>EEOC’s Position on Appeal: The safe harbor provision permits insurance companies or organizations to administer the “terms” of a <i>bona fide</i> 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.</p> <p>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 Flambeau’s policy, and he is not entitled to punitive damages. In addition, Flambeau abandoned its wellness program requirements for reasons unrelated to this litigation. Because the undisputed facts show that the EEOC is not entitled to any relief.”</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. McLane Co.</i>	U.S. Court of Appeals for the Ninth Circuit No. 13-15126	6/3/2013 (appeal filed) 10/27/2015 (decided) 9/29/2016 (Supreme Court cert. petition granted)	ADA Title VII	Sex Result: Pro-EEOC	<p>Background: This case involved a broad-based request for “pedigree information” (name, social security number, last-known address, and telephone number). The EEOC expanded the scope of an individual charge to a nationwide investigation because the same isokinetic examination was used at other locations. The privacy and relevance issues converged based on the EEOC’s request for nationwide “pedigree information” for each test-taker at facilities around the country. The district court held that the pedigree information was not relevant or “necessary” at that stage. The EEOC appealed.</p> <p>Issues on Appeal: Whether the EEOC has jurisdiction, when a single charge of discrimination is filed, to obtain company-wide personal contact information as part of its systemic investigation?</p> <p>EEOC’s Position on Appeal: The lower court committed reversible error in concluding that contact information and other personally identifying information for test takers was irrelevant to the Commission’s systemic investigation, and that the Commission does not need to first provide systemic discrimination before being able to obtain such information.</p> <p>Court’s Decision: The Ninth Circuit made a “de novo” finding, reversed the district court, broadly interpreted the “relevancy” limitation of <i>EEOC v. Shell Oil</i>, 466 U.S. 54 (1984), and held that the EEOC was entitled to such pedigree information based on an expansive view of relevance.</p> <p>Supreme Court Review: On September 29, 2016, the U.S. Supreme Court granted the employer’s Petition for a Writ of Certiorari. The Court will decide whether the district court’s decision to quash or enforce the subpoena should be reviewed <i>de novo</i>.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. BNSF Railway Co.</i>	U.S. Court of Appeals for the Tenth Circuit No: 15-3265	3/9/2016 (appeal filed)	ADA	Disability Result: Pending	<p>Background: The EEOC investigated the charges of two individuals in Colorado. They claimed that the defendant refused to hire them on the basis of disability in violation of the ADA after the defendant's medical officer in Fort Worth, Texas had determined that they posed a significant risk of injury to self or others. The EEOC's investigative files contained similar charges against the defendant by individuals in Colorado, Wyoming, Texas, Minnesota, and Kansas. The EEOC served the defendant with a request for information concerning the manner in which the defendant stored electronic data for its applicants and employees throughout the United States as a prelude to serving a focused request for substantive information. The defendant refused to provide the information, and the EEOC issued a subpoena to get it. The defendant filed a petition to revoke or modify the subpoena, which the EEOC's Commissioners reviewed and denied. The EEOC then filed this enforcement action.</p> <p>Issues on Appeal: Can the EEOC subpoena information about a possible pattern or practice of discrimination where its investigation of individual charges has revealed that others all over the country also have filed charges alleging similar acts of discrimination involving the same decisionmaker?</p> <p>EEOC's Position on Appeal: The EEOC is entitled to virtually any evidence that might shed light on a charging party's allegations, including evidence of potentially related systemic discrimination. When reasonable evidence suggests that an individual charge may be connected to a broader pattern or practice of discrimination, the EEOC need not obtain a Commissioner's charge to investigate the possibility of related, widespread illegality. When an EEOC subpoena seeks relevant information, a court must enforce it whether or not the EEOC convinced the employer during the administrative process that the subpoena is valid.</p> <p>Court's Decision: Oral argument was held on November 17, 2016.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. Tricare Reference Labs</i>	U.S. Court of Appeals for the Tenth Circuit No. 16-2053	6/20/2016 (appeal filed)	ADA, Title VII	Disability Subpoena Enforcement Result: Pending	<p>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.</p> <p>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?</p> <p>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.</p> <p>Court's Decision: The matter remains pending before the court.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. PJ Utah</i>	U.S. Court of Appeals for the Tenth Circuit No. 15-4079	6/1/2015 (appeal filed) 5/18/2016 (decided)	ADA	Intervention Result: Pro-Employee	<p>Background: The EEOC filed an enforcement action against the employer, alleging it discriminated against an employee based on his disability, and retaliated against him for requesting a reasonable accommodation, in violation of the ADA and the Civil Rights Act of 1991. The employee filed a motion for leave to intervene in the EEOC's lawsuit. The employer opposed the motion, claiming the employee entered into an arbitration agreement with the employer, and intervention was contrary to the arbitration agreement. The employer also moved to compel the employee to arbitrate his claims. The district court ruled that the employee's legal guardian had the authority to bind him to the arbitration agreement and the employee had no right to intervene. The court denied the employee's motion for leave to intervene and granted the employer's motion to compel arbitration.</p> <p>Issues on Appeal: (1) Whether the appellate court has jurisdiction to consider whether the district court erred in compelling the employee to arbitrate his individual claims against the employer? (2) Whether the district court erred in holding that the employee's legal guardian had the authority to bind the employee to an employment arbitration agreement at the inception of the employee's employment? (3) Whether the district court erred in denying the employee's motion for leave to intervene in the EEOC's enforcement action against the employer?</p> <p>EEOC's Position on Appeal: A brief was not filed by the EEOC on appeal.</p> <p>Court's Decision: The court reversed the denial of the employee's motion to intervene because he has an unconditional statutory right to intervene. The court also dismissed his appeal regarding compelling arbitration, because it lacked appellate jurisdiction to decide that issue. The order compelling arbitration was not a final order because the EEOC's lawsuit was not stayed, therefore, the order compelling arbitration did not dispose of all claims by all parties in the action.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
<i>EEOC v. Catastrophe Management Solutions</i>	U.S. Court of Appeals for the Eleventh Circuit No. 14-13482	9/22/2014 (appeal filed) 9/15/2016 (decided)	Title VII	Race Discrimination Failure to Hire Result: Pro-Employer	<p>Background: The EEOC filed suit on behalf of an employee whose job offer was rescinded by the employer, pursuant to a race-neutral grooming policy, when she refused to cut her dreadlocks.</p> <p>The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b) (6) because it determined that the EEOC's complaint did not plausibly allege intentional racial discrimination by the employer against the plaintiff.</p> <p>In addition to dismissing the complaint, the district court also denied the EEOC's motion to amend the complaint after it determined that amending the complaint would be futile.</p> <p>Issues on Appeal: Whether the district court improperly dismissed the EEOC's original complaint and denied the EEOC's motion to file an amended complaint for failure to state a plausible claim of intentional race discrimination.</p> <p>EEOC's Position on Appeal: The EEOC argued that, in accordance with Rule 8, its complaint set forth a short, plain statement of facts showing that the employer's refusal to hire a qualified applicant because she would not cut her dreadlocks was race discrimination. The EEOC argued that its complaint set forth sufficient facts to allege a prima facie case of discrimination and, therefore, that its complaint was sufficient to support a claim for race discrimination.</p> <p>The EEOC also argued that its amended complaint made clear that denying employment on the basis of dreadlocks was race discrimination because dreadlocks are a trait of "Black hair texture," are directly associated with race, targeting dreadlocks can be a type of racial stereotyping, and dreadlocks can be an expression of racial pride.</p> <p>Court's Decision: The Eleventh Circuit affirmed the district court's decision, despite accepting the factual allegations set forth by the EEOC as true.</p>

CASE NAME	COURT	DATE OF APPELLATE FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/ RESULT	COMMENTARY
					<p>In affirming, the court first determined that the EEOC's proposed amended complaint (and briefing to the 11th Circuit) confused the EEOC's disparate treatment theory of discrimination with the separate disparate impact theory of liability. Because the EEOC was only proceeding on a disparate treatment theory, the EEOC's amended complaint was futile, as determined by the district court.</p> <p>Second, the court determined that its precedent prohibits discrimination based upon "immutable traits." Because the EEOC's complaint did not assert that dreadlocks are an immutable trait (even if culturally associated with race), it did not assert a claim of discrimination based upon such an immutable trait.</p> <p>Third, the court refused to defer to the EEOC's Compliance Manual. In rejecting the interpretation set forth in this Manual, the court noted that the EEOC had previously taken a conflicting position in prior litigation less than a decade ago and had never provided an explanation for its recent change in course.</p> <p>Fourth, the court also noted that no other court had accepted the view of Title VII argued for by the EEOC. Given these reasons, the court determined the allegations offered by the EEOC did not set forth a plausible claim of race discrimination.</p>
<i>EEOC v. West Customer Mgmt Group</i>	U.S. Court of Appeals for the Eleventh Circuit No. 16- 15003	9/19/2016 (appeal filed)	Title VII	Attorneys' Fees National Origin Result: Pending	<p>Background: 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.</p> <p>Issues on Appeal: Did the district court err in affirming attorneys' fees for the defendant after receiving a jury verdict on the plaintiff's Title VII claim?</p> <p>EEOC's Position on Appeal: First, the EEOC argued plaintiff's claims were not "frivolous, unreasonable, and without foundation" because the plaintiff'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.</p> <p>Court's Decision: The matter remains pending before the court.</p>

APPENDIX C – SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2016⁵

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
11/16/2015	WI	USDC Eastern District of Wisconsin 15-mc-62-pp Hon. Pamela Pepper Order of Compliance Issued, but Limited Scope of Subpoena	Wells Fargo Bank	Systemic Investigation	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of disability discrimination alleged by two charging parties. On August 4, 2015, the EEOC issued a subpoena seeking the employer's policies regarding (1) reasonable accommodation for its employees; (2) job search leave as it applies to reasonable accommodations; and (3) attendance occurrences as applied to reasonable accommodations. On December 2, 2015, the court ordered the employer to file a memorandum to show cause why it should not be compelled to comply with the subpoena and the EEOC to file a responsive memorandum. On February 24, 2016, a show cause hearing was held and the court ordered the employer to respond to the EEOC's subpoena, but narrowed discovery to policies that were applicable to employees in the two states where the charging parties were employed.

⁵ The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2016. According to the FY 2016 PAR, the EEOC resolved 32 subpoena enforcement actions during this period. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to issuance of a court opinion.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
11/20/2015	IL	UCDC Southern District of Illinois 3:15-cv-01293-SMY-PMF Hon. Staci M. Yandle Court Granted the Application	American Coal Company	Individual Charging Party	<p>The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of gender and sex discrimination alleged by one charging party. On June 23, 2015, the EEOC issued a subpoena seeking the employer's policies regarding (1) written rules, policies, practices and procedures relating to EEO, the employer's complaint process, application process, hiring, and compensation; (2) an Excel spreadsheet identifying all individuals employed during the relevant time period, including their race, gender, position, reasons for termination, if terminated, and other identifying information; (3) an Excel spreadsheet identifying all unsuccessful applicants with largely the same information; (4) complaint copies of all application materials for those individuals identified in (2); and (4) the same for all individuals identified in (3). Respondent refused to comply and, in or around November, 2015, the EEOC then initiated an action by filing its "Application for Order to Show Cause Why a Subpoena Should not Be Enforced." Respondent opposed the application by stating that information (e.g., race information) was irrelevant and presented evidence of the amount of labor hours required to comply with the demand (250, according to the human resources director) made the subpoena unduly burdensome. After hearing oral argument and reviewing supplemental briefing, the district court ruled that, despite the fact no race discrimination was alleged, the information relating to employees' race was fair game under the "'generous' relevancy standards" articulated by the U.S. Supreme Court in EEOC v. Shell Oil Co., 466 U.S. 54 (1984). The court further held that while compliance with the subpoena would pose a substantial burden on the company's human resources, the company did not articulate why it could not hire temporary help. The court stated that the financial burden did not outweigh the need for the records.</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
11/30/2015	NM	USDC New Mexico 1:15-cv-1078; 1:15-mc-46 Hon. William P. Johnson Court Denied EEOC's Application to Show Cause	Tricore Reference Laboratories	Individual Charging Party	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of discrimination based on disability and sex (pregnancy). On April 28, 2015, the EEOC issued a subpoena seeking: (1) biographical employment and contact information of all employees who requested an accommodation due to disability since January 1, 2012; (2) all employees who were pregnant while employed since January 1, 2012; and (3) any accommodation requests since January 1, 2012. On May 7, 2015, the employer timely objected and petitioned to revoke the subpoena. On September 18, 2015, the EEOC denied the petition to revoke and ordered the employer to produce the above-detailed employee information. On February 8, 2016, the court denied the EEOC's application to show cause.
12/11/2015	MD	USDC Maryland 1:15-cv-03794-ELH Hon. Ellen L. Hollander Court Granted Motion to Dismiss Based on Substantial Compliance	MJJ Inc. TA Suburban House	Individual Charging Party	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex discrimination and harassment. On September 17, 2015, the EEOC issued a subpoena seeking (1) the employer's response to the EEOC charge; (2) documents identifying the owner(s) and management hierarchy of the employer; (3) personnel document related to the charging party; (4) personnel documents of two individuals; (5) a list of each employee's name, sex, job title, dates of employment, current or former salary, and last known contact information who were employed from January 2012 through December 2014; (6) the name, job title, and business address of anyone performing human resource or labor relations functions for the employer at any time; (7) the employer's policies and procedures regarding discrimination based on sex, including sexual harassment, in the workplace; (8) the name, job title, and last known contact information of any persons responsible for supervising the charging party during her employment; (9) documents reflecting complaints of sex discrimination, including sexual harassment, received by the employer between January 2012 and December 2014; (10) the job descriptions and/or job duties of each position held by charging party during her employment; (11) the job descriptions and/or job duties for all of the employer's managers, supervisors, and deli clerks. On December 16, 2015, the court ordered the employer to appear on February 12, 2016 to show cause why it should not be compelled to comply with the subpoena. On February 11, 2016, the court granted the EEOC's voluntary dismissal following the employer's compliance with the subpoena.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/8/2016	CO	USDC for the District of Colorado 1:16mc1 Hon. Philip A. Brimmer Magistrate: Hon. Craig B. Shaffer Motion Withdrawn Pursuant to Agreement between Parties	The Coleman Company	Individual Charging Party	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of disability discrimination and retaliation based upon requesting reasonable accommodation and family medical leave alleged by one charging party. The charge alleged that the Respondent terminated the charging party's employment after notifying the company of his need for leave and that Respondent's business practice was to offer severance in exchange for signing an agreement waiving certain legal rights, including the right to file EEOC discrimination charges, which he was offered. On February 3, 2015, the EEOC issued a subpoena seeking the employer's policies regarding (1) the identities of all employees who separated and offered a severance agreement like one offered to the charging party; (2) the dates and locations at which the severance agreement was in use; and (3) a copy of all other severance agreements used by Respondent during the relevant time period. In response to Respondent's petition to revoke, the EEOC narrowed the temporal scope of its subpoena. Respondent responded to the application on February 16, 2016, stating that the subpoena was overbroad since there was no "pattern or practice" charge at issue; that seeking severance agreements of other employees served no "legitimate purpose"; and because the documents are overbroad and unduly burdensome. On March 14, 2016, after entering into agreement with Respondent regarding the outstanding subpoena, the EEOC filed its motion to withdraw its application, which the district court granted on March 16, 2016.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
1/26/2016	NC	USDC Eastern District of North Carolina 5:16-mc-5 Hon. James C. Dever, III Pending	Bailey Brothers Ag Partnership aka Bailey Brothers Ag LLC	Systemic Investigation	<p>The EEOC filed an application to show cause why two administrative subpoenas should not be enforced arising from an investigation of race discrimination from two charging parties. On June 9, 2015, the EEOC issued two subpoenas seeking: (1) a list of all persons who worked for respondent, including all independent contractors and H-2B workers, at any time during August 1, 2012 through December 31, 2014, including each individual's full name; last known address and phone number; hire date; job title and status (e.g., H-2B worker); supervisor's name; and termination date, if applicable; (2) a list of all persons terminated for any reason at any time from August 1, 2012 through December 31, 2014, which should include each individual's full name, date of termination, and reason for termination; (3) a copy of all files maintained by Respondent that pertain to a particular supervisor, including all personnel files; (4) a copy of a particular supervisor's job description; (5) a copy of all employment contracts and work agreements executed by a particular supervisor; (6) a copy of all pay records for the two charging parties from August 1, 2012 to August 31, 2014; (7) a copy of all work schedules for the two charging parties from August 1, 2012 to August 31, 2014; (8) a copy of all time records from August 1, 2012 to August 31, 2014; (9) documents showing all benefits provided to the two charging parties such as insurance, leave or worker's compensation from August 1, 2012 to August 31, 2014; (10) a copy of all employee handbooks used by Respondent since August 1, 2012; (11) a copy of all employment policies which relate to time and attendance, terms and conditions of employment and/or which contain any work rules governing employees; (12) a copy of all written policies that address or reference harassment, discrimination, or termination; (13) documents identifying the full name and job title of all persons who supervised the two charging parties at any time from August 1, 2012 through August 31, 2014. On February 23, 2016, the court ordered the employer to appear on March 25, 2016 to show cause why it should not be compelled to comply with the subpoenas. On March 17, 2016, the employer responded that it was unaware of its obligation to respond to the subpoenas, and made no objection to fully complying and providing the EEOC with the documents and information sought. On April 28, 2016, a show cause hearing was held. The court has not yet ruled.</p>

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/9/2016	IL	USDC for the Northern District of Illinois 16-cv-02984 Hon. Harry D. Leinenweber Court Granted Motion to Dismiss Based on Substantial Compliance	Lone Star Steakhouse		The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of disability discrimination. On June 26, 2015, the EEOC issued a subpoena seeking (1) a list of all employees employed at the same restaurant as the charging party since January 1, 2012 who were auto-terminated after not being paid for 30 days in the employer's payroll system including each employee's name, position or title prior to termination, date of hire, nature of disability, reason for 30-day absence, date of separation, current or last known home address, and all known telephone numbers; (2) a list of all employees employed at the same restaurant as the charging party since January 1, 2012 who took medical leave including each employee's name, position or title prior to each medical leave, date of hire, nature of disability, accommodation requested, accommodation provided, start and end dates of each medical leave, date and reason for separation, position held upon return from medical leave, current or last known home address, and all known telephone numbers; (3) copies of the employer's handbook, including all policies and procedures regarding leaves of absence, time, and attendance issued since January 1, 2012; (4) copies of contracts, guidelines, and instructions between the employer and its third party payroll servicer since January 2012. On April 5, 2016, the court ordered the employer to appear on May 19, 2015 to show cause why it should not be compelled to comply with the subpoena. On April 13, 2016, the court granted the EEOC's voluntary dismissal following the employer's compliance with the subpoena.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/30/2016	IA	USDC for the Northern District of Iowa 1:16mc61 Magistrate: Hon. Jon S Scoles Motion Withdrawn/ Dismissed Pursuant to Agreement of Parties	CRST Inc.	Individual Charging Party (Disparate Impact)	The EEOC filed an motion for an order to show cause why an administrative subpoena should not be enforced arising from an investigation of a charge alleging discrimination on the basis of race, color, and sex on a disparate impact theory. Specifically, the charging party alleged that Respondent's reliance upon criminal records in its application process had a disparate impact upon African American males like him. On November 23, 2015, the EEOC issued a subpoena seeking (1) the race of certain individuals cited by Respondent as having been hired despite having been arrested/convicted for engaging in allegedly "ineligible" criminal offenses under the complainant's theory; and (2) an electronic database of all drivers hired during the relevant time period whose background disclosed criminal arrests or convictions (including information relating to their race, date of hire, and list of criminal arrests and convictions). In its petition to revoke the subpoena, Respondent agreed to comply with the first request but ultimately refused to comply with the remainder, prompting the EEOC's application on March 30, 2016. While Respondent opposed the subpoena, prior to the hearing on the EEOC's motion, the Respondent agreed to produce documents "which will be in substantial compliance with the subpoena," according to the EEOC's motion to dismiss the subpoena enforcement action. The district court granted to the motion to dismiss on June 21, 2016.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
4/12/2016	CO	USDC Colorado 1:16-mc-55 Hon. William J. Martinez Pending	Centura Health	Systemic Investigation	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of 11 charges of ADA discrimination. On December 11, 2014, the EEOC issued a subpoena seeking information and documents under 18 headings, with most headings also broken into multiple sub-headings. On December 22, 2014, the employer timely objected and filed a petition to revoke or modify the subpoena, but also provided some of the requested information. On June 24, 2015, the EEOC denied the petition to revoke or modify and ordered the employer to produce all information requested within twenty days. On September 28, 2016, the court ordered the employer to respond to requests regarding employer policies, general information about a database that allegedly track employees' disability status, and certain employee-specific information such as payroll records and internal complaints. However, the court referred the remaining requests to the Magistrate Judge to determine whether their production created an undue burden on the employer. These requests included: (1) a compilation of detailed data from 11 facilities regarding all employees who requested an accommodation due to a medical condition since August 1, 2009; (2) a compilation of data from a particular facility regarding all employees who were sent for fitness-for-duty evaluations from August 1, 2009 to present; (3) a compilation of detailed data from a particular facility regarding all physicians who received patient complaints in 2010 and 2011; (4) a list of all employees at two facilities who have been discharged for sleeping on the job since August 1, 2009; and (5) a compilation of detailed data regarding essentially every employee in Colorado who was ever identified by the company as disabled since August 1, 2009. The Magistrate Judge has not yet ruled.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
4/14/2016	TX	USDC Southern District of Texas 4:16-mc-00842 Hon. Vanessa D. Gilmore Stipulated Dismissal (Voluntary Compliance by Employer)	Pet Club dba Pet Club Pearland	Individual Charging Party	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of age discrimination. On March 14, 2016, the EEOC issued a subpoena seeking (1) the charging party's personnel records; (2) a list of all employees that worked at the same store as the charging party from November 1, 2014 through January 31, 2015 including each employee's name, date of birth, date of hire, and date of separation (if applicable); (3) a list of all Store Supervisors working under the charging party's District Manager including each employee's name, date of birth, date of hire, and date of separation (if applicable); (4) any other documents the employer deemed to support its defense, including a statement of position on the issues. On May 3, 2016, the court ordered the employer to appear on May 27, 2016 to show cause why it should not be compelled to comply with the subpoena. On May 25, 2016, the court entered the EEOC's stipulated order that the employer will fully comply with the subpoena. On June 15, 2016, the court entered the EEOC's stipulated order to close the matter following the employer's compliance with the subpoena.
4/22/2016	CA	USDC Eastern District of California 1:16mc27 Hon. Sheila K. Oberto Withdrawn/Voluntarily Dismissal (Voluntary Compliance by Respondent)	Knight Transportation, Inc. dba Arizona Knight Transportation	Individual Charging Party	The EEOC filed a motion for an order to show cause why an administrative subpoena should not be enforced arising from an investigation of a charge alleging discrimination (failure to hire) on the basis of sex/sexual harassment and retaliation for opposing discrimination. On February 11, 2016, the EEOC issued a subpoena seeking four categories of documents (1) information and documents relating to Respondent's operational structure and practices; (2) information and documents relating to Respondent's policies and practices regarding hiring; (3) information and documents regarding Complainant's application; and (4) information and documents regarding the alleged harasser. Respondent did not respond, prompting the EEOC to file its application on April 22, 2016, seeking enforcement of the subpoena. The district court granted a stipulation to extend the time for Respondent to respond to the application; however, before a response was filed, on July 20, 2016, the EEOC filed a request for dismissal of the application. The request for dismissal stated that Respondent "made efforts to resolve the subpoena dispute by producing documents requested by the EEOC in its administrative subpoena" and that it had "now fully complied with the subpoena." The district court granted the request for dismissal the next day, on July 21, 2016.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
5/20/2016	IL	USDC Northern District of Illinois 1:16-cv-5419 Hon. Sarah L. Ellis Order for Compliance Issued	Groupon, Inc.	Individual Charging Party	The EEOC filed an application to show cause why two administrative subpoenas should not be enforced arising from an investigation of race discrimination. On June 3, 2015, the EEOC issued two subpoenas, which sought: (1) detailed information regarding the employer's methods to fill open positions since January 1, 2013; (2) detailed information regarding each person employed since January 1, 2013; (3) detailed information regarding each person that applied for employment since January 1, 2013; (4) detailed information of all 192 individuals who applied for a particular position that the charging party applied for; (5) non-redacted copies of all employment application documents for the individuals named in response to request four; (6) access to the premises including software, technology, records, and other documents related to the employer's hiring and recruiting process; and (7) testimony of a representative who is competent to discuss and describe all software, technology, records, and other documents related to the employer's hiring and recruitment processes. On June 15, 2015, the employer timely objected and filed a petition to revoke or modify the subpoenas. On December 9, 2015, the EEOC denied the petition to revoke and ordered the employer to produce the above-mentioned information, but slightly narrowed the subpoenas' requests. On September 21, 2016, the court granted the EEOC's petition and directed the employer to fully comply with the EEOC's subpoenas as modified on December 9, 2015.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
5/27/2016	AR	USDC Eastern District of Arkansas 4:16-mc-8-DPM Hon. D.P. Marshall Jr. Order of Compliance Issued, but Limited Scope of Subpoena	Dillard's, Inc.	Systemic Investigation	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of race discrimination. On February 18, 2016, the EEOC issued a subpoena seeking (1) a list of African American currently employed or previously employed since July 11, 2010 including their addresses and telephone numbers; (2) copies of all student resumes received by the employer in response to the announcement that an employer representative would visit college campuses since July 11, 2010; (3) for each resume received by the employer from students on college campuses, identify the college's name, address contact, and the employer representative who appeared on campus; (4) the names of the students selected for interview by the employer representative(s); (5) the names of all students the employer actually interviewed; (6) for each student on a college campus that the employer's representative(s) selected for interview, provide the students' names and race; (7) the names of students from college campuses selected for a second interview in Little Rock, Arkansas. On February 26, 2016, the employer timely objected and petitioned to revoke or modify the subpoena. On April 21, 2016, the EEOC denied the petition to revoke and ordered the employer to produce the above-detailed information. On June 7, 2016, the court ordered the employer to appear of July 22, 2016 to show cause why it should not be compelled to comply with the subpoena. On August 22, 2016, the court ordered the employer to comply with the subpoena, but limited the scope of the production to a specific development program the employer conducted interviews for. On November 8, 2016, the court ordered the employer comply with specific survey parameters and scheduled a joint status report for January 6, 2017.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
6/7/2016	AZ	USDC for the District of Arizona 2:16-mc-00047-NVW Hon. Neil V. Wake Pending	VF Jeanswear LP	Individual Charging Party (Investigation for Systemic Discrimination also Pursued)	The EEOC filed an application for an order to show cause why an administrative subpoena should not be enforced arising from an investigation of a charge alleging discrimination on the basis of sex, age, and pay discrimination. On July 22 2015, the EEOC issued a subpoena seeking an electronic database identifying, with pedigree information, all supervisors, managers, and executive employees at Respondent's facilities during the relevant time period. Respondent filed a petition to revoke the subpoena on the basis that the subpoena sought irrelevant information and that it was unduly burdensome, which was denied by the EEOC. On June 7, 2016, the EEOC filed its application. Respondent filed its opposition on August 15, 2016, stating that the EEOC is exceeding its statutory authority by compelling information relating to all of Respondent's hundreds of supervisors, managers, and executive employees based upon a bare assertion in Complainant's charge that "top level positions are male dominated." Respondent further contended that company-wide information is irrelevant to the Complainant's charge in light of Complainant's testimony in a parallel lawsuit against the company, in which she did not make any allegations relating to promotions. On September 30, 2016, the district court ordered the parties to meet and confer further. On November 8, 2016, the district court granted the parties' stipulation and allowed the EEOC to file supplemental briefing discussing the EEOC's jurisdiction to issue a subpoena in light of the fact that the charging party was issued a right to sue and brought her own lawsuit and the fact that Complainant's charge did not identify any pattern, policy, or practice of discrimination. The EEOC filed its brief on November 8, 2016, and Respondent filed its response on November 20, 2016. No ruling has yet been made.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
7/26/2016	MO	USDC Eastern District of Missouri 4:16-MC-426-CEJ Hon. Carol E. Jackson Court Granted Motion to Dismiss Based on Substantial Compliance	Mannington Mills Inc.	Individual Charging Party	The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex and age discrimination and retaliation. On July 28, 2015, the EEOC issued a subpoena seeking (1) sales goals given to all District Managers who reported to the same General Sales Manager as the charging party; (2) actual sales records for all District Managers who reported to the same General Sales Manager as the charging party; (3) all documents which show the charging party's history of performance and discipline. On August 16, 2016, the court granted the parties' joint motion to stay entry of the show cause order until September 15, 2016. On September 16, 2016, the court granted the parties' joint motion to extend the stay of the show cause order until October 17, 2016. On October 20, 2016, the court granted the EEOC's application for enforcement of its administrative subpoena and dismissed the action following the employer's compliance with the subpoena.

FILING DATE	STATE	COURT NAME/CASE NUMBER/JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
9/30/2016	IL	USDC for the Northern District of Illinois 1:16cv9389 Hon. Marvin E. Aspen Magistrate: Hon. Sheila Finnegan Court Granted the EEOC's Application to Enforce the Administrative Subpoena.	WestRock Co.	Individual Charging Party	<p>The EEOC filed an application for an order to show cause why an administrative subpoena should not be enforced arising from an investigation of a charge alleging sex discrimination based upon pregnancy. On May 4, 2016, the EEOC issued a subpoena seeking, for the period of January 1, 2011 through the present, the name, date of hire, position and title, employment status, reason for separation, and last known address and phone numbers for each female employed by Respondent under the age of 50. On July 18, 2016, Respondent filed a petition to revoke the subpoena on the basis that the subpoena, which was granted in part by requiring the EEOC to narrow the temporal scope of the request through June 30, 2015 rather than "the present." On September 30, 2016, the EEOC filed its application. Respondent filed its opposition on October 18, 2016, stating that the subpoena is overbroad and irrelevant to the underlying charge. Respondent contended the EEOC's overbroad subpoena is precipitated by Respondent's response to an earlier subpoena in which the Commission requested the identities of individuals who had taken maternity leave at the facility where the Complainant worked. Respondent identified a handful of women, but the EEOC alleged that it had reason to believe, from witnesses, that more women were encompassed by that request. Respondent alleged in its opposition that the EEOC's belief is based upon mere speculation and should not serve as a basis for a more invasive request. Respondent also contended in its opposition that the request is irrelevant to the underlying charge, as it has presented clear and convincing evidence that Complainant was terminated for good cause, after many levels of appeals, for failing to provide supporting evidence of need for pre-partum leave. On November 30, 2016, the EEOC's application was heard and taken under advisement. The district court also provided Respondent leave to supplement its response by December 14, 2016 with an affidavit regarding the alleged burden in responding to the subpoena. On January 20, 2017, a telephonic hearing was held as to EEOC's application for entry of order to show cause to discuss the EEOC's compromise position. The Court's Report and Recommendation granting the application was issued on January 24, 2017.</p> <p>The company was ordered to produce the information as requested by the subpoena, except it need only provide termination codes (and the keys to those codes), and not information regarding the specific reasons for each employee's separation.</p>

APPENDIX D - FY 2016 SELECT EEOC-RELATED DISPOSITIVE DECISIONS BY CLAIM TYPE(S)

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Age Discrimination in Employment Act	Mattress Firm	U.S. District Court for the District of Nevada Civil Action 2:13-cv-01745-GMN-VCF	2016 U.S. Dist. LEXIS 132301 (D. Nev. Sept. 27, 2016)	EEOC's Motion for Partial Summary Judgment; Employer's Motion for Summary Judgment on Age Discrimination Claim Result: Pro-Employer The court granted the employer's motion for summary judgment, and denied the EEOC's motion.	Did the employer violate the ADEA by engaging in a campaign to rid its store of older workers?	<p>The EEOC argued that a mattress company discriminated against and either constructively discharged or directly fired nine employees over age 40 in violation of the Age Discrimination in Employment Act. The complainants alleged that when the company took over the store at which the employees worked, it engaged in a systematic attempt to rid the store of older workers by giving them menial or strenuous tasks, or by demoting them.</p> <p>The court, however, denied the EEOC's motion, finding that none of the complainants could show that any alleged adverse employment actions were taken because of their age, nor did the employees raise the age issue with the company before leaving. The court examined each of the nine complainants' allegations, finding that eight of them left on their own accord. While many of the former employees expressed dissatisfaction with their job for one reason or another, they did not show their gripes stemmed from age discrimination. The company, therefore, had no real opportunity to address the alleged discrimination, the court held. The court noted that a "failure to raise concerns regarding age-based discrimination during . . . employment . . ." forecloses a constructive discharge claim.</p> <p>The ninth employee was terminated for insubordination after a dispute with management. The company, therefore, offered a legitimate, nondiscriminatory reason for the termination. Moreover, the court held the EEOC failed to meet its burden of offering "specific" and "substantial" evidence that insubordination and use of profanity with supervisors was pretext for an age-motivated termination.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						The court therefore granted the employer's motion for summary judgment, denied the EEOC's motion for summary judgment, and granted the stipulation for dismissal.
Americans with Disabilities Act	BNSF Ry. Co.	U.S. District Court for the Western District of Washington No. C14-1488	2016 U.S. Dist. LEXIS 2557 (W.D. Wash. Jan. 8, 2016)	Cross Motions for Summary Judgment Result: Pro-EEOC The court granted the EEOC's motion on ADA liability and denied the employer's motion.	Did the employer violate the ADA by failing to hire an applicant based on his inability to provide additional requested medical information at the post-conditional offer stage? Is § 12112(b)(6) of the ADA a disparate-impact, not a disparate-treatment provision?	The charging party applied for the position of senior patrol officer with the employer. Four years prior, he had suffered a back injury. He did not miss work during treatment for that injury. After the interview for the senior patrol officer job, the charging party was given a conditional offer subject to a medical examination and criminal background check. The company used a medical contractor to coordinate the post-offer medical evaluation process. The third-party coordinator forwards the exam results and medical questionnaire to the employer's medical officer for a final decision. The medical officer in this case could not make a final decision, claiming he lacked sufficient information, and requested an updated MRI and additional medical record information. Because the MRI was not medical-related, but rather for a job application process, the charging party was informed he would need to pay for the procedure himself, which he would not do. Because he did not provide the MRI results, the company treated him as having declined the position. The EEOC alleged the company violated ADA §§ 102(a), 102(b)(6), and 102(d)(3) –i.e., the generic discrimination provision, 42 U.S.C. § 12112(a), the “selection criteria” subtype of that discrimination provision, 42 U.S.C. § 12112(b)(6), and the restriction on use of medical records obtained pursuant to an “employment entrance examination.” 42 U.S.C. § 12112(d).

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>In its motion for summary judgment, the company argued that ADA § 12112(b)(6) is intended to function as a disparate impact test, and claimed it was inappropriate to interpret "selection criterion" as an additional requirement imposed only on individuals whom the employer may perceive as disabled, an interpretation that would transform the provision into a disparate treatment test. It also reiterated an argument that the EEOC's interpretive guidance controls the scope of 29 C.F.R. § 1630.14(b) rather than explaining one way the regulation might come into play.</p> <p>The court agreed with the company that the EEOC had not shown that actual "qualification standards, employment tests or other selection criteria" were employed by the company to disqualify the charging party. The court noted the "EEOC's theory about selection criteria, in contrast, tries to shoehorn the request for an MRI into § 12112(b)(6) even though it was not an across-the-board requirement for all applicants." However, the court added, "the fact that 'discrimination' under § 12112(a) is not limited to the categories listed in § 12112(b) means that [the company] has not necessarily escaped liability on the EEOC's generic § 12112(a) claim."</p> <p>The company further alleged that it did not decline to hire the applicant on the basis of a "record of" disability because his records did not show a substantially limiting impairment and it did not decline to hire him on the basis of "regarded-as" disability because it did not know whether his prior or latent back condition constituted an actual impairment.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>The court noted that the dispute over the request for an MRI “centers on subsection (d), titled ‘Medical examinations and inquiries.’ This provision specifies that medical examinations can constitute discrimination, § 12112(d), but also explicitly permits medical ‘employment entrance examination[s]’ made after a conditional offer of employment but before employment duties have commenced so long as the examinations adhere to certain requirements, including that ‘the results of such examination are used only in accordance with [the ADA].’” § 12112(d)(3)(C).</p> <p>Because employers may withdraw conditional offers based only on the applicant’s failure to meet standards that are job-related and consistent with business necessity and only where performance of the essential job functions cannot be accomplished with reasonable accommodation, the company’s withdrawal of the job offer when he failed to supply an updated MRI at his own cost constituted facial “discrimination.” The court noted that a reasonable jury “could not escape the conclusion that in the absence of the” 2007 MRI and additional responses to the medical questionnaire—considered “results” obtained from the post-offer medical exam—the company would not have sought an additional MRI and would not have treated the applicant as if he had declined the job offer. Moreover, the company could have paid for the MRI.</p> <p>Therefore, because the company withdrew its conditional offer on grounds not sanctioned by the ADA and its accompanying regulations, the court found the EEOC provided sufficient undisputed evidence to establish a prima facie case for disparate treatment under § 12112(a). Moreover, the court held the company failed to offer evidence in support of the affirmative defense of a direct threat.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Americans with Disabilities Act Disability Accommodation Unlawful Termination	Dolgencorp	U.S. District Court for the Eastern District of Tennessee No.: 3:14-CV-441-TAV-HBG	2016 U.S. Dist. LEXIS 88385 (E.D. Tenn. July 7, 2016)	(1) Employer's Motion for Summary Judgment on the Claimant's Retaliation Claim; (2) Parties' Cross Motion for Summary Judgment on ADA Failure-to-Accommodate and Unlawful Discharge Claims. Result: Mixed, although the case went to trial where the jury ultimately sided with the EEOC on the second claim. (1) The court granted the employer's Motion for Summary Judgment with respect to the retaliation claim; (2) The court denied the parties' motions for partial summary judgment on the failure-to-accommodate and unlawful discharge claims. At trial, a jury found in favor of the EEOC.	Did the employer violate the ADA by failing to provide a diabetic employee with a reasonable accommodation, retaliating against her, and unlawfully discharging her for taking steps to control her illness that violated company policy?	The claimant is an insulin-dependent diabetic hired as a sales associate in a retail store. The associate often needed to eat and drink in order to manage her blood sugar levels. While she never explicitly asked for a workplace accommodation—namely, to keep food and drink at her work station in contravention of store policy—her supervisor was aware of her illness and need to maintain her blood sugar level. However, the claimant was informed that if she wanted to keep food and drink items at the register, she needed to file a reasonable accommodation request with HR, which she did not do. Store policy prohibits “grazing,” i.e., eating/drinking items before paying for them. On a couple of occasions, the claimant did so when she deemed it a medical necessity. On each occasion the claimant notified her supervisor of these incidents, and was not disciplined. Following a loss prevention audit, the claimant admitted her violations of the anti-grazing policy, and was terminated. Claimant filed a Charge of Discrimination with the EEOC 187 days after her termination. The EEOC and the Tennessee Human Rights Commission (“THRC”) had a work-sharing agreement at the time. The agreement provides that charges may be dual-filed with the EEOC and the THRC. In the claimant's charge, she marked “disability,” but did not mark “retaliation,” in the “cause of discrimination based on” box on the form.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>Following its investigation, the EEOC filed its complaint against defendant asserting claims under the ADA for (1) failure to provide a reasonable accommodation; and (2) discriminatory discharge. The claimant filed her intervenor complaint two months later, asserting claims under the ADA for: (1) failure to provide a reasonable accommodation; (2) discriminatory discharge; and (3) retaliation for activity protected by the ADA.</p> <p>The employer argued (1) all claims are untimely; (2) the claimant failed to administratively exhaust her remedies in regard to her retaliation claim; and (3) there is no dispute of material fact that defendant did not violate the ADA under any theory presented.</p> <p>With respect to the timeliness issue, the court noted it was undisputed that the claimant filed her disability discrimination claims with the EEOC more than 180 days but less than 300 days after defendant allegedly discriminated against her. The parties are in dispute as to whether the 180-day or 300-day limit applies.</p> <p>The employer argued that the 180-day limit applies because the claimant never instituted proceedings with a state or local agency, and all of her legal theories for relief are premised on the alleged failure to accommodate, a theory of relief that is not provided for in the Tennessee Disability Act ("TDA"). Therefore, the employer argued the THRC does not have subject matter jurisdiction over the charge and, therefore, the 180-day limit applies.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>The court, however, noted that the inquiry is not whether the claimant could succeed on the merits of a claim brought under the TDA. Rather, the court “must determine whether the THRC would properly have subject matter jurisdiction, that is, whether it has the ‘authority to grant or seek relief’ from the alleged unlawful employment practice.” The court stated the THRC has the ability to grant or seek relief because the TDA applies to defendant; therefore, the THRC retains subject matter jurisdiction, and the filing is timely.</p> <p>As for the failure to exhaust her administrative remedies allegation, it is undisputed the claimant did not check the retaliation box on her charge and that she did not amend the charge to add a retaliation claim. The court therefore looked to the text of the charge to determine whether she included “facts that would suggest [she] intended to bring an ADA retaliation claim.” In this case, the claimant never mentioned or implied she was terminated because she requested a reasonable accommodation. The court therefore granted the employer’s motion for summary judgment on the retaliation claim.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>Regarding the failure to accommodate claim, the court denied both the employer's and the EEOC's motions for summary judgments. Although the employer argued the employee never requested a reasonable accommodation, the court found sufficient evidence on the record to establish the employer was aware the employee's request to keep juice by her work station was related to her medical condition. The court noted an employer is "not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation." There remained a genuine issue of material fact as to whether the employer failed to provide sufficient accommodation.</p> <p>Finally, with respect to the discriminatory discharge claim, the court used an indirect evidence analysis, and determined questions of material fact remained, thus denying both parties' motions.</p> <p>This case eventually went to trial in September 2016, where a jury agreed with the EEOC that the termination was in violation of the ADA, and therefore unlawful, awarding her \$27,565 in back pay and \$250,000 in compensatory damages.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Americans with Disabilities Act	Flambeau, Inc.	U.S. District Court for the Western District of Wisconsin No. 14-cv-638	2015 U.S. Dist. LEXIS 173482 (W.D. Wis. Dec. 30, 2015)	Cross Motions for Summary Judgment Result: Pro-Employer The court granted the employer's motion, and denied the EEOC's motion.	Whether the employer's employee wellness program, which required employees to fill out a health risk assessment and submit to a biometric screening test as a condition of participating in the employer's health insurance plan, violated the ADA?	<p>In this case, the EEOC claimed the company's wellness program violated the ADA, as it required that employees submit to biometric testing and a health risk assessment (HRA) or face cancellation of medical insurance, unspecified disciplinary action for failing to attend the scheduled testing, and a requirement to pay the full premium to stay covered. In the EEOC's view, the company used biometric testing and the HRA to gather medical and disability information from its workforce. Only if the company could demonstrate that its means of gathering information were "voluntary" could the company be in compliance with the ADA. Because, according to the EEOC, the test and HRA were required for employees to continue getting the normal employee health insurance, the test and HRA were not voluntary as a matter of law.</p> <p>The employer argued that the EEOC was wrong as a matter of law. The employer asserted that the wellness program satisfied the ADA's "safe harbor provision" because it was a term of a bona fide benefit plan, based on "underwriting risks, classifying risks, or administering such risks" and not inconsistent with Wisconsin law. Moreover, the program was "voluntary" pursuant to the ADA because the company never required employees to participate as a condition of their employment with the company.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>On December 30, 2015, the U.S. District Court for the Western District of Wisconsin agreed, finding that the wellness program fell within the ADA's safe harbor provision. According to the court, the "wellness program requirement constituted a 'term' of its health insurance plan and that this term was included in the plan for the purpose of underwriting, classifying and administering health insurance risks." In addition, the court agreed with the defendant that the wellness program was not a subterfuge for discrimination, as there was evidence that the company used the information from its health-related tests and assessments "to make disability-related distinctions with respect to employees' benefits." The wellness program at issue "clearly did not involve such a distinction or relate to discrimination in any way. Regardless of their disability status, all employees that wanted insurance had to complete the wellness program before enrolling in defendant's plan."</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Americans with Disabilities Act	Graceworks Lutheran Services	U.S. District Court for the Southern District of Ohio Case No. 3:15-cv-261	2016 U.S. Dist. LEXIS 78231 (S.D. Ohio June 15, 2016)	Employer's Motion for Summary Judgment on the EEOC's ADA Refusal-to-Hire Claim Result: Pro-EEOC The court denied the employer's motion, finding the EEOC was able to set forth a <i>prima facie</i> case for disability discrimination.	Did the EEOC meet its <i>prima facie</i> burden of showing the employer violated the ADA by refusing to hire a job applicant because she cannot hear or speak?	The EEOC claimed that the employer violated Title I of the Americans with Disabilities Act by refusing to hire the charging party as a Site Manager at one of its assisted living community sites "for deaf/hard-of-hearing persons or with other physical disabilities." The EEOC claims that the employer violated the ADA by its refusal to hire the charging party allegedly due to her inability to hear and speak. The employer moved for summary judgment, arguing that the charging party never suffered an adverse employment action and, thus, the EEOC cannot meet its <i>prima facie</i> burden on its ADA discrimination claim. The EEOC claims that the employer undertook two actions that evinced a "consistently discriminatory policy" against hiring deaf individuals. The first action was the job description created by the employer, which included a requirement that the applicant be able to hear. The EEOC claims that the supposedly discriminatory job posting was the employer's "reject[ing] [the applicant] before she even applied," as the "advertisement humiliated [the charging party] and subjected her to explicit and certain rejection." The second alleged adverse action occurred when the employer informed the charging party that, because she is unable to hear and speak, she "really wouldn't qualify for the position." The EEOC argued that the email was tantamount to a refusal to hire, and faced with certain rejection, the charging party was under no obligation to continue the futile interview and application process. The court agreed with the EEOC that the email constituted an adverse employment action. Thus, the EEOC had thus made a <i>prima facie</i> claim of disability discrimination.

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Americans with Disabilities Act	Grisham Farm Products	U.S. District Court for the Western District of Missouri Case No. 6:16-cv-03105	2016 U.S. Dist. LEXIS 76374 (W.D. Mo. June 8, 2016)	EEOC's Motion for Judgment on the Pleadings Result: Pro-EEOC The court agreed with the EEOC that the employer violated the ADA and GINA.	Whether the defendant's application questions seeking health history information violated the ADA?	Pending before the court was the EEOC's motion for judgment on the pleadings. The EEOC's complaint against the defendant alleged that it unlawfully required job applicants, including the complaining party, to fill out a three-page "Health History" before they would be considered for a job. The EEOC also alleged the defendant failed to maintain or retain employment records as required by law. The court held that the defendant violated the ADA and GINA because the company required all job applicants, including the complaining party, to complete a pre-offer health history form, which inquired into whether the applicant suffered from 27 different types of health conditions — including everything from allergies to epilepsy to breast disorder to heart murmur to sexually transmitted diseases to depression to varicose veins and beyond. The court awarded the following remedies: (1) "Because of its violations of federal employment law with respect to pre-offer medical inquiries, [defendant], its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them are permanently prohibited from requiring any pre-offer medical examinations or making any pre-offer medical inquiries, including but not limited to use of any health history form, in violation of the ADA, 42 U.S.C. § 12112(d), and GINA, 42 U.S.C. § 2000ff-1(b); (2) [defendant], its officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them, are further ordered to make and preserve all records relevant to the determination of whether unlawful employment practices have been or are being committed, in accordance with the ADA, 42 U.S.C. § 12117(a), and GINA, 42 U.S.C. § 2000ff-6(a), both of which incorporate by reference 42 U.S.C. § 2000e-8(c); (3)

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						For a period of five years after entry of this Order and Judgment, the [EEOC] shall have the right, upon notice to [defendant] of at least one (1) business day, to enter onto and inspect Defendant's premises to ensure compliance with this Order and Judgment and federal anti-discrimination laws; (4) Finally, [defendant] is ordered to pay \$10,000.00 to the complaining party for the damages suffered that are a direct and proximate result of its violation of the ADA, 42 U.S.C. § 12112(d) and GINA, 42 U.S.C. § 2000ff-1(b), to be paid as follows: \$5,000.00 on July 15, 2016 and \$5,000.00 on August 15, 2016."
Americans with Disabilities Act Disability Accommodation	Kroger Co.	U.S. District Court for the Eastern District of Michigan, Southern Division Case No. 14-13757	2016 U.S. Dist. LEXIS 27532 (E.D. Mich. Mar. 4, 2016)	EEOC's Motion for Partial Summary Judgment; Employer's Motion for Summary Judgment Result: Mixed The court denied both motions.	Whether the claimant's concessions that she could not perform the physical demands of the job entitled the employer to summary judgment on the claimant's disability accommodation claim?	The claimant was a grocery clerk who suffered an on-the-job back injury. After more than two years on leave and two back surgeries, the claimant requested to return to work. Her doctor informed her she could return to work with restrictions. She initially returned to work part-time as a cashier. A total reward manager had an operations manager conduct an "interactive process" with the employee to determine whether her work restrictions could be accommodated. The operations manager showed the employee her former and current job descriptions, which included a list of the essential job functions and physical demands description. The employee said she was capable of performing the essential functions, but only some of the physical demands. Based on this information, the total reward manager terminated the employee, reasoning there was no available position for which the employee could perform the essential job functions.

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						<p>The claimant sued for disability discrimination, and both parties moved for summary judgment. The court noted the dispute boiled down to (1) whether the claimant was capable of performing the essential functions of the cashier position she was fired from and, if not, (2) whether accommodations to make her capable, such as using hand scanners instead of lifting items or working only in the self-scanning area, would have been reasonable.</p> <p>The court determined there remained a genuine issue of material fact as to whether the employer could have accommodated her limitations. The court pointed out that while an employer's written job description is a factor to be considered in determining whether functions are essential, it is not the only factor. In addition, "this factor is entitled to less weight given that the job description listed the 'physical demands' separately from its list of 'essential functions.' The description and [the claimant's] responses are also ambiguous in ways requiring interpretation (i.e., factfinding)." Thus, the court concluded that the claimant's concessions about her physical limitations preclude summary judgment in her favor, but are insufficient to support summary judgment in the employer's favor.</p>

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Americans with Disabilities Act Disability Discrimination	McLeod Health	U.S. District Court for the District of South Carolina, Florence Division Civil Action No.: 4:14-3615-BHH	2016 U.S. Dist. LEXIS 43057 (D.S.C. Mar. 31, 2016)	EEOC's Objections to the Magistrate Judge's Report and Recommendations that the Employer's Motion for Summary Judgment be Granted Result: Pro-Employer The court adopted in part the magistrate's report and recommendations that the employer's motion be granted. Specifically, the court dismissed the EEOC's claim for improper medical examinations with prejudice and remanded the case for further consideration of the EEOC's wrongful termination claim based on the employer's remaining arguments for summary judgment.	Did the employer administer an improper medical examination to the claimant, and violate the ADA by terminating her employment when she failed the exam? Did the claimant's failure to provide a requested doctor's note and apply for open positions indicate she failed to engage in the interactive process?	The EEOC alleged the employer subjected the claimant, a communications specialist, to two illegal medical examinations and discriminated against her by placing her on forced medical leave and ultimately discharging her because of her disability. The magistrate judge had issued a report and recommendation that the employer's motion for summary judgment be granted. After hearing the EEOC's objections to the report, the court held that the magistrate reasonably determined that the two-part medical examination was job-related and consistent with business necessity. The claimant had mobility issues, and was given certain tests to assess, among other health concerns, her balance. The EEOC objected that the magistrate's finding that the ability to "navigate safely" is an essential function of the claimant's job. In support of this argument, the EEOC pointed to deposition testimony in which the claimant stated that she did not think the ability to navigate safely was a requirement of her job, and the fact that the job description did not include physical requirements. However, the court noted the ADA's regulations offer a non-exhaustive list of evidence relevant to determining whether a job function is essential, and that in this case, the uncontroverted evidence showed that these factors strongly favored the employer. Therefore, the court dismissed the EEOC's claim that the medical examination was improper. However, the court found that genuine issues of material fact remained regarding whether the employer sufficiently engaged in an interactive process to accommodate the claimant's limitations instead of terminating her.

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						<p>First, the court noted there remained a fact issue regarding whether the claimant's failure to submit a doctor's report at her employer's request was an act of bad faith that violated the interactive process. The claimant said she believed submitting a doctor's report would have been futile because her employer told her she could not return to her former position, as she could not perform its essential functions.</p> <p>In addition, the court found that the claimant's failure to formally apply for open positions was not evidence of her failure to engage in the interactive process. Therefore, summary judgment could not be granted on this issue.</p>
Americans with Disabilities Act	Orion Energy Systems, Inc.	U.S. District Court for the Eastern District of Wisconsin Civil Action 1:14-cv-01019	2016 U.S. Dist. LEXIS 127292 (E.D. Wis. Sept. 19, 2016)	EEOC's Motion for Summary Judgment Result: Mixed The court held that the employer's wellness program was voluntary, therefore denying the EEOC's motion on its claim that the employer violated the ADA. The court, however, granted the EEOC's motion with respect to the retaliation claim, finding factual questions remained.	Whether the employer violate the ADA by (1) requiring employees who elected coverage under the employer's self-insured health plan to complete a health risk assessment (HRA); and (2) retaliating against an employee who complained about that requirement.	In this case, the employer offered a self-insured group health plan that included a wellness program. The component of the wellness program at issue required employees to complete an HRA consisting of a health history questionnaire, biometric screening and a blood draw. Employees who completed the HRA and health screen could eliminate their monthly premiums entirely, but employees who did not complete this requirement paid the entire cost of health insurance coverage. The results of the employees' HRAs were aggregated and then anonymously reported to the employer, which could then promote education or tools to address the staff's common health concerns. Employees received the results of their HRAs so that they could address any health issues identified, and all data was treated by the wellness vendors as protected health information under the HIPAA Privacy and Security Rule.

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						<p>Only one employee objected to the HRA requirement. The company terminated her employment due, it claims, to legitimate non-discriminatory and non-retaliatory reasons, about three weeks after she opted out of the program. The EEOC sued, alleging that the employer violated Section 12112(d)(4)(A) of the ADA that, among other things, bars employers from requiring medical examinations of employees or making medical inquiries that could involve potential disabilities. That section, however, permits “voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site.” The employer here argued that its wellness program was voluntary within the meaning of Section 12112(d)(4)(B). It further contended that its program was lawful under the “safe harbor” provision of the ADA relating to insurance. Indeed, as the employer noted, two prior courts had concluded that the “safe harbor” provision protected similar wellness programs.</p> <p>The district court rejected the rationale of those earlier decisions, concluding that a broad reading of the “safe harbor” provision conflicts with the ADA’s remedial purpose. The court found that the wellness program in question simply did not fall under the “safe harbor” because it was not used by the employer to underwrite, classify, or administer risk. In fact, the court held that the wellness program was not a part of the employer’s group health plan because the employer adopted the program “separately from the terms of [the] health benefit plan and did not amend its health benefits summary plan to include the wellness initiative.”</p>

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						<p>And while it did not find the regulation dispositive, the court also appeared persuaded by the EEOC's interpretation of the "safe harbor" in its recently issued final wellness regulation, 29 C.F.R. § 1630.14(d)(6). In this new rule, the EEOC expressly states that the "safe harbor" provisions "do not apply to wellness programs, even if such plans are part of a covered entity's health plan." The court granted "<i>Chevron</i> deference" to the EEOC's interpretation under the regulation, giving it the effect of law, holding that the question of whether the ADA's "safe harbor" applies to wellness programs presented an ambiguity that could be resolved under the EEOC's regulatory authority.</p> <p>Having addressed the safe harbor question, the court then considered the voluntariness of the wellness initiative. The court readily concluded that the employer's program was voluntary because it was optional. It rejected the EEOC's position that shifting 100% of the premium cost rendered the program involuntary. To the contrary, the court found that employees had a choice (albeit, a hard choice) about whether to take advantage of the program's incentive. The court therefore granted judgment in favor of the employer on this claim.</p>

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						<p>Finally, the court denied summary judgment as to the retaliation claim. The court held that the complaining employee's concern about the confidentiality of the wellness initiative was legitimate and, moreover, that her objection appeared to be protected. The court concluded that a jury must decide the fact issues surrounding her termination, including the suspicious timing. While the court in <i>Orion</i> ultimately ruled in favor of the employer on the wellness program question, employers must heed its warnings. Other courts may adopt <i>Orion's</i> reasoning on the "safe harbor" question—particularly in light of the EEOC's clarification in 29 C.F.R. § 1630.14(d)(6). Additionally, employers should review their wellness programs to ensure that such programs comply with the EEOC's recent guidance on what medical inquiries qualify as "voluntary" under the ADA.</p>

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Equal Pay Act Retaliation	Hobson Bearing	U.S. District Court for the Western District of Missouri No. 3:16-cv- 5034	2016 U.S. Dist. LEXIS 119641 (W.D. Mo. Aug. 25, 2016)	Order on Consent Judgment Concerning the EEOC's Motion to Dismiss Employer's Malicious Prosecution Lawsuit Against Plaintiff for Filing an EPA Lawsuit. Result: Pro-EEOC The court entered the consent judgment that the employer's lawsuit was improper.	Was the employer's malicious prosecution lawsuit against the plaintiff for filing an Equal Pay Act lawsuit improper?	The employee filed a charge of discrimination with the EEOC alleging the employer violated provisions of the Equal Pay Act. After an investigation, the EEOC issued a Dismissal and Notice of Rights. The Dismissal and Notice states "[t]his does not certify that the respondent is in compliance with the statutes." The employer subsequently filed a malicious prosecution lawsuit against the employee. The lawsuit alleged the employee maliciously filed the EPA charge to harass the company and receive financial gain. After four months of litigation between the employer and employee, the EEOC informed the company that the lawsuit was unlawful retaliation under the EPA. The company moved to dismiss its lawsuit without prejudice, which was granted. The employee sued for costs associated with litigating the malicious prosecution claim for the four months. The court ordered the company to dismiss its lawsuit against the employee <i>with</i> prejudice. The company was also enjoined from filing any other lawsuit or bringing any counterclaims against the employee that are based upon her having filed a charge with the Commission, including but not limited to defamation.

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Failure to File EEO-1 Reports	VIP Home Nursing & Rehabilitation Service, LLC	U.S. District Court for the Middle District of Tennessee No. 3:14-01927	2016 U.S. Dist. LEXIS 56263, (N.D. Tenn. Apr. 26, 2016)	EEOC's Motion for Partial Summary Judgment on the Failure to File EEO-1 Reports Claim Result: Pro-EEOC The court granted the EEOC's motion for the years in which it was undisputed the employer failed to file the requisite reports.	Is the EEOC entitled to partial summary judgment on the claim that the employer failed to file EEO-1 reports?	The EEOC filed a complaint on September 30, 2014, alleging the employer discharged a former employee because of his race, and failed to file EEO-1 reports as required by law "for each calendar year from 2012 to the present." The EEOC sought summary judgment on the second claim. The EEOC requires all employers with more than 100 employees to file an annual "Employer Information Report EEO-1" on or before September 30 of every year. In response to the EEOC's Statement Of Undisputed Material Facts, the defendant admitted that "No EEO-1 Reports were filed on behalf of Defendants for calendar years 2013 and 2014, but were filed prior to those years, and since, including for calendar year 2015." Accordingly, the court granted the EEOC summary judgment on its claim that the defendant failed to file EEO-1 reports as required for the calendar years 2013 and 2014.

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Title VII Hostile Work Environment Constructive Discharge	Costco Wholesale Corp.	U.S. District Court for the Northern District of Illinois No. 14-3653	2015 U.S. Dist. LEXIS 168187 (N.D. Ill. Dec. 15, 2015).	Employer's Motion for Summary Judgment Result: Mixed The court granted the employer's motion on the constructive discharge claim, but denied the motion on the hostile work environment claim.	Whether the employer is entitled to summary judgment on the plaintiff's claims that she was subjected to a hostile work environment based on a customer's alleged harassment, and that she was constructively discharged?	The court granted the employer's motion as to the constructive discharge claim, but denied the motion as it applied to the hostile work environment claim, as factual issues remained. In this case, an employee at defendant Costco alleged a customer repeatedly harassed and stalked her, and that the employer's steps to address the alleged harassment were insufficient. The employee, the customer, and personnel at Costco offered varying versions of the events at issue. The customer said his interactions were innocuous. The employee claimed she was followed, harassment, touched, and videotaped. The employer claimed it took a number of actions to address the complaints the employee made it aware of, including offering to have her work in an area near other employees, speaking with the customer, and eventually revoking the customer's membership to the store. The employee subsequently requested and was placed on an extended medical leave pursuant to Costco's employment agreement, which permits employees to take at least one year of personal medical leave. When her one-year leave was about to expire, the employer inquired into her plans to return to work. She responded by providing documentation from her health care provider stating that she would be unable to return to work for an additional one to two years. Because the company did not provide indefinite leave as an accommodation, her employment was terminated. She was advised that she would be eligible for re-hire.

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						<p>The EEOC raised two claims: that Costco subjected the claimant to a hostile work environment because of the customer’s harassment, and that Costco constructively discharged her when she left her job due to its failure to remedy the harassment.</p> <p>With respect to the hostile work environment claims, the court noted employers are held strictly liable for harassment inflicted by supervisors, but if the harassment is committed by someone other than a supervisor—whether it be “an employee, independent contractor, or even a customer”—a negligence standard applies. To meet this standard, the plaintiff must show that the employer was “negligent either in discovering or remedying the harassment.” Citing <i>Jajeh v. Cty. of Cook</i>, 678 F.3d 560, 569 (7th Cir. 2012). “An employer is not considered to be on notice of the harassment ‘unless the employee makes a concerted effort to inform the employer that a problem exists.’ <i>Id.</i> If the employer took “prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring,” the employer cannot be held liable. <i>Id.</i></p> <p>The court held that if the claimant’s version of events were true, “a reasonable jury could conclude that, added together and given the length of time over which they allegedly occurred, they rose to the level of a hostile work environment.” However, there remained factual disputes regarding the incidents themselves, the employer’s knowledge of these incidents and its efforts to take remedial action. Thus, the court could not conclude as a matter of law that the company took reasonable steps to end the alleged harassment.</p>

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						<p>However, the court granted the employer's motion on the constructive discharge claim. To prevail on a claim for constructive discharge, the plaintiff must show "that he was forced to resign because his working conditions, from the standpoint of the reasonable employee, had become unbearable." In this case, the claimant never resigned. "Instead, the record shows that she stopped reporting to work, was placed on an extended medical leave, and was ultimately terminated after her medical leave ran out. . . . If anything, the fact that [the claimant] requested and obtained medical leave from Costco shows a continuing employment relationship, not a resignation." Thus, no genuine issue of material fact remained, so the company could not be held liable for constructive discharge.</p>
Title VII Race Discrimination Failure to Promote	Outokumpu Stainless USA, LLC	U.S. District Court for the Southern District of Alabama, Southern Division CIVIL ACTION 15-0473- WS-N	2016 U.S. Dist. LEXIS 121143 (S.D. Ala. Sept. 8, 2016)	Employer's Motion for Summary Judgment on the EEOC's Race-Based, Failure-to-Hire Claims Result: Pro-EEOC The court denied the employer's motion for summary judgment.	Could the employer show that its reasons for not promoting five African-American employees was based on legitimate, nondiscriminatory reasons that were not pretext for unlawful discrimination?	<p>In this failure-to-promote case based on race, the EEOC filed a claim on behalf of five workers at a stainless steel manufacturer. The employer restructured its personnel, moving from having one "shift leader" per shift to having a "team leader" for each line per shift. The employer promoted six white employees to the new position. The plaintiffs are all African American, and alleged they were qualified for the position but not selected based on their race.</p> <p>As part of the promotion process, a total of 19 candidates were interviewed by a panel and given a rating of A-C. While the rating was not a determinative factor, all of those selected to the team leader position received an "A" rating. However, two of the plaintiffs also received an "A" rating; two received a "B" rating; one received a "C" rating.</p>

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						<p>The employer was able to articulate legitimate, nondiscriminatory reasons for not selecting the five plaintiffs. Specific reasons included the candidates' deficiencies in experience, processing knowledge, learning speed, self-confidence and leadership, among other criteria. The court held the employer cleared its initial prima facie showing. The burden then fell to the plaintiffs to prove that those reasons were pretextual. The court found that the plaintiffs could set forth sufficient evidence to show such pretext.</p> <p>Namely, the employer presented the court with more detailed and specific reasons for not selecting the plaintiffs than it presented to the EEOC in response to the plaintiff's initial charge of discrimination. In reality, the more detailed reasons presented in litigation were entirely consistent with the broader reasons provided to the EEOC, but the court noted: "[w]e have recognized that an employer's failure to articulate clearly and consistently the reason for an employee's discharge may serve as evidence of pretext. . . . This principle applies when a defendant in litigation offers reasons it did not offer the EEOC." Therefore, "a properly functioning jury could find that the defendant's articulated reasons for not promoting [one plaintiff] were not its true reasons for not promoting him. The Court further concludes that, should the jury make such a finding, it could properly make the additional finding that race was the true reason for the promotion decision." Relying on the "me too" doctrine, court then concluded that this asserted evidence of pretext could be used to show discriminatory intent regarding the remaining plaintiffs.</p> <p>Therefore, the court denied the employer's motion for summary judgment.</p>

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Title VII Race and National Origin Discrimination	Wisconsin Plastics	U.S. District Court for the Eastern District of Wisconsin Case No. 14-C663	2016 U.S. Dist. LEXIS 59931 (E.D. Wis. May 5, 2016)	Employer's Motion for Summary Judgment Result: Pro-EEOC The court denied the employer's motion for summary judgment, holding that a reasonable fact-finder could conclude the employer's proffered reason for its termination decision was a pretext for unlawful discrimination.	Could a fact-finder reasonably conclude that an employer's stated reason for terminating a group of Hmong and Hispanic employees (lack of English proficiency) was instead a pretext for unlawful discrimination, thereby defeating the employer's motion for summary judgment?	The EEOC filed suit against the employer for race and national origin discrimination after the employer laid off a large group of Hmong and Hispanic employees who did not speak English. The employer moved for summary judgment on the grounds that while the plaintiffs were members of a protected class and suffered an adverse employment action, they provided no evidence of prohibited discrimination, and that an inability to speak English (the stated reason for termination) is not a protected class. The court denied the employer's motion. Among other reasons, the court pointed out the employer acknowledged the ability to speak English had no bearing on job performance. In addition, the employer's proffered reason for termination changed over time, and the employer hired new employees following the layoff that ultimately changed the racial/ethnic composition of the workforce. While an employer's preference for English proficiency could be a legitimate consideration, the court noted, this position "does not mean a court can conclude, as a matter of law, that the ability to speak English is necessarily a legitimate, nondiscriminatory reason." In this case, the employer did not provide substantial justification for that reason, so the employer was unable to establish, as a matter of law, that its policy of favoring English-speakers was a legitimate, non-discriminatory reason.

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						<p>Moreover, the plaintiffs could make a case that termination based on language fluency was a pretext for unlawful discrimination. While English proficiency is not a protected class, language “can sometimes serve as a proxy, or stalking horse, for discrimination against a protected class.” Notably, in this case, during the same period of terminations the employer hired 88 new employees, 62 of whom were Caucasian. Therefore, the racial composition of the workforce resulted in a lower percentage of Asian and Hispanic employees. Thus, “a reasonable jury, faced with this evidence, might draw the conclusion that the company was reconstituting itself by race or national origin—particularly if that jury heard that language ability . . . did not affect job performance.”</p> <p>Thus, a fact-finder could reasonably conclude that race and national origin, and not language ability, were the true reason for the layoffs. As such, the employer’s motion for summary judgment was denied.</p>
Title VII Race Discrimination Procedural	Stone Pony Pizza	U.S. District Court for the Northern District of Mississippi No. 4:13- CV-92	2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016)	Consideration of an Entry of an Order Striking the Employer’s Answer and Defenses to the Claims Asserted by the EEOC Result: Pro-EEOC The court recommended that the employer’s answer and defenses to the claims asserted against it by the EEOC in this lawsuit be stricken.	Did the employer fail to comply with the court Order requiring the employer to obtain new counsel within 21 days of service upon the employer of that Order?	The magistrate judge recommended that the employer’s answer and defenses to the claims asserted against it by the EEOC in the lawsuit be stricken and that the EEOC be granted a period of up to 14 days after entry of an order adopting the report and recommendation to move for entry of a judgment against the employer. The court noted that it is well-settled law that a corporation, such as the employer, cannot appear in federal court without representation by a licensed attorney. The court found that defense counsel had served upon the employer a copy of the order allowing the counsel to withdraw as counsel for the employer and that the employer had not complied with the entry of new counsel within 21 days of the service of that Order.

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Title VII Race Discrimination Procedural	Stone Pony Pizza	U.S. District Court for the Northern District of Mississippi No. 4:13- CV-92	2016 U.S. Dist. LEXIS 40229 (N.D. Miss. Mar. 28, 2016)	Employer's Motion for Summary Judgment; EEOC and Intervenors' Motion for Summary Judgment Result: Pro-EEOC The court denied the employer's motion for summary judgment. The scope of the EEOC's enforcement authority is broader than the individual's claim.	Can the EEOC sue on behalf of individuals who never filed charges? Can individuals who did not file EEOC charges intervene in an EEOC case? Did the EEOC fail to conciliate in good faith? Did the plaintiffs fail to establish a prima facie case of discrimination and fail to establish pretext? Did the plaintiffs have a basis for claiming that the employer failed to comply with the record keeping requirements of Title VII?	The court found that the EEOC has the authority to sue on behalf of individual plaintiffs regardless of whether they have filed individual charges with the EEOC. While private parties cannot sue on claims not brought in administrative charges, the EEOC, because of its own mandatory investigation and conciliation requirements, can go beyond the scope of the charge in its investigation. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The court noted that a dearth of precedent discussed whether individuals who did not file EEOC charges could intervene in an EEOC case but found persuasive the common sense approach of allowing individuals to intervene in a suit brought on their behalf. The court removed three intervenors whose claims began before the time period of the plaintiff- intervenor who had filed charges with the EEOC. The court denied the employer's claim that the EEOC failed to conciliate in good faith, noting that the employer did not engage in conciliation discussions and his only responses to EEOC's attempts at conciliation were wholesale denials of the allegations and rejections of offers to engage in negotiation and discussion.

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						<p>The court denied the employer's claim that the individual plaintiffs failed to establish a prima facie case of discrimination, finding that the plaintiffs had shown that they are African American, had applied for front-of-the-house positions, were not hired for those positions, and instead, white persons were hired. The court also found that the EEOC had established a prima facie case that the employer had maintained a racially segregated workforce with statistical evidence, bolstered by individual and circumstantial evidence, that during a specific time period, all of the employees hired for front-of-the-house positions were white.</p> <p>The court further denied the employer's motion for summary judgment on the plaintiffs' § 1981 claim because the reasons provided by the employer for its employment practices were overcome by lack of objective hiring criteria, statistical evidence, and other evidence of discrimination presented by the plaintiffs, leading the court to find for the existence of genuine issues of material fact.</p> <p>The court also denied employer's motion for summary judgment on whether EEOC had proved that it violated recordkeeping requirements, finding that genuine issues of fact remained as to whether the employer violated those requirements.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Religious Discrimination National Origin Discrimination Retaliation	JBS USA LLC	U.S. District Court for the District of Nebraska Case No. 8:10CV318	2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016) 2016 U.S. Dist. LEXIS 128825 (D. Neb. Sept. 21, 2016) (final orders)	Employer's Motion for Partial Judgment on the Amended Phase II Pleadings, the Motion to Dismiss Parties, and Motion for Summary Judgment Result: Pro-Employer The court granted the employer's motion for summary judgment.	Whether the employer is entitled to summary judgment, in which employer contends that (1) no material disputed facts could support a conclusion that its proffered reason for terminating the claimants was pretext for race, religion or national-origin-based discrimination; and (2) claimants cannot prove their retaliation claims as a matter of law.	The EEOC filed suit against the employer alleging it violated Title VII, asserting three claims (1) religious discrimination; (2) national origin discrimination; and (3) retaliation based on claimants' requests for religious accommodations and complaints about denial of those requests. Somali Muslim claimants requested religious accommodation involving breaks for prayers, namely during Ramadan 2008. On September 12, 2008, the employer's management representatives, Union representatives, and representatives of Somali Muslim employees met to discuss the potential accommodation. Several options were discussed, including changing meal times to coincide with prayer times. The employer told the Muslim representatives that the employer could not meet the requests because they violated the meal time requirements of the collective bargaining agreement (CBA). The group met again on September 15, and the employer said they could not meet the requests because there were safety concerns with allowing a large number of employees to leave the line at the same time, as well as referring to the meal break requirements of the CBA. A large group of Somali Muslim employees protested this decision by refusing to work on September 15 and 16. An agreement was then reached that the B-shift meal break would be a mass break and 7:45 and the B-shift would be shortened by 15 minutes. On September 17 and 18, a large number of Hispanic workers protested the decision to provide a religious accommodation to the Somali Muslim employees by walking off the job and/or refusing to start working. In order to avoid a shutdown, the employer decided not to implement the agreement and to return the meal break to its original time.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>On September 18, the employer told employees through the Union that the next group of employees that refused to work would be terminated.</p> <p>That evening, during the 8pm meal break, in the cafeteria, a group of Somali Muslim employees began a loud demonstration as protest of the employer's decision to rescind the break-time agreement. 70-80 Somali Muslim employees remained in the cafeteria at the end of the meal break, and police were called. Several employees left the plant, and it is disputed whether the employees left out of protest or were told by the employer to leave. The employer decided to terminate the employees who refused to go back to work and left the plant that night. All four claimants and several non-Somali non-Muslim employees were on the list of employees that left the plant and should be terminated. On September 19, these employees were terminated and given their final paychecks. The employer learned that several employees were mistakenly terminated, and they were allowed to return to work.</p> <p>In its Motion for Summary Judgment, the employer first argued that no material disputed facts could support a conclusion that its proffered reason for terminating the claimants was pretext for race, religion or national-origin based discrimination.</p> <p>Claimants argued that the employer's investigation was insufficient and that the circumstances of the termination showed that the real reason for termination was discrimination on the bases of race, religion, and/or national origin.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>The court concluded that the investigation showed no evidence of discriminatory motive, reasoning that the terminated employees were given a letter stating they could call with questions, and that several employees terminated by mistake were allowed to return to work. The court also concluded that the circumstances of the termination do not suggest the proffered reasons were pretextual. The court rejected claimants' argument that the employer's knowledge of a hostile work environment showed pretext. The court rejected claimants' argument that pretext for discrimination was shown because the employer treated Somali Muslim employees less favorably than similarly situated Hispanic employees; the court reasoned that the comparison between the two groups was improper because only Somali Muslim employees engaged in a work stoppage after being warned about the employer's zero-tolerance policy.</p> <p>In its Motion, the employer's second argument is that claimants cannot prove their retaliation claims as a matter of law. The court agreed, stating the adverse action (termination) was not causally linked to any protect conduct, and, therefore, claimants have failed to make a prima facie case of retaliation. Even if they could, the court stated that the employer articulated a legitimate, non-discriminatory reason for the adverse action (perceived misconduct) and claimants cannot demonstrate genuine issues of material fact as to pretext.</p> <p>Therefore, the court granted the employer's Motion for Summary Judgment.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Religious Discrimination Failure to Accommodate	JetStream Ground Services, Inc.	U.S. District Court for the District of Colorado No. 13-2340	2016 U.S. Dist. LEXIS 29500 (D. Colo. Mar. 8, 2016)	EEOC's Motion for Reconsideration of Court's Dismissal of Individual Claims Result: Pro-Employer The court denied the EEOC's motion.	Does an employer's failure to accommodate an employee's religion constitute a standalone violation under Title VII?	<p>Unlike failure to accommodate disability claims under the ADA, a failure to accommodate an employee's religion does not amount to a standalone Title VII violation, a Colorado federal district court held. The claimant must show that the alleged failure to accommodate resulted in some adverse action. In this case, a female Muslim airplane cabin cleaner alleged she was given part-time work after she asked to wear a hijab. In opposing the company's motion for summary judgment, the EEOC failed to claim the employee suffered an adverse action on account of her religious accommodation request. Thus, in asking the court to reconsider its motion, the EEOC failed to show extraordinary circumstances to overturn the court's ruling.</p> <p>The court held, however, that the EEOC could go forward with its religious discrimination claims regarding employees who were allegedly not hired on account of their religion, but that the claimant in this case suffered only a "de minimis" reduction in hours before being granted full-time employment. Therefore, she suffered no adverse action.</p> <p>The court in this case reasoned that Title VII's language could mean an employer has a "purported affirmative duty" to accommodate an employee's or applicant's religion-related requests, it does not "necessarily follow" that Title VII create an independent, separate cause of action based on the failure to accommodate.</p>

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Title VII Religious Discrimination and Accommodation	United Cellular, Inc.	U.S. District Court for the Northern District of Alabama, Northeastern Division Case Number: 5:13-cv-1207- JHE	2015 U.S. Dist. LEXIS 174885 (N.D. Ala. Nov. 13, 2015)	EEOC's Motion for Summary Judgment Result: Pro-Employer The magistrate denied the EEOC's motion. The district court adopted the magistrate's recommendations on Jan. 15, 2016.	Was the EEOC entitled to a grant of summary judgment on its religious accommodation claim?	The claimant alleged he was an observant Seventh-day Adventist, and therefore could not work on the Sabbath (sundown Friday through Saturday). He alleged he informed his employer of this requirement when he applied for the job as a phone repairman. He alleged he was ordered to work on a Saturday despite his protests for an "all hands on deck" work day. When he refused to work on account of his religion, he alleged he was given reduced hours in retaliation. He said he also requested switching schedules to accommodate his religion, but was denied those schedule swaps. He allegedly was scheduled to work one Sabbath, but informed his supervisor on that Friday that he could not work for religious reasons, and walked off the job. He then filed a charge of discrimination.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>In denying the EEOC's motion for summary judgment, the magistrate noted the many factual conflicts that would preclude summary judgment. For example, per the employer, there were doubts the employee's beliefs were sincerely held; the reduction in hours were the result of the release of the new iPhone, which caused people with broken phones to buy the new phone instead of getting their old one repaired, and the claimant was only employee at the location who worked solely as a technician (the other employees were, at least in part, in sales, so their hours were not affected as much by the decreased demand for repairs); in terms of swapping schedules, the store was sales-only on Sundays and the claimant was the only employee in the store who was not cross-trained to handle sales in addition to repairs, both of which made schedule swaps challenging; the claimant was terminated for walking out of his shift without saying anything to his supervisor; and he had been disciplined for issues unrelated to his religion. Although the EEOC claimed these reasons were pretextual, the magistrate concluded: "[t]he parties disagree as to a number of material facts, the inferences that can be drawn from them, and the credibility of the various witnesses. These kinds of disputes are the province of the jury and beyond the scope of the Court's review on summary judgment. In short, summary judgment on the claim for failure to accommodate would be inappropriate."</p> <p>The magistrate's recommendations were adopted.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Religious Discrimination	United Health Programs of America	U.S. District Court for the Eastern District of New York No. 14-CV- 3673	2016 U.S. Dist. LEXIS 136625 (E.D.N.Y. Sept. 30, 2016)	EEOC's Motion for Partial Summary Judgment on the Question of Whether Employer's Practices Constituted a Religion. Employer's Motion for Summary Judgment. Result: Pro-EEOC The court granted the EEOC's motion, finding the employer's mandatory practice of "Onionhead" in the workplace constituted a religion.	Did the employer violate Title VII by forcing employees to adhere to the practices of "Onionhead"?	In a purported effort to improve its corporate culture, the chief executive officer of Cost Containment Group ("CGC") instituted a program, developed by his aunt, called "Onionhead." While the CEO's aunt initially developed Onionhead for children, she adjusted the program and placed it under the umbrella of her "Harnessing Happiness" programs. The CEO and CGC's chief operating officer invited Onionhead's developer to utilize the programs within the CGC workplace. CGC's position was that Onionhead is merely a multi-purpose conflict resolution tool to help employees interact better with one another. The program includes cards, pins, dictionaries, workshop materials, magnets, journals, and a Declaration of Virtues of Empowerment. The claimants argued that they were forced to subscribe to Onionhead despite its religious nature. In support of their claims, the claimants presented the aunt's e-mails which included references to God, spirituality, demons, Satan, divine destinies, purity, blessings, and miracles. Separately, while the "Declaration of Virtues of Empowerment" referenced above was not introduced to CGC's workplace, another document entitled "Onionhead Keys and Codes to Living Good" was distributed. Some claimants described being told to burn candles and incense to cleanse the workplace. One even stated that he was told not to use overhead lighting in order to "prevent demons from entering the workplace through the lights." Several others described occasions where they were told to chant or pray in the workplace.

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						<p>Each of the claimants was terminated by CGC and subsequently filed a charge with the EEOC. The EEOC pursued both traditional discrimination claims—arguing that because claimants subscribed to other religions, they could not adhere to Onionhead—as well as reverse religious discrimination claims. Both the EEOC and the company moved for summary judgment.</p> <p>The court analyzed Second Circuit cases on religious discrimination, determining that the important questions in this analysis are (1) is belief is sincere?; and (2) is the belief, in “the believer’s own scheme of things, religious?”</p> <p>The court had little trouble concluding that Onionhead was religious in nature. The founder’s comments, as well as the frequent invocation of God or other-wordly beings (like demons and spirits) in the materials, led the court to conclude that Onionhead was “more than intellectual.”</p> <p>The court did not expressly hold that CGC was sincere in its belief when it invited the CEO’s aunt to promote Onionhead in the workplace. Instead, it simply stated that a reasonable trier of fact could conclude that CGC was sincere because it invited, authorized, and paid to use Onionhead within CGC. This, combined with the more clearly established religious elements of Onionhead, was sufficient for the district court to conclude that Onionhead was a religion as a matter of law. Therefore, the company was held potentially liable under Title VII for seeking to impose its own religious beliefs on employees.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Retaliation	Day and Zimmerman	U.S. District Court for the District of Connecticut Case No. 15CV01416	2016 U.S. Dist. LEXIS 48800 (D. Conn. Apr. 12, 2016)	Employer's Motion to Dismiss Result: Pro-EEOC The court denied the employer's motion.	Whether the EEOC's Complaint based on the defendant's letter sent to its employees suffices to state a plausible claim for retaliation and interference claims?	The EEOC allegations focus on one of the defendant's electricians. The electrician filed a charge of discrimination with EEOC, alleging that the defendant failed to accommodate his disability reasonably and unlawfully terminated his employment. In response, the EEOC sought information from the defendant as part of its investigation of the employee's charge, including the names and contact information of other electricians who had worked for the defendant at the Millstone Power Station in the fall of 2012. Before providing the requested information to the EEOC, the defendant sent a letter (the "June 2014 Letter") to approximately 146 individuals, all of whom were members of Local 35 and all of whom had worked, or continued to work, for the defendant. In the June 2014 Letter, (i) the defendant identified the electrician by name and indicated that he had filed a charge of discrimination on the basis of disability; (ii) the letter identified the employee's union local, the medical restrictions on his ability to work, and the accommodation he had requested; and (iii) the letter informed the recipients of their right to refuse to speak to the EEOC investigator and offered them the option to have the defendant's counsel present if they chose to speak to the EEOC. The EEOC alleges that this letter constitutes retaliation against the complaining electrician for opposing conduct made unlawful by the ADA and further alleges that the letter interfered with the electrician and the approximately 146 recipients of the letter in their the exercise or enjoyment of rights protected by the ADA, including the right to communicate with EEOC, the right to participate in an EEOC investigation, and the right to file a charge of discrimination with EEOC.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						The court agreed with the EEOC and denied the defendant's motion to dismiss. The court found that the EEOC's claims are sufficient to support its claims for retaliation and interference claims under the ADA because "it is plausible that the first opportunity to retaliate against [the electrician], whom they had already terminated, was when the EEOC provided a list of fellow union members to whom Defendant could disseminate the potentially damaging EEOC charge" and "the Court reasonably could infer that the letter could have the effect of interfering with or intimidating [the electrician] and the letter's recipients with respect to communicating with the EEOC about potential disability discrimination by Defendant."
Title VII Retaliation	Guardsmark	U.S. District Court for the Eastern District of Michigan Case No: 13-15229	2016 U.S. Dist. LEXIS 47581 (E.D. Mich. Apr. 8, 2016) (Motion for Summary Judgment) 2016 U.S. Dist. LEXIS 80844 (E.D. Mich., June 22, 2016) (Motion for Reconsideration)	EEOC and Plaintiff-Intervenor's Partial Motion For Summary Judgment; Employer's Motion for Summary Judgment Result: Mixed The court denied all motions.	Do the EEOC and the plaintiff-intervenor have standing? Do genuine issues of material fact exist to deny the employer's motion for summary judgment?	In this case, the plaintiff-intervenor worked as a security guard for a company, which provided security services to another company. The plaintiff-intervenor witnessed a security guard using a camera to zoom in on a woman's breast. The plaintiff-intervenor informed the woman. After HR became involved, the employer removed the plaintiff-intervenor. The court did not find persuasive the employer's argument that the plaintiffs did not have standing because Title VII does not protect employees from retaliation for opposing discrimination against non-employees. The court noted that a reasonable worker could be dissuaded from opposing sexually inappropriate conduct in the workplace if he knew he would be fired. The court further found that genuine issues of material fact existed as to whether the employer knew that the plaintiff-intervenor had engaged in protected activity by providing information to the woman who filed a complaint and whether the employer had sufficient business reasons for removing the plaintiff-intervenor.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Retaliation	Peters' Bakery	U.S. District Court for the Northern District of California Case No. 13-cv-04507	2016 U.S. Dist. LEXIS 54379 (N.D. Cal. Apr. 21, 2016)	EEOC's Motion for Partial Summary Judgment on its Retaliation Claim Result: Pro-Employer The court denied the EEOC's motion, as it found a reasonable jury could conclude the employee's filing of a discrimination claim with the EEOC was not the but-for cause of the employer's filing a defamation claim against the employee.	Did the employer/ bakery owner retaliate against an employee who filed a claim of race and national origin discrimination with the EEOC when he filed a defamation claim against the employee?	A Hispanic bakery employee claimed she was discriminated against because of her race and national origin, and that the bakery owner retaliated against her after she filed a charge with the EEOC. The employee filed the charge of race and national origin discrimination with the EEOC in September 2011. Two months later, on November 3, 2011, the EEOC issued a Notice of the charge. In April 2012, the employer filed a defamation claim against the complainant for alleged statements made the same day the EEOC issued its notice. The bakery owner alleged the employee, in her complaint and online, called him a racist. The EEOC filed the discrimination and retaliation lawsuit against the employer on September 30, 2013, and moved for partial summary judgment on the retaliation claim. As to the first element of the retaliation claim, the court noted it is undisputed that the employee filed an EEOC charge against the employer, and that the filing of that charge constituted protected activity. Regarding the second element, it is well established that "[t]he scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm." In evaluating this element, the court looked to whether a reasonable person would be dissuaded by the employer's defamation suit from pursuing a claim, and therefore found unpersuasive the employer's argument that the filing of the defamation claim did not dissuade the employee from pursuing her charge, and that three of her co-workers even attended her defamation hearing to support her.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>The summary judgment motion ultimately rested on the third element: the causal link between the employer's conduct and the protected activity. In order to establish this element, "a plaintiff making a retaliation claim under § 2000e-3(a) must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer."</p> <p>In this case, the bakery owner claimed the employee said he was a racist, and this information was published on the Internet. The defendant argued that the EEOC excluded "critical testimony" from the bakery owner's deposition excerpt, and that the excluded testimony gives rise to a reasonable inference that he filed the defamation action at least in part because of statements that he believed were published online. While the EEOC claimed this was hearsay, the court disagreed: "[t]he statements do not constitute hearsay, as they are not presented for the truth of the matter asserted — that [the employee] actually published the claimed statements to the Internet — but to show that [the bakery owner] believed that to be the case."</p> <p>The court concluded that while the EEOC's evidence was "quite strong," it was not strong enough to show the employee's EEOC charge was the "but for" cause of the defamation claim. A reasonable jury could conclude that the bakery owner filed the defamation claim based on his belief that statements about him were published online. There court, therefore, denied the EEOC's partial motion for summary judgment on its retaliation claim.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Sexual Harassment Retaliation	East Columbus Host, LLC	U.S. District Court for the Southern District of Ohio, Eastern Division Case No. 2:14-cv-1696	2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016)	Employer's Motion for Partial Summary Judgment on Sexual Harassment, Retaliation, and Constructive Discharge Claims of 10 of 12 Claimants Result: Mixed The court granted the employer's motions with respect to four of the claimants' retaliation claims, and three of the claimant's constructive discharge claims, but denied the employer's motions for the remaining claims.	Did the EEOC show that genuine issues of material fact exist in a lawsuit brought on behalf of 12 named complainants and a class of similarly situated women who allege they were subjected to sexual harassment, retaliation, and/or constructive discharge in violation of Title VII?	The EEOC brought an action against a restaurant on behalf of 12 complainants and a class of similarly situated women. The complainants alleged a managing partner repeatedly sexually harassed female employees, retaliated against some who complained, and caused some women to leave their job because of such harassment. The defendants moved for partial summary judgment on the claims of 10 of the 12 women. They argued the court should reject most of the retaliation claims because the complainants failed to engage in any protected activity. The court agreed with respect to three of the complainants, but disagreed with the rest. Most of the employees complained about the managing partner's behavior directly to the managing partner or to other local managers, corporate personnel, or HR. Three women, however, failed to present "colorable evidence that they engaged in even the most basic of protected activity" - i.e., they did not resist or confront the managing partner on his behavior. Therefore, they did not show evidence they engaged in protected activity. The court noted one claimant did not directly oppose or confront the managing partner on his behavior. However, the managing partner interpreted the woman's "laughing it off" response as resistance to his sexual innuendos and advances, because he asked her why she continued to resist him, and then "arguably punished that resistance by refusing her requested time off." Therefore, the court held, "[b]ecause these retaliation claims present a genuine issue of material fact, these claims will proceed to trial."

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>Regarding the hostile work environment claim, the defendants challenged the severity and pervasiveness of the managing partner’s conduct, arguing the claimants presented no evidence of a tangible decline in productivity or harm. The court held, however, that the complainants need only show that the harassment made it more difficult to do the job. Thus, their testimony presents a genuine issue of fact as to whether the treatment changed the conditions of their employment.</p> <p>In evaluating a hostile work environment, the court noted while it does not “aggregate all the evidence to make a finding of a hostile work environment,” it does consider each claimant’s experience. The multiple allegations over a several-year period could support a finding of a hostile work environment.</p> <p>The court noted also that “a claim for emotional-distress damages must be supported by competent evidence, which is evidence that is specific and definite, but a plaintiff does not need to present evidence of physical manifestations to survive summary judgment.”</p> <p>In sum, the court found that sufficient questions of fact remained regarding most of the claimants’ allegations to necessitate a trial on the merits, therefore denying a majority of the defendants’ motion.</p>

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
Title VII Sex/Gender Discrimination Religious Freedom Restoration Act (RFRA)	R.G. & G.R. Harris Funeral Homes	United States District Court for the Eastern District of Michigan, Southern Division Case No. 14-13710	2016 U.S. Dist. LEXIS 109716 (E.D. Mich. Aug. 18, 2016)	Cross-Motions for Summary Judgment Result: Pro-Employer The court denied the EEOC's Motion and granted summary judgment in favor of the employer as to the wrongful termination claim. The court dismissed the clothing allowance claim without prejudice.	Whether there was an issue of material fact on liability regarding claimant's allegations that (1) the employer wrongfully terminated transgender claimant because claimant did not conform to the employer's sex- or gender-based expectations, and (2) that the employer engaged in an unlawful employment practice by providing work clothes to male but not female employees. Whether the employer has a valid defense to the termination, namely that the employer's enforcement of its sex-specific dress code did not constitute impermissible sex stereotyping under Title VII, and second that the Religious Freedom Restoration Act prohibits the EEOC from applying Title VII to force the employer to violate its sincerely held religious beliefs.	The EEOC filed this action against the employer alleging (1) wrongful termination on behalf of claimant, a transgender former funeral director, who was transitioning from male to female and/or because claimant did not conform to the employer's sex- or gender-based expectations, and (2) that the employer engaged in an unlawful employment practice by providing work clothes to male but not female employees. The employer admitted that it fired claimant because she intended to "dress as a woman" while at work, but the employer asserted two defenses. First, the employer asserted that its enforcement of its sex-specific dress code (pantsuit and neck tie for men and skirt-suit for women) cannot constitute impermissible sex stereotyping under Title VII. The court rejected this defense, stating that the Sixth Circuit has not provided any guidance on how to reconcile the previous line of authority (where other circuits upheld dress codes with slightly differing requirements for men and women) with the more recent sex/gender-stereotyping theory of sex discrimination. The employer's second defense is that it is entitled to an exemption under the federal Religious Freedom Restoration Act. The court found that the employer met its initial burden of showing that enforcement of Title VII and the body of sex-stereotyping case law would impose a substantial burden on the employer's ability to conduct business in accordance with its sincerely held religious beliefs (the religious beliefs include that the employer would be "violating God's commands" if he permitted a male funeral home director to wear the female uniform).

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES	COMMENTARY
						<p>The court found that the EEOC failed to meet its burden of showing that the application of the burden was the least restrictive means of protecting employees from gender stereotyping. The court went on to explain that allowing claimant to wear a skirt-suit would not remove or eliminate gender stereotypes in the workplace, and the EEOC should have instead explored a gender-neutral dress code.</p> <p>As to the second claim, the EEOC alleged that the employer violated Title VII by providing a clothing allowance/work clothes to men but not to women. Before reaching the merits of this claim, the court addressed the employer's assertion that the EEOC lacked the authority to bring this second claim. The employer argued that the EEOC may include in a Title VII lawsuit only those claims that fall within an investigation reasonably expected to grow out of the charge of discrimination. The court concluded that this claim was not of a kind raised by the claimant in the EEOC Charge, and also that this claim did not involve claimant. As a result, the court found that the EEOC could not proceed with the claim.</p> <p>The court denied the EEOC's Motion and granted summary judgment in favor of the employer as to the wrongful termination claim. The court dismissed the clothing allowance claim without prejudice.</p>

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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
505.244.3115

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

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

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
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267.402.3000

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412.201.7600

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207.774.6001

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503.221.0309

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401.824.2500

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775.348.4888

Rochester, NY
585.203.3400

Sacramento, CA
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619.232.0441

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415.433.1940

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408.998.4150

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787.765.4646

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805.934.5770

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206.623.3300

St. Louis, MO
314.659.2000

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703.442.8425

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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

Hamburg, Germany
+49 40-5 54 34 56-0

Duesseldorf, Germany
+49 211-13 06 56-0

Munich, Germany
+49 89-41 611 63-0

Guatemala City, Guatemala
502.2335.2179

San Pedro Sula, Honduras
504.2516.1133

Mexico City, Mexico
52.55.5955.4500

Monterrey, Mexico
52.81.8851.1200

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506.2545.3651

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507.830.6552

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511.226.1600

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Caracas, Venezuela
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