THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2018

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

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Littler®

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

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With the steady rise in the number of discrimination, harassment and retaliation claims filed each year, employers must be more vigilant and pro-active than ever when it comes to their employment decisions. Since laws prohibiting discrimination statutes have existed, Littler's Equal Employment Opportunity & Diversity Practice Group has been handling discrimination matters for its clients. Members of our practice group have significant experience working with all types of discrimination cases, including age, race, gender, sexual orientation, religion and national origin, along with issues involving disability accommodation, equal pay, harassment and retaliation. Whether at the administrative stage or in litigation, our representation includes clients across a broad spectrum of industries and organizations, and Littler attorneys are at the forefront of new and innovative defenses in each of the key protected categories. Our attorneys' proficiency in handling civil cases brought by the EEOC and other state agencies enables us to develop effective approaches to defending against any EEOC litigation, whether it involves claims brought on behalf of individual claimants or class-wide allegations involving alleged "pattern and practice" claims and other alleged class-based discriminatory conduct.

In addition, our firm recognizes the value of a diverse and inclusive workforce. Littler's commitment to diversity and inclusion starts at the top and is emphasized at every level of our firm. We recognize that diversity encompasses an infinite range of individual characteristics and experiences, including gender, age, race, sexual orientation, national origin, religion, political affiliation, marital status, disability, geographic background, and family relationships. Our goal for our firm *and* for clients is to create a work environment where the unique attributes, perspectives, backgrounds, skills and abilities of each individual are valued. To this end, our EEO & Diversity Practice Group includes attorneys with extensive experience assisting clients with their own diversity initiatives, providing diversity training, and ensuring employers remain compliant with the latest discrimination laws and regulations.

For more information on Littler's EEO & Diversity Practice Group, please contact any of the following Practice Group Co-Chairs:

- Barry Hartstein, Telephone: 312.795.3260, E-Mail: bhartstein@littler.com
- Cindy-Ann Thomas, Telephone: 704.972.7026, E-Mail: cathomas@littler.com

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2018

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

INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2018** (hereafter "Report"), our eighth annual publication, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

In **Part One**—*A Practical Primer for Dealing with the Equal Employment Opportunity Commission*—Littler Shareholder James A. Paretti, Jr. provides insight into the operations of the EEOC, where he served as Chief of Staff and Senior Counsel to Acting EEOC Chair Victoria A. Lipnic. This discussion touches on an employer's key concerns with the investigation process, national mediation agreements, insights on EEOC guidance and regulations, and anticipated changes in the coming year.

Part Two outlines EEOC charge activity, litigation and settlements in FY 2018, 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, particularly as the Commission's composition is in transition.

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 2018.

Part Five of the Report focuses on FY 2018 litigation in which the EEOC was a party. This discussion is broken into several topic areas, including: (1) pleading deficiencies raised by employers; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) the state of employer challenges based on the EEOC's alleged failure to meet its conciliation obligations prior to filing suit; (4) intervention-related issues, both when the EEOC attempts to enter a case through intervention and when third parties attempt to join as plaintiffs in EEOC-filed lawsuits; (5) class discovery issues in EEOC litigation, including the scope of discovery in class-based or pattern-or-practice cases, and the use of experts; (6) general discovery issues involving both employers and the EEOC in litigation between the parties; (7) favorable and unfavorable summary judgment rulings; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are useful resources that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury awards. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief, and decided appellate cases in FY 2018. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2018. **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 PRACTICAL PRIMER FOR DEALING WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This introductory chapter is designed to provide practical insights into the operation of the Equal Employment Opportunity Commission (EEOC). Please join this conversation between Barry Hartstein, Co-Chair of Littler's EEO & Diversity Practice and Executive Editor of Littler's Annual Report on EEOC Developments, and James A. (Jim) Paretti, Jr., Shareholder and member of Littler's Workplace Policy Institute®, who recently joined Littler after serving as Chief of Staff and Senior Counsel to Acting EEOC Chair Victoria A. Lipnic. Topics covered in these Q&As include:

- Day-to-day operation of the EEOC, including anticipated changes during the coming year;
- Key concerns in the investigation process, including commissioner charges, directed investigations, and subpoena enforcement actions;
- National mediation agreements with the EEOC; and
- Insights on EEOC guidance and regulations, including the Task Force on Prevention of Harassment in the Workplace and other guidance deserving attention by the employer community.

Jim Paretti joined Littler as a shareholder in the firm's Washington, D.C. office on August 20, 2018. In his work at the EEOC, Jim joined then-Commissioner Lipnic's staff shortly after her appointment to the Commission in 2010, and most recently was her senior advisor on all legal, enforcement, and policy matters before the EEOC. As manager and primary representative of the Office of the Chair, Jim oversaw the agency's operations, participated in negotiations with other commissioners and internal constituencies, and served as a liaison to regulated stakeholders and legislators.

A. Operation of the EEOC

Q. Jim, what is the current size of the Commission and its annual budget, and what are its prospects during the coming year?

At the end of FY 2018, the EEOC had a staff of 1,968 FTEs—a net decrease of 114 FTEs (representing 5% of the agency's staff).[1] That number reflects the continued steady decrease in EEOC staffing levels—from almost 3,400 FTE in FY 1980, to roughly 2,800 in FY 1990 through FY 2000, to 2,400 in FY 2010. Notably, more than 500 members of the EEOC's staff are currently retirement-eligible, and an additional 600-plus are eligible to retire within the next 10 years,[2] suggesting that we may see increased turnover, particularly of long-term and senior staff, at the agency. That necessarily means a loss of institutional experience and a "learning curve" for newer employees—even where an existing EEOC employee is hired into a new position. In all, the EEOC reports that nearly 20 percent of agency staff are new to their positions within the agency in the last fiscal year.[3]

Notable hires during the past fiscal year include three new district directors: Bradley A. Anderson, in the agency's Birmingham District Office, Belinda F. McAlister, in the Dallas District Office; and Jamie Williamson, in the Philadelphia District Office. In Washington headquarters, EEOC hired a new chief human capital officer, Kevin L. Richardson, and its first-ever chief data officer (CDO), Samuel Christopher

1 *See* EEOC, *2018 Performance and Accountability Report* (hereinafter, "EEOC FY 2018 PAR"), at 17.
2 *See* EEOC, *Congressional Budget Justification*, Fiscal Year 2019, at 2.
3 *See* EEOC FY 2018 PAR, at 7.

("Chris") Haffer. Under the new CDO, the EEOC overhauled its data office for the first time in twenty years with the creation of a new Office of Enterprise Data and Analytics, and the establishment of the agency's first Data Governance Board. These efforts in particular reflect the EEOC's commitment to upgrade its data analytics capacity to become "a 21st century enforcement and data analytics agency."[4]

In FY 2017, the last year that figures for full funding of the government are available, the EEOC's enacted budget was $364.5 million. The agency was allocated $379.5 million by way of continuing resolutions funding the government for fiscal year 2018. That number included a one-time allocation of an additional $16 million appropriated by Congress earlier this year to provide the EEOC with more resources to combat sexual harassment in the #MeToo era. In the president's FY 2019 budget proposal, which will be taken up in the next Congress, the administration requested $363.8 million for EEOC funding.

Q. What is the current status of the Commission and the membership of the Commission?

Currently, only two of the Commission's five commissioner slots are filled: Acting Chair Victoria A. Lipnic, a Republican, is serving her second term, which expires on July 1, 2020. Acting Chair Lipnic began her service as a commissioner in April 2010, and was designated in January 2017 by President Trump to serve as the acting head of the agency. Having served in that role for almost two years, she is the longest-serving acting chair in the agency's 50+ year history. Commissioner Charlotte A. Burrows, a Democrat, is serving her first term on the Commission, which expires on July 1, 2019.

On January 3, 2019, Commissioner Chai R. Feldblum's tenure on the Commission in holdover status expired. Ms. Feldblum had been nominated for a third term, but her nomination was not acted upon by the U.S. Senate, and lapsed at the end of the last session of Congress. She recently announced publicly that she would not seek to be re-nominated to the Commission.

With only two members, the Commission lacks a voting quorum. As a practical matter, this means that while the day-to-day enforcement operations of the agency will largely continue, lacking a quorum, the Commission is unable to adopt new guidance or policies that would require a vote of the Commission to approve.

There are presently three vacancies on the Commission for which the president may submit new nominations to the Senate. Republican Janet Dhillon, most recently the general counsel for the Burlington Corporation, had been nominated by the president in the prior session of Congress, but, as with the Feldblum nomination, her nomination was returned to the White House at the end of that session. Ms. Dhillon has been re-nominated; if confirmed by the Senate, she would serve as chair of the Commission.

In the last Congress, the president had also nominated Republican Daniel M. Gade to be a commissioner; his nomination expired as well, and Mr. Gade has indicated he is not interested in being re-nominated.

Finally, the position of the EEOC general counsel has been vacant since the retirement of Obama-era General Counsel P. David Lopez in December 2016; James A. Lee, a career deputy general counsel, has led the GC's office since that time. In the last Congress, the president nominated Republican employment attorney Sharon Fast Gustafson to serve as general counsel. She was recently re-nominated.

4 EEOC FY 2018 PAR, at 8.

Q. How significant a role does the Commission play in the day-to-day operation of the EEOC's fifteen district offices and nine field offices around the country?

Good question. Historically, the role of the commissioners has been to set Commission policy, adopt enforcement priorities and strategies, and make decisions on significant matters, such as high-profile litigation.[5] The Commission examines policy issues and solutions through a range of measures. Most publicly, the Commission conducts meetings, which may be used to explore a specific policy issue in depth, allow commissioners to hear from experts and regulated stakeholders, and generally inform the policy direction of the Commission at its highest level. Over the last few years, the Commission has held public meetings on topics ranging from the state and future of the American workforce to workplace harassment, the implications of social media and big data in EEO law, workplace wellness programs, and others.

A significant amount of day-to-day operation is exercised through the Commission's program offices, based in its Washington, D.C. headquarters, which in turn operate through staff in the field. The program offices ultimately report to the chair, but on a day-to-day level, routine operations (*e.g.*, the investigation of charges, garden-variety mediations, outreach and training efforts) are largely handled by way of field staff. The authority to sign letters of determination is delegated to district directors, for example. That does not mean that the Commission has no involvement in the field's activities, or is wholly removed from day-to-day operation, but rather that most of the agency's "bread and butter" work is supervised in the field, with reporting authority to the Washington program offices, and, ultimately, to the chair. Operational priorities and strategies may be set by the chair—Acting Chair Lipnic's initiative focusing on reducing the agency's backlog of charges comes to mind. Broader policy initiatives may be set by the chair (for example, the agency's focus on age discrimination in 2017 as the EEOC marked the 50th anniversary of enactment of the Age Discrimination in Employment Act), or by the Commission as a whole. Most notably, in recent years, the Commission has used its strategic enforcement plan to, among other things, set enforcement priorities and areas of substantive legal focus for the agency.[6]

Litigation is another area where the Commission has reserved its authority with respect to certain significant matters, but broadly delegated much of the routine or functional operation of litigation to the field. Pursuant to Title VII, the general counsel is charged with the conduct of Commission litigation. By way of its Strategic Enforcement Plan, the Commission has reserved to itself the right to approve certain categories of litigation (where a proposed case raises a novel issue or law, or one where the Commission has not established policy; cases that may consume a large amount of agency resources, cases which otherwise may cause public controversy; and all amicus briefs). The decision to commence or intervene in other litigation matters is broadly delegated to the general counsel, who in turn has delegated significant authority to the agency's 15 regional attorneys.[7] This means the routine day-to-day litigation of federal cases is largely conducted through field attorneys reporting to the regional attorneys, who in turn report to the general counsel at Headquarters.

5 *See generally*, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, FY 2017-2021 ("EEOC FY 2017-2021 SEP"), *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.

6 The EEOC FY 2017-2021 SEP broadly identifies six areas as substantive national enforcement priorities: eliminating barriers to recruitment and hiring (including policies and practices that could discriminate against protected classes); protecting vulnerable workers, including immigrant and migrant workers; addressing emerging issues of law (including LGBT discrimination, pregnancy-related limitations, ADA qualification standards and leave policies, and others); ensuring equal pay; preserving access to the legal system (by way of challenges to "overly broad" waivers, releases, and arbitration agreements; and preventing systemic harassment. These national enforcement priorities are complemented by district level priorities adopted on a local basis.

7 The EEOC FY 2017-2021 SEP provides that if the general counsel does not submit for approval by the Commission at least one litigation recommendation from each district office in a given year, he must submit a report to the Commission detailing the litigation recommendations approved by his office pursuant to the delegation for those district offices that did not submit a recommendation.

Q. How would you characterize the difference in the operation of the EEOC as compared to the U.S. Department of Labor?

Where policy-making is concerned, the Commission is a voting body—that means significant policy decisions or changes need be made by a majority vote of the commissioners. In contrast, in a cabinet agency such as the Department of Labor, policy-making authority is vested within the secretary, who is empowered to unilaterally enact and move forward the administration's policy agenda. There is generally not the same need or urgency to reach consensus within an office or offices. With respect to day-to-day field investigations and operations (*e.g.*, DOL's Office of Federal Contract Compliance Programs (OFCCP)'s routine audits of federal contractors' compensation systems). That distinction is likely not as significant, except to the extent that investigations and other enforcement activities are dictated by the sitting administration's policy priorities. Where the distinction bears more weight is in the setting of policy or regulation—for example, OFCCP's decision earlier this year to rescind Obama-era directives regarding compensation audits, and adopt a more flexible regulatory approach—that was something that was able to be done unilaterally, whereas at an agency like the EEOC, the decision to rescind prior significant guidance would in most instances need be done via a vote of the majority of the Commission's members.

B. The Investigation Process

One of the most troublesome concerns to the employer community in dealing with the EEOC involves initiation of an investigation by the EEOC in the complete absence of a discrimination charge being filed by a charging party.

1. Commissioner Charges

Q. I would like you to first address commissioner charges and would appreciate your providing some detailed guidance concerning: (1) the legal basis for such charges; (2) how they are initiated by the Commission; (3) the type of discrimination claims they can address; (4) how they are processed; (5) the frequency of such charges on an annual basis; and (6) the likelihood of a reasonable cause finding.

Title VII of the Civil Rights Act of 1964 expressly provides that an investigative charge alleging an unlawful employment practice may be filed by an aggrieved person *or* by any member of the Commission.[8] This authority is carried over into other non-discrimination statutes whose enforcement scheme and powers are modeled on or drawn from Title VII. Commissioner charges represent a very small number of the charges filed with the Commission each year, usually numbering no more than 15 to 20 per year in each of the last 10 years[9] (by way of comparison, the EEOC received more than 76,000 charges filed by employees or their representatives in the last fiscal year). A commissioner's charge can be filed to address any sort of unlawful discrimination under any of the statutes within the Commission's jurisdiction (although, as discussed below, in some instances, the Commission is empowered to begin an investigation in the absence of any charge whatsoever).

Theoretically, a commissioner may propose and sign a charge on his or her own initiative. If, for an example, a commissioner had a reasonable belief that a company was maintaining discriminatory hiring practices, he or she could draw up and sign a charge him/herself. Far more common, however, is for charges to be developed through offices in the field, and submitted to Washington headquarters for consideration by a commissioner (the commissioner charge operates as a "queue" system—a charge is sent to a particular commissioner's office for consideration; if that commissioner declines to sign it,

8 *See*, *e.g.*, 29 U.S.C. § 2000e-5(b).

9 *See* EEOC, A review of the Systemic Program of the U.S. Equal Employment Opportunity Commission (July 7, 2016), *available at* https://www.eeoc.gov/eeoc/systemic/review/#_ftnref52.

for whatever reason, the proposed charge is passed on to the next commissioner for consideration, until it has been presented to each sitting commissioner for approval). Commissioner charges are most commonly proposed by the field where an investigation of a charge reveals that there may be discrimination beyond the scope of investigation of that filed charge. For example, if an individual alleged that she was not hired on the basis of her sex, but in the course of the investigation of that charge the EEOC discovered that the company subjected applicants to pre-offer medical investigations (a potential violation of the Americans with Disabilities Act (ADA)), the investigating office might propose a commissioner's charge alleging discrimination under the ADA. In that way, the agency is able to investigate suspected discrimination that might not otherwise be sufficiently related to an individual's filed charge of discrimination. Commissioner charges are also used where the investigation of an individual charge suggested that there was a broader policy or practice at issue.[10] Finally, the EEOC has used commissioner charges to investigate discrimination in hiring, its articulated reason being that applicants will typically lack information about a discriminatory hiring policy or practice.[11]

The filing of a commissioner charge becomes meaningful in, for example, subpoena enforcement actions. While the EEOC has broad investigative authority, a reviewing court is usually going to be more willing to allow the EEOC's investigation into seemingly unrelated allegations of discrimination where the basis for the investigation comes from a commissioner's charge, rather than by way of an individual charge alleging discrimination on a different statutory basis. Finally, it is perhaps not surprising that the likelihood of cause being found on a commissioner's charge is significantly more likely than a cause finding on a charge filed by an individual—in its 2016 review of its systemic program, the EEOC observed that "[t]he investigation of Commissioner Charges is a highly effective tool for determining whether discrimination is likely to have occurred. Since 2006, EEOC has found reasonable cause to believe discrimination occurred in 81 percent of Commissioner Charges investigated."[12] This is not to suggest that investigation of commissioner's charges are biased or tilted toward a cause finding, but reflects the reality that, in most cases, a significant amount of investigation and analysis will have been done before a commissioner's charge is even proposed as an option.

2. Directed Investigations

Q. Next turning to directed investigations, which also involve an EEOC investigation in the absence of a charge, (1) what is the legal basis for directed investigations; (2) how do these arise; and (3) how do they differ from commissioner charges?

Certain statutes – notably the Equal Pay Act (EPA) and the Age Discrimination in Employment Act (ADEA) – provide that the EEOC may begin a "directed investigation" of suspected discrimination in the absence of an aggrieved party filing a charge. These may arise under the same circumstances that lead to the proposal of a commissioner's charge—for example, the agency finds evidence that suggests sex-based pay discrimination during the investigation of an otherwise unrelated ADA charge. Alternately, there may be circumstances where the field office has reason to believe discrimination on the basis of age, or pay discrimination on the basis of sex, is occurring. In these instances, the ADEA and EPA (which incorporates the remedial scheme of the Fair Labor Standards Act) expressly provide that the Commission may begin an investigation on its own initiative, and without the filing of a charge. As a practical matter, the only significant difference between directed investigations and commissioner charges is that a field office may begin a directed investigation under these statutes on its own initiative, and without the requirement that a commissioner swear out a charge. The decision of whether or not to commence a directed investigation falls generally within the discretion of the appropriate district director, rather than a commissioner.

10 *See Id.*
11 *See Id.*
12 *Id.*

3. Subpoena Enforcement Actions

During the course of an EEOC investigation, assuming the EEOC serves an employer with overly broad requests and then serves the company with a subpoena after the employer objects to the subpoena, most employers now understand that a petition to modify or revoke has to be filed with the Commission within five business days or it otherwise risks waiving the right to challenge the subpoena, as the Seventh Circuit held in *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013). (*Here, too, the right to file a petition to modify or revoke applies only to Title VII and ADA claims; the EEOC has the option of going directly to court to enforce a subpoena based on ADEA or Equal Pay Act claims.*)

Q. Assuming an employer timely files a petition to modify or revoke a subpoena with the Commission, (1) To whom and how is the petition assigned at the Commission in D.C.? (2) How is it reviewed and processed at the Commission? (3) How are decisions made whether to affirm, modify or overturn the subpoena? (4) How frequently does the Commission revoke or modify a subpoena? (5) How many petitions to modify or revoke a subpoena are typically submitted to the Commission on an annual basis? And (6) How frequently are subpoena enforcement actions filed in federal court?

The Commission's power to issue and enforce subpoenas is statutory. Section 710 of Title VII provides that the conduct of hearings and investigations (including subpoena power) is identical to the authority granted the National Labor Relations Board in section 11 of the National Labor Relations Act. Title VII provides that the EEOC is required to revoke a subpoena if, in its opinion, "the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena [sic] does not describe with sufficient particularity the evidence whose production is required."[13]

In general, when a respondent submits a petition to modify or revoke a subpoena, the Commission's decision on whether or not to revoke or modify is drafted in the first instance by the field office that issued the subpoena itself. In light of this fact, readers will not be shocked to learn that, by and large, the Commission generally (but not always) tends to decline these petitions (of which it typically sees a few dozen in a given year). That said, where a respondent can make a compelling case that a particular request is duplicative, unduly burdensome (be specific!), unclear, or otherwise unlikely to bear fruit, the Commission will consider tailoring or clarifying a subpoena in response to a petition. In fairness to the agency, the relative infrequency of successful petitions reflects as a substantive matter the fact that courts have generally given significant deference to the EEOC in conducting its investigations, and have construed the EEOC's subpoena authority very broadly (for example, the standard for the determination of relevance with respect to information sought by a subpoena is far broader than the standard that would be applied by a court addressing a discovery dispute between private parties, or the admissibility of evidence in a trial).

Once a proposed determination on a petition has been drafted, it is circulated to the full Commission for review. During that process, a commissioner may put the document on "hold" pending consultation with the issuing office. For example, a commissioner (or her staff) may have questions regarding the scope of the subpoena, or why certain documents are being requested. Those concerns may be readily addressed, or may lead commissioner(s) to request that a determination be modified, or its reasoning better explained. Ultimately, any commissioner has the authority to request that a subpoena determination be resolved by way of a Commission vote; in those instances, whether a determination will be approved becomes a function of whether there are sufficient votes to approve the decision. In FY 2018, the EEOC filed 18 subpoena enforcement actions in federal district court, up from 15 in FY 2017, but

13 29 U.S.C. § 161.

notably down from three years prior when the agency filed roughly 30 subpoena enforcement actions.[14] Based upon review of courtroom dockets, in most instances, subpoena enforcement matters are resolved prior to the issuance of a court opinion.[15]

C. National Mediation Agreements

Q. Many employers participate at the local level in the mediation process with the EEOC, but what is the role of national mediation agreements, in terms of employers being eligible to participate, aside from the pros and cons of entering into such agreements?

At the end of FY 2018, the EEOC had entered into more than 2,900 "Universal Agreements to Mediate" (UAM) with employers,[16] including more than 400 regional or national UAMs, under which an employer and the EEOC agree to mediate all eligible charges in a multi-state region or on a nationwide basis (local UAMs, in contrast, are agreements between an employer and the EEOC field office to mediate all eligible charges filed within that office's jurisdiction).[17]

Frankly, from both charging parties and employers, the EEOC's mediation program draws general high marks, and is one of the agency's more successful programs for the quick resolution of charges. In FY 2018, the agency obtained successful resolution of 6,754 out of 9,437 mediations conducted (roughly 71.6%).[18] 97.2 percent of all participants indicated that they would use the mediation program again.[19] EEOC's website includes frequently asked questions about UAMS, including a sample UAM agreement, and a list of employers participating on a non-confidential basis.[20]

D. EEOC Guidance and Regulations

Select Task Force on the Study of Harassment in the Workplace

Acting Chair Lipnic was one of the co-chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, which she co-chaired with Commissioner Chai Feldblum.

Q. While last year's opening chapter of Littler's Annual Report on EEOC Developments focused on a review of the Task Force Report, are there any findings of the Report that you found to be surprising and/or that you recommend particularly close attention by the employer community?

Well, first, I think both Acting Chair Lipnic and Commissioner Feldblum are to be commended. It is very rare that you can say "government was out in front on this"—but with harassment, and #MeToo, that was very much the case. The Select Task Force was formed in January 2015, and met for over a year before the June 2016 delivery of the co-chairs' report.[21] A little more than a year later, what was then known as the "Weinstein scandal" began to unfold, and within weeks the country was in the middle of a bona fide movement and reckoning around sexual harassment in the workplace—our collective #MeToo moment. Almost immediately, the agency began to see increased traffic on the harassment sites on its website, and now, based on preliminary FY 2018 numbers, the EEOC confirms that it has seen a significant uptick in the number of harassment charges filed since then. The agency has prioritized

14 *See* EEOC Performance and Accountability Reports for FY 2014, FY 2015, and FY 2016, *available at* https://www.eeoc.gov/eeoc/plan/archives/annualreports/index.cfm.
15 A detailed discussion of reported court orders in subpoena enforcement actions may be found in this Report in Section IV and Appendix C, *infra*.
16 *See* EEOC FY 2018 PAR, at 32.
17 *See* EEOC, Questions and Answer Universal Agreements to Mediate (UAMS), *available at* https://www.eeoc.gov/eeoc/mediation/uam.cfm.
18 *See* EEOC FY 2018 PAR, at 32.
19 *See id.*
20 *See* EEOC, Questions and Answer Universal Agreements to Mediate (UAMS), *available at* https://www.eeoc.gov/eeoc/mediation/uam.cfm.
21 *See* EEOC Select Taskforce on 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.

harassment in its enforcement efforts—in FY 2018, one-third of all lawsuits the agency filed contained allegations of harassment (and roughly two-thirds of those were allegations of sex-based harassment).

As to the co-chairs' report, a few things stand out. First, I think all employers would do well to review the report's discussion of the economic "business case" for preventing and eliminating workplace harassment. The report does an excellent job of laying out the true cost, direct and indirect, of workplace harassment—it's not simply potential lawsuit damages. Rather, looked at more broadly, the increased costs of employee turnover, decreased productivity, lowered morale, and the like, make a very compelling economic argument for aggressive workplace harassment prevention programs. This is so even in the cases of the so-called "superstar harasser"—the senior partner with high-dollar clients, or the leading academic whose work brings in all the grant money. For a long time, I think employers conditioned themselves to think that it made more economic sense to keep these problem employees in place, and to quietly settle harassment issues as they arose. The report does an excellent job of questioning that reasoning.

On a more practical note, there are a number of user-friendly tools contained in the report and its appendices, such as charts of "risk factors" for workplace harassment, and checklists to assess an organization's anti-harassment policies and procedures. These are written in simple, easy-to-understand language and accessible formats, and I think would be invaluable to employers seeking to refresh mid-level managers and front-line supervisors on the contours of their harassment efforts.

Other Guidance and Regulatory Developments

Over the past couple of years, aside from addressing harassment, the EEOC has taken an active role in addressing retaliation, national origin, wellness, and disabilities.

Q. Do you have any insight you can share on other significant regulatory items over the last few years?

Retaliation and National Origin Guidance. Near the end of the last administration, the Commission issued revised enforcement guidance on retaliation and national origin discrimination.[22] To provide some context, even when styled as "enforcement guidance," there generally is not much new or novel within a given guidance document. Rather, these collect and set forth the Commission's positions on various issues, provide examples (often updated after years, if not decades), and cite to relevant decisions laying out the case law. That said, there are instances where courts have not been uniform in their application of the law, or have come to different conclusions as to the interpretation or treatment of a given issue. In those instances, the EEOC will often use guidance documents to indicate to stakeholders how it views the law, and what its enforcement position is (for example, which side of a circuit split the agency believes is the correct interpretation of the law). More often than not, the agency's chosen position will be the more expansive one, or that which reads the relevant statute the most broadly. I would say both the national origin and retaliation guidance documents fall squarely within this description. Much of the respective documents are restatements of well-established law, with reasoned analysis or examples provided. In each, however, around a few issues, the agency chooses to read the statute very broadly, and extend the reach of the statutes as far as it can (for example, reading the "participation" prong of Title VII's anti-retaliation clause as expansively as possible and concluding that even an employee's participation in the EEO process in bad faith is protected under the law, or, with respect to national origin discrimination, providing for lawful "English-only" rules in only the narrowest of circumstances). While probably 90% of these documents is the explication of well-settled law, those issues at the margin are

22 *See* EEOC, *Enforcement Guidance on Retaliation and Related Issues* (Aug. 25, 2016), *available at* https://www.eeoc.gov/laws/guidance/retaliation-guidance.cfm; *Enforcement Guidance on National Origin Discrimination* (Nov. 18, 2016), *available at* https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm.

often where the agency reaches furthest. In that light, it may be informative that both the retaliation guidance and national origin discrimination guidance were adopted along party-line votes (which is not as frequent an occurrence at the EEOC as at many other agencies).

ADA & GINA Wellness Regulations. In 2014, when the EEOC's then-general counsel sued Honeywell, Inc. to enjoin its workplace wellness plan,[23] the agency attempted to become "the mouse that roared." Unfortunately, the district court had something different in mind, and rejected the EEOC's challenge in relatively short order. That said, the *Honeywell* case marked the opening of the most recent chapter in the EEOC's wellness saga—which continues to this day.

By way of very brief background, workplace wellness plans are governed by a comprehensive regulatory scheme under the Health Insurance Portability and Accountability Act (HIPAA), as amended in 2009 by the Affordable Care Act (ACA). The statute and its implementing regulations (issued jointly by the Departments of Labor, Treasury, and Health and Human Services, and commonly referred to as the "tri-agency regulations") provide robust non-discrimination requirements, including prohibitions in plans on discrimination on the basis of a disability or other health factor. The tri-agency regulations also set strict limits on the financial incentives (whether in the form of reward or penalty) that an employer can use to encourage employee participation in a workplace wellness plan run as part of the employer's group health plan (generally, the value of an incentive cannot be more than 30% of the total premium cost of the health plan in which an employee is enrolled).

Two statutes enforced by the EEOC—the ADA and the Genetic Information Non-Discrimination Act (GINA)—are also implicated by wellness plans. The ADA generally prohibits medical examinations or disability-related inquiries that are not job-related and consistent with business necessity. GINA prohibits the acquisition of genetic information from employees and their families, including certain family medical histories. Both statutes, however, provide an exception to the general rule of prohibition where this information is requested in the context of a workplace wellness program, so long as such participation is *voluntary*.

For years, the EEOC offered little guidance as to when an incentive for wellness program participation becomes so great as to render participation in the program coercive or involuntary (for two months in early 2009, the agency had opined that a 20% of premium cost limit—what HIPAA then allowed—was permissible, but that opinion was quickly withdrawn by the incoming Obama administration). The EEOC also brought very few suits in this area, and where it did so, it tended to go after wellness plans where incentives were far beyond those offered under mainstream plans (*e.g.*, failure to participate in the wellness plan meant the employee couldn't participate in the employer's health plan, or had to bear 100% of the cost of the plan).

In 2016, the agency issued final regulations under GINA and the ADA setting forth, for the first time, its view on when a wellness plan incentive could be considered "voluntary."[24] While these regulations bore a surface resemblance to the tri-agency regulations and HIPAA regulatory scheme, they did differ in material ways (for example, the EEOC regulations provided for a 30% cap, facially similar to HIPAA's, but calculated in a significantly different fashion; the EEOC's regulations also included a number of other limitations not found in HIPAA or the ACA). Critics in the employer and plan sponsor communities argued that the regulations unduly restricted their ability to incentivize wellness plan participation, and were inconsistent with what Congress had affirmatively allowed them to do under HIPAA and the ACA. Critics in the employee and disability advocacy communities, on the other hand, argued that the

23 *See EEOC v. Honeywell International, Inc.*, Civ. No. 14-4517 (D. Minn.) (Oct. 27, 2014).

24 *See Regulations Under the Americans with Disabilities Act*, 81 FR 31126 (May 17, 2016); *Genetic Information Nondiscrimination Act*, 81 Fed. Reg. 31143 (May 17, 2016).

regulations allowed employers to offer incentives or penalties that were far too onerous, which could render employee participation in a wellness plan coercive and involuntary.

In the fall of 2016, the American Association of Retired Persons (AARP) sued the EEOC in federal district court to enjoin the wellness regulations, arguing that they were insufficiently protective, and allowed employers to offer wellness plan incentives that rendered participation involuntary.[25] The court declined to grant a preliminary injunction, but after briefing, granted summary judgment in AARP's favor in August 2017. Specifically, the court held that the EEOC had offered insufficient economic analysis to justify its setting a permissible rate at 30% of total premium cost. Moreover, insofar that among the EEOC's stated purposes in promulgating these regulations was to "harmonize" with HIPAA requirements, the fact that the EEOC's regulations differed in some dramatic ways undercut the agency's argument. After some back and forth motion practice, the court vacated those portions of the regulations setting permissible incentive limits effective January 1, 2019 (other limitations on confidentiality, participation, structure, and notice that are unrelated to the financial incentive remain in effect). On December 20, 2018, the EEOC published regulations in the *Federal Register* removing those portions of the regulations that were stricken by the court, effective January 1, 2019.

The EEOC's most recent regulatory agenda indicates that it expects to publish new draft wellness regulations in June 2019. That date has slipped in the past, however, and in the absence of a confirmed Republican majority at the Commission, may prove to be overly ambitious. Moreover, given the court's pointed criticism of the prior regulations, it is unclear what form new regulations will take – they may attempt to provide economic analysis to support a different monetary incentive threshold, or they may take an entirely different approach to the question.

Until new rules are promulgated, employers are once more "in the dark" as to what level of incentive the EEOC will deem to be permissible, and/or when incentives will be so great as to render participation in a workplace wellness plan involuntary. In the interim, there are several key takeaways for employers here: first, it bears repeating that only the incentive "safe harbor" provision of the EEOC's regulations was struck down by the district court; other provisions within the EEOC's final regulations (including those that prohibit "gatekeeper" wellness plans, as well as confidentiality and notice requirements) remain in effect; employers will want to be certain that even if their wellness plans are fully HIPAA-compliant, they are also in accord with the EEOC's regulations. Second, employers and plan sponsors will want to closely scrutinize wellness plan incentives on a holistic basis to assess "voluntariness" and not simply assume that because financial limits fall within permitted HIPAA guidelines, the EEOC will take the same view.

ADA Guidance. By way of background, it is important to note that in FY 2018, disability discrimination represented the highest number of cases filed—84 of the 199 merits lawsuits filed by the EEOC included an allegation of disability discrimination, more than race, age, religion, and national origin combined.[26] Among the most-litigated issues in recent years has been the issue of "fixed leave" policies, and how they interact with the ADA. The agency still sees, for example, many investigations where an employer's policy has a hard-and-fast limit to how much leave (paid or unpaid) an employee is allowed (*e.g.*, the maximum leave allowed under the Family and Medical Leave Act, or a hard six months). This issue has been a focus of the Commission for some time now, and was the subject of a public Commission meeting in June 2011. The EEOC's long-standing position has been that, as a reasonable accommodation under the ADA, an employer may be required to provide a disabled employee with more leave than he or she would otherwise be entitled to under the employer's general leave policies. Unfortunately, how much additional leave, under what circumstances, and what an employer can reasonably expect from its employees in terms of predictable and reliable attendance, are all questions that tend to fall in a very fact-specific "gray area" with few hard-and-fast legal limiting principles.

25 *See AARP v. EEOC*, No. 1:16-cv-02113 (D.D.C. Oct. 24, 2016).
26 *See* EEOC FY 2018 PAR, at 35.

To that end, in May 2016, the agency issued a targeted "resource document"[27] setting forth examples and scenarios employers might face, including when and how an employer may be required to offer leave beyond what its fixed policy would otherwise provide; practical guidance for addressing leave via the ADA's "interactive process" for reasonable accommodation requests; communicating with employees during leave periods (particularly as a scheduled return-to-work date approaches); what an employer can ask of an employee in terms of medical information or documentation in support of a leave request; "100% healed/no restriction" leave policies; and reassignment following a leave as a reasonable accommodation. Given that courts continue to wrestle with these issues—on even as fundamental a question of when attendance constitutes an essential function of a job—employers are best served to look very closely at the specific facts of any extended leave request, and avoid rote application of otherwise "standard operating procedure" rules.

Q. Can you recommend any useful resources for review of EEOC actions and activities?

On an annual basis, two documents immediately come to mind—the EEOC's Performance and Accountability Report (the "PAR") and its Congressional Budget Justification. The PAR is issued in mid-November, and recaps in detail the agency's activities and use of resources for the fiscal year prior.[28] The Congressional Budget Justification is generally submitted to Congress in February, and sets out the agency's rationale for its budget requests for the coming year.[29] Both documents go into significant detail as to EEOC's operations, priorities, resources, and the like, and both are available publicly on the agency's website.

E. Final Takeaways

Q. In looking back at your experience in working with Commissioner Lipnic and her most recent role as acting chair, what do consider to be her greatest challenges and achievements to date based on her work at the Commission?

At this point, Acting Chair Lipnic is the longest-serving acting chair in the EEOC's 53-year history. Yet at the same time, throughout her chairmanship, she has been the sole Republican, and in the minority on the Commission (outnumbered first, three to one; later, when former Chair Jenny Yang left the Commission in January 2018, two to one). I know that has been a challenge for her, in terms of being limited in the ability to revisit decisions made in prior administrations, or to pursue new policy priorities. To her credit, even given those structural disadvantages, she had done an outstanding job in raising the Commission's profile on sexual harassment issues broadly, both to public stakeholders and to Congress. She's also made it a priority to address the oft-criticized "backlog" of cases at the Commission, with considerable success. Through improvements to the agency's digital charge filing systems (which, even the agency would admit, are still not perfect), and strategic prioritization of charges and investigations, by the close of FY 2018, the EEOC's inventory of pending charges was just under 50,000, the lowest it has been in more than a decade (and this in a year where the agency received 76,400 new charges). In that same year, the agency recovered more than half a billion dollars for victims of discrimination, including $354 million through private sector, state, and local government mediation, conciliation, and settlements, $53.6 million through its litigation program, and $98.6 million for federal employees and applicants.[30]

More broadly, I think among her most notable achievements, as commissioner and now as acting chair, has been to steadfastly keep the agency focused on its core mission: preventing unlawful

27 *See* EEOC, *Employer-Provided Leave and the Americans with Disabilities Act* (May 9, 2016), *available at* https://www.eeoc.gov/eeoc/publications/ada-leave.cfm.
28 EEOC, *Performance and Accountability Report for Fiscal Year 2018*, *available at* https://www.eeoc.gov/eeoc/plan/2018par.cfm.
29 EEOC, Fiscal Year 2019 Congressional Budget Justification U.S. Equal Employment Opportunity Commission, *available at* https://www.eeoc.gov/eeoc/plan/2019budget.cfm.
30 *See* EEOC FY 2018 PAR, at 13.

discrimination, and seeking relief for its victims. While it is tempting to "swing for the bleachers" every time you're at the plate, it is important to remember that high-profile cases, or efforts to expand dramatically the scope of the law, may be met with resistance by courts and result in no relief for injured parties. I think, fairly characterized, Chair Lipnic's approach has been to balance the need to enforce the law to its fullest extent with a pragmatic approach to making sure real people get the relief to which they are entitled when the government goes to bat on their behalf.

Finally, at a time when it seems that almost every issue in Washington is hyper-politicized and hyper-partisanized, and debate is antagonistic if not openly hostile, Chair Lipnic—and her fellow commissioners—have shown that compromise and bipartisanship can still sometimes carry the day, if one is looking for common ground and a common good. Equally important, she has throughout her tenure fostered and maintained civility and a willingness to engage in open and honest debate, even in the strength of strong disagreement among passionate advocates. Her leadership on these points is one that, in my opinion, more policymakers in Washington would do well to emulate.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

The EEOC announced the publication of its FY 2018 Performance and Accountability Report ("FY 2018 PAR") on November 15, 2018. According to the FY 2018 PAR, the Commission received 84,254 private-sector charges during this past fiscal year.[31] This figure represents a 9.3% decrease from the number of charges filed in FY 2017. As shown by the following chart, the number of charges filed in FY 2018 is the lowest number of charges filed in more than a decade.

FISCAL YEAR	NUMBER OF CHARGES	% INCREASE/ DECREASE
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%

The EEOC has historically maintained a significant backlog of pending charges. According to Acting Chair Lipnic, "The pending inventory of private sector charges . . . has been a lo ngstanding issue for the EEOC and the public it serves."[32] To that end, she explained that early in 2017 the Commission "made addressing the backlog a priority, and as an agency, we began to share strategies that have been particularly effective in dealing with the pending inventory, while ensuring we are not missing charges with merit."[33]

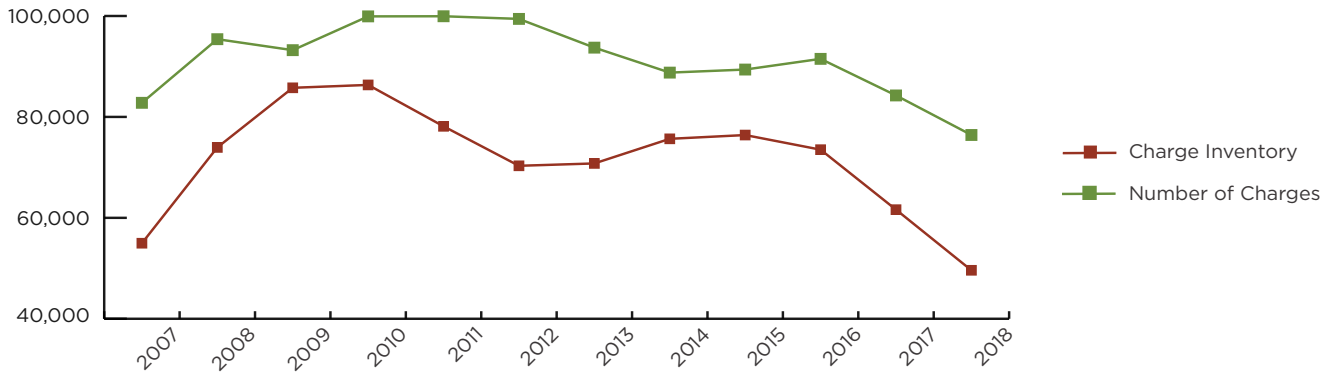
As a result of these efforts, in FY 2018 the Commission made significant progress in reducing its charge inventory. The Commission reduced the backlog of pending inventory of private sector charges by 19.5% to 49,607 charges—the smallest charge backlog the EEOC has maintained in 10 years.[34]

31 EEOC FY 2018 PAR at 31.
32 EEOC FY 2018 PAR at 7.
33 EEOC FY 2018 PAR at 7.
34 EEOC FY 2018 PAR at 8.

FISCAL YEAR	CHARGE INVENTORY	% INCREASE/ DECREASE
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%
2016	73,508	-3.7%
2017	61,621	-16.2%
2018	49,607	-19.5%

This is the third year in a row that the charge inventory has decreased, and by a growing percentage.

COMPARING CHARGES FILED WITH CHARGE INVENTORY



B. Continued Focus on Systemic Investigations and Litigation

The FY 2018 PAR demonstrates the EEOC's continued interest in addressing systemic discrimination stating "[t]ackling systemic discrimination… is central to the mission of the EEOC."[35] Indeed, as far back as March 2006, the Commission reported in its Systemic Task Force Report that "combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency's daily work."[36] The EEOC defines "systemic discrimination" as: "where a discriminatory pattern, practice or policy has a broad impact on an industry, company or geographic area."[37]

In recent years, the Commission has taken a very proactive approach in evaluating the efficacy of its systemic program. In 2012, the EEOC's Strategic Plan and Strategic Enforcement Plan made dedicated efforts to strengthening its resolve towards combating systemic discrimination. The Strategic Plan specifically included clearly-defined performance measures[38] and the 2012 Strategic Enforcement Plan furthered its intent to support its initiative by identifying six national priority areas—one of which was the prevention of harassment through systemic enforcement and targeted outreach.[39]

35 EEOC FY 2018 PAR at 37.
36 EEOC Systemic Task Force Report (Mar. 2006), at 2.
37 EEOC FY 2018 PAR at 37.
38 *See* EEOC, EEOC FY 2012-2016 Strategic Plan, available at https://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm#objective1 (last visited Nov. 29, 2017).
39 *See* EEOC, EEOC FY 2013-2016 Strategic Enforcement Plan, available at https://www.eeoc.gov/eeoc/plan/sep.cfm (last visited Nov. 29, 2017).

On July 7, 2016, the EEOC published "Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission."[40] The goal of the EEOC's publication was to conduct a top-to-bottom review of the Commission's systemic initiative since its 2006 System Task Force Report. Among other things, *Advancing Opportunity* identified eight key findings: "(1) EEOC has the capacity in every district to undertake systemic investigations and litigation, and all districts have initiated systemic investigations and lawsuits; (2) coordination of systemic investigations and cases has significantly increased, with staff regularly sharing information and strategies on systemic cases and partnering across offices on lawsuits to support a nationwide or multi-facility focus; (3) EEOC has developed national strategies on specific priority issues that have enabled the agency to better identify the strongest cases and provide a model for other key areas; (4) investments in hiring and training staff focused on systemic work have produced a 250% increase in systemic investigations in the past five years; (5) more than 80% of systemic resolutions in fiscal year 2015 raised national priority issues identified in the [Strategic Enforcement Plan]; (6) concerted efforts to reach voluntary resolutions of systemic investigations have resulted in the conciliation success rate tripling from 21% in fiscal year 2007 to 64% in fiscal year 2015; (7) the systemic litigation program has achieved significant impact, with a 10-year success rate of 94% for systemic lawsuits; and (8) EEOC tripled the amount of monetary relief recovered for victims in the past five fiscal years from 2011 through 2015, compared to the relief recovered in the first five years after the Systemic Task Force Report."[41]

Later that same year, in 2016, the EEOC specifically prioritized systemic cases as one of the three major categories of cases in its National Enforcement Plan.[42] In addition, on September 30, 2016, the Commission continued to build upon its prior Strategic Enforcement Plan for Fiscal Years 2017 through 2021. Under the prior Strategic Enforcement Plan for Fiscals Years 2012-2016, the EEOC's aimed to "identify and attack discriminatory policies and other instances of systemic discrimination."[43] In the revised Strategic Enforcement Plan, the EEOC "reaffirm[ed] its commitment to a nationwide, strategic and coordinated systemic program as of [the] EEOC's top priorities."[44]

Under its "Strategic Objective I," which is to "combat employment discrimination through strategic law enforcement" efforts, one of the Commission's four key strategies includes "us[ing] administrative means and litigation to identify and attack discriminatory policies and other instances of systemic discrimination."[45] Under its established performance metric, 22-24% of the cases in the Commission's litigation docket must be systemic cases.[46] As demonstrated in the following chart, the EEOC met its goal this last fiscal year with 23.5% of its litigation docket comprising systemic cases.[47]

40 *See* EEOC, Advancing Opportunity: A Review of the Systemic Program of the U.S. Equal Employment Opportunity Commission, available at https://www.eeoc.gov/eeoc/systemic/review/index.cfm#VB (last visited Nov. 29, 2017).
41 *Id.*
42 *See* EEOC, EEOC National Enforcement Plan, *available at* https://www.eeoc.gov/eeoc/plan/nep.cfm (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.").
43 EEOC Strategic Enforcement Plan for FY 2012-2016, at 17.
44 EEOC Strategic Enforcement Plan for FY 2017-2021, at 5.
45 EEOC FY 2018 PAR at 19.
46 EEOC FY 2017 PAR at 22.
47 EEOC FY 2018 PAR at 35.

FISCAL YEAR	NUMBER OF TOTAL LITIGATION CASES	NUMBER OF SYSTEMIC CASES	% OF SYSTEMIC CASES IN LITIGATION
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%

It is the Commission's belief that "[w]ithout systemic enforcement, many discriminatory systems and structures would persist—leading to more harm to individuals subject to such discriminatory practices and potentially more individuals filing charges of discrimination against their employers."[48] The EEOC FY 2018 PAR likewise states that "systemic enforcement [has been shown through research studies to be] a greater driver of employer compliance than individual investigations or cases."[49] In short, the Commission will continue to pursue its systemic agenda and will likely rely on systemic cases to further its mission of eradicating discrimination in the workplace.

C. The EEOC's Systemic Initiative Results – A Comparison of the Last Seven Fiscal Years

Despite some concerns that a focus on systemic discrimination has detracted the EEOC from addressing its charge backlog and other core missions, the Commission continues to find value in prioritizing systemic investigations. Among the six priorities listed in the EEOC's 2017-2021 Strategic Enforcement Plan (SEP) are (a) preventing systemic harassment, and (b) eliminating barriers in recruitment and hiring, both of which typically involve systemic charges.[50] In FY 2018, therefore, the Commission continued its focus on these categories of cases. In FY 2018, EEOC resolved 409 systemic investigations during the administrative process, obtaining over $30 million in remedies.[51] The EEOC made 204 reasonable cause findings during this time, the highest number over the past seven fiscal years.[52]

In terms of systemic litigation, one of the EEOC's goals for FY 2018 was to increase the proportion of systemic cases on its litigation docket to approximately 22-24% of all active cases.[53] By the end of the fiscal year, the agency achieved this target, reporting that 71 cases (or 23.5%) on its litigation docket were systemic cases.[54] Moreover, the EEOC resolved 26 systemic cases, and filed 37 new systemic lawsuits, the largest number of such lawsuits filed over the past seven years.[55] Of the settled matters, four cases involved at least 100 victims of discrimination, and two involved over 1,000 victims of discrimination.[56] A comparison of the EEOC's systemic investigation results can be seen in the following table.

48 EEOC FY 2018 PAR at 37.
49 *Id.*
50 U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan, Fiscal Years 2017-2021, at 3, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.
51 EEOC FY 2018 PAR at 37.
52 *Id.*
53 EEOC FY 2018 PAR at 22.
54 *Id.* at 38.
55 *Id.* at 37.
56 *Id.*

SYSTEMIC INVESTIGATIONS	2012	2013	2014	2015	2016	2017	2018
Number Completed	240	300	260	268	273	329	409
Monetary Recovery	$36.2 million	$40 million	$13 million	$33.5 million	$20.5 million	$38.4 million	$30 million
Reasonable Cause Findings	94	106	118	109	113	167	204
Systemic Lawsuits Filed	12	21	17	16	18	30	37

D. EEOC Litigation Statistics and Increased Focus on Workplace Harassment

In FY 2018, the EEOC filed 199 "merits" lawsuits, which included 117 suits filed on behalf of individuals, 45 non-systemic class suits, and 37 systemic suits.[57] FY 2017 was notable because there was a dramatic increase in the overall total of "merits" lawsuits that were filed when compared to FY 2016 (*i.e.*, 184 in FY 2017 versus 86 in FY 2016). FY 2018 is also noteworthy because not only did the EEOC increase its overall number of "merits" lawsuits filed during the fiscal year, but 41% percent of its "merits" lawsuits constitute "multiple victim" cases, which is an all-time high for the Commission.[58]

YEAR	INDIVIDUAL CASES	"MULTIPLE VICTIM" CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC "MERITS"[59] LAWSUITS
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199

57 EEOC FY 2018 PAR at 35.

58 *See* EEOC, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2017, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

59 *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.

As in past years, the EEOC continued its trend of filing the bulk of its lawsuits during the last two months of the EEOC's fiscal year—between August 1 and September 30. In FY 2017, the EEOC filed 112 lawsuits, which was 61% of the lawsuits filed during the entire fiscal year.[60] Similarly, in FY 2018, 60% of the EEOC's lawsuits were filed on or after August 1, 2018.

The top fourteen (14) states for EEOC lawsuits filed over the past fiscal year are as follows:[61]

STATE	NUMBER OF LAWSUITS
California	19
Texas	14
Maryland	13
Georgia	13
North Carolina	11
New York	10
Florida	9
Michigan	9
Alabama	7
Illinois	7
Pennsylvania	7
Tennessee	7
Washington	7
Wisconsin	7

With respect to the EEOC's non-systemic class suits as well as its systemic litigation, the FY 2018 PAR stated, "At the end of fiscal year 2018, the EEOC had 302 cases on its active district court docket, of which 65 (21.5%) were non-systemic multiple victim cases and 71 (23.5 percent) involved challenges to systemic discrimination."[62] Moreover, in FY 2018, the EEOC had resolved 141 merits lawsuits at the federal district court level, and as a result, recovered a little over $53.5 million.[63]

Looking at the bases or types of claims asserted in the 199 "merits" lawsuits filed in FY 2018, 109 lawsuits implicated Title VII claims (*i.e.*, race, sex, religion, and national origin), 84 contained ADA claims, 9 contained ADEA claims, and 51 filings included retaliation claims.[64]

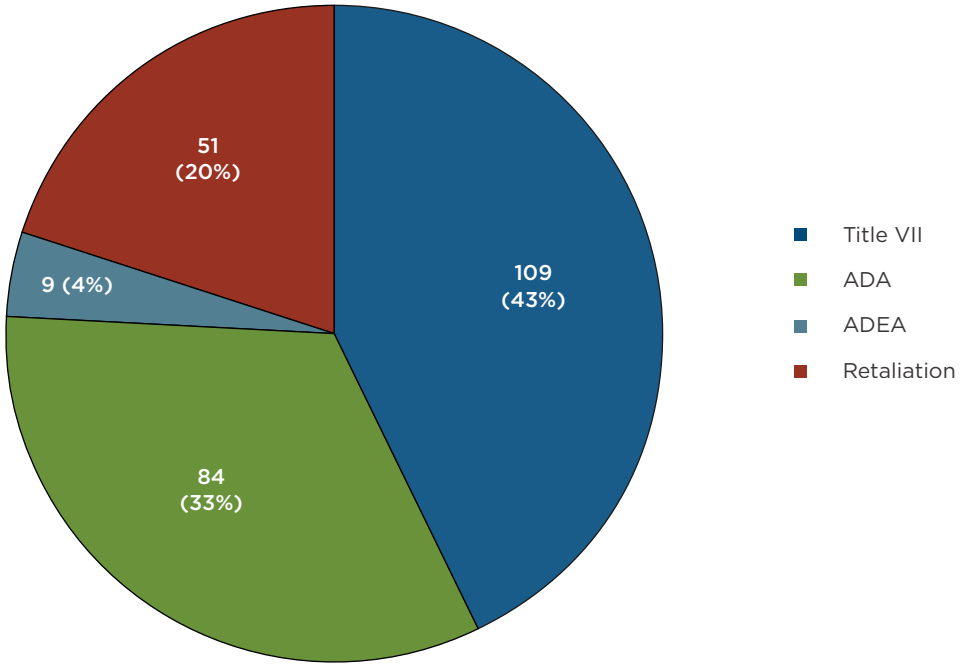
60 Littler monitors the EEOC's court filings each fiscal year, and the information reported on the Commission's timing for filing its lawsuits in FY 2018 is based on the firm's tracking.

61 Littler monitored the EEOC's 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 - 2017 EEOC CHARGE RECEIPTS BY STATE (INCLUDES U.S. TERRITORIES) AND BASIS*, *available at* http://www1.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm.

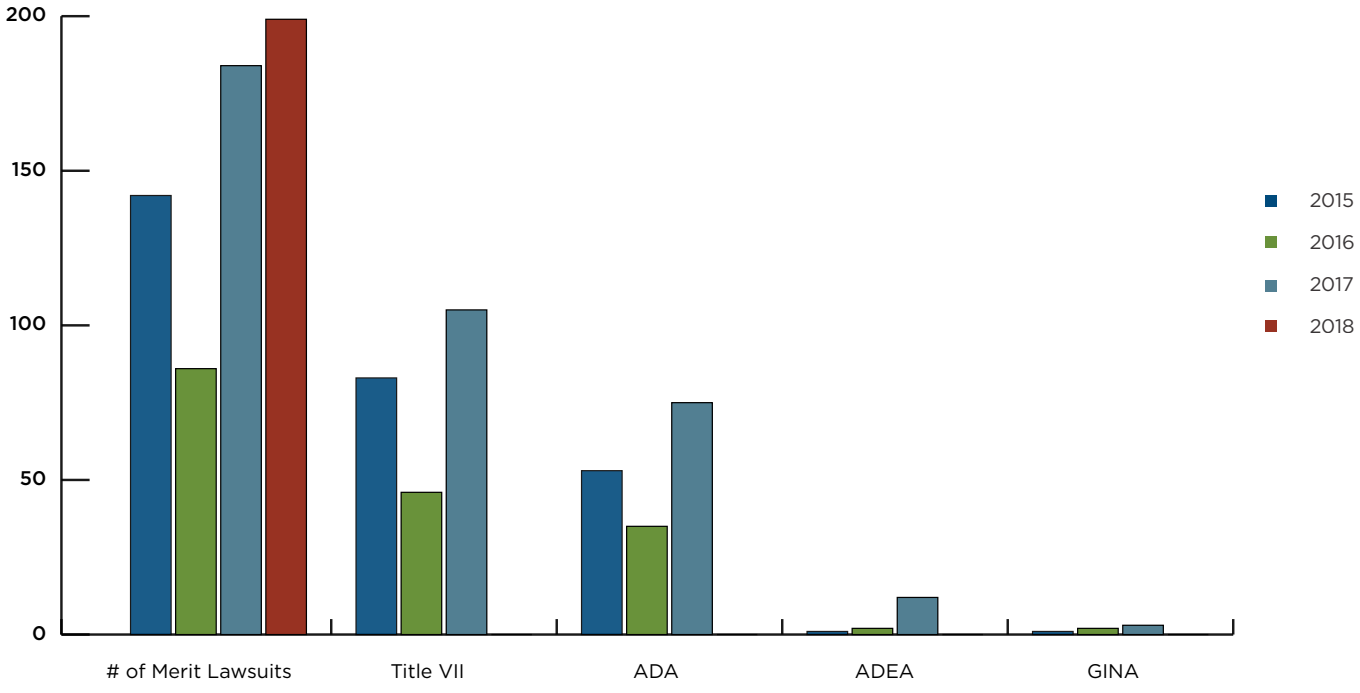
62 EEOC FY 2018 PAR at 35

63 *Id.*

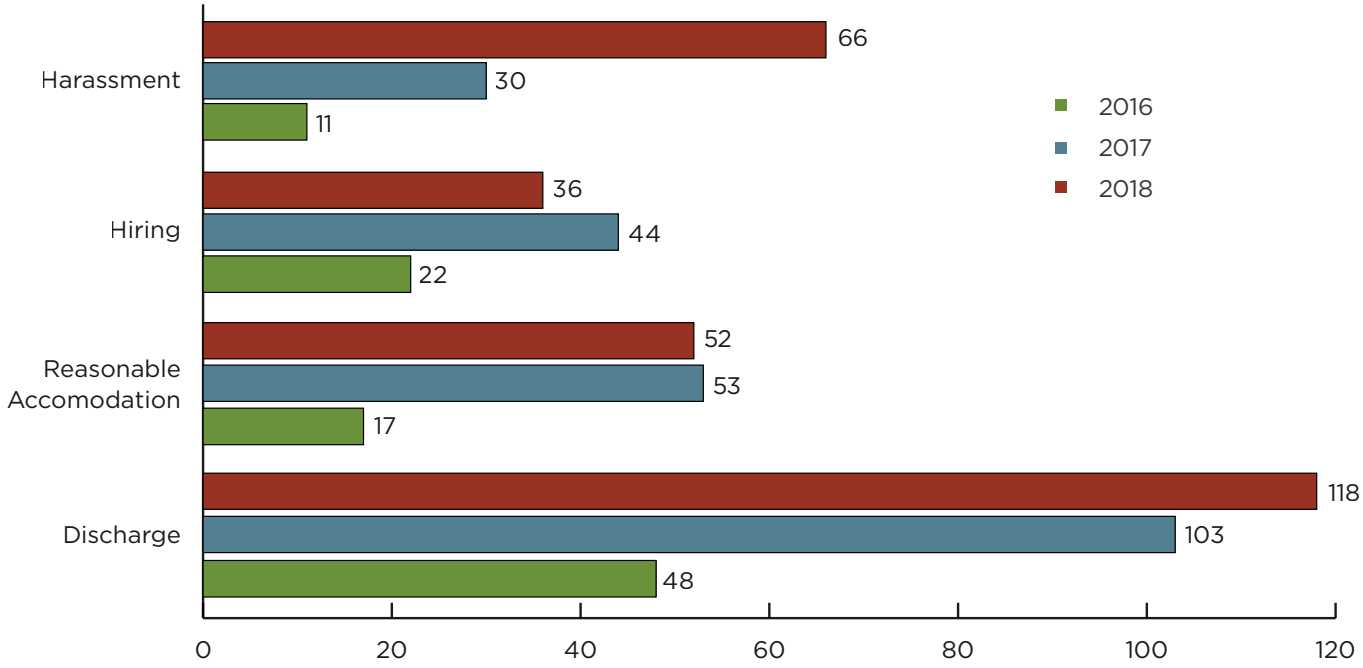
64 *Id.*



The following chart shows a year-over-year comparison for the last four years (FY 2015-2018) for the aforementioned bases of the lawsuits filed by the EEOC.



For the past three years, the EEOC's PAR also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[65] The chart below demonstrates the variance by issue for each fiscal year.[66]



More recently, the EEOC has made combating workplace harassment a "top priority," especially in light of the #MeToo movement that has swept the nation in the last fiscal year.[67] Beginning in 2015, the EEOC created the Select Task Force on the Study of Harassment in the Workplace and a Co-Chairs' Report was issued in 2016 summarizing their findings.[68] Based on the increased public attention and the EEOC's Study, the Commission has ramped up its efforts on both the training and enforcement fronts.[69]

The EEOC reports that there was an increase of 13.6% in charges alleging sexual harassment in FY 2018.[70] Even when looking at the above chart, the number of harassment lawsuits more than doubled from 30 lawsuits in FY 2017 to 66 lawsuits in FY 2017. Forty-one of those lawsuits specifically involve claims of sexual harassment.[71] Breaking that down even further, 34 of the 41 sexual harassment lawsuits were class cases and another five lawsuits involved systemic litigation.[72] As an attempt to shed additional light on this issue, the EEOC filed groups of harassment lawsuits on the same day around the county on specific days in June and August 2018.[73]

65 EEOC FY 2017 PAR at 36.
66 *Compare id.* and EEOC FY 2016 PAR at 36.
67 *Id.* at 31, 35.
68 *Id.* at 31.
69 *Id.*
70 *Id.*
71 *Id.* at 35.
72 *Id.*
73 *Id.*

E. Mediation Efforts

In its FY 2018 PAR, the EEOC states that out of a total of 9,437 mediations conducted, the EEOC was able to obtain 6,754 mediated resolutions.[74] Moreover, the Commission secured $165.8 million in monetary benefits for complainants through its mediation program.[75] The mediations were completed in an average of 93 days and the EEOC states that 97.2% of all mediation participants expressed positive feedback about the EEOC's mediation program.[76]

The EEOC attributed some of its success with its mediation program to its increased outreach efforts via marketing campaigns, but also through the use of Universal Agreements to Mediate (UAMs).[77] Specifically, UAMs are agreements between the EEOC and employers in which they agree to mediate all eligible charges before investigations or litigation are initiated. In FY 2018, the EEOC secured 108 UAMs with employers.[78]

F. Significant EEOC Settlements and Monetary Recovery

In recent years the EEOC has made significant progress in reducing its charge inventory. Resolution of discrimination charges through settlements has been one way of achieving this continued goal. As discussed in the Commission's updated Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021, the EEOC encourages early resolution of charges pre-determination settlements, among other avenues of alternative dispute resolution.[79] In FY 2018, the EEOC continued to place a high priority on resolving disputes involving systemic charges of discrimination—those involving a large number of claimants in an industry, profession, company, or geographic area.

Many of these settlements resulted in high-dollar payments to the individual or class of individuals alleging discrimination. Over the course of the fiscal year, at least 22 settlements resulted in payments of $500,000 or more, 17 of which exceeded $1 million.

The majority (15) of these high-dollar settlements involved claims of disability discrimination or sexual harassment. The rest of the settlements involved a variety of claims, including race, sex, national origin, age, pay, and religious discrimination. At least three settlements included claims of retaliation.

The top two largest settlements involved class disability discrimination claims. The EEOC has increased its scrutiny of employer return-to-work policies to ensure they comport with the ADA. The Commission has taken the position that policies requiring employees to have no medical restrictions upon return from medical leave can violate the ADA if the employer does not first take steps to determine whether reasonable accommodations are available to allow employees to return with restrictions. In one notable consent decree entered into in FY 2018, the employer agreed to pay $9.8 million in stock to settle a nationwide class disability discrimination lawsuit based on the employer's return-to-work policy.

In another disability discrimination settlement, the employer agreed to pay $4.4 million to a class of 40 job applicants who were allegedly denied employment as a result of a third-party-administered medical screening process. The EEOC alleged the manufacturer violated the ADA by not hiring applicants who failed a nerve conduction test for carpal tunnel syndrome, which was performed by the third-party entity. The EEOC averred the employer should have individually assessed each applicant's ability to do the job safety.

74 *Id.* at 32.
75 *Id.*
76 *Id.*
77 *Id.*
78 *Id.*
79 EEOC Strategic Enforcement Plan for FY 2017-2021, at 14.

While high-dollar verdicts and judgments are not as common, the EEOC did recover some significant amounts for claimants at trial during FY 2018.

In April 2018, for example, a federal jury in Brooklyn, New York awarded 10 claimants $5.1 million in a religious discrimination and retaliation case.[80] The employer in this case was found to have unlawfully compelled its employees to engage in religious practices at work, creating a hostile work environment. The jury also found that the employer violated Title VII by terminating one employee who opposed these practices, which included prayers, rituals and other practices that were part of a belief system called "Harnessing Happiness" or "Onionhead," which was created and administered by the CEO's relative.

In a separate case involving disability discrimination, the Sixth Circuit upheld a jury's verdict and award of damages in favor of a diabetic employee who was terminated for violating the company's anti-grazing policy during a hypoglycemic episode.[81] The jury had awarded the charging party $27,565 in back pay and $250,000 in compensatory damages. The district court granted some of the injunctive relief requested, and upheld damages and fee awards ($445,322 in attorney's fees and $1,677 in expenses). The Sixth Circuit panel upheld the fee award, determined the district court did not miscalculate the attorney's fees, and that the magistrate considered both success and complexity in his calculation of the lodestar amount.

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

G. APPELLATE CASES

1. Notable Wins for the EEOC

At the close of FY 2018, the EEOC was handling 18 appeals in enforcement actions and was participating as *amicus curiae* in 29 appeals in private suits.[82] Several notable appellate wins are discussed below.

In *EEOC v. Maryland Insurance Administration* (MIA), the EEOC successfully challenged the lower court's grant of summary judgment in favor of the employer.[83] MIA is an independent state agency that enforces insurance regulations, and it follows the state's standard salary schedule when determining employee compensation. New hires are assigned a grade and step on the pay schedule based on various factors, including the value of the position to be filled, work experience, professional licenses, and prior state employment. The EEOC brought suit under the Equal Pay Act (EPA) on behalf of three female former fraud investigators, who asserted that MIA paid them less than four male counterparts.[84]

Before the Fourth Circuit, the parties did not dispute that the claimants were paid less than their male comparators, or that the fraud investigators performed substantially equal work under similar working conditions.[85] Instead, MIA argued that the identified male investigators were not proper comparators because they had been "hired at higher step levels than at least one of the claimants, allegedly based on their background experience, relevant professional designations, and licenses or certifications."[86] The Fourth Circuit rejected that argument because those factors related only to MIA's affirmative defense and did not undermine the EEOC's *prima facie* case or choice of comparators.[87]

80 *EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.*, No. 14-CV-03673, (E.D.N.Y. Apr. 25, 2018) (verdict form).
81 *EEOC v. Dolgencorp, LLC*, No. 17-6278 (6th Cir. Aug. 7, 2018).
82 EEOC FY 2018 PAR, p. 37.
83 879 F.3d 114 (4th Cir. 2018).
84 *Id.* at 116-19.
85 *Id.* at 121-22.
86 *Id.* at 122
87 Relatedly, the court noted that "[a]n EPA plaintiff is not required to demonstrate that males, as a class, are paid higher wages than females, as a class, but only that there is discrimination in pay against an employee with respect to one employee of the opposite sex." *Id.*

As its affirmative defense, MIA then offered two gender-neutral explanations for the pay disparity identified by the claimants. First, MIA relied on its adherence to the state salary schedule for new hires. Second, it pointed to differences in the employees' experiences and qualifications. The court was not persuaded by either argument, however. The Fourth Circuit held that "MIA cannot shield itself from liability under the EPA solely because MIA uses the state's Standard Salary Schedule and awards credit for prior state employment or a lateral transfer within the state employment system."[88] The court explained that "while MIA uses a facially gender-neutral compensation system, MIA still must present evidence that the job-related distinctions underlying the salary plan, including prior state employment, *in fact* motivated MIA to place the claimants and the comparators on different steps of the pay scale at different starting salaries."[89] Turning to the factors touted by MIA—professional designations and prior state work experience—the court found that MIA had failed to show as a matter of law that these distinctions did *in fact* explain the pay discrepancy between the claimants and comparators. Accordingly, MIA was not entitled to summary judgment.[90]

In another Fourth Circuit decision, the court agreed with the EEOC that back pay is mandatory, not discretionary, under the ADEA, which incorporates the FLSA's remedial scheme. *EEOC v. Baltimore County*[91] stemmed from a county's compulsory defined-benefit pension plan for its employees, which the EEOC contended was structured in a way that discriminated against older workers. After the district court ruled in favor of the EEOC, the Commission requested that the county be held liable for monetary relief for those employees who had to pay more into the pension system because of their age at hire. The district court concluded that pre-judgment backpay was discretionary under the ADEA and that the monetary relief sought for post-judgment harm was not mandatory. The district court ultimately denied the EEOC any monetary relief.

On appeal, the Fourth Circuit reversed and remanded the lower court's decision, finding that "[r]etroactive monetary awards, such as the back pay sought here, are mandatory legal remedies under the ADEA upon a finding of liability." The court reasoned that "[b]ack pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA . . . we presume that Congress was aware of judicial interpretations of the FLSA when drafting associated provisions of the ADEA."

The EEOC also prevailed before the Sixth Circuit against a private employer that appealed its loss at trial on disability discrimination claims.[92] The employer fired a diabetic sales associate after the employee drank orange juice twice at her station prior to paying for the juice, to avoid hypoglycemic episodes. Although the employee previously requested an accommodation of the store's "no grazing" policy in light of her medical condition, the employer denied her request. The EEOC sued, and a jury awarded the claimant $27,565 in back pay, $250,000 in compensatory damages, and nearly $450,000 in attorneys' fees and costs.[93]

On appeal, the employer argued that it had no duty to accommodate the employee because she could have treated her condition in other ways, *i.e.*, without drinking juice at the cash register before paying for it. The Sixth Circuit was not persuaded, in light of evidence that the employer did not consider any accommodation at all, including any of the purported alternatives. Under the circumstances, the court affirmed the jury verdict on both the reasonable accommodation and discrimination claims—and upheld the substantial attorneys' fees award.[94]

88 *Id.* at 122-23.
89 *Id.* at 123.
90 *Id.* at 123-24. Judge Wilkinson issued a highly critical dissent, bemoaning the lack of respect for state sovereignty allegedly shown by both the majority and "Washington's overlords." *Id.* at 124-32 (advocating for the clear and convincing standard of proof to apply to the EEOC when suing a state entity, rather than the preponderance standard).
91 *EEOC v. Baltimore Cty.*, 2018 U.S. App. LEXIS 26644 (4th Cir. Sept. 19, 2018).
92 *EEOC v. Dolgencorp, LLC*, 899 F.3 428 (6th Cir. 2018).
93 *Id.* at 432-33.
94 *Id.* at 434-37.

The Seventh Circuit also agreed with the EEOC in an attorneys' fees dispute.[95] In the underlying litigation, the EEOC pursued a pattern-or-practice case questioning the employer's severance agreement, but it initiated that action prior to engaging in conciliation with the employer. The employer defeated that approach, and the district court awarded the employer more than $300,000 in attorneys' fees.[96] In granting the fees award to the defendant-employer, the lower court found that the EEOC should have known before filing suit that it was obligated to first enter conciliation.[97] The Seventh Circuit reached the opposite conclusion on appeal, noting that "fees should be awarded to prevailing defendants only in limited circumstances."[98] In reviewing the EEOC's theory from the "time the action was litigated," the court held that, while ultimately wrong, the agency's interpretation had a "textual foothold" and "modest support in . . . prior case law."[99] Moreover, no authority "squarely foreclosed" the EEOC's argument.[100] The Seventh Circuit struck the fees award because the EEOC's lawsuit was not legally or factually frivolous and the "fee statute does not punish a civil rights litigant for pursuing a novel, even if ambitious, theory."[101]

In addition, the EEOC carried the day in a somewhat unusual case before the Seventh Circuit involving the sexual harassment of an employee by a customer.[102] At trial, a jury found in favor of the EEOC, which sued on behalf of an employee who had been stalked by a customer for more than a year.[103] The employee complained repeatedly to management about her concerning interactions with the customer, obtained a no-contact order from the state circuit court, and took a medical leave of absence.[104] The employer appealed, and the Seventh Circuit upheld the jury verdict.

In its opinion, the Seventh Circuit reiterated that "an employer can be liable for a hostile work environment that results from the acts of non-employees, including customers."[105] While the employer asserted that the interactions between the employee and customer were "tepid" and "mild," the court stressed that "harassment need not be overtly sexual to be actionable under Title VII."[106] Considering all of the circumstances, the court found that reasonable jurors could conclude that the employee suffered a hostile work environment based on the customer's constant hounding of her for over a year, despite intervention from management and the police.[107] The Seventh Circuit further explained that the employer's liability depended not only on the customer's conduct but also on how it responded.[108] Because the employer's "response was unreasonably weak," the court affirmed the verdict.[109] It also remanded to the district court for that court to consider the employee's right to recover back pay for the period she took leave.[110]

In the Ninth Circuit, the EEOC—as the appellee this time—was successful in arguing companies cannot require individuals with disabilities to pay for their own follow-up medical testing during the hiring process. In *EEOC v. BNSF Railway Co.*,[111] the company had extended a job applicant a conditional

95 *EEOC v. CVS Pharm., Inc.*, 892 F.3d 307 (7th Cir. 2018).
96 *Id.* at 309-11.
97 *Id.* at 310.
98 *Id.* at 311.
99 *Id.* at 312-13.
100 *Id.* at 313.
101 *Id.* at 313-15.
102 *EEOC v. Costco Wholesale Corp.*, 2018 U.S. App. LEXIS 25539 (7th Cir. Sept. 10, 2018).
103 *Id.* at **1-2.
104 *Id.* at **3-10.
105 *Id.* at *12.
106 *Id.* at *15.
107 *Id.* at **16-17.
108 *Id.* at *19.
109 *Id.*
110 *Id.* at **20-24.
111 *EEOC v. BNSF Railway Co.*, 2018 U.S. App. LEXIS 24534 (9th Cir. Aug. 29, 2018), 2018 U.S. App. LEXIS 25852 (amended opinion issued Sept. 12, 2018).

offer of employment as a patrol officer. The company's medical contractor then conducted a physical examination and reported that the applicant was fit for the position. Because the applicant informed the employer that he had a prior back jury, the employer required him to obtain a current magnetic resonance imaging scan (MRI). The applicant declined to take the test on affordability grounds; the company therefore rescinded the conditional offer.

The company and the EEOC cross-moved for summary judgment. The district court sided with the EEOC, and permanently enjoined the company "from engaging in the unlawful employment practice found in this case to constitute intentional disparate treatment discrimination."

On appeal, the Ninth Circuit panel found that the EEOC demonstrated all three elements of a 42 U.S.C. § 12112(a) claim by showing (1) the applicant had a "disability" within the meaning of the ADA because company perceived him to have a back impairment; (2) the applicant was qualified for the job; and (3) the company impermissibly conditioned the job offer on the applicant's procuring an MRI at his own expense because it assumed he had a back impairment. The company offered no affirmative defense on appeal. The Ninth Circuit thus affirmed the district court's holding that the EEOC made a *prima facie* case for a violation of ADA, and was entitled to summary judgment. "Requiring that an applicant pay for an MRI—or else lose his or her job offer—because the applicant has a perceived back impairment is a condition of employment imposed discriminatorily on a person with a perceived impairment."

The panel explained that "[a]n employer would not run afoul of § 12112(a) if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense … Where, however, an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability."

The appellate court, however, vacated the district court's injunction, as the lower court did not review the standard four-factor test for providing injunctive relief. The panel remanded the matter back to the district court to make further factual findings to support the scope of the injunction.

2. Notable Wins for Employers

Not all appellate rulings in FY 2018 ultimately favored the EEOC. Employers prevailed in a few key matters as well, as summarized below.

In *EEOC v. Jetstream Ground Services, Inc.*, the Tenth Circuit affirmed judgment for the employer on the plaintiffs' spoliation argument.[112] The jury rejected the plaintiffs' underlying religious discrimination claim. On appeal, the plaintiffs challenged the district court's refusal to sanction the defendant-employer for allegedly destroying records contrary to federal regulation.[113] For purposes of the appeal, the court assumed that the employer had, in fact, violated the pertinent recordkeeping rule. Even so, the Tenth Circuit found that the plaintiffs failed to preserve their spoliation argument.[114] The plaintiffs filed a pretrial motion seeking spoliation sanctions, on which the judge reserved ruling, but they neglected to renew their motion at trial. In light of that omission, the district court properly declined the plaintiffs' request to exclude the disputed evidence. The Tenth Circuit also upheld the lower court's rejection of the plaintiffs' proposed adverse-inference jury instruction, because the plaintiffs conceded in closing arguments that the missing evidence was not lost or destroyed by the employer in bad faith.[115]

112 878 F.3d 960 (10th Cir. 2017).
113 *Id.* at 961.
114 *Id.* at 963-64.
115 *Id.* at 964-67.

Meanwhile, the Eleventh Circuit heard cross-appeals in a sex-discrimination matter, following a jury verdict in the plaintiff's favor.[116] After the trial, the employer renewed its motion for judgment as a matter of law, to no avail. It appealed that denial, while the EEOC appealed the district court's vacatur of the jury's punitive damages award.[117] The court upheld the judgment for plaintiff but also affirmed the damages ruling.[118] According to the lower court, the EEOC failed to prove that liability for punitive damages could be imputed to the employer. In the absence of evidence that the discriminatory actor (the claimant's supervisor) was "high[] up the corporate hierarchy, or that higher management countenanced or approved [his] behavior," liability for punitive damages could not attach.[119]

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

116 *EEOC v. Exel, Inc.*, 884 F.3d 1326 (11th Cir. 2018).
117 *Id.* at 1328.
118 *Id.* at 1329-33.
119 *Id.* at 1331-33.

III. EEOC AGENCY AND REGULATORY RELATED DEVELOPMENTS

A. EEOC Leadership

More than two years into the Trump administration, the composition of the Equal Employment Opportunity Commission remains in flux. With several seats on the Commission (and the general counsel slot) vacant, the agency has yet to have a Republican majority since the president took office.

Commissioner Victoria A. Lipnic (R) has served as acting chair of the Commission since January 2017, and is at this point the longest-serving acting chair in the agency's 50+ year history. Lipnic may remain on the Commission until at least July 1, 2020, when her second term is set to expire, and potentially beyond that date, given Title VII's rules on commissioners "holding over" until the confirmation of a successor (or, should Lipnic seek a third term, her own reconfirmation). Commissioner Charlotte A. Burrows, a Democrat, is serving her first term on the Commission, which expires on July 1, 2019. Former Commissioner Chai Feldblum's term expired on January 3, 2019, leaving the Commission with only two seats filled and the lack of a voting quorum.

The Senate failed to confirm a slate of EEOC nominees in the prior Congress, including Feldblum (who had been re-nominated for a third term). Those nominations were returned to the White House at the start of the new Congress; several have been resubmitted to the U.S. Senate for consideration in this Congress.

In the last Congress, two Republican nominees for commissioner seats—Janet Dhillon and Daniel Gade—were approved by the Senate Health, Education, Labor, and Pensions (HELP) Committee, but were not confirmed by the full Senate. Dhillon, who upon her confirmation would become the EEOC's chair, has a long career as in-house corporate counsel to several large national companies. She was recently re-nominated. Gade is an Iraq combat veteran, and was a professor of public policy at the United States Military Academy at West Point. At the end of 2018, Gade indicated that he was not interested in being re-nominated in 2019.

During a September 2017 hearing before the Senate HELP Committee, Dhillon and Gade were—as is customary at such hearings—noncommittal in their positions regarding more controversial EEO issues, such as whether Title VII should be interpreted to expressly prohibit discrimination on the basis of sexual orientation (though both nominees said that they are personally opposed to employment discrimination against members of the LGBTQ community). Chair-nominee Dhillon described litigation as a "last resort" during the hearing, and suggested that if she is confirmed as Chair, she may seek to focus the agency's efforts more on education and outreach.

In 2018, the president nominated a candidate to serve as the EEOC's general counsel, Sharon Fast Gustafson. Gustafson is perhaps best known for her role as plaintiff's counsel in the case of *Young v. United Parcel Services*, the 2015 U.S. Supreme Court case addressing employers' obligations with respect to reasonable accommodations for pregnant workers under the Pregnancy Discrimination Act.

Many had expected the Senate to confirm the four nominees as a "package" last year, but opposition to Feldblum's re-nomination complicated that plan. It is unclear whether or when the Senate will take up nominations that have been resubmitted.

B. EEOC Strategic Enforcement Plan and Updates on Strategic Plan

In February 2018, the EEOC released its Strategic Plan for Fiscal Years 2018-2022,[120] which broadly sets the agency's operational framework and overarching strategic objectives: (1) combating and preventing employment discrimination through strategic enforcement; (2) preventing discrimination through education and outreach; and (3) promoting an agency culture of excellence. Perhaps of greater interest to employers, in 2016 the Commission updated its Strategic Enforcement Plan (SEP) for Fiscal Years 2017-2021, which sets forth the agency's enforcement priorities in greater detail, and identifies core areas of interest where the agency will focus its limited resources.[121] For FY 2017-2021, these include:

- Eliminating barriers in recruitment and hiring that discriminate against protected classes, including "exclusionary policies and practices" and "screening tools that disproportionately impact workers based on their protected status";
- Protecting vulnerable workers, including immigrant and migrant workers and underserved communities, from discrimination in the form of job segregation, harassment, trafficking, pay discrimination, and retaliation;
- Addressing selected emerging and developing legal issues, including ADA qualification standards and "inflexible" leave policies; accommodation of pregnancy-related limitations; protection of LGBT workers; complex or non-traditional employment relationships and the on-demand economy; and "backlash" religion or national origin discrimination against certain workers;
- Ensuring equal pay protections for all workers, not solely on the basis of sex, but on all protected bases;
- Preserving access to the legal system via close scrutiny of "overly broad" waivers, releases, and mandatory arbitration agreements; applicant and employee data and retention policies; and "significant" retaliatory practices; and
- Preventing systemic harassment, including policies, practices, or patterns of workplace harassment.

C. EEOC Priorities and Other Noteworthy Regulatory Activities

Many of the EEOC's activities over the past fiscal year reflect the above priorities. The following highlights some of the more notable recent Commission activities, as well as the status of certain rulemaking efforts.

1. Combating Age Discrimination

On June 26, 2018, Acting Chair Lipnic released a report on the state of older workers in America to mark the 50th anniversary of the effective date of the Age Discrimination in Employment Act (ADEA).[122] According to the report, more than 44% of the U.S. civilian workforce in 2017 was age 45 or older.[123] This fact notwithstanding, EEOC's report details how age discrimination—particularly discrimination in hiring—remains a significant barrier for older workers.[124]

The report recommends that employers take steps to improve workplace culture to counter unconscious bias and stereotyping, including increasing age diversity in the workforce and fostering a corporate culture that values a multi-generational workforce. Specific recommendations include ensuring

120 EEOC, Strategic Plan for Fiscal Years 2018-2022 (Feb. 2018), *available at* https://www.eeoc.gov/eeoc/plan/upload/strategic_plan_18-22.pdf.
121 EEOC, *Strategic Enforcement Plan Fiscal Years 2017–2021*, *available at* https://www.eeoc.gov/eeoc/plan/sep-2017.cfm.
122 EEOC, *The State of Age Discrimination and Older Workers in the U.S. 50 Years After the Age Discrimination in Employment Act* (ADEA) (June 2018).
123 *Id.* at 16.
124 *Id.* at 32.

that age is included in diversity and inclusion programs, and avoiding application or interview questions such as date of birth or other age-related inquiries.[125]

2. Combating Sexual Harassment

Addressing and preventing sexual harassment in the workplace has been an EEOC priority long before the #MeToo movement entered the national conversation. In January 2015, the Commission formed a Select Task Force on the Study of Harassment in the Workplace, co-chaired by Commissioners Lipnic and Feldblum. The Task Force, which included stakeholders representing workers, employers, organized labor, as well as academics and social scientists, culminated in a final report in June 2016.[126] The report includes a review of available data on workplace harassment, as well as practical tips for employers with regard to anti-harassment programs, investigations, reporting systems, and the like.

Recognizing "the public's demand for action" in the wake of high-profile allegations of sexual harassment since October 2017, the Task Force reconvened on June 11, 2018 to hear from expert witnesses on "Transforming #MeToo Into Harassment-Free Workplaces." Legal scholars and attorneys discussed non-disclosure and arbitration agreements and training mandates, and shared proposals for legal reform from state legislatures and industry groups, who have taken up action to address sexual harassment in the workplace. A representative of the National Conference of State Legislatures noted that many states are looking to go beyond federal regulations to prevent workplace sexual harassment and testified that over "125 pieces of legislation have been introduced this year in 32 states." She projected that proposals to address and prevent harassment would continue to be a priority for state legislatures this year and next. An additional panel presented innovative strategies that employers, unions, and others have developed to promote workplaces free of harassing conduct.

Given this topic's prevalence over the past year, it not surprising that EEOC data shows a significant increase in anti-harassment activity in FY 2018. The Commission filed 66 harassment lawsuits over the course of the year, including 41 that involved allegations of sexual harassment. This reflects a more than 50% increase in such filings over the prior year, and almost one-third of all litigation filed nationally in FY 2018. In addition, individual filed charges alleging sexual harassment increased by 13% this year.[127] EEOC litigation and administrative enforcement efforts resulted in approximately $70 million for harassment victims, an increase of over $22 million over FY 2017.[128]

Comprehensive national guidance to prevent harassment, however, remains in limbo. Shortly before President Trump took office, the EEOC issued draft guidance on workplace harassment. The 70-page guidance document set forth the EEOC's legal positions on workplace harassment law regarding all protected bases—not just sex-based harassment—and offered recommendations and best practices for employers to prevent and/or address future incidents of harassment. As of this writing, the draft remains pending review by the Office of Management and Budget, and no final guidance has been issued. Given the new administration's skepticism of sub-regulatory guidance generally, pending nominations, and conflict within the administration over certain substantive provisions in the draft, the fate of final guidance remains uncertain at best. That fact notwithstanding, considering the continued national attention and its inclusion in the EEOC's SEP, it is likely the Commission will continue to make the prevention and remedy of unlawful workplace harassment a high priority.

125 *Id.* at 43.
126 EEOC, Select Task Force on the Study of Harassment in the Workplace, *available at* https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm.
127 EEOC FY 2018 PAR at 32.
128 EEOC, Press Release, *EEOC Releases Preliminary FY 2018 Sexual Harassment Data* (Oct. 4, 2018).

3. Reducing Backlog and Expanding Online Services

The EEOC recently released its fiscal year 2018 Performance and Accountability Report (PAR), detailing the agency's activities and use of resources in the year prior.[129] Via the PAR, the agency highlights what its view to be its major achievements. For FY 2018, these include:

- Reducing the backlog of private sector charges by more than 19.5%, to 49,607 charges – the lowest in more than 12 years.
- Securing more than $505 million for victims of discrimination, including:
  - » $354 million for victims in the private sector and state and local government through mediation, conciliation, and settlement;
  - » $53.6 million for charging parties through litigation; and
  - » $88.6 million for federal sector employees and applicants.
- Achieving 6,754 successful mediations, a 7.9% increase over the prior year, and recovering $165.8 million in benefits to charging parties through the mediation process.

Among the reasons the EEOC credits for the dramatic reduction in inventory is the agency's increased use of technology. In November 2017, the EEOC launched on a nationwide basis the EEOC Public Portal, which allows individuals to submit online initial inquiries and requests for intake interviews with the agency. The system was initially piloted by five EEOC offices (Charlotte, Chicago, New Orleans, Phoenix, and Seattle), which tested the system for six months prior to the nationwide launch. The new system enables individuals to digitally sign and file a charge prepared by the EEOC for them (but does not permit individuals to file charges of discrimination online directly).

Once an individual files a charge, he or she can use the EEOC Public Portal to provide and update contact information, agree to mediate the charge, upload documents to his or her charge file, receive documents and messages related to the charge from the agency and check on the status of his or her charge. Employers are also able to submit certain documents, such as position statements, via the Public Portal. In a press release,[130] Acting Chair Lipnic commented, "[t]his secure online system makes the EEOC and an individual's charge information available wherever and whenever it is most convenient for that individual," adding that it was "a giant leap forward for the EEOC in providing online services."

4. Status of Wellness Program Rules

After years of uncertainty, in 2016 the EEOC issued final regulations under the Americans with Disabilities Act (ADA) and the Genetic Information Nondiscrimination Act (GINA) regarding permissible incentive limits for workplace wellness plans, offering employers at least some certainty in their plan structure.[131] Unfortunately, key provisions of these rules proved to be short-lived.

Generally speaking, the ADA prohibits employers from requiring employees to submit to physical examinations or answer disability-related questions, unless these activities are job-related and consistent with business necessity, or are part of a "voluntary employee health programs." GINA generally prohibits acquiring genetic information of applicants or employees, but includes an exception where employers offer voluntary health or genetic services to employees or their family members. Under both statutes, the key question is whether medical information is provided on a *voluntary* basis. For years the EEOC failed to answer the question of when a financial incentive or penalty became so great in the agency's view as to render the disclosure of such information coercive and involuntary.

129 *See generally* EEOC FY 2018 PAR, *supra* note 28.
130 EEOC, Press Release, *EEOC Launches Online Services for Inquiries, Appointments and Discrimination Charges* (Nov. 1, 2017).
131 *See Regulations Under the Americans with Disabilities Act*, 81 Fed. Reg. 31126 (May 17, 2016); *Genetic Information Nondiscrimination Act*, 81 Fed. Reg. 31143 (May 17, 2016).

The EEOC's 2016 wellness plan regulations purported to answer that question. Under the final rules, a wellness program would be considered to be a "voluntary employee health program" as long as certain requirements were satisfied, including privacy and confidentiality safeguards, mandatory notice distributions, and caps on the rewards or penalties associated with the wellness program. Specifically, the regulations provided that a wellness program would still be considered "voluntary" if rewards (or penalties for nonparticipation) did not exceed 30% of the total cost of the least-expensive employee-only medical coverage option (the regulations provided alternative caps for employers that do not sponsor medical coverage).

Shortly after the rules were issued, the AARP filed a lawsuit in federal court challenging them, alleging that the EEOC failed to adhere to proper rulemaking procedure, and failed to sufficiently explain how it arrived at a 30% "voluntary" threshold. In August 2017, the court ruled in favor of the AARP and remanded the regulations to the EEOC for reconsideration.[132] In its decision, the court held that the EEOC did not respond to "substantial criticism" of its choice of the 30% threshold, and did not consider its financial and economic impact, such as the impact on specific premium levels, personal income, and other factors. The court subsequently vacated the challenged sections of EEOC's final regulations effective as of January 1, 2019. Importantly, the court's ruling struck down only those sections of the regulations regarding the penalty/reward incentive limits. The remainder of the regulations remains in effect. On December 20, 2018, the EEOC published regulations in the *Federal Register* removing those portions of the regulations that were stricken by the court, effective January 1, 2019.[133]

To date, the EEOC has not provided updated regulations, and, given the complexity of the issue and the length of the rulemaking process, it is appears unlikely that the agency will issue new final rules in the near future. According to the administration's Unified Agenda of Regulatory and Deregulatory Actions released on October 17, 2018, the EEOC indicated that it was pushing back the dates for proposed rules addressing permissible incentives in workplace wellness programs under the ADA and GINA from January 2019 to June 2019. We expect little action on these rules until a Republican majority is confirmed at the EEOC. In the interim, employers will continue to lack certainty as to whether their wellness programs are in compliance with the ADA and GINA.

5. LGBT Coverage Under Title VII

Title VII of the Civil Rights Act of 1964 prohibits covered employers from discriminating against workers on the basis of sex. A critical question for federal courts in recent years has been whether discrimination on the basis of sexual *orientation* or gender identity is a form of sex discrimination prohibited under Title VII.

Since 2015, the EEOC has held that discrimination on the basis of sexual orientation is a form of sex discrimination and thus unlawful.[134] The EEOC has offered three different arguments in support of its position: (1) that "sexual orientation" is, by definition, inseparable from "sex" (*i.e.*, the sexual orientation of a female employee attracted to males is heterosexual, while the sexual orientation of a male employee likewise attracted to males is homosexual—the difference in sexual orientation is based solely on the sex of the subject employee); (2) that discrimination on the basis of sexual orientation is prohibited discrimination on the basis of association (much as discrimination on the basis of an employee's spouse's race would be prohibited racial discrimination); and (3) discrimination on the basis of sexual orientation is a form of "sex stereotyping" prohibited under prior Supreme Court case law.

132 *AARP v. EEOC*, No. 1:16-cv-02113 (D.D.C. Aug. 22, 2017).
133 EEOC, *Removal of Final ADA Wellness Rule Vacated by Court*, 83 Fed. Reg. 65296 (Dec. 20, 2018), *Removal of Final GINA Wellness Rule Vacated by Court*, 83 Fed. Reg. 65296-65297 (Dec. 20, 2018).
134 *See Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (July 15, 2015).

In 2017, in the case of *Hively v. Ivy Tech Community College*, the full U.S. Court of Appeals for the Seventh Circuit (which includes Illinois, Indiana, and Wisconsin) became the first federal appeals court to adopt the EEOC's reasoning and hold that Title VII prohibits discrimination on the basis of sexual orientation.[135] Less than a year later, the Second Circuit Court of Appeals followed suit in *Zarda v. Altitude Express, Inc.*, similarly holding that Title VII protects workers from sexual orientation discrimination.[136] In contrast, the Eleventh Circuit Court of Appeals, citing binding precedent, held in 2017 that Title VII does not include discrimination on the basis of sexual orientation, thus creating a split in the federal circuits.[137]

In addition to differing views among federal appeals court, there is conflict within the administration on this point. During consideration of the *Zarda* case in the appeals court,[138] the U.S. Department of Justice filed a friend of the court brief arguing that sexual orientation is not discrimination on the basis of sex.[139] At this writing, two petitions for review are pending at the U.S. Supreme Court that directly raise the question of whether Title VII prohibits discrimination on the basis of sexual orientation.[140]

Previously, in 2012, the EEOC took the position that discrimination on the basis of gender identity is prohibited under Title VII.[141] To date, one federal circuit court has adopted the EEOC's reasoning, and held that Title VII prohibits discrimination on the basis of gender identity.[142] In addition to the two petitions pending on the question of sexual orientation, a separate request for review is pending on the question of Title VII's coverage of gender identity. Should the Supreme Court decline to review these cases and answer the question definitively, it is unclear what the impact of a functioning Republican majority at the Commission will be.

135 *See* Kevin Kraham and Emily Haigh, *Seventh Circuit Holds Title VII Protections Extend to Sexual Orientation Discrimination*, Littler ASAP (Apr. 6, 2017).
136 *Zarda v. Altitude Express, Inc.,* 883 F.3d 100 (2d Cir. 2018), *petition for cert. filed*, (U.S. May 29, 2018) (No. 17-1623).
137 *Evans v. Georgia Reg'l Hosp.* 850 F3d 1248 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).
138 *See* Emily Haigh and Mark Phillis, *Another Federal Appeals Court Finds Title VII Prohibits Sexual Orientation Discrimination*, Littler ASAP (Feb. 26, 2018).
139 *See* Emily Haigh and Kevin Kraham, *Is Sexual Orientation Protected Under Title VII? The DOJ Weighs In*, Littler ASAP (July 31, 2017).
140 *Altitude Express v. Zarda*, case number 17-1623 and *Bostock v. Clayton County, Georgia*, case number 17-1618.
141 *See Macy v. Holder*, EEOC No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012).
142 *See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560 (6th Cir. 2018), petition for cert. filed, (U.S. July 20, 2018) (No. 18-107).

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Investigations

1. EEOC Authority to Conduct Class-Type Investigations

In recent years, the progeny of *Mach Mining* and *Caterpillar*[143] continue to clarify how charges and conciliations affect the EEOC's authority to investigate and litigate. At least in the Seventh Circuit, the courts have been granting the EEOC broad leeway in its investigation and conciliation process with minimal judicial interference.[144]

In *EEOC v. Dolgencorp, LLC*,[145] for instance, the EEOC moved the court to summarily adjudicate two of the employer's defenses: (1) that the EEOC's claims were barred because they were beyond the scope of the charges of discrimination and the EEOC's investigation, and (2) that the EEOC failed to satisfy the statutory precondition for bringing suit when it failed to conciliate on one of the particular grounds of its suit.[146] The court disposed of the first of these in short order. Citing prior precedent,[147] the court found that the EEOC was not limited to the claims raised by the charging party, nor by the sufficiency of its pre-suit investigation.[148]

The *Dolgencorp* court likewise gave wide latitude to the EEOC in meeting its conciliation requirements. In disposing of the second affirmative defense, the court applied *Mach Mining*'s "extremely narrow" standard of review.[149] Under this "barebones" review, the court limited its review to whether the parties "engaged in written and oral communications regarding the alleged discrimination."[150] Finding that they had, the court ruled that the employer's conciliation defense failed as a matter of law.[151]

The scope of a charge may be one matter, but what if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate remains unabated.[152] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[153] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[154] While the federal appellate courts have been split on this issue,[155] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC.[156] In *Waffle House*, the Court held that, "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[157]

143 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015); *EEOC v. Caterpillar Inc.*, 409 F.3d 831 (7th Cir. 2005) (Posner, J.).
144 *But see, e.g., EEOC v. Tri-core Reference Labs.*, 849 F.3d 929, 937 (10th Cir. 2017) (applying a narrower view of EEOC relevance based on the narrower scope of the charge); *EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154, 1157-58 (10th Cir. 2012) (rejecting notion that, just because an individual charge of discrimination could be part of a pattern or practice of discrimination, the EEOC was entitled to such evidence).
145 249 F. Supp. 2d 890 (N.D. Ill. 2017).
146 *Id.* at 892.
147 141 F. Supp. 3d 912, 915 (N.D. Ill. 2015).
148 249 F. Supp. 2d at 892-93 (N.D. Ill. 2017).
149 *Id.* at 896.
150 *Id.*
151 *Id.* at 896-97.
152 *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).
153 867 F.3d 843 (7th Cir. 2017).
154 *Id.* at 845.
155 *See EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. Federal Express Corporation*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).
156 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).
157 *Id.* at 291.

This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[158] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[159] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority.

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it to "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[160] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[161] 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."[162] 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."[163]

Challenges to subpoenas typically turn on two related issues: (1) relevance and (2) burdensomeness. As reviewed in Littler's prior Annual Reports on EEOC Developments, the courts have been extremely deferential to the EEOC in subpoena enforcement actions. On balance, the courts have been least deferential in the Tenth and Eleventh Circuits.[164]

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

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

An employer may be barred from challenging a subpoena in a subpoena-enforcement action in circumstances where it does not timely move to challenge or modify the subpoena.[165] 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.[166]

158 867 F.3d at 851 (7th Cir. 2017).
159 *Id.*
160 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.
161 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).
162 *Id.* at 59.
163 *Id.*
164 *See, e.g., EEOC v. BNSF*, 669 F.3d 1154 (10th Cir. 2012) (denying the EEOC's request for nationwide recordkeeping data, as such information is not "relevant to" charges of individual disability discrimination filed by two men who applied for the same type of job in the same state) and *EEOC v. Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) ("Although eradicating unlawful discrimination and protecting other as-yet undiscovered victims are laudatory goals and within the Commission's broad mandate, the EEOC must still make the necessary showing of relevancy in attempting to enforce its subpoena.").
165 *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).
166 *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).

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

Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. The district court held that Aerotek filed its Petition to Revoke or Modify the subpoena six days after the subpoena was issued, instead of the statutorily-required five days. The Seventh Circuit agreed, finding that "Aerotek has provided no excuse for this procedural failing and a search of the record does not reveal one . . . We cannot say whether the Commission will ultimately be able to prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because Aerotek has waived its right to object."[168]

Contrary to *Aerotek*, in one decision issued in FY 2017, the court more carefully considered the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period. In a decision by the U.S. District Court for the Eastern District of Kentucky, a large retailer had, like the staffing agency *Aerotek*, filed its petition a day late.[169] Unlike the staffing agency, however, it provided excuses. Whether these excuses could overcome procedural failure turned on the application of *EEOC v. Lutheran Social Services*.[170] There, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[171] 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."[172] 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.[173] The court therefore ruled in favor of the employer and permitted the employer to raise challenges to the subpoena.

It should also be noted, however, that an employer does not have the option to file a petition to modify or revoke a subpoena when faced with subpoenas involving ADEA and EPA claims.[174]

167 *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013).
168 *Id.* at 648.
169 *EEOC v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071 (E.D. Ky. Mar. 29, 2016).
170 *EEOC v. Lutheran Social Services*, 186 F.3d 959 (D.C. Cir. 1999).
171 *Id.* at 959.
172 *Id.*
173 *Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 41071, at *7.
174 The EEOC may initiate a systemic investigation under either the ADEA or the EPA. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute. *See, e.g.*, 29 U.S.C. § 626(a) of the ADEA (the EEOC "shall have the power to make investigations. . . for the administration of this chapter); 29 C.F.R. § 1626.15 ("the Commission and its authorized representatives may investigate and gather data . . . advise employers . . . with regard to their obligations under the Act . . . and institute action . . . to obtain appropriate relief").

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

A relatively recent district court decision highlighted an additional procedural requirement in responding to a subpoena-related action, namely, that an employer cannot respond to an EEOC enforcement action without legal representation. In *EEOC v. Ayala AG Services*,[175] the EEOC sought enforcement of its administrative subpoena seeking information related to the investigation of two sexual harassment charges. The enforcement action went to hearing, at which a former employee of the company appeared to inform the court that the company had gone out of business.

The court explained that the respondent was a business entity and, therefore, can appear in federal court only through licensed counsel or, in the case of a sole proprietorship, by personal appearance. The individual who purported to appear on behalf of the company was neither the sole owner nor licensed counsel. Thus, the court deemed his appearance ineffective.

3. Review of Recent Cases Involving Broad-Based Investigation by the EEOC[176]

a. Supreme Court Decisions

In a much-anticipated case (at least by procedural-issue standards), the Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until last year's Supreme Court decision,[177] in which the Court brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[178] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[179] For the Court, each favored a more deferential standard. Otherwise, while the Court explained that the district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[180]

b. Court of Appeals Decisions

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

In one decision favorable to employers, the Tenth Circuit took a more restrictive approach in reviewing the EEOC's subpoena enforcement authority. In *EEOC v. Tri-Core Reference Laboratories*,[181] the Tenth Circuit affirmed the lower court's decision to deny an application to enforce a pattern-or-practice subpoena that arose out of an individual charge of discrimination. The court concluded, "[g]iven the

175 *EEOC v. Ayala AG Services*, 2013 U.S. Dist. LEXIS 148431 (E.D. Cal. Oct. 15, 2013).
176 *But see EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014), in which the Eleventh Circuit limited the scope of a subpoena enforcement action.
177 *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017).
178 *Id.* at 1170.
179 *Id.* at 1166-67.
180 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.
181 *EEOC v. Tri-Core Reference Labs.*, 849 F.3d 929 (10th Cir. 2017).

EEOC's paltry explanation of how the . . . request was relevant, the overbreadth of the request, and the EEOC's burden of showing the subpoena's relevancy to the charge," it could not "say the district court abused its discretion."[182]

On the other hand, taking a broader review of the related principle of burdensomeness, the Sixth Circuit ruled in the EEOC's favor regarding evidence to which the EEOC is entitled.[183] At issue was how the employer stored and disclosed employees' medical information. While this was related to the charge, the EEOC sought company-wide evidence on how the information is stored and disclosed. Rejecting the employer's unduly burdensome request, the court found that, because the employer had not shown any material undue burden and had in fact admitted the information could be transmitted electronically, the EEOC was entitled to it.[184]

Regardless of an investigation's scope relative to the charge, the parties and courts also have to grapple with the evidentiary issues that may arise. In the *EEOC v. BDO U.S.A. LLP*,[185] for instance, the Fifth Circuit decided whether the district court erred when it affirmed the magistrate judge's ruling that the documents were privileged, without an *in camera* inspection and without supporting documentation supporting why the documents were privileged. In deciding the magistrate judge did so err, the court held that the "the privilege log" provided by the employer "lacked sufficient detail to ascertain whether" the withheld documents came within the privilege's scope. In the view of the court, the magistrate judge therefore erred when placing the burden on the EEOC to show that the defendant's withheld communications were not privileged.[186]

Determining whether a magistrate judge errs is no easy matter. It depends, in large part, on the district court's standard of review, which in turn depends on whether an application to enforce an administrative subpoena is a dispositive motion. A magistrate judge's findings of fact are reviewed de novo for dispositive motions, clear error for non-dispositive motions.[187] While the question has already been decided in the Third Circuit as precedent, its application is not without issue. In *EEOC v. City of Long Branch*,[188] for instance, the district court had misapplied the precedent and treated the magistrate judge's ruling as a non-dispositive motion. On appeal, therefore, the Third Circuit affirmed the circuit precedent treating an application as dispositive and remanded the case to the district court for consideration in the first instance or reference of the motion to a magistrate judge for a report and recommendation.[189] On remand, the district court ruled in the EEOC's favor.

182 *Id.* at 942.
183 *EEOC v. UPS*, 859 F.3d 375 (6th Cir. 2017).
184 *Id.* at 380.
185 2017 U.S. App. LEXIS 23067 (5th Cir. Nov. 16, 2017).
186 *Id.* at **12-13.
187 28 U.S.C. § 636(b)(1)(A), (B).
188 866 F.3d 93 (3d Cir. 2017).
189 *Id.* at 101-02.

c. District Court Cases

As noted in last year's Report, district courts had several opportunities in the past two years to interpret and apply the Tenth Circuit's *EEOC v. Tri-Core Reference Laboratories* decision. On the whole, those cases reiterated the principle that the EEOC cannot issue subpoenas to give force to an informal expansion of an investigation. To the contrary, the EEOC must initiate additional charges in order to broaden the scope of relevant discovery.[190]

But if FY 2017 was a year in which the lower courts took a narrower view of subpoena enforcement, FY 2018 was not. Unlike in FY 2017, respondents had less success this year in beating back broad-based subpoenas and in protecting pedigree information.

In the ongoing individual-charge case of *EEOC v. Centura Health*, for instance, a district court not only upheld a magistrate judge's order to produce what the employer felt was pattern-or-practice information, but also suggested that practice information could always be relevant, no matter the charge.[191] As discussed in last year's Report, the district court had first rejected the pattern-or-practice argument and then referred the issue of burdensomeness to the magistrate judge.[192] Once before the magistrate judge, however, the employer renewed the argument that the EEOC was seeking pattern-or-practice information even though it had not filed a formal pattern-or-practice charge. In support of this argument, the employer cited an e-mail from the EEOC's counsel mentioning a desire to "gain an understanding of [the company]'s practices and procedures regarding the reasonable accommodation."[193] Disagreeing with the employer that this e-mail conceded that the sought information was relevant only to a pattern-or-practice investigation, the magistrate judge ordered production over its objections.[194]

The district court reached the same conclusion, but with more expansive reasoning. After admonishing the employer for not citing the correct standard of review, the court agreed that the use of the words "practice and procedures" did "not admit anything about a pattern-or-practice investigation."[195] Citing no authority, the court then offered a proposition that may be as significant for what it said as for what it did not. "Practices and procedures," the court stated without qualification, "are as relevant to investigation of an individual charge as they are to a pattern-or-practice charge."[196] Though the court did not discuss the relevance of *patterns*, its suggestion that practices and procedures are always relevant to individual claims may be inconsistent with the Tenth Circuit's decision in *TriCore* to reject a pattern-or-practice subpoena where the EEOC could not explain its relevance.[197]

Similarly, a court in California determined that some evidence suggesting a broader pattern or practice of misconduct than that discussed in the initial charge involving specific locations can be enough to warrant a state-wide subpoena. In *EEOC v. Nationwide Janitorial Services*,[198] three female employees alleged a company supervisor sexually harassed them at their job site, and that another supervisor threatened to retaliate against them for filing complaints. During the course of the investigation, the company voluntarily disclosed information about additional incidents of supervisor misconduct, leading the EEOC to broaden the scope of its investigation. To that end, the EEOC sought

190 Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2016*, pp. 74-76 (Feb. 2017), *available at* https://www.littler.com/files/annual_report_on_eeoc_developments_-_fy_2016.pdf.
191 2018 U.S. Dist. LEXIS 57121(D. Col. April 4, 2018).
192 2017 U.S. Dist. LEXIS 141469 **1-5 (D. Colo. Sept. 1, 2017).
193 2018 U.S. Dist. LEXIS 57121 *5 (D. Col. April 4, 2018).
194 *Id.*
195 *Id.* at **6-8.
196 *Id.* at **7-8.
197 *EEOC v. Tri-core Reference Labs.*, 849 F.3d 929, 942 (10th Cir. 2017).
198 *EEOC v. Nationwide Janitorial Services*, 2018 U.S. Dist. LEXIS 161273 (C.D. Cal. Aug. 17, 2018), *adopted by EEOC v. Nationwide Janitorial Services*, 2018 U.S. Dist. LEXIS 161234 (C.D. Cal. Sept. 20, 2018).

the names, contact information, and additional data for all employees in California over a multi-year period. The company objected, claiming the EEOC did not have a sufficient basis for expanding its investigation state-wide.

The court, however, exercised its discretion and concluded the subpoena request was relevant to the ongoing EEOC investigation. In its report and recommendation, the magistrate judge determined the charging parties' grievance "suggests—without any corroborating detail, allegation, or evidence—that this misconduct is pervasive within the company."[199] The agency was able to point to its broader investigation and suggest a level of misconduct "[t]hat comes closer to the [pattern or practice] class kind of investigation for which the EEOC is entitled to obtain broader evidence."[200] Thus, the state-wide subpoena was relevant to the EEOC's investigation.

In another long-pending case, the district court of Arizona grappled with the ill-defined undue-burden standard in a context where inquiries resist simple formulation.[201] After the Supreme Court last year held that the standard of review of a district court's EEOC subpoena order is abuse-of-discretion, it remanded this case to the Ninth Circuit to decide whether the district court had abused its discretion in denying an EEOC subpoena on the ground that pedigree information was not relevant.[202] On remand, the Ninth Circuit court found that district court had, so it remanded the case to the district court, where the employer was free to renew its argument that the request's scope was unduly burdensome.[203]

While acknowledging that the burden remains "difficult to meet," the district court stated that the size of a targeted company's operating budget does not give the EEOC "free reign to impose significant costs for information of minor significance."[204] A company's revenue matters, but it is far from the end of the inquiry. In this case, however, the court found that the employer's revenue was large and its costs speculative.[205] Declining to "weigh such speculative costs or make such premature determinations on the merits," the court ordered the company to produce the pedigree information.[206]

Employers, of course, are concerned not only with what they must produce to the EEOC, but also with what happens to that information after they produce it. Under what conditions, if any, can the EEOC take the information subpoenaed from the targeted company and disclose it to the charging party or other charging parties? Such was the question in *EEOC v. City of Long Branch*.[207] There, the EEOC had sought all disciplinary action taken against the charging party's white co-workers. In response, the employer conditioned its production on the EEOC's not disclosing the information to the charging party, but the EEOC said no.[208] After the district court initially sided with the employer, its ruling was reversed for misapplying the correct precedent.[209] On remand, the district court ruled in the EEOC's favor. Under *Associated Dry Goods*, the court noted, an employee filing a charge with the EEOC is not a member of the public to whom disclosure is prohibited.[210] The restriction, rather, is that a charging party is not entitled to know the content of any other employee's charge.[211] The EEOC, then, could lawfully disclose to the charging party the subpoenaed information concerning his co-workers.

199 *Id.* at *8.
200 *Id.* at *9.
201 *EEOC v. McLane Co.*, 2018 U.S. Dist. LEXIS 70127 (D. Ariz. April 25, 2018).
202 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
203 *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017)
204 *EEOC v. McLane Co.*, 2018 U.S. Dist. LEXIS 70127 *5 (D. Ariz. Apr. 25, 2018).
205 *Id.* at **7-8.
206 *Id.* at *8.
207 *EEOC v. City of Long Branch*, 2018 U.S. Dist. LEXIS 105008 (D.N.J. June 22, 2018).
208 *Id.* at **2-5.
209 *Id.* at *4.
210 *Id.* at *11.
211 *Id.* Seeking to mitigate the court's ruling, the employer sought a confidentiality order, but that too was rejected, because the employer failed to show, among other things, injury with "specificity." *Id.* at *13-15.

Before the court even decided this issue, however, it first decided whether the employer had waived its right to bring any objection at all. Before challenging an EEOC subpoena in court, an employer must first "exhaust" its remedies by challenging it with the EEOC.[212] To do so, an employer must serve a petition on the EEOC that identifies each portion of the subpoena that the employer does not intend to comply with and the grounds for not complying—and it must do so within five business days of being served with the subpoena.[213] Instead of doing so, the City of Long Branch served a "notice of objection" that was late by at least one week.[214] Trying to excuse the delay, the city argued that because the EEOC's subpoena was silent on its face about the time to respond or the applicable regulation, the delay was excusable.[215] The district court disagreed. Without deciding whether the EEOC must ever provide notice of the exhaustion requirement or regulation, the district court found that the city nevertheless failed to prove that the EEOC needed to do so in this case.[216] The city was also, the court noted, represented by counsel "who should've been capable of determining" the time to respond.[217]

B. Conciliation Obligations Prior to Bringing Suit

Similar to other "reasonable cause" findings by the EEOC, before filing a pattern-or-practice lawsuit under Section 707 of Title VII or a "class" lawsuit under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[218] Only after "[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer."[219] 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.[220] 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*,[221] clarifying that the EEOC's conciliation efforts *are* judicially reviewable, but that EEOC has broad discretion in the efforts it undertakes to conciliate.

1. The *Mach Mining* Decision

Before *Mach Mining*, the circuits were split regarding whether the EEOC's conciliation efforts were subject to judicial review and the extent of that review. The Fourth and Sixth Circuits had adopted a standard deferential to the EEOC, under which a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC . . . and is beyond judicial review."[222] 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.[223] The Seventh Circuit had held that the EEOC's conciliation efforts were not judicially reviewable at all.[224]

212 29 C.F.R. § 1601.16(b)(1)-(2).
213 *Id.*
214 *EEOC v. City of Long Branch*, 2018 U.S. Dist. LEXIS 105008 **7-8 (D.N.J. June 22, 2018).
215 *Id.* at *8.
216 *Id.* at **9-10.
217 *Id.*
218 42 U.S.C. § 2000-e5(b).
219 *EEOC v. Global Horizons, Inc.*, 2012 Dist. LEXIS 35915, at *12 (D. Haw. Mar. 16, 2012).
220 *EEOC v. Global Horizons*, 2013 U.S. Dist. LEXIS 53282 (E.D. Wash. Apr. 12, 2013), at *21.
221 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).
222 *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).
223 *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).
224 *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 177 (7th Cir. 2013).

In *Mach Mining*, the Supreme Court unanimously vacated the Seventh Circuit's decision of non-reviewability and resolved the circuit split, holding that the EEOC's attempts to conciliate a discrimination charge before filing a lawsuit *are* judicially reviewable.[225] 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 merely 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).[226] 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.'"[227] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[228]

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.[229] 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."[230] 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."[231] The court reasoned that this holding

225 *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645 (2015).
226 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
227 *Id.* at 635-636.
228 *Id.* at 635.
229 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189 (9th Cir. 2016).
230 *Id.* at 1200.
231 *Id.*

was "consistent with the Supreme Court's broad interpretation of the EEOC's enforcement powers."[232] 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.[233]

The same rule applies in cases brought under Section 706. In *EEOC v. New Mexico*, the District of New Mexico denied the employer's motion to dismiss claims brought on behalf of previously-unidentified aggrieved individuals, holding that actual pre-litigation notice of such claims is not relevant to whether a complaint states a cognizable claim.[234] Noting that it was unable to identify authority to the contrary, the court rejected the employer's request that the court evaluate whether the employer had notice of such claims "as part of the notice pleading inquiry."[235] Ultimately, the court rejected the state's motion for partial summary judgment as to the previously unidentified individuals, holding that the EEOC had had sufficiently described the affected class of individuals in notifying the state of the charges and had otherwise met its conciliation obligations under *Mach Mining*.[236]

In *EEOC v. UPS*, the Eastern District of New York also held that the EEOC need *not* name specific aggrieved individuals where it investigated and conciliated with regard to claims arising out of the same alleged course of conduct.[237] There the court granted the EEOC's motion to strike an affirmative defense that it had failed to conciliate with regard to each allegedly-aggrieved individual in light of "the limited nature of judicial review of the scope of the EEOC's duty to conciliate."[238]

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.[239] The District of Maryland held that the EEOC met its conciliation obligations by submitting a declaration in which the Director of the Commission's Baltimore Field Office noted the EEOC had "engaged in communications with the [Employer] . . . including sending [the Employer] a conciliation proposal."[240] 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."[241]

In *EEOC v. East Columbus Host, LLC*,[242] 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

232 *Id.* at 1201.
233 *EEOC v. Bass Pro Outdoor World. LLC*, 826 F.3d 791, 805 (5th Cir. 2016).
234 *EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770 (D. N.M. Dec. 4, 2017).
235 *Id.* at *8-10.
236 *EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770, *12-14 (D. N.M. Dec. 4, 2017).
237 *EEOC v. UPS*, 2017 U.S. Dist. LEXIS 34929, *26-29 (E.D.N.Y. Mar. 9, 2017), report and recommendation adopted in relevant part by 2017 U.S. Dist. LEXIS 101564 (E.D.N.Y. June 29, 2017).
238 2017 U.S. Dist. LEXIS 34929 at *29.
239 *EEOC v. Dimensions Healthcare System*, 2016 U.S. Dist. LEXIS 70126 (D. Md. May 27, 2016).
240 *Id.* at **13-14.
241 *Id.* at *16.
242 *EEOC v. East Columbus Host*, LLC, 2016 U.S. Dist. LEXIS 118993 (S.D. Ohio Sept. 2, 2016).

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."[243]

In *EEOC v. Amsted Rail Co.*,[244] 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.

In *EEOC v. MJC, Inc.*, the District of Hawaii rejected the defendants' motion to stay proceedings, finding that the defendants had failed to produce credible evidence establishing the EEOC's failure to conciliate.[245] In doing so, the court analyzed the EEOC's determination letter and a series of correspondence from defendants to the EEOC, finding that they established that the EEOC had satisfied its conciliation obligations under *Mach Mining* insofar as the EEOC had sufficiently notified the defendants of the claim, invited conciliation through the determination letter, and offered to settle the charge by proposing a settlement involving the payment of monetary damages.[246]

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.[247] 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.[248] Some courts have accepted less. In *EEOC v. PC Iron, Inc.*, the Southern District of California struck a failure-to-conciliate affirmative defense, finding that the EEOC had satisfied its conciliation obligations where the employer was aware of a discrimination claim not addressed in the EEOC's determination letter, and had made an offer to resolve the matter in response to the charge.[249]

Accordingly, for these same reasons, the courts also have stricken references to the substance of the EEOC's conciliation efforts from motions to dismiss. In *EEOC v. Phase 2 Investments, Inc.*, for example, the District of Maryland granted a motion to strike such references based on Title VII's prohibition against the disclosure of statements made during the conciliation process absent an agreement between the parties.[250] In so doing, the court reasoned that the defendant had not asserted a failure-to-conciliate defense and, even if it had, under *Mach Mining*, doing so "would not open the door to the introduction of all things said or done during conciliation."[251]

While the burden on the EEOC to engage in conciliation efforts is light, 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

243 *Id.* at *33.
244 *EEOC v. Amsted Rail Co.*, 2016 U.S. Dist. LEXIS 6466 (S.D. Ill. Jan. 20, 2016).
245 *EEOC v. MJC, Inc.*, 306 F. Supp. 3d 1204 (D. Haw. 2018).
246 *Id.* at 1219.
247 *EEOC v. Lawler Foods*, 2015 U.S. Dist. LEXIS 167178 (S.D. Tex. Dec. 4, 2015).
248 *EEOC v. Stone Pony Pizza, Inc.*, 2016 U.S. Dist. LEXIS 115658 (N.D. Miss. July 7, 2016).
249 *EEOC v. PC Iron, Inc.*, 316 F. Supp. 3d 1221, 1231-32 (S.D. Cal. 2018).
250 *EEOC v. Phase 2 Investments, Inc.*, 2018 U.S. Dist. LEXIS 22546 (D. Md. Dec. Feb. 12, 2018).
251 *Id.* at *25.

to conciliate separate, unrelated claims and that a case cannot be dismissed for lack of conciliation if any effort to conciliate has taken place.[252] The district court rejected that argument, reasoning that to satisfy its conciliation obligations the EEOC must give an employer "an adequate opportunity to respond to all charges and negotiate possible settlements," and in this case the EEOC did not do that. Since there was no evidence the EEOC made *any* effort to conciliate its allegations that the separation agreements at issue violated the ADEA, the court refused to stay proceedings to permit conciliation on that claim and dismissed the EEOC's claim "for lack of jurisdiction as a result of the EEOC's failure to satisfy the jurisdictional prerequisites of notice and conciliation."[253] This ruling was upheld on a motion for reconsideration.[254]

In *EEOC v. Dolgencorp, LLC*, the Northern District of Illinois held that the EEOC met its pre-suit investigation and conciliation obligations under the *Mach Mining* standard before filing suit.[255] The EEOC claimed that the employer's use of background checks in hiring and firing discriminated against employees on the basis of race in violation of Title VII and moved for partial summary judgment.[256] The employer argued that the EEOC failed to meet its conciliation obligations under *Mach Mining* by failing to provide adequate notice of the allegations of discrimination and failing to engage adequately in conciliation discussions.[257] With respect to the adequacy of the EEOC's notice, the court held that the EEOC had adequately identified the persons or class of persons affected by the alleged discriminatory practice in two letters of determination it sent to the employer.[258] With regard to the substance of the conciliation discussions, the court held that it was bound under *Mach Mining* to determine only whether the EEOC had attempted to confer regarding the charge, which it had.[259]

In *EEOC v. Western Distributing Co.*, the District of Colorado held that the EEOC met its pre-suit conciliation and investigation obligations.[260] Noting that the EEOC had engaged the employer in discussions regarding remedying the discriminatory practice by providing a settlement offer, meeting in person, and exchanging letters, the court held the EEOC had met its conciliation obligations.[261] The court also rejected the employer's argument that the EEOC was required to identify all aggrieved individuals to satisfy the conciliation requirement, noting that *Mach Mining* makes clear that the EEOC need not identify each aggrieved individual, even if doing so would have placed the employer in a better position to respond to the EEOC's settlement offer.[262]

In *EEOC v. MVM, Inc.*, the District of Maryland held that the EEOC established that it had complied with both prongs of Title VII's conciliation requirement by presenting evidence that it had informed the employer of the specific allegations and attempted 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."[263] Applying *Mach Mining*, the court held that no further inquiry was necessary and that the EEOC had acted well within its "wide latitude" over the conciliation process.[264]

However, 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.[265] The court distinguished *Mach*

252 *EEOC v. College America of Denver, Inc.*, 75 F. Supp. 3d 1294, 1302-03 (D. Colo. Dec. 2, 2014).
253 *Id.*
254 *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.
255 *EEOC v. Dolgencorp*, 249 F. Supp. 3d 890 (N.D. Ill. 2017).
256 *Id.* at 891.
257 *Id.* at 893.
258 *Id.* at 893-94.
259 *Id.*
260 *EEOC v. Western Distribution Co.*, 218 F. Supp. 3d 1231 (D. Colo. 2016).
261 *Id.*
262 *Id.* (citing *Mach Mining, LLC v. EEOC*, 135 S.Ct. 1645, 1654 (2015)).
263 *EEOC v. MVM, Inc.*, 2018 U.S. Dist. LEXIS 66217 (D. Md. Apr. 18, 2018).
264 *Id.* at *9-13.
265 *EEOC v. CRST Van Expedited, Inc.*, 2015 U.S. Dist. LEXIS 166797 (N.D. Iowa Dec. 14, 2015).

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.[266]

In *EEOC v. Sensient Dehydrated Flavors Co., et al.*, the Eastern District of California relied on *CRST* in upholding an employer's challenge to discovery demands served by the EEOC that went well beyond the scope of the allegations in the charge in issue.[267] 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.[268]

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

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

In *EEOC v. CVS Pharmacy, Inc.*,[269] 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.[270] 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."[271] 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).[272] 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.[273]

266 *Id.* at *8.
267 *EEOC v. Sensient Dehydrated Flavors Co., et al.*, 2016 U.S. Dist. LEXIS 109479 (E.D. Cal. Aug. 17, 2016).
268 *Id.* at *21.
269 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
270 *Id.* at 340-41.
271 *Id.* at 341-42.
272 *Id.* at 342.
273 *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. Motion to Dismiss/Scope of Complaint

In 2018, courts continued to treat liberally EEOC complaints at the pleadings stage.

In North Carolina, an employer moved to dismiss an EEOC complaint on the ground that it failed to allege the essential functions of the employee's job and that the employee could have performed the job with a reasonable accommodation.[274] Denying the motion, the court noted that the nature of the position was adequately described and the factual allegations were sufficient to infer that the employee could have performed the essential functions of her job with an accommodation.

In Maryland, a district court similarly rejected an employer argument that a complaint was not sufficiently specific to support a pay discrimination claim.[275] The employer argued the complaint lacked enough detail about the job requirements to determine whether equal work was being performed. The court disagreed, finding it reasonable to infer from the complaint that the positions in question were sufficiently similar to support an equal pay claim.

In a different case, a Maryland district court rejected an employer's effort to limit the scope of an EEOC complaint to legal theories asserted in the charge.[276] The employer argued that, because only national origin discrimination was raised in the charge, the EEOC's complaint seeking redress for race and national origin discrimination and harassment was overly broad. Rejecting that argument, the court noted that distinguishing between race and national origin discrimination often is difficult and an employee may pursue a claim not included in the charge as long as it is "reasonably related" to the charge and/or an investigation that would naturally arise from the charge. The court viewed notice as the key issue: "a court…does not need to peer into what was actually uncovered during an investigation; its focus is on the notice provided to the defendant." Since the charge put the employer on notice of the claims in the complaint, the court rejected the argument that the race discrimination claim was not exhausted.

Courts also are willing to excuse technical defects in order to permit a claim to proceed. In the Northern District of New York, the court found a claimant's failure to affirm her charge under oath as required by statute did not warrant a finding that she failed to exhaust administrative remedies.[277] The claimant had signed the charge, indicating that she swore she had read it and it was true to the best of her knowledge, information and belief, but did not have it notarized. Although the verification requirement is meant to "provide some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees," the court noted that technical readings of Title VII are "particularly inappropriate" and "[u]ltimately, the purpose of the exhaustion requirement is to give the administrative agency the opportunity to investigate, mediate, and take remedial action." Even without the verification, the filing of the charge set the administrative machinery in motion. The court also noted that the employer had been sent and responded to a copy of the charge without asserting any defect related to lack of verification, and there appeared to be no prejudice to the employer from a lack of verification.

In a case involving alleged discrimination based on disability by a railroad employer, a Pennsylvania district court addressed questions concerning the timeliness and administrative exhaustion of the EEOC's

274 *EEOC v. Advanced Home Care, Inc.*, 2018 U.S. Dist. LEXIS 60264 (M.D.N.C. Apr. 10, 2018).
275 *EEOC v. Enoch Pratt Free Library*, 2018 U.S. Dist. LEXIS 130297 (D. Md. Aug. 2, 2018).
276 *EEOC v. Phase 2 Invs. Inc*, 2018 U.S. Dist. LEXIS 65719 (D. Md. Apr. 17, 2018).
277 *EEOC v. Draper Dev.*, LLC, 2018 U.S. Dist. LEXIS 115124 (N.D.N.Y. July 11, 2018).

claims.[278] According to the EEOC's complaint, the railroad discriminated against 17 specific employees and applicants, as well as "presently unidentified employees," who were barred from working in certain positions due to actual or perceived disabilities.[279] The employer filed a partial motion to dismiss, first challenging the timeliness of the consolidated claims. The disputed issue was the date of charge filing, the options being: (1) the date the first claimant filed his intake questionnaire with the EEOC; (2) the date of the Notice of Charge of Discrimination for that individual; (3) the date he signed an EEOC charge; and (4) the date the EEOC notified the employer that it was consolidating investigation of the 17 charges and expanding the scope to include potential violations for other aggrieved individuals.[280] The EEOC argued for the first option, the earliest date, while the employer argued for the last option, the latest date. Based on the statute, the court rejected the employer's argument and focused on when the initial claimant filed a charge.[281] The court concluded that "claims brought by the EEOC, like claims brought by private litigants, shall be limited to those claims alleged to have been based upon events that occurred within 300 days of the earliest charge that gave rise to the EEOC's instant enforcement action"—and not the date that the employer "received actual notice of the scope of the investigation."[282] The court then found that the claimant's intake questionnaire (the earliest option) satisfied the requirements of a "charge" under the EEOC's regulations.

In the same case, the employer also sought dismissal of claims brought on behalf of unidentified individuals, who had never filed charges of discrimination with the EEOC, arguing that the EEOC failed to exhaust administrative remedies as to these claims. The court rejected this argument, explaining that the EEOC is not required to exhaust remedies or identify claimants in pursuit of an enforcement action.[283] The EEOC could proceed so long as it satisfied its required pre-suit obligations, such as conciliation. The EEOC had alleged that it met those obligations, so the court also denied this effort at dismissal.[284]

Although the courts are liberal in construing the EEOC's complaints where a motion to dismiss is filed, some basic pleading requirements must be met. In Hawaii, a district court granted a motion to dismiss against the EEOC in an ADA failure-to-hire case because the complaint included no allegations indicating the prospective employee was a qualified individual under the ADA—the complaint only alleged that the applicant was hearing-impaired and was not hired.[285] Because the court could not evaluate whether the prospective employee was capable of performing the requirements of the job, it granted the motion, allowing leave to amend.

Courts also are reluctant to dismiss complaints where discovery may support the allegations. A Florida district court declined to grant a motion to dismiss where the employer argued it was not vicariously liable for the illegal acts of its employee.[286] Noting that vicarious liability is a "fact-intensive inquiry," the court found that the issue was more appropriately addressed at the summary judgment stage. A court in Illinois reached a similar result in a case involving the EEOC's allegation of failure to accommodate an employee who had been out on an extended leave. The employer filed an early summary judgment motion, arguing that the suit was barred by Seventh Circuit authority holding that an employee who needs long-term leave cannot work and is thus not qualified under the ADA. The court disagreed and denied the motion, saying issues of reasonable accommodation are fact-intensive, that the Seventh Circuit precedent pointed to was on a full record, and here discovery was needed to

278 *EEOC v. Norfolk S. Corp.*, 2018 U.S. Dist. LEXIS 154377 (W.D. Pa. Sept. 11, 2018).
279 *Id.* at **2-9.
280 *Id.* at *13-14.
281 *Id.* at **14-20.
282 *Id.* at **17-18.
283 *Id.* at **22-27.
284 *Id.* at **27-32.
285 *EEOC v. MJC, Inc.*, 2018 U.S. Dist. LEXIS 11494 (D. Haw. Jan. 24, 2018).
286 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).

determine whether reasonable accommodation was possible, who decided to terminate the employee's employment and the reason for that decision.[287]

In another Illinois district court case, an employer moved to dismiss, arguing that the same Seventh Circuit precedent established that long-term medical leave removes an employee from the protections of the ADA.[288] The court disagreed with the employer's view of Seventh Circuit decisions and noted that the employee in this case was willing, ready and able to carry out his job duties without any accommodation before he was terminated.

Courts continue to reject employer attempts to join additional parties and thus shift liability for claimed violations. In South Dakota, a district court declined to reconsider its grant of motions to strike and dismiss a third-party complaint, holding that third-party claims for contribution and indemnification are impermissible under the ADA because the statute's enforcement procedures do not provide for such a remedy.[289] A district court in South Carolina granted judgment on the pleadings, dismissing a third-party complaint by the employer against a temporary labor services provider and holding that efforts to obtain contribution or indemnity for Title VII violations are improper.[290]

2. Amendments to Pleadings

An entity usually must be named in an EEOC charge in order to be sued, but that is not always the case. In a case before the U.S. District Court for the Northern District of Alabama, the underlying charge named only a successor company. In the lawsuit, the EEOC sought to add as defendants the predecessor company and two affiliates, not named in the charge.[291] The employer argued the motion for leave to amend should be denied on the ground that not naming these entities in the charge was a failure to exhaust administrative remedies. The court rejected that argument, noting several factors relevant to whether a party unnamed in an EEOC charge may still be sued in a later civil action: (1) similarity of interest between the named and unnamed parties; (2) whether the identity of the unnamed party was ascertainable when the charge was filed; (3) whether adequate notice of the charges was provided to the unnamed parties; (4) whether the unnamed parties had an opportunity to participate in the conciliation process; (5) whether the unnamed parties suffered any prejudice; and (6) whether an investigation into the unnamed party would reasonably have grown out of the charge. The court ultimately granted leave to amend based on Fed.R.Civ.P. 9(c), which allows a general allegation that all conditions precedent to suit have been met, focusing on the allegations in the EEOC's proposed amended complaint that "all conditions precedent to suit have been fulfilled."

3. Key Issues in Class-Related Allegations

a. Challenges to Pattern-or-Practice Claims

Employers had difficulty attacking pattern-or-practice claims in 2018.

A Colorado district court held that the EEOC could proceed on an ADA pattern-or-practice claim under Section 706 (which allows the EEOC to act on behalf of individuals who file charges) as opposed to just Section 707 (which permits the EEOC to initiate suits without first receiving a charge).[292] This was significant because Section 706 allows the award of compensatory and punitive damages, while such damages are not explicitly authorized under Section 707. The parties agreed to bifurcate the trial, with a jury first determining whether the EEOC had proven the unlawful discrimination was a pattern or practice

287 *EEOC v. Midwest Gaming & Entm't., LLC*, 2018 U.S. Dist. LEXIS 88367 (N.D. Ill. May 25, 2018).
288 *EEOC v. S&C Elec. Co.*, 303 F. Supp. 3d 687 (N.D. Ill. 2018).
289 *EEOC v. M.G. Oil Co.*, 2018 U.S. Dist. LEXIS 11941 (D.S.D. Jan. 25, 2018).
290 *EEOC v. Akebono Brake Corp.*, 2018 U.S. Dist. LEXIS 54666 (D.S.C. Feb. 8, 2018).
291 *EEOC v. Labor Sols. Of AL LLC*, 2017 U.S. Dist. LEXIS 180729 (N.D. Ala. Nov. 1, 2017).
292 *EEOC v. W. Distrib. Co.*, 2018 U.S. Dist. LEXIS 128319 (D. Colo. July 27, 2018).

and a second jury, if necessary, evaluating each individual plaintiff's claim that he or she was a victim of the alleged discriminatory practice, but the parties disagreed about when the issue of punitive damages should be raised. Courts are split on this issue—some hold that a determination of punitive damages should not be heard before other damages evaluations because not all class members may be entitled to compensatory damages, and any punitive damages should be reasonable and proportionate to the general damages recovered, while others hold that a determination of the right to (but not award of) punitive damages may be heard before other damages evaluations because the purpose of punitive damages is not to compensate the victim but to punish and deter the defendant. The Colorado court took the latter view, concluding that the first jury, in furtherance of judicial efficiency, would determine whether the employer was liable for punitive damages based on a pattern or practice of unlawful discrimination before the second jury evaluated whether each individual plaintiff was actually a victim of the alleged discrimination.

In Maryland, an employer moved to dismiss an EEOC systemic complaint on several grounds, a primary argument being that the class disparate treatment claims were outside the scope of the underlying letters of determination ("LODs").[293] In response, the EEOC moved to stay proceedings so the agency could amend the LODs and try to conciliate the new claims. The employer countered that the regulations do not allow for amendment of the LODs under these circumstances. The court disagreed and granted the motion, reasoning that a stay was the most efficient step. The court also denied the employer's motion to dismiss a claim based on *perceived* national origin, disagreeing with the employer's argument that it was not a cognizable claim because Title VII's language does not include the term "perceived." Citing to decisions from the Third, Fifth, Ninth and Eleventh Circuits, another Maryland district court and to EEOC guidance, the court held Title VII's prohibition against national origin discrimination to extend to discrimination based on both real and perceived national origin.

Liberal treatment of class claims at the pleading stage was not limited to claims filed by the EEOC. An Oklahoma district court allowed a plaintiff-intervenor to proceed on his class claims in a case filed by the EEOC, even though the court recognized that in his charge he had presented only an individual complaint.[294] The employer argued that, by not including class allegations in his charge, the employee had failed to exhaust administrative remedies. The court rejected that argument, saying the employer had notice of the class-based nature of the EEOC investigation because the EEOC repeatedly notified the employer of its expansion of its investigation to a class-wide scope. The court also rejected the employer's claim that the Tenth Circuit has a higher exhaustion burden for class action claims, finding such burden was limited to federal employee class actions.

b. Identity of and/or Eligible Class Members

Courts also gave the EEOC leeway in 2018 on the issue of when in litigation the agency must identify eligible class members in pattern-or-practice cases. The District Court for the Eastern District of Arkansas summarily denied an employer's motion to dismiss based on the EEOC's failure to identify each purported class member in a pattern-or-practice case, saying that the EEOC had sufficiently identified the class as a class of male bartenders who had applied for bartending positions at two specific locations and were not hired because of their sex.[295] The court also said it was unnecessary for the EEOC to identify each individual who might be aggrieved and that, when the EEOC was pursuing such a case, no requirement existed that each class member exhaust administrative remedies.

Even when cases have proceeded for years, courts do not require the EEOC to identify class

293 *EEOC v. MVM, Inc.* 2018 U.S. Dist. LEXIS 81268 (D. Md. May 14, 2018).
294 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).
295 *EEOC v. R Wings R Wild*, 2017 U.S. Dist. LEXIS 214602 (E.D. Ark. Dec. 21, 2017).

members. In a failure-to-accommodate-religious-belief case ongoing for over two years, a New York district court denied an employer's request for a cutoff of one year after filing of the complaint for claims not identified by the EEOC.[296] The court agreed with the EEOC that it was premature to set a date closing the class and by which the EEOC must identify claimants. Observing that discovery had been limited while the parties engaged in settlement discussions, the court said that the EEOC was entitled to engage in full discovery on all claims through the present since the EEOC claimed the discrimination was ongoing.

In Colorado, after two extensions of the deadline for the EEOC to identify aggrieved individuals in an ADA action, the court allowed the EEOC to identify another individual eight months after the deadline expired.[297] The employer argued good cause was not shown to allow modification of the scheduling order because the EEOC had investigated the allegations for six years and had not exercised diligence with respect to the individual they were now seeking to add, including losing the individual's participation agreement sent well before the deadline, failing to return the individual's calls on six occasions and waiting another month after contact to identify him as a potential claimant. The EEOC responded that it had proceeded diligently with respect to the class in general and the individual himself acted diligently in his attempts to communicate with the EEOC and should not be penalized. The court agreed, allowing the individual be added because these two factors outweighed the EEOC's apparent failings with respect to the individual.

The EEOC may not need to identify class members at the pleading stage for an ADA claim, but a California district court determined that it still must satisfy pleading requirements on behalf of class members it specifically identifies in a complaint.[298] By including them in the complaint, the court found the EEOC is averring each is covered by the ADA, suffered discrimination and had experiences similar to those of unidentified class members, and thus, the EEOC should know at a minimum whether each is covered by the ADA and entitled to recovery. The court granted the employer's motion to dismiss eight of 13 identified class members, agreeing that the complaint failed to establish each was disabled and/or a qualified individual entitled to protection under the ADA. But, it gave leave to the EEOC to amend to cure the deficiencies.

In an ADEA case in New Mexico, an employer succeeded in obtaining the identity of aggrieved individuals early in the litigation. The employer moved to dismiss ADEA class allegations brought by the EEOC on behalf of unidentified aggrieved individuals, arguing that the EEOC could only recover on behalf of employees specifically named in the complaint. The court denied the motion, saying courts are more permissive about class allegations where the complaint is specific about the charging parties.[299] But, the court acknowledged that the ADEA provides for any action seeking the right to recover wages and damages on behalf of an employee, and the action is deemed commenced for the purposes of the statute of limitations on the date the employee is identified as a party plaintiff in the complaint. The court declined to hold that the aggrieved individuals had to be identified in the complaint, but agreed the EEOC should identify each aggrieved individual in the record and ordered the EEOC to file a supplemental pleading identifying those individuals.

c. Special Issues re: ADEA Claims

In the same ADEA class action discussed in V.A.3(b) above, the New Mexico court also denied an employer's motion for partial summary judgment, which argued that the EEOC may only bring claims for wrongdoing discovered and disclosed during the pre-litigation and conciliation period.[300] The court disagreed, concluding that the EEOC's investigative function included discovering possible

296 *EEOC v. UPS*, 2018 U.S. Dist. LEXIS 37646 (E.D.N.Y. Mar. 5, 2018); *adopted by EEOC v. UPS*, 2018 U.S. Dist. LEXIS 45596 (E.D.N.Y. Mar. 20, 2018).
297 *EEOC v. Western Distrib. Co.*, 2018 U.S. Dist. LEXIS 519 (D. Colo. Jan. 3, 2018).
298 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 119305 (E.D. Cal. July 17, 2018).
299 *EEOC v. New Mexico*, 2017 U.S. Dist. LEXIS 198770 (D.N.M. Dec. 4, 2017).
300 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125 (D.N.M. Mar. 27, 2018).

victims of discrimination after the case has commenced. Citing to a Tenth Circuit decision, the court also held that inadequate conciliation is not a defense to liability, as dismissal on such grounds would hamper enforcement of the ADEA. Finally, because the right to initiate litigation under the ADEA is not dependent on the filing of a charge, the court granted the EEOC's motion for summary judgment on the employer's statute of limitations defense alleging certain claims were not timely because individuals had not filed charges.

d. Third-Party Complaints

Courts generally have denied employer attempts to shift liability of federal anti-discrimination claims onto other parties.

In South Dakota, in response to an EEOC lawsuit alleging violation of the ADA, the employer filed a third-party complaint against another company, alleging that the other company was liable for all or part of any judgment against the employer, which the federal district court dismissed.[301] In denying a motion for reconsideration of dismissal of the third-party complaint, the court affirmed its prior ruling that "third party claims for contribution and indemnification were impermissible under [. . .] the ADA."[302] Citing to U. S. Supreme Court precedent, the court reiterated that, when Congress omits a remedy like indemnification from a comprehensive statute like the ADA, the court cannot fashion new remedies.[303]

Similarly, a South Carolina district court determined that an employer could not assert a third-party claim against another company for contribution or indemnification for violations of Title VII.[304] In reaching its decision, the court noted that liability-shifting claims are preempted because allowing such a shift would frustrate Title VII's regulatory scheme. The court further noted that the EEOC bears the burden of demonstrating that the employer is liable and if there is a question concerning liability, the employer can demonstrate that another company was the "wrongdoer" without indemnification.[305] In Maryland, however, a district court allowed a third-party complaint in a Title VII lawsuit insofar as the third party claims were rooted in an indemnification agreement between the parties.[306]

e. Other Issues

In 2018, the district court for North Dakota addressed the issue of whether a deceased person's spouse could represent the decedent *pro se* in a discrimination suit.[307] The court held that the answer was no because the discrimination suit is on behalf of the estate, not the spouse personally. For the discrimination case to proceed, the estate must be represented by an attorney.

4. Who is the Employer?

In FY 2018, courts addressed successorship as it relates to liability for discrimination claims brought by the EEOC.

In Maryland, a district court addressed two topics concerning successorship: jurisdiction and liability.[308] Given the jurisdictional requirement of filing an administrative charge against a defendant, the court concluded that suits against successors were problematic because an employee might not be able to file a timely charge against a successor company. Relying on Sixth Circuit precedent, the court acknowledged that employees can only be required to bring a charge against companies they reasonably know of at the time.[309] The court found that it had jurisdiction over the successor employer

301 *EEOC v. M.G. Oil Co.*, 2018 U.S. Dist. LEXIS 11941 (D.S.D. Jan. 25, 2018).
302 *Id.* at *5.
303 *Id.* at **10-11 (*citing Northwest Airlines Inc. v. Transport Workers Union*, 451 U.S. 77 (1981)).
304 *EEOC v. Akebono Brake Corp.,* 2018 U.S. Dist. LEXIS 54666 (D.S.C. Feb. 8, 2018).
305 *Id.* at *8.
306 *United States EEOC v. Phase 2 Invs., Inc.*, 2018 U.S. Dist. LEXIS 132298 (D. Md. Aug. 6, 2018).
307 *EEOC v. Pyramid Instrumentation & Elec. Corp.*, 2018 U.S. Dist. LEXIS 141397 (D.N.D. Aug. 21, 2018).
308 *United States EEOC v. Phase 2 Invs., Inc.*, 2018 U.S. Dist. LEXIS 65719 (D. Md. Apr. 17, 2018).
309 *Id.* at *24 (*citing EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974)).

based on the successor employer's knowledge of the lawsuit when it acquired the prior company. The court held that filing another charge against the successor employer was unnecessary because it "would be simply a useless exercise in technical nicety."[310]

The Maryland court then addressed successor liability under Title VII, which is a matter of common law. Balancing two competing interests—the potential for leaving an employee without a remedy and the "unfairness of holding an innocent purchaser liable for another's misdeed"[311] —the court looked to a nine-factor test to determine successor liability, emphasizing three factors: (1) whether the successor employer had notice of the charge; (2) whether a predecessor had the ability to provide relief; and (3) the continuity of the business. The court held the successor employer could be liable because it obtained some knowledge of the charge as it went through the due diligence process, the predecessor employer could not provide the injunctive relief which the EEOC sought and, despite some changes, the successor's business was substantially the same as the predecessor's. In finding that the successor employer had sufficient notice of the charge, the court pointed to the lengths to which the company went to protect itself from liability, including by securing an indemnification provision.

A court in New Mexico, applying the same nine-factor test as the Maryland court, granted a successor employer's motion to dismiss, finding no successor liability.[312] The court's decision turned on the EEOC's failure to demonstrate that the successor had any notice of the EEOC's claim when it acquired the predecessor company, although the court gave the EEOC the option to amend its complaint.

In a decision out of the Southern District of Mississippi, the defendant strip club owner argued it was entitled to summary judgment on the EEOC's race discrimination claim because it was not the owner/employer during the period of the alleged discrimination.[313] It contended that, as purchaser of the club's assets in 2016, it could not be held liable for acts committed under the prior ownership. The EEOC countered that as the new owner of the club, the defendant is liable for the Title VII infractions that occurred under the previous owner under the successor liability doctrine.

Again applying the same nine-factor test used by the Maryland and New Mexico district courts, the Mississippi court was persuaded that the defendant was indeed liable as the successor in interest for Title VII violations that allegedly occurred during the prior ownership. The fact that the defendant-owner was in prison during the time was not dispositive, as the defendant provided no evidence he was not involved in the business while incarcerated. Although he provided copies of the prison policies and handbook in an effort to show he was unable to conduct business from the prison because that would violate prison policies, he acknowledged he conducted other business while in prison.

Courts in FY 2018 also addressed the issue of whether multiple companies are an "integrated enterprise." The District Court for the Western District of Kentucky identified these factors for determining whether an integrated enterprise exists: (1) interrelation of operations; (2) common management, directors, and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control.[314] In the case, the EEOC sought summary judgment, arguing that two companies were integrated enterprises because they were purportedly managed by the same person. The court disagreed and denied summary judgment, holding that a reasonable jury could conclude that the two companies were not integrated given that, *inter alia*, they had different owners and used separate bank accounts.

310 *Id.* at *27 (citation omitted).
311 *Id.* at *39.
312 *EEOC v. Roark-Whitten Hosp. 2, LP*, 2018 U.S. Dist. LEXIS 126854 (D.N.M. July 30, 2018).
313 *EEOC v. Danny's Restaurant, LLC*, 2018 U.S. Dist. LEXIS 163364 (S.D. Miss. Sept. 24, 2018). In a separate decision, the court held the defendant was equitably estopped from claiming it was not the successor in interest. *EEOC v. Danny's Restaurant, LLC*, 2018 U.S. Dist. LEXIS 164062 (S.D. Miss. Sept. 25, 2018).
314 *EEOC v. Indi's Fast Food Rest., Inc.*, 2017 U.S. Dist. LEXIS 177363 (W.D. Ky. Oct. 26, 2017).

Moreover, courts in 2018 continued a liberal approach with respect to naming by charging parties of corporate entities in an EEOC charge as preclusive in subsequent litigation. For example, a New York district court denied an employer's motion for summary judgment, claiming failure to exhaust administrative remedies when the proper corporate entity was not named in the underlying charges.[315] The court said flexibility is appropriate with respect to EEOC charges filed by laypersons, concluding that the charging parties, two teenage applicants, likely had never heard of the store's parent company. The court also pointed out that the company did not raise this issue earlier, received prompt notice of the charge and responded to it.

5. EEOC Motions—Challenges to Affirmative Defenses

In 2018, the EEOC continued to have success challenging employer affirmative defenses.

In a case where the EEOC alleged pregnancy harassment and discrimination, the U.S. District Court for the Southern District of California granted summary judgment in favor of the EEOC on several employer affirmative defenses—most notably, that the EEOC had failed to conciliate and the employee was lawfully terminated because she could not perform her essential job duties while out on maternity leave.[316] As to the conciliation defense, the EEOC issued a letter of determination stating simply that it had reasonable cause to believe that the employee at issue "was discharged because of her sex." The employer argued the letter was too vague and failed to describe the unlawful act(s) the employer had taken and which employees suffered as a result.[317] The court acknowledged that the EEOC's letter was vague but granted the summary judgment in favor of the EEOC, citing the narrow, "relatively barebones review" scope of review concerning the EEOC's conciliation efforts. The court also dismissed the employer's bona fide occupational qualification defense as mislabeled because the employer was not arguing a BFOQ, only that it had non-discriminatory reasons for its discharge decision.[318]

Care must be taken in filing motions seeking to file amended answers to a complaint. As an example, in a recent ruling, a defendant sought to add an affirmative defense previously abandoned, asserting that the EEOC had not met its pre-suit conciliation obligations. The district court in Pennsylvania, however, rejected the defendant's motion.[319] Because the deadline for the filing of amended pleadings had passed, the court evaluated the defendant's motion for leave under Federal Rule of Civil Procedure 16(b)(4). This standard requires the movant to show good cause for extension of the court-imposed deadline, and the court determined that the employer failed to meet that standard.[320]

Though not obligated to do so, the court went on to address the defendant's motion for leave to amend its answer under the more lenient standard found in Rule 15.[321] Under Rule 15, leave should be freely given unless the court finds other factors weigh against allowing the amendment. In this case, the court held that several factors—including undue prejudice to the EEOC, futility of the proposed amendment and the interest of judicial economy—warranted denial of the motion for leave.[322]

6. Coverage Under Title VII

In a District of Colorado decision,[323] a motion to dismiss a claim of transgender discrimination in a failure-to-hire case was denied. The employer argued that the complaint must be dismissed for failure

315 *EEOC v. Draper Dev. LLC*, 2018 U.S. Dist. LEXIS 115124 (N.D. N.Y. July 11, 2018).
316 *EEOC v. PC Iron, Inc.*, 2018 U.S. Dist. LEXIS 73521 (S.D. Cal. May 1, 2018).
317 *Id.* at *25.
318 *Id.* at **27-28.
319 *EEOC v. FedEx Ground*, 2018 U.S. Dist. LEXIS 155253 at **14-17 (W.D. Pa. Sept. 12, 2018).
320 *Id.* at 14-17.
321 *Id.* at **21-33.
322 *Id.*
323 *A&E Tire, Inc.*, 2018 U.S. Dist. LEXIS 150451 (D. Colo. Sept. 5, 2018).

to state a claim under Fed. R. Civ. Pro. 12(b)(6) because it failed to state a viable Title VII claim as a matter of law and plaintiffs failed to allege facts sufficient to state a claim for relief plausible on its face.[324] Plaintiff asserted two theories to support the claim he is in fact a member of a protected class under Title VII. The first was that he was not hired because of sex-stereotyping discrimination—*i.e.*, he experienced discrimination because his appearance (that of a stereotypical male) did not conform to social expectations of a person with his birth sex (female). The second was that the Title VII prohibition on discrimination "because of . . . sex" protects transgender individuals. The court agreed with the first theory, but declined to address the second.[325]

B. Statute of Limitations and Equitable Defenses for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action. Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.[326]

In the past, the Commission has argued that individuals whose claims of alleged harm occurred more than 300 days before the filing of the charge could still be eligible to participate in a pattern-or-practice lawsuit. There has yet to be a court of appeals decision to determine whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge. However, most district courts have held in recent years that the 300-day limitation applies and the Commission appears to be relying on this argument less often.[327]

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.[328] The Fourth Circuit, however, declined to address this issue, focusing solely on the exclusion of the EEOC's expert reports.

Prior to 2015, a handful of district courts did hold that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day period.[329] In the most recent example, *EEOC v. New Prime*, a district court in Missouri observed that a "few" district courts have applied the 300-day period to pattern-or-practice cases, but then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[330] 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 consideration, this Court has concluded that the limitations

324 *Id.* at *6.
325 *Id.* at **14-15.
326 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.
327 *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).
328 *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).
329 *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).
330 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34 (W.D. Mo. Aug. 14, 2014).

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."[331] 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.[332] 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."[333] 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.[334]

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).[335] 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.[336] 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.[337] 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.[338]

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.[339] This is helpful to employers because it shortens the time period during which the EEOC can reach back to draw in additional claimants. However, in *Arizona ex rel. Horne v. Geo Group, Inc.*, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[340] The Ninth Circuit observed the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[341]

Given the district court trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving

331 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F.Supp. 1059, 1085 (C.D. Ill. Jan. 20, 1998).
332 *Id.* at 1085, *accord EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).
333 *Id.* at 1087.
334 *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).
335 *EEOC v. GMRI, Inc.*, 2014 U.S. Dist. LEXIS 106211 (D. Md. Aug. 4, 2014).
336 *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).
337 *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).
338 *EEOC v. DHD Ventures Mgmt. Co.*, 2015 U.S. Dist. LEXIS 167906 (D.S.C. Dec. 16, 2015).
339 *EEOC v. Princeton Healthcare Sys.*, 2012 U.S. Dist. LEXIS 150267, at *14 (D.N.J. Oct. 18, 2012).
340 *Arizona ex rel. Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).
341 *Id.*

age discrimination under the ADEA, the EEOC can attempt to avoid section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[342] In such a case, the Commission claims its authority to bring a pattern or practice case derives from the ADEA's 29 U.S.C. § 626(b), which adopts "the powers, remedies, and procedures provided in" the Fair Labor Standards Act (FLSA).[343]

In *EEOC v. New Mexico*, the court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[344] The court granted summary judgment to the EEOC on the employer's statute of limitations defense because the court found that Title VII's 300-day deadline did not apply to EEOC enforcement actions under the ADEA.[345]

In an effort to resurrect claims 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 frame and similar conduct as a timely filed claim.[346] In FY 2018, one district court conceded the application of the continuing violation doctrine in pattern-or-practices cases was a "close call" but ultimately was bound by Tenth Circuit precedent to apply the doctrine.[347] The court further found the EEOC sufficiently alleged the continuing violations theory, denying the employer's motion to dismiss untimely disability discrimination-in-hiring claims.[348] The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[349] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing his or her claim.[350] Termination, failure to promote, and denial of overtime are all examples of discrete actions that are only reachable if within the 300-day limitation, even if they occur as part of a hostile work environment.[351]

342 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at *14-15, n.9 (D.N.M. Mar. 27, 2018) ("no statute of limitations on EEOC enforcement actions under the ADEA").

343 29 U.S.C. § 201, *et seq.*; *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *26 (explaining but not deciding the EEOC's argument it could pursue a pattern or practice age discrimination claim without resort to Title VII).

344 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at *6 (D.N.M. Mar. 27, 2018) ("pattern or practice" not specifically alleged but the EEOC brought a representative action on behalf of "aggrieved" individuals).

345 *EEOC v. New Mexico*, 2018 U.S. Dist. LEXIS 50125, at *14-15 (D.N.M. Mar. 27, 2018).

346 *EEOC v. Draper Development LLC*, 2018 U.S. Dist. LEXIS 115124, *9-10 (N.D.N.Y. July 11, 2018) (adopting flexible approach and excusing charging party's failure to verify charge where employer not prejudiced); *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).

347 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434, at *21, following *Bruno v. W. Elec. Co.*, 829 F.2d 957, 960 (10th Cir. 1987).

348 *Id.* at *23; *see also*, *EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **5-6 (D. Minn. Aug. 27, 2014) (300-day limit does not apply to pattern-or-practice cases where a "continuing violation" is alleged); see also, *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, *50-51 (D. Md. Apr. 17, 2018) (court denied summary judgment based on timeliness in multi-plaintiff hostile work environment case where EEOC claimed continuing violations defense).

349 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51 (D. Md. Apr. 17, 2018).

350 *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 115 (2002) ("each discrete discriminatory act starts a new clock for filing charges alleging that act").

351 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51 (D. Md. Apr. 17, 2018).

The EEOC is not always successful in arguing the continuing violation doctrine should apply to pattern-or-practice cases. In FY 2017, the court in *EEOC v. Discovering Hidden Hawaii Tours, Inc.* stated:

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[352]

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on *Discovering Hawaii* and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the "300-day window."[353] Where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[354] In FY 2018, one district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[355] In FY 2017, a federal district court in California held that a defendant *may not* bring a laches defense in an enforcement action brought by the United States unless the defendant can show affirmative misconduct on the part of the government.[356]

In a more recent decision, a district judge issued a pro-EEOC ruling in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment.[357] The EEOC brought suit against alleged joint employers on behalf of nine former employees and other aggrieved individuals, complaining of discrimination, retaliation, and harassment on the basis of race, sex, color, and/or national origin.[358] (Seven of the individuals joined as intervenors as well.) In their motion to dismiss, defendants argued that the Title VII claims must be limited to acts occurring on or after February 10, 2009, which marked 300 days prior to the filing of a discrimination charge by the initial claimant.[359] In response, the EEOC and intervening plaintiffs pointed out that conduct predating the 300-day period may be considered by a fact-finder as part and parcel of a hostile work environment claim, and as "'background evidence' of discriminatory intent."[360] The court noted that the U.S. Supreme Court had not expressly decided the question of "whether discrete acts of discrimination falling outside the 300-day window may be considered in conjunction with a hostile work environment claim."[361] Nonetheless, the court ultimately agreed with the plaintiffs and declined to adopt a rule "categorically barring the use of discrete acts to

352 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).
353 *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).
354 *EEOC v. Baltimore Cty.*, 2016 U.S. Dist. LEXIS 112731, at **65-66 (D. Md. Aug. 24, 2016).
355 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, at **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).
356 *EEOC v. Marquez Brothers International Inc.*, 2017 U.S. Dist. LEXIS 153339, at *23 (E.D. Cal. Sept. 18, 2017).
357 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
358 *Id.* at **2-15.
359 *Id.* at *16.
360 *Id.* at *18.
361 *Id.*

support a hostile work environment claim."[362] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[363]

Defendants also challenged claims asserted on behalf of two individuals who did not file discrimination charges with the EEOC. Defendants contended that the EEOC neglected to exhaust administrative remedies with respect to these two non-charging parties, necessitating dismissal.[364] The court rejected that theory, however, because the EEOC brought those claims through an enforcement action, which does not require administrative exhaustion.[365] And while the defendants argued in their reply brief that the EEOC had failed to satisfy other pre-suit conditions (such as notice and conciliation), the court refused to entertain that argument because it was not properly raised.[366]

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims are outside the 300-day window based on the continuing violations doctrine 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. Employers might begin to see the EEOC's reliance on other equitable defenses, such as waiver and estoppel in response to these case law developments.

C. Intervention And Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their administrative remedies, allowing intervention by individuals who have previously stipulated to dismissal of claims, allowing intervention by an individual whose claims were subject to mandatory arbitration, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[367]

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."[368] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[369] The same approach is followed in dealing with intervention in ADA actions.[370]

362 *Id.* at **22-25.
363 *Id.* at **25-27.
364 *Id.* at *28.
365 *Id.* at *29.
366 *Id.* at **30-31.
367 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*.
368 42 U.S.C. § 2000e-5(f)(1).
369 *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).
370 42 U.S.C. § 12117.

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."[371] 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.[372]

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

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[373]

2. A 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.[374] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence his/her own lawsuit terminates.[375]

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,[376] 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.

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

372 *Id.*

373 *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 16958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exists; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties." *See also EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018) (denying intervention because plaintiff-intervenors failed to comply with pleading requirements under Rule 24(c) and finding untimeliness when plaintiff-intervenors sought to intervene five months after judgment was entered thereby prejudicing the parties).

374 *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.").

375 *See* 29 U.S.C. § 626(c)(1); *see also EEOC v. SVT, LLC*, 297 F.R.D. 336, 341 (N.D. Ind. Jan. 8, 2014) (explaining the differences between Title VII and the ADEA and specifically noting that the right of any person to bring suit under the ADEA is terminated when suit is brought by the EEOC); *EEOC v. Darden Restaurants, Inc.*, 2015 U.S. Dist. LEXIS 149897, at **4-5 (S.D. Fla. Nov. 3, 2015) (holding the proposed plaintiffs-intervenors "have no conditional or unconditional right to intervene in the ADEA action because the ADEA expressly eliminates such a right upon the EEOC's filing of an action on a person's behalf").

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

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). If, however, pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[377] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[378] or the movant is a governmental entity other than the EEOC.[379]

A plaintiff-intervenor's Title VII complaint is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[380] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[381] Courts will also permit intervention even when the individual's complaint includes claims that are legally barred, reasoning that these claims may be used to support a claim that is timely.[382]

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

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[383] 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*,[384] 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.

377 *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).
378 *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).
379 *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)).
380 *EEOC v. Denton Cty.*, 2017 U.S Dist. LEXIS 202499 (E.D. Tex. Dec. 8, 2017).
381 *Id.* at *5.
382 *Id.* at *6.
383 *EEOC v. Stone Pony Pizza, Inc.*, 172 F.Supp.3d 941 (N.D. Miss. 2016).
384 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).

In *EEOC v. Horizontal Well Drillers, LLC*,[385] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor failing to state that he sought to represent others on his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

A mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[386] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review, and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b) as discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[387]

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. § 1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[388]

For example, in *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[389] 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. Likewise, in *EEOC v. Favorite Farms*,[390] the plaintiff-intervenor survived a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

385 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. Jun. 18, 2018).
386 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
387 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
388 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017).
389 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
390 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (MD. Fla. Jan. 4, 2018).

Note that in *EEOC v. LXL Learning, Inc.*,[391] the court permitted intervention even though the parties had stipulated to dismissal of a prior lawsuit with prejudice. After the dismissal and after the EEOC had initiated its own lawsuit, the plaintiff-intervenor sought to intervene on the Title VII claim (which the employer did not oppose based on the prior agreement) under a different factual theory. The intervenor also sought to add a state law claim previously not asserted. The employer opposed such additions on the basis that the stipulated dismissal barred the plaintiff-intervenor from any claims or theories in the case beyond what the EEOC had included in its complaint. However, while the court agreed that the employer did not consent to expand the case, the court conditionally permitted intervention with the understanding that the employer may further pursue its *res judicata* defense.

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

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[392] 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 different proof schemes.

In *EEOC v. JBS USA, LLC*,[393] the EEOC sued a meatpacking company—alleging it discriminated against Somali, Muslim, and African American employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 intervenor-plaintiffs sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also intervenor-plaintiffs.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, that the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of his/her current address and telephone number.[394]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted that only the Third Circuit has held it only applies to class actions.[395] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given that multiple employees filed charges alleging similar discriminatory treatment on the same day.

391 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).
392 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
393 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).
394 *EEOC v. JBS USA, LLC,* 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
395 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[396] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay.

In *EEOC v. Faurecia Auto Seating, LLC*,[397] two plaintiffs with separate lawsuits sought to consolidate their cases with an EEOC lawsuit filed on behalf of 15 claimants. Both plaintiffs alleged ADA discrimination by the same employer and the EEOC did not oppose consolidation. However, the court denied consolidation given that a significant amount of discovery had already been conducted, including 29 depositions. Thus, the court noted that seeking to add the additional parties would require all 29 deponents to be re-deposed and would expand the scope and extend the time of discovery. The court further noted that consolidation would also result in a significant risk of prejudice to the employer and increase litigation costs for the parties.

D. Other Critical Issues in EEOC Litigation

1. ESI: Electronic Discovery-Related Issues

Employers today continue to be challenged based on large volumes of information being requested through e-discovery. A recent federal court decision demonstrates that employers need to be prepared for similar e-discovery requests when involved in litigation with the EEOC.[398]

In a Pennsylvania district court decision, the district court—upon reviewing extensive briefing on the issue, as well as deferring its ruling following oral argument "in anticipation that the parties could reach some sort of resolution"[399]—denied the employer's motion to preclude.[400] Turning to the employer's undue burden arguments, the court explained, "[m]any organizations . . . choose to store really large amounts of data electronically, presumably because they have concluded that doing so furthers their important day-to-day interests and, on balance, is the best/most efficient method for compiling and storing that information."[401] These decisions necessarily carry with them the consequent "tasks of examining and then as applicable producing . . . electronic information so compiled and stored when called upon in litigation."[402] That "these repositories create complex mechanisms to store huge amounts of information cannot be used in and of itself as a shield to avoid discovery requests otherwise permitted under the Federal Rules of Civil Procedure."[403] The court further observed that the actual burden on the employer was limited by the fact that the EEOC had offered to search any identified and segregated documents at its own expense and in the context of the "clawback" provisions of Federal Rule of Evidence 502(d).[404]

2. Reliance on Experts, Particularly in Systemic Cases

Expert testimony remains a frequent topic of law and motion in EEOC cases. In one FY 2018 case,[405] the magistrate judge considered the EEOC's May 1, 2017 motion for clarification that the EEOC is permitted to serve expert rebuttal reports by May 22, 2017.[406]

396 Fed. R. Civ. P. 42.
397 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).
398 *See EEOC v. FedEx Ground Package Systems*, 2018 U.S. Dist. LEXIS 45884 (W.D. Pa. Mar. 21, 2018).
399 *Id.* at *6.
400 *Id.* at *2.
401 *Id.*
402 *Id.*
403 *Id.* at *10.
404 *Id.* at *14. The court further underscored the importance of the meet-and-confer obligation when trying to agree upon search terms.
405 *EEOC v. GMRI, Inc.*, 2018 U.S. Dist. LEXIS 65391 (S.D. Fla. Apr. 17, 2018).
406 *Id.* at *2.

As the motion was not considered for almost a year, on April 10, 2018, the magistrate judge asked the parties to indicate whether the issue was moot given the passage of time in which the EEOC had moved for partial summary judgment on the defendant's affirmative defenses, the defendant had moved for summary judgment, and both parties filed several *Daubert* motions challenging the opposing party's experts.[407] The EEOC advised that the issue was not moot, and argued that allowing rebuttal experts would not require further briefing and would not require that that the rebuttal expert reports be considered in ruling on the pending motions for summary judgment.[408]

The court did not accept the EEOC's position. The court initially noted that the defendant would want to depose the experts regarding the new positions set forth in the rebuttal reports, and then likely revise its pending *Daubert* motions and update its summary judgment briefing.[409] The court concluded that there would be a substantial impact on the case in the form of delaying rulings on the pending motions, and a delay in the trial, as, even if the rebuttal reports did not need to be referenced in connection with the pending motions, the rebuttal reports would require additional motions practice as the defendant would seek to exclude some or all of the rebuttal opinions in another round of *Daubert* motions.[410]

In recommending that that district court deny the EEOC's motion for clarification, the magistrate noted that while the EEOC could have done so, it never filed a motion under Rule 56(d) on the grounds that it needed additional time to obtain discovery in order to respond to the defendant's summary judgment motion.[411]

In another FY 2018 case in which plaintiff alleged sex-based discrimination,[412] the court addressed the plaintiff's motion to exclude the supplemental expert report of defendants' expert on the grounds that it was not a "supplemental" report under Rule 26 such that it was not timely filed.[413] The defendant argued that the report was a supplemental report and therefore timely filed, but that even if the court found that it was not a true supplemental report, its exclusion was not warranted as plaintiff had not been prejudiced.[414]

After reviewing the requirements for supplementing expert reports,[415] the court first addressed whether the report was a true supplement to the original report or if it was a new report that was not timely disclosed.[416] After explaining that supplementation means to correct inaccuracies or inadvertent errors and is not meant to permit the bolstering of original opinions or new opinions, the court noted that the report at issue reached the same conclusions as the original report, but included new opinions and more sophisticated analyses and modeling.[417] The court explained that "the supplemental report does not correct any errors or omissions in the first report and is based on materials and information that were available to [defendants' expert] when he submitted his first report, not based on newly discovered evidence."[418]

The court concluded that the report was not a true supplement, and then turned to whether exclusion of the report was warranted as plaintiff requested.[419] The court noted that under Rule 37(c)(1), exclusion may be justified unless the failure to provide the information required in accordance with Rule

407 *Id.* at *3.
408 *Id.* at **3-4.
409 *Id.* at *4.
410 *Id.* at **4-5.
411 *Id.* at **5-6.
412 *EEOC v. Performance Food Group, Inc.*, 2018 U.S. Dist. LEXIS 125756 (D. Md. July 27, 2018).
413 *Id.* at **3-4.
414 *Id.* at *4.
415 *Id.* at **5-6.
416 *Id.* at *6.
417 *Id.* at **6-7.
418 *Id.* at **7-8.
419 *Id.* at *8.

26 or the court's scheduling order was substantially justified or harmless.[420] In making this determination, courts consider (i) the surprise to the party against whom the new discovery would be offered; (ii) the ability of that party to cure the surprise; (iii) whether the trial would be disrupted; (iv) the importance of the evidence; and (v) the offering party's justification for failing to disclose the evidence.[421]

The court held that the first and last factors supported the exclusion of the report as plaintiff was "presumably surprised" and defendants did not provide an explanation for the timing of the disclosure other than to explain that it was believed to be compliant with Rule 26(e).[422] The court found, however, that the remaining factors did not weigh in favor of exclusion as there was "ample time to cure any surprise" given that there was no trial date and summary judgment briefing had been stayed.[423] The court also emphasized that that there was no question that the evidence was important as it related to conclusions reached by the parties' experts as to fundamental issues in the case.[424]

In holding that excluding the supplemental report was not warranted, the court explained that any prejudice to plaintiff could be cured by permitting the plaintiff to depose the expert with respect to the new opinions in his report at defendants' expense, and submitting a rebuttal report from its own expert addressing the new opinions.[425]

3. Background Checks

Background check litigation continues to be a hot topic for the EEOC.[426] In one case in which the EEOC alleged that the defendant violated Title VII by using a criminal background check policy that had a disparate impact on African-American applicants,[427] the court addressed defendant's motion to compel discovery defendant believed was needed to establish its affirmative defenses, as well as a motion to stay the expert report deadline. In its motion to compel, the defendant sought to compel the EEOC to do the following: (i) identify the specific positions in which African-American applicants have experienced disparate impact due to the criminal background check policy, and the portions of the policy that were responsible for the disparate impact; (ii) identify the less discriminatory policies and practices the EEOC believed could be implemented; (iii) explain how those proposed policies and practices were consistent with defendant's business needs; and (iv) produce any responsive documents the EEOC intends to rely on at trial which had not yet been produced.

The court first noted that with respect to the interrogatories at issue, its primary question was the timing and extent of information the EEOC must provide the defendant to assist it in proving that its criminal background check policy was job-related for each position and consistent with business necessity.[428] The defendant contended that a disparate impact analysis was required on a position-by-position basis, while the EEOC contended that such was not required since the defendant applied the policy across all positions to all job applicants.[429] With respect to the dispute regarding the less discriminatory alternative policies, the EEOC argued that it was an issue for the experts to resolve.[430]

420 *Id.*
421 *Id.* at **8-9 (quoting *Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 190 (4th Cir. 2017)).
422 *Id.* at *9.
423 *Id.*
424 *Id.* at *10.
425 *Id.* at **10-11.
426 By way of example, the EEOC recently filed a subpoena enforcement action in the Northern District of Ohio seeking criminal background check documentation as part of its investigation of systemic race discrimination. *See* Appendix C to this Report for more information.
427 *EEOC v. Dolgencorp, LLC*, 2017 U.S. Dist. 211498 (N.D. Ill. Dec. 11, 2017).
428 *Id.* at *4.
429 *Id.*
430 *Id.* at *5.

With respect to the first category of information sought, the court denied the defendant's requests that the EEOC be compelled to undertake a position-by-position analysis and that the EEOC identify the criminal history criteria it believed caused the disparate impact on African-American applicants.[431] The court first noted that the EEOC's expert submitted a report stating that there was a disparate impact on African-American applicants generally, and on applicants for the positions of sales associate and store manager specifically. The court then explained that the defendant could proceed with its own position-by-position disparate impact analysis to prove that there was not a disparate impact, and could challenge the EEOC's expert opinion as flawed or inadequate, which, if it succeeding in doing, the EEOC would then have to try to rebut. In explaining its holding, the court noted "[a]ssuming the EEOC presents sufficient evidence that the application of the policy caused a disparate impact on black applicants (whether this must be done on an overall basis or on a position-by-position basis will be decided by the district judge), it then falls to [the defendant] to try and refute that claim and show that its decision to implement the policy was based on legitimate business needs."[432]

As for the request that the EEOC identify the criminal history criteria it believed caused the disparate impact on African-American applicants which the court denied, the court explained that the EEOC contended that its expert looked at the policy as a whole, instead of focusing on specific elements of the policy, which it contended was appropriate in light of the fact that there was no evidence the defendant applied different criteria to different positions or even knew why an applicant had failed to pass a criminal background check.[433] The court noted that if the EEOC was incorrect, it would bear the consequences, and the defendant was free to address the issue through its own expert if it believed that only certain portions of the policy were relevant in determining the purported disparate impact.[434]

As for the second category of information sought related to the less-discriminatory policies and practices the EEOC believed could be implemented, the court denied that request as well.[435] The court first acknowledged that the EEOC did not dispute its burden to identify the less discriminatory alternative employment practices ("LDAs"), and the EEOC contended that it had already provided the defendant with several less discriminatory options for its consideration. While the defendant contended that the options were only generic suggestions that failed to provide any meaningful guidance, the court agreed with the EEOC that the matter was best addressed through expert discovery, which was specifically contemplated in the parties' agreed expert discovery schedule. Specifically, the discovery schedule contemplated that once the defendant's expert explained why the policy was job-related and consistent with business necessity, the EEOC's expert would need to identify the LDAs available to the defendant, which the defendant could then attempt to rebut, by, for example, explaining how the proposed procedures would be inappropriate.[436]

As for the third category of information sought, how the proposed LDAs were consistent with defendant's business needs, the court noted that it had already determined that "the task of analyzing specific LDAs to determine which ones [the defendant] should adopt properly falls to the parties' experts," and the experts were in the best position to determine whether each specific LDA met the defendant's business needs.[437]

As for the defendant's motion to compel the production of documents, the court explained that "the time for allowing open-ended responses that contemplate additional investigation has long-since

431 *Id.* at *9.
432 *Id.* at **8-9.
433 *Id.* at *9.
434 *Id.* at **9-10.
435 *Id.* at *13.
436 *Id.* at **12-13
437 *Id.* at **14-15.

passed," and the defendant is entitled to know the universe of documents the EEOC plans to use in the matter. The court granted the defendant's motion, holding that the EEOC's generic references to "other documents" was insufficient and that if it intended to rely on any other EEOC publications not previously identified, it must identify them with specificity.

As for defendant's motion to stay the expert report deadline, the court denied the motion as it had determined that the EEOC did not need to provide additional information with respect to the vast majority of defendant's discovery requests.[438]

In another FY 2018 case,[439] the State of Texas sought declaratory and injunctive relief against the EEOC and the United States Attorney General, challenging the EEOC's "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII."[440] Texas contended that the Guidance interfered with its "authority to impose categorical bans on hiring felons and to discretionarily reject felons for certain jobs."[441] EEOC argued that as the Guidance had not yet been enforced against Texas, there was a ripeness issue, the Guidance's purpose was only to update and consolidate the EEOC's prior policy statements regarding Title VII and the use of criminal records in employment decisions, and the Guidance did not expand Title VII.

In this decision, the court addressed the parties' Motions for Summary Judgment. The court first declined to declare that Texas had a right to absolutely bar convicted felons from serving in any job in the State as "a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions."[442]

As for Texas' request that the court enjoin the EEOC from issuing right-to-sue letters in cases grounded on the denial of employment opportunities based on the job applicant's criminal history, the court declined to enjoin the EEOC since the mere issuance of a right-to-sue letter did not reflect a determination by the EEOC that there existed a meritorious claim.[443]

Regarding Texas' request that the court find the Guidance unlawful as (i) a substantive rule issued without notice and opportunity for comment, (ii) outside the scope of the EEOC's statutory authority, and (iii) an unreasonable interpretation of Title VII, the court, without comment, agreed that the Guidance was a substantive rule issued without notice and opportunity for comment, and declined to address the remaining arguments as premature.[444] The court enjoined the EEOC and Attorney General from enforcing the EEOC's interpretation of the Guidance against Texas until the EEOC complied with the requirements under the Administrative Procedures Act for promulgating an enforceable substantive rule with respect to notice and comment.[445]

E. GENERAL DISCOVERY BY EMPLOYER

Like most litigants, the EEOC often takes an aggressive approach to combating opposing parties' discovery efforts. Further, as demonstrated in *EEOC v. UPS*,[446] the agency enjoys certain governmental prerogatives that make it a particularly formidable adversary during the discovery process. Nevertheless, the decisions of fiscal year 2018 confirm that the EEOC is not immune from compliance with employers' legitimate and diligently pursued requests for information.

438 *Id.* at *18.
439 *Texas v. EEOC*, 2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb. 1, 2018).
440 *Id.* at *3.
441 *Id.*
442 *Id.* at **5-6.
443 *Id.* at *6.
444 *Id.* at **6-7.
445 *Id.* at *7.
446 *EEOC v. UPS*, 2018 U.S. Dist. LEXIS 37646 (E.D.N.Y. Mar. 5, 2018).

1. Discovery of EEOC-Related Documents

One particularly notable decision involving discovery by the employer in litigating with the EEOC arose in a federal district court in Chicago.[447] In response to certain requests for production of documents, the EEOC identified some documents but also cited to "other [unspecified] documents published by EEOC."[448] Defending its position that no more specific response was necessary, the EEOC contended the unspecified publications were "in the public record" and were accessible "to anyone who has access to the internet."[449] The court, however, was not persuaded by the EEOC position. Given that the parties were nearing trial, "the time for allowing open-ended responses that contemplate additional investigation ha[d] long-since passed, and [the employer] ha[d] a right to know the universe of documents the EEOC plans to use in the case."[450]

2. Discovery Involving Charging Parties

In *EEOC v. L-3 Communications Integrated Systems*,[451] the court granted the employer's motion to compel the charging party to undergo a mental examination by its expert and granted in part the employer's motion to compel an executed authorization for the release of the charging party's medical records. However, the court denied the employer's request for *ex parte* communications with the charging party's physicians.

In addressing the motion to compel a mental examination, the court concluded that the exam should go forward because the EEOC had placed the charging party's mental state in controversy. In its complaint, the EEOC had alleged that the employer violated the Americans with Disabilities Act by terminating the charging party because he was depressive and refusing to grant him a reasonable accommodation.[452] To prove its failure-to-accommodate claim, the EEOC would be required to prove that "a reasonable accommodation would have enabled [the charging party] to perform the essential functions of the job."[453] Accordingly, to succeed on its claim, the EEOC would need to demonstrate that, had he been reasonably accommodated, the charging party could have performed his essential job functions notwithstanding his depressive condition. "Thus, both the EEOC's ADA claim and [the employer's] defenses . . . turn on [the charging party's] mental condition."[454]

The court rejected as premature the EEOC's counterargument that the results of the employer's proposed mental examination would be inherently suspect given the intervening temporal distance, as that argument went to the "future admissibility and reliability" of future expert opinions and not the relevant analysis under Federal Rule of Civil Procedure 35.[455] The court also rejected the argument that no mental examination was necessary given that the employer had administered a fitness evaluation to the charging party prior to terminating him. The court reasoned that the employer's evaluation "did not address the disputed issue" of whether the charging party could perform his duties with or without a reasonable accommodation.[456] For these reasons, the court concluded that the employer had successfully demonstrated the requisite good cause for a mental examination.[457]

As for the motion to compel an executed authorization for the release of medical records, the court took the position that Federal Rule of Civil Procedure 34 is a proper mechanism for obtaining such

447 *EEOC v. Dolgencorp, LLC*, 2017 U.S. Dist. LEXIS 211498 (N.D. Ill. Dec. 11, 2017).
448 *Id.* at *16 (brackets in original).
449 *Id.*
450 *Id.* at *17.
451 *EEOC v. L-3 Communs. Integrated Sys.*, 2018 U.S. Dist. LEXIS 123286 (N.D. Tex. July 24, 2018).
452 *L-3 Communs.*, 2018 U.S. Dist. LEXIS 123286, at **1–2.
453 *Id.* at *3 (citations and internal quotation marks omitted).
454 *Id.* at *4.
455 *Id.* at *5.
456 *Id.*
457 *Id.* at *4.

an authorization. The court recognized that district courts had come to conflicting conclusions on the issue.[458] Nevertheless, the court decided that rule 34 could properly be invoked because the rule provides for the production of documents within a party's "possession, custody, or control," and the written authorization in question was within the control of the EEOC.[459]

However, while the court did compel the EEOC to produce a signed authorization for the disclosure of the charging party's medical records, it declined to enforce the employer's request for *ex parte* communications with his physicians. In support if its decision, the court cited several "serious concerns" that were implicated by the employer's request.[460] It cited, for instance, the potential for such communications to "disintegrate into a discussion of the adverse impact the jury award may have on the rising cost of medical insurance rates."[461] It stated that they may also "result in defense counsel abusing the opportunity to interrogate the physician by privately inquiring into facts or opinions about the patient's mental and physical health or history," which information "might neither be relevant to the law suit nor lead to the discovery of admissible evidence."[462] The court further opined that the employer had failed to articulate a sufficiently compelling need for *ex parte* communications, explaining that, should the employer require any additional information, it may communicate with the charging party's physicians "via formal discovery processes."[463]

3. Third-Party Subpoenas

The district court's opinion in *EEOC v. L-3 Communications Integrated Systems*,[464] which is treated in detail in section 2 of this part, is also telling of the federal courts' recent treatment of third-party subpoenas. In that case, the employer moved to compel the charging party to undergo a mental examination performed by its expert. As explained above, the court supported its decision by reasoning that the "EEOC placed [the charging party's] mental condition in controversy when it asserted an ADA claim based on [his] mental condition."[465]

4. Confidentiality and Protective Orders

In *EEOC v. UPS*,[466] the court refused the employer's request to preclude the EEOC from using the discovery it obtained in the case for purposes unrelated to the case, including present or future investigations. Conversely, the court found the EEOC had demonstrated good cause for the protective order language it had offered "preserv[ing]" its prerogative "to use such information in connection with its duty to enforce federal anti-discrimination laws."[467]

In its motion, the employer requested that all "discovery in this litigation be used solely for the purposes of this litigation and for no other purpose, investigation, or matter."[468] The employer cited several reasons for its request. For instance, the employer observed that the "discovery materials in this case contain personal information, including religious affiliation, about literally hundreds of employees and hundreds of applicants across the country."[469] These individuals had "never expected or authorized [the employer] to disclose their information to the EEOC."[470] The employer further averred that, in the

458 *Id.* at **7–8.
459 *Id.* at *8.
460 *Id.* at *9.
461 *Id.* at *10.
462 *Id.*
463 *Id.*
464 *EEOC v. L-3 Communs. Integrated Sys.*, 2018 U.S. Dist. LEXIS 123286 (N.D. Tex. July 24, 2018).
465 *Id.* at *3.
466 *EEOC v. UPS*, 2018 U.S. Dist. LEXIS 37646 (E.D.N.Y. Mar. 5, 2018), adopted in full, 2018 U.S. Dist. LEXIS 34496.
467 *Id.* at *16.
468 *Id.* at *12.
469 *Id.* at **12–13.
470 *Id.* at *13.

absence of the protective order it requested, the personal information of its employees and applicants "would proliferate by virtue of work-sharing agreements between the EEOC and other state and federal agencies."[471] Finally, the employer contended that permitting the EEOC to use the information it obtained in the case for purposes of other investigations and lawsuits would "deprive[it] of due process."[472]

The court concluded that the employer had failed to demonstrate the necessary good cause for its proposed order. Regarding the argument that employees and applicants had not given the employer consent to share their personal information, the court responded that these individuals were at least on constructive notice that this information might end up in the hands of the EEOC given the agency's subpoena powers.[473] And as for the due process argument, the court stated that it was "unable to ascertain anything fundamentally unfair" in allowing the EEOC to use the information in question for other purposes, and it further observed that the employer had "offer[ed] no authority" to support its position."[474]

On the other hand, the court concluded that the EEOC had shown good cause to include language in the envisioned protective order allowing it to use the information it collected in the litigation for other purposes. While conceding that confidential information should not be disclosed to third parties or the public, the EEOC nevertheless insisted that it should be allowed to use such information "in furtherance of its law enforcement function."[475] The court agreed: "That information obtained in discovery might reveal other wrongdoing for which [the employer] could be held liable does not constitute the good cause required by Rule 26(c)" of the Federal Rules of Civil Procedure.[476] "Indeed, it would be profoundly unjust for the Court to require the EEOC to turn a blind eye to information properly obtained through discovery while litigating a case under its statutory authority to act in the public interest to remedy unlawful discrimination."[477]

The court also rejected the employer's request to limit the EEOC's ability to share information obtained during the litigation relating to an individual claimant with other claimants in the same matter. In support of its decision, the court analogized the circumstances of the litigation to an ordinary class action, explaining that an effective litigation strategy would likely require the EEOC "to share some confidential information pertaining to other claimants with at least one individual claimant."[478] "Indeed," the court reasoned, "it is common in class action litigation under Rule 23 [of the Federal Rules of Civil Procedure] for the named plaintiffs to have knowledge of the facts on which all class members' claims rely."[479] The court did, however, mandate that the parties include a provision requiring that any individual claimant with whom confidential information is shared be made a party to the confidentiality order.[480]

5. Other Issues

a. Religious Objections to Discovery

The decisions in fiscal year 2018 highlighted several additional issues relating to the discovery efforts of employers' counsel that are worth noting. The first such issue involves employers' entitlement to discovery where opposing parties have objected to the employers' requests on religious grounds.

471 *Id.*
472 *Id.*
473 *Id.* at *15 n.6.
474 *Id.* at *15.
475 *Id.* at *13.
476 *Id.* at **14–15.
477 *Id.* at *15.
478 *Id.* at *19.
479 *Id.*
480 *Id.*

In *EEOC v. Baystate Medical Center, Inc.*,[481] the EEOC alleged that the employers had terminated the charging party in violation of federal antidiscrimination law after she informed them that her religious beliefs precluded her from accepting an influenza vaccination.[482] The EEOC further alleged that under the employers' policies, the charging party was required to wear a mask if she refused the vaccine, and that this negatively affected her ability to communicate and, thus, her job performance.[483] The employers moved to compel the EEOC to respond to certain interrogatories.

At the outset, the court explained that "[r]eligious beliefs protected by Title VII need not be acceptable, logical, consistent, or comprehensible to others."[484] They must, however, "be sincerely held."[485] Further, the court explained that, "[w]hile it is well recognized that courts are poor arbiters of questions regarding what is religious and what is not, it remains the fact that the EEOC bears the burden of proof by a preponderance of the evidence on this point."[486]

One set of interrogatories inquired about the "specific denomination, sect, school, branch, group, party, or other affiliation with Christianity of which [the charging party] has considered herself to be a member."[487] In its responses, the EEOC had been unwilling to say more than the charging party "was an adherent of the Christian faith," and that while her religion did not require her to attend religious services, she "occasionally attended services at the Resurrection Life Christian Center International in Hartford, Connecticut."[488] Citing precedent for the proposition that "religion" is an "elusive" term, and that an employee's religious beliefs "need not be espoused by a formal religion or conventionally organized church," the court concluded that the EEOC's responses were sufficient.[489]

A second set of interrogatories requested a detailed description of the ways in which the charging party "adheres to her belief that 'her body is a temple' including any associated practices, rituals, observances, as well as each and every substance she refrains from taking into her body."[490] The EEOC had responded that the charging party "does not permit anything into her body . . . that might defile her body, such as vaccines."[491] Given "Title VII's requirement of proof of a bona fide religion and the statute's lack of protection for what amounts to a purely personal preference," the court found this response inadequate.[492] It therefore ordered the EEOC to supplement its response with more detailed information.

A third set of interrogatories requested the "name, address, and dates of treatment" for "each physician, clinic, hospital, or health care provider . . . that examined and/or treated [the charging party] in any manner from the date that she first claims to have formed the religious belief that 'her body is a temple.'"[493] The EEOC objected on psychotherapist-patient and doctor-patient privilege grounds, among others. But the court found that the relevance of the information "outweigh[ed] any privilege," as the information related directly to "whether or not [the charging party] was observing a religious belief or indulging in a personal preference when she declined the influenza vaccine."[494]

The employers also sought to compel the EEOC to respond to interrogatories relating to the charging party's inability to effectively perform her job while wearing a mask. One set of interrogatories sought the personal information of every individual to whom the charging party had spoken while wearing the

481 *EEOC v. Baystate Med. Ctr., Inc.*, 2017 U.S. Dist. LEXIS 179015 (D. Mass. Oct. 30, 2017).
482 *Id.* at **1–2.
483 *Id.* at *2.
484 *Id.* at *6 (citations and internal quotation marks omitted).
485 *Id.*
486 *Id.* (citations and internal quotation marks omitted).
487 *Id.*
488 *Id.* at *7.
489 *Id.* (citations and internal quotation marks omitted).
490 *Id.* at **7–8.
491 *Id.* at *8.
492 *Id.* (citations and internal quotation marks omitted).
493 *Id.* at *9.
494 *Id.* at **9–10.

mask at her job and who had complained that she could not be understood. The EEOC had responded only by asserting that there was at least one person who had complained about not being able to understand the charging party because of her mask.[495] The court ordered the EEOC to supplement its response, as the issue of "[w]hether requiring [the charging party] to wear a mask was a reasonable accommodation is at issue in this case," and cases involving reasonable accommodations "turn heavily upon their facts."[496]

Finally, the employers sought to compel the EEOC to state "all facts and information that [are] used to formulate the basis of . . . EEOC's claim that Defendants' vaccination policy was not implemented with a bona fide objective, but instead was done with malice."[497] The EEOC refused to respond, contending that the request was argumentative and misstated the relevant claims. But the court concluded that the employers were entitled to an answer. In support, the court explained that an "employer's motive and intent are central to employment discrimination claims."[498]

b. Statistical Evidence of Disparate Impact—Must the EEOC Produce a Position-Specific Analysis?

In *EEOC v. DolgenCorp, LLC*,[499] the court addressed whether an employer may compel the EEOC to produce a position-specific disparate impact analysis in the face of the EEOC's assertions that a company-wide analysis is sufficient. In its complaint, the EEOC alleged that the employer's criminal background check policy had a disparate impact on Africa-American job applicants, in violation of federal antidiscrimination law. To prosecute such a claim, the EEOC is required to offer "statistical evidence of a kind and degree sufficient to show that the [background check policy] has caused the exclusion of applicants for jobs . . . because of their membership in a protected class."[500] Assuming the EEOC makes this showing, the burden then shifts to the employer "to demonstrate that the policy is 'job related for the position in question and consistent with business necessity.'"[501] If the employer can meet this burden, it will then become incumbent upon the EEOC "to show that an equally valid and less discriminatory practice was available that [the employer] refused to use."[502]

Over the course of a discovery dispute spanning more than two years, the employer had consistently taken the position that the EEOC was required "to demonstrate disparate impact on a position-by-position basis."[503] In accordance with that position, the employer sought to compel the EEOC to identify "every . . . job position for which the EEOC contends there is currently (or has been at any time since 2004 to the present) a disparate impact on black applicants."[504] The EEOC, on the other hand, had "maintained that a position-by-position disparate impact analysis is not required in this case because [the employer] applied the criminal background check policy to all job applicants across positions."[505] Consistent with that view, the EEOC had produced an expert report employing a "global approach," wherein the expert had concluded that the policy exerted a disparate impact on black applicants "overall."[506] The report did, however, contain a supplemental analysis examining the policy's impact on applicants for two specific positions, namely, sales associate and sales manager.[507]

The court denied the employer's motion to compel the EEOC to produce a position-specific analysis. In support of its decision, the court explained that the propriety of the EEOC's "global" disparate-impact

495 *Id.* at *11.
496 *Id.* at **11–12 (citations and internal quotation marks omitted).
497 *Id.* at *12 (internal quotation marks omitted).
498 *Id.* at *13.
499 *EEOC v. Dolgencorp, LLC*, 2017 U.S. Dist. LEXIS 211498 (N.D. Ill. Dec. 11, 2017).
500 *Id.* at *3 (brackets in original) (citations and internal quotation marks omitted).
501 *Id.* (citations omitted).
502 *Id.* at **3–4 (citations omitted).
503 *Id.* at *4.
504 *Id.* at *6.
505 *Id.* at *4.
506 *Id.* at **4–5.
507 *Id.* at *5.

analysis would be best evaluated in light of the employer's own competing analysis. In that connection, the court observed that the employer had "retained its own expert who will be free to use whatever methodology he or she deems appropriate to try and demonstrate from the same data used by the EEOC's expert that the policy does not have a disparate impact on black applicants, including a position-by-position assessment."[508] Further, the court observed that the employer's expert would also be free to "challenge the analysis performed by the EEOC's expert and offer evidence explaining why it is flawed or inadequate."[509]

c. Failure to Exercise Due Diligence

Finally, the cases in fiscal year 2018 underscore the importance of pursuing discovery objectives with the appropriate degree of diligence and speed. In *EEOC v. PC Iron, Inc.*,[510] counsel for the employer sought unsuccessfully to extend the final fact discovery deadline so that it might conduct a mental examination of the intervenor-plaintiff, as permitted by Federal Rule of Civil Procedure 35. In support of its decision denying the request, the court explained that counsel "was not diligent with respect to scheduling [the intervenor-plaintiff's] deposition and thus its request for an extension of the fact discovery deadline . . . lacks justification."[511] In this regard, the court observed that the discovery phase had commenced nearly a year earlier, yet counsel had failed to propound even a single item of written discovery upon the intervenor-plaintiff.[512] Given that "[d]epositions often cannot be scheduled unless and until document and other written discovery has occurred," the fact that counsel had failed to propound written discovery meant that there "was no good reason why it could not and did not schedule [the intervenor-plaintiff's] deposition well before July 2017."[513] Because of this delay, the court found no compelling reason to grant the request for an extension.

F. General Discovery by EEOC/Intervenor

1. Section 30(b)(6) Depositions

In *EEOC v. M&T Bank*, a case in which the EEOC alleged the employer failed to reassign the complainant to a vacant position for which she was minimally qualified, the U.S. District Court for the District of Maryland granted the EEOC's motion to compel the employer to designate a 30(b)(6) corporate representative to testify regarding Topic No. 9.[514] Topic No. 9 requested that the employer designate someone who, for three separate position titles from August 1, 2014 to March 20, 2014, could testify regarding: (1) the number of vacant positions; (2) the number of positions filled; (3) the identities of the individuals selected; (4) the qualifications of the individuals selected; (5) whether the individuals were internal candidates; and (6) the employees involved in the selection process.[515] The employer objected to the EEOC's 30(b)(6) deposition notice and asserted that it already produced all the information in document form for the positions the EEOC agreed are relevant to the litigation, *i.e.*, those the complainant applied for or expressed interest.[516] The court rejected the employer's contention, noting that the proper procedure to object to a 30(b)(6) deposition notice is not to serve objections on the opposing party, but to move for a protective order, which the employer never did.[517] However, in granting the EEOC's motion, the court held that the employer's designee need only testify as to the information sought in Topic No. 9 regarding positions to which the complainant applied.[518]

508 *Id.* at *8.
509 *Id.*
510 *EEOC v. PC Iron, Inc.*, 2018 U.S. Dist. LEXIS 12434 (S.D. Cal. Jan. 25, 2018).
511 *Id.* at *2.
512 *Id.*
513 *Id.* at *3.
514 *EEOC v. M&T Bank*, 2018 U.S. Dist. LEXIS 4219 (D. Md. Jan. 9, 2018).
515 *Id.* at **4–5
516 *Id.* at *5.
517 *Id.* at **5–6.
518 *Id.* at *7.

An employer in an Iowa federal case successfully avoided sanctions after the EEOC argued that it should be compensated because the employer failed to produce a prepared and consenting 30(b)(6) designee.[519] In denying the EEOC's motion, the court in *EEOC v. CRST Int'l Inc.* explained that Rule 30(d)(2) permits courts to impose appropriate sanctions on a person who impedes, delays, or frustrates the fair examination of a Rule 30 deponent.[520] However, the court clarified that a finding of bad faith—amounting to a practiced fraud upon the court—is specifically required in order to assess attorneys' fees.[521] The court found that no bad faith existed, reasoning that the employer designated three individuals for 30(b)(6) depositions and, although not completely prepared for each topic listed on the deposition notice, the deponents willingly answered questions to the best of their abilities.[522] Because the employer did not act in bad faith, the court held that the correct remedy is not to issue sanctions, but rather to grant leave for additional time to depose the employer pursuant to 30(b)(6).[523]

2. Scope of Permitted Discovery by EEOC

The Eastern District of New York addressed several discovery disputes in *EEOC v. UPS*, in which the EEOC alleged the employer violated the religious rights of some male employees by maintaining a policy that prohibited those in certain positions from having beards or growing their hair longer than collar-length.[524] The EEOC brought the suit on behalf of two charging parties and a nationwide class of similarly situated individuals.[525] In this opinion, the court ruled on the employer's motion seeking, in part, an order: (1) establishing a deadline for the addition of claimants; and (2) adopting the employer's proposed confidentiality order limiting the EEOC's use of discovery. In addition, the court ruled on the EEOC's motion to compel discovery.[526]

First, the employer asked the court to impose a deadline by which the EEOC must identify new claimants and to limit the class to employees harmed prior to a date certain.[527] In support, the employer argued that it would be unreasonable and prejudicial to require the employer to provide discovery and defend against new claimants, while maintaining a litigation hold on over 3,700 current employees.[528] In response, the EEOC averred it was premature to impose a deadline for claimant identification because discovery had been limited in order to facilitate early settlement.[529] Further, the EEOC argued that the employer had made no representation that all discriminatory practices had ceased, thus any deadline was arbitrary and undermined public interest.[530] The court denied the employer's request and held it was premature to set a date by which the EEOC must identify claimants.[531] The court noted that an appropriate cutoff date should not be determined until the EEOC had an opportunity to engage in additional discovery not limited by the goal of early settlement.[532] Further, the court emphasized that the employer did not demonstrate good cause to impose such a deadline at this time.[533]

Second, the employer requested that the court prohibit the EEOC's use of discovery materials outside the present litigation and restrict the disclosure of confidential information regarding one claimant to another claimant.[534] The employer contended that the discovery materials in the case contained

519 *EEOC v. CRST Int'l Inc.*, 2018 U.S. Dist. LEXIS 123140 (N.D. Iowa July 24, 2018).
520 *Id.* at *18.
521 *Id.*
522 *Id.* at **19–21.
523 *Id.* at *21.
524 *EEOC v. UPS*, 2018 U.S. Dist. LEXIS 37646, at *1 (E.D. N.Y. Mar. 5, 2018).
525 *Id.*
526 *Id.* at *2.
527 *Id.* at *5.
528 *Id.*
529 *Id.* at *6.
530 *Id.* at *7.
531 *Id.* at *11.
532 *Id.* at *10.
533 *Id.*
534 *Id.* at *12.

personal information, including religious affiliation, about hundreds of employees and applicants across the county who never expected or authorized the employer to disclose their information.[535] In addition, the employer argued that sharing claimant-specific information would result only in the unnecessary revelation of claimants' personal information, which was irrelevant to other claimants.[536] Although the EEOC agreed that it would not disclose confidential information to third parties or the public, it insisted that it should be able to use such information in furtherance of its law enforcement function, including other litigation.[537] Furthermore, the EEOC underscored that the employer included a paragraph in the protective order that permitted its employees to share confidential information on a need-to-know basis and, therefore, claimants should be treated the same.[538]

The court held in favor of the EEOC on both issues, reasoning that the employer did not show good cause to support its positions.[539] Specifically, the court noted it would be unjust to require the EEOC to ignore information properly obtained through discovery.[540] The court also agreed with the EEOC that claimants should be permitted access to other claimants' confidential information to assist in pursuing an effective litigation strategy after signing the confidentiality order.[541]

Turning to the EEOC's motion to compel, the court reviewed the EEOC's request for an order requiring the employer to reproduce a large batch of employee accommodation requests as individually separated files.[542] The EEOC also identified 26 files that were unreadable, and other documents that the employer produced with redactions on relevance grounds.[543] In response, the employer asserted that it was not required to produce the accommodation requests individually, the original 26 documents were handwritten and illegible, and only one document was redacted due to relevance.[544] The court directed the parties to meet and confer to resolve the batching issue and ordered the employer to produce the original 26 documents for inspection.[545] In addition, the court held that redactions based on relevance are improper.[546]

In *EEOC v. Akebono Brake Corp.*, the court analyzed the merits of the EEOC's motion to compel entry onto the employer's property to inspect and videotape various areas of its facility.[547] The EEOC argued the employer illegally denied claimant employment because she requested to wear a skirt as her religion prohibited wearing pants.[548] The employer claimed allowing her to wear a skirt was unduly burdensome, given the safety risks of wearing loose-fitting clothes on the job.[549] When analyzing the merits of the parties' positions, the court noted that "the degree to which the proposed inspection will aid in the search for truth must be balanced against the burdens and dangers created by the inspection."[550] The EEOC argued that the employer put the physical condition and nature of its facility at issue by asserting a safety/undue hardship defense.[551] In response, the employer argued that the EEOC's Request for Entry and inspection of its facility was not relevant because the record contained no evidence as to the length,

535 *Id.* at **12-13.
536 *Id.* at *17.
537 *Id.* at *13.
538 *Id.* at **17–18.
539 *Id.* at **14, 18.
540 *Id.* at **14–15.
541 *Id.* at **18–19.
542 *Id.* at *20.
543 *Id.*
544 *Id.* at **20–21.
545 *Id.* at 21.
546 *Id.* at **21–22.
547 *EEOC v. Akebono Brake Corp.*, 2018 U.S. Dist. LEXIS 43159 (D. S.C. Mar. 16, 2018).
548 *Id.* at *2.
549 *Id.*
550 *Id.* at *6.
551 *Id.* at *7.

type, or material of the skirt that claimant proposed to wear in lieu of pants.[552] The employer asserted the absence of this information would make any conclusions drawn from the inspection highly speculative.[553] The court, however, noted that the employer had ample opportunity to question the complainant regarding the particulars of the skirt during deposition, and that it would be unreasonable to deny the EEOC's request for entry and inspection on account of the record lacking information that the employer could have obtained.[554] The court determined the importance of the issues at stake weigh in favor of the EEOC.[555] In addition, the court examined other factors, including the employer's privacy and business concerns that would be impacted by videotaping.[556] Based on that analysis, the court granted the EEOC's motion, but narrowed its scope. Specifically, the court allowed two counsel for the EEOC and a legal photographer to enter, inspect, and take still photography of only the particular work area for 60 minutes on a date of the employer's choosing.[557]

In *EEOC v. CRST Int'l Inc.*, the court considered the EEOC's request to reopen depositions after evidence, which was not previously produced, came to light during depositions.[558] Because the EEOC filed its motion after the close of discovery, it was untimely and the court had to determine whether the EEOC's delay was due to "excusable neglect."[559] In evaluating excusable neglect, the court analyzed four factors: (1) the possibility of prejudice to the employer; (2) the length of the EEOC's delay and its impact on judicial proceedings; (3) the EEOC's reasons for delay; and (4) whether the EEOC acted in good faith.[560] The court noted that the reopening of depositions would necessarily benefit the EEOC and prejudice the employer.[561] Next, the court reasoned that, although the delay would delay trial, the EEOC filed its motion within 24 hours of learning of the additional relevant material.[562] The third factor weighed heavily in the EEOC's favor because the documents initiating the motion were disclosed after the discovery cutoff solely due to the employer's actions.[563] The court emphasized this delay was not within the EEOC's reasonable control.[564] Finally, the court reasoned that the EEOC demonstrated good faith in its actions, and, weighing the four factors, determined the EEOC satisfied the "excusable neglect" standard.[565] However, the court limited the specific depositions permitted to the EEOC and restricted the deposition topics to only that information that was made available in the additional relevant documents.[566]

3. 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. GMRI, Inc.*, the EEOC alleged the employer, a restaurant chain, engaged in a nationwide pattern or practice of intentional age discrimination against applicants age 40 and older.[567] In its motion for spoliation and sanctions, the EEOC alleged the employer failed to preserve

552 *Id.*
553 *Id.*
554 *Id.* at *8.
555 *Id.* at *11.
556 *Id.* at **14–15.
557 *Id.* at *16.
558 *CRST Int'l Inc.*, 2018 U.S. Dist. LEXIS 123140, at *6.
559 *Id.*
560 *Id.* at **6–7.
561 *Id.* at *7.
562 *Id.* at **7–8.
563 *Id.* at *8.
564 *Id.*
565 *Id.* at *9.
566 *Id.* at *13.
567 *EEOC v. GMRI, Inc.*, 2017 U.S. Dist. LEXIS 181011 (S.D. Fla. Nov. 1, 2017).

and intentionally destroyed paper applications and interview booklets.[568] In addition, the EEOC averred the employer failed to take any steps to preserve emails sent by or to hiring managers involved in the decisions challenged by the EEOC's lawsuit.[569] Significantly, the parties disputed whether the EEOC's pre-suit investigation was national in scope and, if so, when the employer learned of that scope.[570] This issue was crucial because the EEOC needed to establish the employer was under a duty to preserve documents and electronically stored information (ESI) for the imposition of spoliation sanctions. According to the employer, it was only under a duty to preserve such documents for one restaurant because the complaints triggering the investigation concerned only one location.

The court granted the EEOC's motion in part by permitting the parties to introduce evidence at trial of missing documents and ESI, and the circumstances surrounding destruction or absence of records.[571] The court also held that the parties can make arguments regarding the destruction—or non-destruction—of the evidence, possible motive, and the significance of missing material.[572]

The court refused to grant an adverse inference jury instruction regarding missing evidence because the EEOC failed to establish two essential factors: (1) with respect to the paper applications and interview booklets, that the allegedly missing evidence was crucial to the EEOC's case; and (2) in regard to emails and other ESI, that the employer acted in bad faith to deprive the EEOC of the information.[573] However, if the EEOC successfully persuaded the jury that the employer acted in bad faith, then the EEOC could seek an adverse inference. In its ruling, the court noted that mere negligence in losing or destroying records or evidence is not enough to justify an adverse inference jury instruction.[574]

The Tenth Circuit reviewed an appeal by the EEOC wherein the EEOC's sole argument was that the district court abused its discretion by refusing to impose sanctions on the employer due to the employer's destruction of records. In *EEOC v. JetStream Ground Services*, the EEOC brought suit alleging that the employer refused to hire five Muslim women because they would not remove their hijabs at work, hired two other women only after they agreed to work without wearing their hijabs, and then laid off one of those two women several months later because she wore her hijab during breaks.[575] For the first several years of the controversy, the employer asserted that its decisions not to hire the claimants were based on their applications and interviews.[576] However, a year into discovery, the employer changed its position and instead contended that the hiring decisions were based on the recommendations from a supervisor who worked at a vendor.[577] The employer admitted to destroying key evidence that could have countered its new explanation.[578]

The EEOC requested two sanctions: (1) exclusion of testimony regarding the destroyed evidence; and (2) an instruction to the jury that it should infer the missing documents were harmful to the employer.[579] The district court reserved ruling on the motion until it heard evidence at trial. Although the EEOC submitted a proposed jury instruction at trial, the EEOC failed to renew its request regarding the exclusion sanction and even discussed the missing evidence at length during its opening statement.[580]After the jury ruled in the employer's favor, the district court denied the EEOC's motion for a new trial.

568 *Id* at *3.
569 *Id.*
570 *Id.* at **7–8.
571 *Id.* at *7.
572 *Id.*
573 *Id.* at **6–7.
574 *Id.* at *8.
575 *EEOC v. JetStream Ground Servs.*, 878 F.3d 960 (10th Cir. 2017).
576 *Id.* at 962.
577 *Id.*
578 *Id.*
579 *Id.* at 963.
580 *Id.*

The Tenth Circuit rejected the EEOC's position that the district court's denial of its motion for spoliation sanctions was an abuse of discretion. The court held that the EEOC's argument that the exclusion sanction should have been applied was waived in its opening statement at trial.[581] Further, the court ruled that the district court did not abuse its discretion in refusing to give an adverse-inference instruction after the EEOC conceded that destruction of the records was not in bad faith during its closing argument.[582]

The Northern District of New York denied an employer's motion for spoliation sanctions after the claimants allegedly failed to preserve their electronic devices containing relevant text messages. In *EEOC v. Draper Development LLC*, the EEOC alleged the employer, a restaurant franchisee, engaged in quid pro quo sexual harassment with two job applicants when a manager sent the applicants sexually explicit text messages expressly soliciting sex in exchange for a job.[583] The court reasoned that one claimant affirmatively preserved screen shots of the relevant text messages, and the employer did not dispute their accuracy or authenticity.[584] In regard to the other claimant, the court held that the employer failed to prove that the claimant intentionally erased her hard drive after a duty to preserve was triggered.[585]

4. Third-Party Subpoenas

In *EEOC v. PC Iron, Inc.*, the EEOC issued a document subpoena to the California Employment Development Department (EDD), a non-party, seeking quarterly earnings statements and wage reports regarding the employer's employees.[586] Rather than formally serve the EDD, the EEOC faxed the subpoena under an agreement between the two entities.[587] The EEOC then mail-served the subpoena to the employer.[588] The EDD responded and produced the subpoenaed documents to the EEOC more quickly than anticipated and well before the production deadline.[589] The EEOC produced the documents to the employer and intervenor plaintiff.[590] The employer challenged the subpoena and asserted claims of privacy privilege on behalf on non-parties whose personally identifiable information was contained in the subpoenaed documents.[591] The court held that, even though the EEOC failed to comply with federal subpoena requirements, it nonetheless demonstrated the relevance of the documents and their proportionality to the needs of the case.[592] In addition, the court held that that a protective order strikes the appropriate balance between the need for the information in the disputed documents and the privacy of the persons listed therein.[593]

5. Miscellaneous

EEOC cases gave rise to a number of other assorted discovery disputes this fiscal year. In a Massachusetts federal case, the court considered the EEOC's motion to compel various interrogatory responses and documents in response to requests for production. In *EEOC v. Baystate Medical Center*, Inc., the EEOC alleged the employer improperly terminated an employee after she declined the employer's free influenza vaccine based on her religious beliefs and claimed she was unable to perform the duties of her job adequately while wearing a mask.[594] The employer did not provide certain

581 *Id.* at 964.
582 *Id.* at 966.
583 *EEOC v. Draper Dev. LLC*, 2018 U.S. Dist. LEXIS 115124 (N.D.N.Y. July 11, 2018).
584 *Id.* at *22.
585 *Id.* at **22–23.
586 *EEOC v. PC Iron, Inc.,* 2017 U.S. Dist. LEXIS 213334 (S.D. Cal. Dec. 29, 2017).
587 *Id.* at *2.
588 *Id.*
589 *Id.*
590 *Id.*
591 *Id.* at **3–4.
592 *Id.* at **4–5.
593 *Id.* at **6–7.
594 *EEOC v. Baystate Med. Ctr., Inc.*, 2017 U.S. Dist. LEXIS 179016 (D. Mass. Oct. 30, 2017).

information and documentation regarding: (1) alleged comparators; (2) its affirmative defenses; and (3) its influenza immunization and teleworking policies.[595]

When analyzing the employer's objections to producing information regarding alleged comparators, the court noted it must balance the ability to discover any non-privileged information and even broader discovery upon a showing of "good cause" against the privacy concerns of non-parties to the lawsuit.[596] The employer objected to producing comparator information—defined as every employee who declined the influenza vaccine—because it amounted to the disclosure of approximately 500 employees' personal information.[597] The court held that the right balance would be struck by providing the EEOC with discovery of a statistically significant sample, and ordering the employer to confer with the EEOC in the selection of 75 employees.[598] From there, the court ordered the employer to provide the names, titles, departments, dates of declination of the vaccine, and reasons given for the selected employees.[599] The EEOC also sought the identities and personnel files of all employees who refused the vaccination and were disciplined for non-compliance.[600]

Again, the employer objected to the breadth of the EEOC's request. Nonetheless, the court held that the EEOC sustained its burden of demonstrating the relevance of the information sought and ordered the employer to identify such employees. However, the court narrowed the document request to include only documents from the employees' personnel files that concerned the influenza vaccine policy and any resulting discipline.[601]

Next, the court considered the EEOC's request for all documents and electronically stored information reflecting facts supporting the employer's affirmative defenses.[602] The court held that the request was overbroad and limited it to documents disclosing *facts* supporting the employer's affirmative defenses, excluding any privileged information.[603] Lastly, the court granted the EEOC's motion as it pertained to the employer's influenza immunization and teleworking policies because the EEOC demonstrated they were relevant to the issue of whether requiring all employees to wear masks was a reasonable accommodation.[604]

The Middle District of Florida denied the EEOC's request to maintain all briefing and orders concerning the claimant's U visa application under seal in *EEOC v. Favorite Farms, Inc.*[605] The employer moved to compel a non-party organization to respond to a subpoena *duces tecum* and sought documents concerning the complainant's U visa application. In response, the EEOC moved to seal briefing that revealed complainant's immigration status and argued that unsealing the briefs would place a substantial burden on the claimant and chill others from coming forward in future EEOC matters challenging workplace discrimination.[606] The employer rebutted the EEOC's position, asserting that sealing briefs and orders concerning the U visa application was unnecessary and against the presumption that judicial records should be public. The employer also argued that disclosing the fact that complainant applied for a U visa does not reveal her immigration status.[607]

595 *Id.* at *8.
596 *Id.* at *9.
597 *Id.* at **10–11.
598 *Id.* at *12.
599 *Id.* at *13.
600 *Id.* at **13–15.
601 *Id.* at *16.
602 *Id.* at *20.
603 *Id.* at **20–21.
604 *Id.* at **21–24.
605 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 131531 (M.D. Fla. Aug. 6, 2018).
606 *Id.* at *3–4.
607 *Id.* at *4.

In siding with the employer, the court noted the public has a presumptive right to view judicial records. In addition, the court emphasized that the EEOC failed to prove that there is good cause for keeping all briefing and orders concerning the complainant's U visa application sealed, especially given that no order or brief revealed the complainant's official immigration status.[608]

G. Summary Judgment

In FY 2018, federal courts issued at least 17 decisions addressing the EEOC's or the defendant's motions for summary judgment. Consistent with prior years, a significant portion (35%) of those cases involved claims of disability discrimination. Courts considered summary judgment motions on a range of other typical claims, however, including sexual harassment, pregnancy discrimination, race discrimination, and retaliation. In addition, the courts reviewed cases involving other interesting issues not considered in recent years, such as the scope of mandatory arbitration agreements, an employer's ability to refuse employment due to criminal convictions, independent contractor status under Title VII, and successor liability.

In most instances (about 70% of the cases), the courts either granted the EEOC's motion for summary judgment or partial summary judgment, or denied the employer's motions. In at least three instances, the courts issued mixed results, denying both parties' motions.

Some notable summary judgment decisions issued in FY 2018 are discussed below.

1. Scope of Mandatory Arbitration Agreements

An employer's ability to implement and enforce mandatory arbitration agreements has been challenged on several fronts this past year. In May 2018, the U.S. Supreme Court held that class and collective action waivers in arbitration agreements are lawful and must be enforced under the Federal Arbitration Act (FAA).[609] At the state level, some legislatures enacted laws to limit the use of mandatory arbitration agreements to resolve sexual harassment disputes.[610] It is not surprising, therefore, that the EEOC had brought suit contesting an employer's agreement to resolve certain matters by binding arbitration.

In *EEOC v. Doherty Group., Inc.*,[611] the EEOC sought injunctive relief against the employer regarding a mandatory arbitration agreement, which required employees and applicants to agree to the clause: "I understand that [the employer] utilizes a system of alternative dispute resolution which involves binding arbitration to resolve any dispute." The agreement further provided that any claim, dispute, or controversy "shall be submitted to and determined exclusively by binding arbitration." The EEOC sought summary judgment arguing that the agreement precluded employees from filing charges with the EEOC and Fair Employment Practices Agencies (FEPA).[612]

In ruling on the parties' cross-motions for summary judgment, the court applied a strict interpretation of the language and agreed with the employer that the agreement was simply intended to inform employees that any disputes that required a final *determination* on the merits would be *resolved* through arbitration.[613] The court concluded that filing a charge or participating in an agency investigation does not resolve an employee's disputes. Moreover, the court explained there is no requirement that the

608 *Id.* at *5–6.
609 *Epic Systems Corp. v. Lewis*, 584 U.S. _ (2018).
610 In California, for example, former Governor Brown signed into law AB 3109, which nullifies any term in a contract or settlement agreement that waives a party's right to testify in an administrative, legislative, or judicial proceeding concerning alleged criminal conduct or sexual harassment. Similarly, in Washington, a new law (SB 6313) purports to invalidate any agreement provision that requires an employee to resolve claims of discrimination (of any kind) in a dispute resolution process that is confidential, or that waives the employee's right to publicly pursue a cause of action for discrimination.
611 2018 U.S. Dist. LEXIS 31665 (S.D. Fla. Feb. 28, 2018).
612 *Doherty Group., Inc.*, 2018 U.S. Dist. LEXIS 31665 at *3.
613 *Id.* at **8-11.

agreement affirmatively state that employees were not waiving their right to file charges.[614] The court therefore concluded that nothing in the employment agreement prevented an employee from filing charges with the EEOC or FEPAs or participating in agency investigations.[615]

2. Interlocutory Appeals on Non-Final Summary Judgment Orders

In *EEOC v. Amsted Rail Co.*,[616] the employer sought an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of a non-final order granting summary judgment for the EEOC on ADA claims. The court first clarified that a petition under 28 U.S.C. § 1292(b) must involve (1) a question of law that is (2) controlling and (3) contestable, and (4) its resolution must promise to speed up the litigation. The court interpreted the first requirement under § 1292(b) to mean a *pure* question of law that the appellate court could decide quickly without a lengthy review of the record.[617] Put simply, a pure question of law involved the "meaning of a statutory or constitutional provision, regulation, or common law doctrine." Applying these principles, the court concluded that the employer could not demonstrate that a pure question of law existed. Rather, the employer's question of law turned on the substance of the EEOC's ADA claims and the employer's direct threat affirmative defense and would require the appellate court to apply legal principles to a voluminous body of evidence to determine if a genuine issue of material fact was "lurking" in the evidence.[618] The court concluded that this was not a pure question of law as envisioned by § 1292(b) and denied the employer's motion for certification of an interlocutory appeal.[619]

3. Criminal Records

In *Texas v. EEOC*,[620] the State of Texas filed suit against the EEOC and attorney general for the United States arguing that the EEOC's "*Guidance on Consideration of Arrest and Conviction Records in Employment Decisions under Title VII*" (the "Guidance") interfered with its authority to impose categorical bans on hiring felons and to exercise discretion in rejecting felons for certain jobs. The Guidance emphasizes that employers should exercise "individual assessments" before disqualifying candidates based on their criminal background. Texas sought (1) a declaration that it had a right to maintain and enforce its law and policies, which permitted categorical bans on employing convicted felons in certain positions, and (2) an injunction preventing the EEOC from enforcing the Guidance.[621] Texas also sought a ruling under the Administrative Procedures Act, 5 U.C.S. § 702 (APA) that the Guidance was (1) unlawful as a substantive rule issued without notice and the opportunity for comment, (2) outside of the statutory authority given to the EEOC, and (3) an unreasonable interpretation of Title VII.[622] The court denied summary judgment on Texas' request for a declaration that it had a right to categorically deny employment to applicants with a felony conviction. The court found that although felons posed too great a risk for certain jobs, the categorical ban was overbroad and precluded applicants from meaningful employment opportunities.[623] The court also denied the request to enjoin the EEOC from issuing right-to-sue letters because the letters were not a determination that a meritorious claim existed.[624] Finally, in a narrow victory for Texas, the court granted its motion for summary judgment with respect to the APA claim finding that the Guidance violated the APA because it was issued without providing notice and the opportunity for comment. The court therefore enjoined the EEOC and attorney general from enforcing the Guidance until the EEOC complied with these requirements.[625]

614 *Id.*
615 *Id.* at *11.
616 2018 U.S. Dist. LEXIS 8753 (S.D. Ill Jan. 19, 2018).
617 *Amsted Rail Co.*, 2018 U.S. Dist. LEXIS 8753 at *3.
618 *Id.* at *4.
619 *Id.* at *5.
620 2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb. 1, 2018).
621 *Texas*, 2018 U.S. Dist. LEXIS 30558 at **3-4.
622 *Id.* at *4.
623 *Id.* at **5-6.
624 *Id.* at *6.
625 *Id.* at *7.

4. Statute of Limitations

In *EEOC v. PC Iron, Inc.*,[626] the employee claimed that she suffered negative comments from her supervisor after informing her employer of her pregnancy and was eventually terminated at the end of her maternity leave.[627] The EEOC brought sex discrimination and hostile work environment claims against the employer. The employee intervened and asserted state law claims of sex discrimination, hostile work environment, wrongful discharge, and intentional infliction of emotional distress.

The court considered four summary judgment motions and overall ruled in favor of the employer. The court granted the employer's partial motion for summary judgment against the EEOC and the employee on the Title VII hostile work environment claims, finding that the charge was filed more than 300 days after the last act supporting a hostile work environment claim.[628] The court also granted the employer's motion for summary judgment on the employee's remaining claims, finding that the claims were time-barred and could not be revived under statutory or equitable tolling principles.[629] The EEOC's motion for summary judgment was successful in dismissing 11 of the employer's affirmative defenses, most of which were not true affirmative defenses and did not impact the employer's ability to defend against the remaining discrimination claims at trial.[630]

In another decision involving the timeliness of a charge, a magistrate judge in the Southern District of Georgia considered a joint motion to stay discovery pending resolution of a dispositive motion.[631] The defendant-employer planned to file a motion for judgment on the pleadings, or a motion for summary judgment, in short order. It intended to argue that the underlying charge of discrimination was untimely, requiring dismissal of the case in its entirety. The parties agreed that no additional discovery was necessary on the timeliness question and that future discovery would be moot if the court granted the dispositive motion. Accordingly, the court stayed discovery pending its ruling on the motion for judgment.[632]

5. Independent Contractor Analysis, Successor Liability

In a series of decisions out of the Southern District of Mississippi against the same defendant strip club, the court ruled in favor of the EEOC on its various motions for summary judgment. The EEOC filed the lawsuit on behalf of a class of African-American exotic dancers who alleged they were subject to adverse treatment on account of their race. The defendant, Danny's Restaurant, LLC, first alleged that the dancers were not employees subject to Title VII, but rather independent contractors. The EEOC filed a motion for partial summary judgment on the issue of the dancers' proper classification.[633]

The court analyzed Fifth Circuit precedent governing independent contractor analysis, *Reich v. Circle C Investments*, 998 F.2d 324 (5th Cir. 1993). The appellate court examined five key factors in making the employee/independent contractor determination: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.

In the instant case, the court found that the EEOC met its initial burden in "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." The non-moving party was then required to "go beyond the

626 2018 U.S. Dist. LEXIS 73521 (S.D. Cal. May 1, 2018).
627 *PC Iron, Inc.*, 2018 U.S. Dist. LEXIS 73521 at ** 2-4.
628 *Id.* at ** 8-11.
629 *Id.* at **11-21.
630 *Id.* at **22-28.
631 *EEOC v. Dollar Tree Stores Inc.*, 2018 U.S. Dist. LEXIS 153957 (S.D. Ga. Sept. 10, 2018).
632 *Id.* at *2.
633 *EEOC v. Danny's Restaurant, LLC*, 2018 U.S. Dist. LEXIS 154500 (S.D. Miss. Sept. 11, 2018).

pleadings" and designate "specific facts" in the record showing that there is a genuine issue for trial. The court determined the defendant failed to do so. Instead, it made the following broad arguments:

First, the defendant argued that because the complainants refused to provide tax returns in response to discovery requests, there is no proof that they earned any money as dancers during the applicable time period. The court noted, however, that *Reich* and other cases have determined that exotic dancers can be considered employees even though they were paid only through tips from customers and not directly compensated by their alleged employers. Second, the defendant pointed to an "Entertainment Lease" the dancers signed that designated them as independent contractors. The court pointed out that the Fifth Circuit has held that an agreement on its own cannot render an employee an independent contractor. Third, the defendant claimed the dancers are required to supply their own tools of the trade—*i.e.*, makeup, outfits, etc.—and that the defendant did not control the days they worked. The court countered that the EEOC provided extensive documentation via declarations and deposition testimony that the defendant did in fact exercise significant control over the dancers. For example, the defendant established work schedules, implemented rules and expectations, imposed fine for tardiness, and set rates. The court explained the defendant failed to provide specifics or proof that it lacked control over the dancers.

Because no material issue remained for a fact-finder to determine the dancers' correct classification, the court was able to review the record in the light most favorable to the non-moving party. Given the facts on record, the court determined the dancers were in fact employees, and thus granted the EEOC's motion for partial summary judgment on this point.

As to the merits of the race discrimination charge, the court granted the EEOC's motion for summary judgment as to liability.[634] Allegations of discrimination and harassment include the defendant's maintenance of a quota for African-American dancers on any given shift, and requiring African-American dancers to dance only if scheduled to do so. The club maintained a "dance sheet" that listed the dancers' names, race, and number of dances sold per shift. If an African-American dancer did not show up for work during a scheduled shift, she was fined. The same policies did not apply to white dancers. A manager testified that if he saw too many African-American dancers, he was to send some home. African-American dancers also alleged they were subject to racially offensive comments from the defendant's owners and managers.

The court determined the EEOC produced sufficient evidence of discrimination via deposition testimony of numerous witnesses, declarations and documents that established that the defendant: "limited complainants' work hours by imposing a schedule; sent complainants home; forced complainants to work at a less desirable location; imposed fines on complainants for acts that other dancers were allowed to commit; forbade complainants to perform immediately before or after another Black performer, and took other actions that adversely affected the terms and conditions of the complainants' employment."

The court also considered the language to constitute direct evidence of discrimination, as the offensive comments (1) related to the plaintiff's protected characteristic; (2) proximate in time to the challenged employment decision; (3) made by an individual with authority over the challenged employment decision; and (4) related to the challenged employment decision.

The court found that most of these allegations were undisputed, and that the defendant failed to articulate any legitimate, nondiscriminatory reason for its actions. Therefore, the court granted the EEOC's motion with respect to liability, and ordered the case to proceed to trial on the issue of damages only.

634 *EEOC v. Danny's Restaurant, LLC*, 2018 U.S. Dist. LEXIS 168641 (S.D. Miss. Sept. 30, 2018).

Additional information on these and other summary judgment decisions issued in FY 2018 can be found in Appendix D to this Report.

H. Default Judgment

Although it is a rare outcome, courts have awarded the EEOC default judgment in discrimination cases filed over the years, including FY 2018.

In *EEOC v. Roark-Whitten Hosp. 2, LP*,[635] the EEOC sued Roark-Whitten 2, LP ("RW2") and two of its successors, Jai Hanuman, LLC ("Jai") and SGI, LLC ("SGI"), alleging that RW2's former owner had discriminated and retaliated against a class of Hispanic employees working at the Whitten Inn in Taos, New Mexico. In August 2017, counsel for RW2 and Jai filed a motion to withdraw from representation. The court granted the motion; but it also ordered (1) that RW2 and Jai obtain new counsel no later than October 2, 2017; (2) that certain discovery be completed by October 27, 2017; and (3) that certain depositions of RW2 and Jai representatives be taken by November 2017. Although RW2 and Jai received the court's order, neither company had an attorney file an appearance on its behalf. On October 6, 2017, the EEOC moved for civil contempt against RW2 and Jai, requesting an order to show cause as to why RW2 and Jai should not be held in contempt and for default judgment against RW2 and Jai.[636]

The district judge referred the EEOC's motion to the magistrate judge, who recommended that the court sanction RW2 and Jai by entering default judgment.[637] First, the magistrate judge noted that neither RW2, nor Jai, had responded to the EEOC's motion, and that their failure to respond constituted consent to the motion. Second, the court looked to Rule 37(b)(2), noting that a court may issue sanctions, including default judgment against a party who disobeys a discovery order, consistent with its inherent power to sanction misconduct and abuse of the judicial process.[638]

In determining whether default judgment was an appropriate Rule 37(b)(2) sanction in response to RW2's and Jai's refusal to comply with the court's order, the magistrate judge analyzed the "*Ehrenhaus* factors": (1) the degree of actual prejudice to the non-offending party; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.[639]

Each factor, the magistrate judge found, supported entering default judgment against RW2 and Jai. Under the first and second factors, the magistrate judge noted that the EEOC and the broader judicial process had been prejudiced and/or frustrated due to RW2's and Jai's lack of diligence.[640] As the court observed, the case was three years old, with basic discovery still yet to take place; the case could not effectively move forward without representation for RW2 and Jai. Under the third factor, the magistrate judge found that RW2 and Jai were culpable for failing to adhere to the court's order. Both received the order and failed to comply without cause. Under the fourth factor, the magistrate judge recognized that the court had warned RW2 and Jai it may enter default judgment against them if they failed to obtain counsel as ordered. Under the fifth factor, the magistrate judge found that lesser sanctions, such as striking a defense or issuing a monetary sanction, would do nothing to move the case forward, as RW2 and Jai would remain dilatory without representation.[641]

635 2017 U.S. Dist. LEXIS 183012 (D.N.M. Nov. 2, 2017).
636 *Id.* at *5.
637 *See id.* at *5-6.
638 *Id.* at *7-8.
639 *Id.* at *8 (citing *Ehrenhaus v. Reynolds*, 965 F.2d 916, 921 (10th Cir. 1992)).
640 *Id.* at *9-11.
641 *Id.* at *15-16.

Neither RW 2 nor Jai filed objections to the magistrate's recommendations.[642] The district judge later entered default judgment against RW2 and Jai, consistent with the magistrate's recommendations.[643]

I. Bankruptcy

In *EEOC v. American Airlines, Inc.*,[644] the EEOC sued American Airlines, Inc. ("American Airlines") and Envoy Air, Inc. in the United States District Court for the District of Arizona for alleged ADA violations. Soon thereafter, the parties settled. On November 16, 2017, the court adopted the parties' proposed consent decree and entered judgment.[645] The consent decree stated it was "effective on the later of (i) the date it is signed by th[e] Court or (ii) the date on which an order from the United States Bankruptcy Court for the Southern District of New York (the 'Bankruptcy Court') approving the monetary relief provided for in this Decree becomes final and non-appealable (the 'Effective Date')."[646]

On December 15, 2017, American Airlines filed a Motion to Approve Compromise with the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court").[647] Two former pilots objected to the motion, claiming the settlement amount was inadequate and that the settlement deprived pilots of their right to bring ADA claims against the airline. At the hearing on the airline's motion, the Bankruptcy Court approved the monetary settlement in the consent decree.[648]

After that hearing, the parties drafted an amended consent decree, which accounted for the former pilots' objections to American Airlines' Motion to Approve Compromise with the Bankruptcy Court.[649] The parties then filed a Joint Motion for Entry of an Amended Consent Decree with the District Court for Arizona to (1) modify the list of employees receiving notice of the settlement to include pilots and (2) change the effective date of the consent decree to the date that the Bankruptcy Court approved the consent decree, rather than when such order of approval becomes final and non-appealable.[650]

The District Court of Arizona construed the parties' Joint Motion for Entry of an Amended Consent Decree as a Rule 60(b) Motion to Alter or Amend Judgment, given that the prior consent decree became affective when the Bankruptcy Court approved the monetary settlement in the consent decree.[651] Looking to Rule 60(b), the court found that the parties had failed to identify a mistake, excusable neglect, newly discovered evidence, fraud, or other extraordinary circumstances that warranted reopening the order granting the original consent decree. The court denied the parties' motion.[652]

642 *See EEOC v. Roark-Whitten Hosp. 2, LP*, No. 1:14-cv-00884-MCA-LF, 2017 U.S. Dist. LEXIS 193797, at *1 (D.N.M. Nov. 22, 2017).
643 *Id.*
644 No. CV 17-04059-PHX-SPL, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018). *See* Section L of this Report for a discussion of the parties' consent decree in this matter.
645 *Id.* at *1.
646 *Id.* at *1-2.
647 *Id.* at *2.
648 *Id.*
649 *Id.*
650 *Id.* at *3.
651 *Id.*
652 *Id.* at *5.

J. Trial

1. Jury Instructions

In *EEOC v. JetStream Ground Services*,[653] the EEOC sued JetStream Ground Services, alleging that it refused to hire Muslim women who wore hijabs at work.[654] A year into discovery, the company alleged it had not hired the Muslim woman at issue based on the recommendations of Arnold Knoke, a supervisor who worked for AirServ, JetStream's third-party staffing vendor. JetStream maintained that two of its employees met with Knoke on November 5, 2008 to hear his recommendations about which AirServe employees JetStream should hire. During the meeting, Knoke checked off employees JetsStream should hire using an AirServe employee schedule, which contained a complete list of the AirServe employees under consideration. One of the JetStream representatives wrote the names of these employees on a piece of paper. The other JetStream representative obtained phone numbers for the employees recommended for hire and entered the information into an Excel spreadsheet, which she saved on her laptop and a flash drive. Later that day, JetStream published the list of employees selected for hire—the same list of employees recommended by Knoke.[655]

In discovery, the EEOC asked that the defendant provide all documents related to the nondiscriminatory reasons for not hiring the individual plaintiffs. Neither JetStream representative could recall what happened to their notes or the list with the names of checked off/recommended employees; both said they had no reason to keep their notes. JetStream did produce a November 10, 2008 version of the Excel spreadsheet. The parties did not dispute that the names on this version of the Excel spreadsheet were the same names as those posted as selected for hire on November 5, but the November 10 document had been modified and/or updated after November 5, 2008.[656]

In anticipation of trial, the EEOC moved for spoliation sanctions against JetStream.[657] The EEOC argued that JetStream failed to maintain original versions of documents related to Knoke's recommendations, and therefore violated the company's record keeping obligations after the claims were filed against JetStream in February 2009.[658] Further, the EEOC averred that, without the JetStream representatives' notes, it had no way of rebutting JetStream's new explanation for its decision not to hire the Muslim women because it had no way to compare the November 5 list of employees selected for hire against the list of employees that Knoke recommended.[659] As a sanction, the EEOC asked that the court either (1) bar JetStream from offering testimony about Knoke's recommendations, or (2) instruct the jury to infer that the missing documents would be harmful to JetStream.[660]

Not yet able to determine whether JetStream acted in bad faith in discarding the documents or that the absence of documents prejudiced the EEOC, the trial court stayed ruling on the EEOC's motion for spoliation sanctions until trial.[661] At trial, the EEOC did not renew its request for spoliation sanctions. On the contrary, the EEOC discussed Knoke's recommendations in great detail, as well as JetStream's alleged reliance on the list in deciding not to hire the Muslim plaintiffs. The EEOC later requested an instruction permitting the jury to infer that the missing documents would be harmful to JetStream. The trial court rejected the requested instruction. The jury later found for JetStream.[662]

653 878 F. 3d 960 (10th Cir. 2017).
654 *Id.* at 961.
655 *Id.*
656 *Id.*
657 *Id.*
658 *Id.* (citing 29 C.F.R. § 1602.14).
659 *Id.* at 963.
660 *Id.*
661 *Id.*
662 *Id.*

Following an unsuccessful motion for new trial, the EEOC appealed, arguing that the lower court erred in failing impose spoliation sanctions upon JetStream—specifically, by not precluding testimony about Knoke's recommendations and not submitting adverse-inference instructions to the jury.[663] But the Tenth Circuit affirmed.[664] On testimony about Knoke's recommendations, the court held that the EEOC failed to preserve its objection to such testimony during trial.[665] In fact, the court found that the EEOC had waived any argument about excluding Knoke-recommendation testimony by discussing the Knoke list at length in its opening statement at trial.[666] On the adverse-inference instruction, the court recognized that it would only be appropriate if the EEOC had shown that Jetstream destroyed the documents at issue in bad faith.[667] The EEOC had not.[668] As the court noted, the EEOC stated during closing it was *not* arguing that JetStream had destroyed the documents in bad faith.[669]

2. Post-Trial Motions

In *EEOC v. Exel, Inc.*,[670] the jury found that the claimant was denied a promotion based on her sex in violation of Title VII. The employer moved for judgment as a matter of law.[671] The trial court denied the motion as it pertained the jury's finding of liability, but granted the motion on the jury's award of punitive damages.[672] The EEOC and the employer then filed cross-appeals—with the EEOC challenging the trial court's decision to overturn the jury's award of punitive damages, and the employer challenging the trial court's decision to affirm the jury's finding of liability.[673]

On appeal, the Eleventh Circuit affirmed.[674] First, the Eleventh Circuit held that the trial had not erred in allowing the jury's finding of liability to stand. The evidence showed (1) that the hiring manager had discretion to hire the claimant despite a company policy favoring priority-transfer-practice (PTP) candidates, unlike the claimant; and (2) that hiring manager harbored a bias against women.[675] Based on this evidence, the Eleventh Circuit held, a reasonable jury could have concluded that the hiring manager had discretion to hire the claimant but exercised that discretion in a discriminatory manner.[676]

Second, the Eleventh Circuit held that the trial court was correct in vacating the claimant's award of punitive damages.[677] To prove entitlement to punitive damages, the court said, the claimant must not only prove that the decision-maker acted "with malice or with reckless indifference to the federal protected rights of an aggrieved individual," but also that the malice may be attributed to the employer. Under Eleventh Circuit's "higher management" standard, the latter requires proof that the discriminating employee was "high up the corporate hierarchy" or that the "higher management countenanced or approved [his] behavior."[678] The court recognized that its "higher management" standard was in apparent conflict with the United States Supreme Court's decision in *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526 (1999), which only requires that employees be important—but not top management, officers, directors—to be a manager capable of imputing punitive-damages liability to the employer.[679] But the court found that the conflict was reconcilable. Consistent with Eleventh Circuit cases that acknowledge *Kolstad*, but continue to apply the higher-management standard, the court found that the claimant had failed to

663 *Id.* at 964-65.
664 *Id.* at 967.
665 *Id.* at 964.
666 *Id.*
667 *Id.* at 964-66.
668 *Id.* at 966.
669 *Id.*
670 884 F.3d 1326 (11th Cir. 2018). *See* Section K, *infra*, for a discussion punitive damages related to this case.
671 *Id.* at 1328.
672 *Id.*
673 *Id.*
674 *Id.* at 1333.
675 *Id.* at 1331.
676 *Id.*
677 *Id.* at 1333.
678 *Id.* at 1331-32.
679 *Id.* at 1332.

prove she was entitled to punitive damages, as there was no evidence that the decision maker at issue was sufficiently "high[] up in the corporate hierarchy" as one of 329 general managers at the company with only 23 employees under his supervision.[680] Nor did the court find there was any evidence that "higher management countenanced or approved [of the decision maker's] behavior," as no one other than the decision maker knew that the claimant had requested the promotion at issue.

In *EEOC v. Dolgencorp, LLC*,[681] the EEOC sued Dolgencorp, LLC, alleging that it failed to accommodate the charging party and then terminated her because she was disabled. The charging party intervened as a plaintiff, and her reasonable accommodation and disability discrimination lawsuit proceeded to trial. The jury awarded the plaintiff $27,565 in back pay and $250,000 in compensatory damages. The court awarded the plaintiff's lawyers $445,322 in attorney's fees and $1,677 in expenses.[682] The employer appealed on four grounds: (1) the plaintiff's disability discrimination claims were barred by the statute of limitations; (2) it was entitled to judgment as a matter of law on the plaintiff's failure-to-accommodate claim; (3) it was entitled to judgment as a matter of law on plaintiff's disability discrimination claim; and (4) the lower court erred in calculating the plaintiff's attorney's fees.[683]

The Sixth Circuit rejected each of the employer's arguments. First, the court found that the plaintiff had filed a timely charge of discrimination with the Tennessee Human Rights Commission within 300 days of the alleged discrimination, as required by the statute of limitations.[684] It was of no moment, for the statute of limitations, that the plaintiff filed her initial charge with Tennessee Human Rights Commission under the Tennessee Human Rights Commission, which does not recognize claims for failure to accommodate.[685] The Tennessee Human Rights Commission was still a "state or local agency with authority to grant or seek relief from [a discriminatory] practice" under the language of the statute of limitations.[686]

Second, the court noted that the jury reasonably found that the employer had failed to accommodate the plaintiff.[687] It did not matter that her disability (hypoglycemia) could have been treated in many ways, including through her request to have orange juice at her register if the event of an emergency; the plaintiff was still categorically denied a reasonable accommodation, and refused even the opportunity to explore alternative accommodations.[688]

Third, the court held that the jury reasonably found that the employer had terminated the plaintiff because of her disability.[689] Most important, there was direct evidence of discrimination (failure to consider the possibility of accommodating the employee's known disability and request to keep orange juice near her register if emergency occurs). As a result, the *McDonnell-Douglas* framework did not apply, rendering the company's claims about separating the plaintiff for drinking orange juice under its neutrally-applicable, anti-grazing policy non-dispositive. Similarly, even if the trial court erred in its *McDonnell-Douglas/*neutral-explanation jury instruction, any such error did not prejudice the employer given the employer's undisputed failure to provide the employee an accommodation.[690] Finally, there was sufficient evidence that the company separated plaintiff because of a disability, as required to establish liability under the ADA, even if there was no direct evidence of animus towards individuals with disabilities.[691]

680 *Id.*
681 899 F.3d 428 (6th Cir. 2018).
682 *Id.* at 432-33.
683 *Id.* at 433.
684 *Id.* at 433-34.
685 *Id.*
686 *Id.* at 433.
687 *Id.* at 434-36.
688 *Id.*
689 *Id.* at 435-36.
690 *Id.* at 436.
691 *Id.*

Fourth, the court affirmed the lower court's ruling on the employee's attorney's fees, holding that it had correctly applied the lodestar analysis (number of hours times a reasonable hourly rate) in awarding the employee's attorney fees, without unfairly enhancing the fees based on success or complexity of the case.[692]

K. Remedies

1. Punitive Damages

The EEOC can pursue punitive damages on behalf of individuals making claims under § 706. Title VII allows for punitive damages when the plaintiff "demonstrates the defendant engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[693] Courts continue to follow the Supreme Court's three-part framework for determining whether an award of punitive damages is proper under Title VII.[694] 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."[695]

In *EEOC v. Exel, Inc.*, the Eleventh Circuit upheld a jury verdict of intentional discrimination, finding a reasonable jury could have found that the application of the employer's policy of favoring current employees who are about to be laid off for open positions was merely a pretext for sex discrimination against the charging party.[696] The appellate court, however, upheld the district court's order vacating punitive damages awarded by the jury.

The court found that a reasonable juror could have found against the employer because the jury heard evidence that: (1) the hiring manager had the discretion to hire the charging party despite being presented with a priority transfer practice (PTP) candidate; and (2) the evidence showed that the hiring manager harbored a bias against women. Based on that evidence, the Eleventh Circuit held that a reasonable jury could have concluded that the hiring manager maintained discretion over his own hiring decisions regardless of the PTP process, and that he exercised that discretion in conformity with his discriminatory animus.

On the punitive damages question, the Eleventh Circuit noted that Title VII allows for recovery of punitive damages only if an employer engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[697] That standard focuses on the decision-maker's state of mind, and the EEOC must also impute liability for the punitive damages to the employer. Under Eleventh Circuit precedent, liability can be imputed to an employer by showing the discriminating employee was a high-level employee, or that high-level employees condoned the decision-maker's discriminatory conduct. In this case, the appellate court found the EEOC failed to show the hiring manager was sufficiently prominent in the corporate hierarchy. Accordingly, the Eleventh Circuit affirmed the district court's vacatur of the jury's punitive damages award.

In *EEOC v. Draper Dev. LLC*, the EEOC alleged that a restaurant franchisee violated Title VII by engaging in *quid pro quo* sexual harassment with two teenage job applicants.[698] Specifically, a manager sent two job applicants sexually-explicit texts. In one instance, the manager expressly solicited sex in exchange for a job; in the other, he sent the text shortly after the applicant's job interview.

692 *Id.* at 436-37.
693 *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).
694 *Id.* at *14 (citing *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999)).
695 *Id.* (internal quotation omitted).
696 *EEOC v. Exel, Inc.*, 884 F.3d 1326 (11th Cir. 2018).
697 *Id.* at 1331.
698 *EEOC v. Draper Dev. LLC*, 2018 U.S. Dist. LEXIS 115124 (N.D.N.Y. July 11, 2018).

The parties filed cross-motions for summary judgment. With respect to the job applicant to whom the manager expressly offered a job in exchange for sex, the defendant claimed that the manager did not have the authority to hire her. The court rejected this defense, and explained that a reasonable factfinder could determine that even if the manager did not have *actual* authority to hire the applicant, it was reasonable to believe he had apparent authority to offer her the position based on the circumstances. The court noted that she was a teenager, had applied for a position, provided her contact information on her application, the defendant empowered the manager to access and review applications, and the manager held himself out as having authority to hire the applicant for the assistant manager position. The court determined that it was "undisputed" that the applicant refused the manager's advances, she was qualified for the job, and that the manager did not hire her. This refusal "clearly constitutes a tangible employment action." As such, the claim hinged on the factual issue of whether the charging party reasonably believed the manager had the authority to hire her—a question for the jury.

The employer also argued in its motion for summary judgment that the EEOC could not prove the requisite malice or reckless indifference required for an award of punitive damages. The court was unpersuaded, and held that a reasonable juror could award punitive damages based on the manager's actions and exercise of apparent authority.

Exel and *Draper* represent facially varying standards applied by courts in evaluating the scope of managers' actions that may be imputed to his or her employer for purposes of punitive damages awards.

With respect to backpay, the Fourth Circuit in *EEOC v. Baltimore County*[699] sided with the EEOC in determining that this remedy is mandatory, not discretionary, under the ADEA. Specifically, the court held "[r]etroactive monetary awards, such as the back pay . . . are mandatory legal remedies under the ADEA upon a finding of liability." The court reasoned that "[back pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA . . . we presume that Congress was aware of judicial interpretations of the FLSA when drafting associated provisions of the ADEA."

L. Settlements

Recent cases have highlighted the manner in which disputed settlement language can impact final settlement.

In *EEOC v. American Airlines Inc.*, the EEOC brought claims under the ADA.[700] The United States District Court for the District of Arizona adopted the parties' consent decree, and entered judgment. The consent decree provided that it would become "effective on the later of (i) the date it is signed by this Court or (ii) the date on which an order from the United States Bankruptcy Court for the Southern District of New York approving the monetary relief provided for in this Decree *becomes final and non-appealable*."[701] The company filed a motion to approve compromise. Following approval, two former pilots filed objections to the terms of the consent decree in the bankruptcy proceedings, arguing that the settlement amount was inadequate and that it deprived pilots of their right to bring ADA claims against the airlines. Following a hearing, the bankruptcy court approved the monetary settlement contained in the consent decree, and the parties drafted an amended consent decree.

The parties moved for entry of an amended consent decree that would modify: (1) the list of employees who receive written notice of the settlement—revised to include pilots; and (2) the effective date of the consent decree—revised to occur upon approval of the consent decree by the bankruptcy court, rather than at the time such order of approval becomes final and non-appealable. The court demurred, and held that the parties failed to present grounds for disregarding the final judgment

699 2018 U.S. App. LEXIS 26644 (4th Cir. Sept. 19, 2018).
700 *EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018).
701 *Id.* at *3 (emphasis added).

under Fed. R. Civ. P. 60(b) and failed to present any extraordinary circumstance that would warrant the proposed revision to the list of employees entitled to notice in the consent decree. The court also found that the proposed revision making the consent decree immediately effective upon court approval—sought for the purpose of preempting a stay of an order of approval pending and subsequent appeal—falls within the equitable relief contemplated by Fed. R. Civ. P. 60(b)(6).

Here, a seemingly innocuous provision regarding the effective date of an agreement provided an opening for an unforeseen challenge. Although it is impossible to consider every potential issue in drafting agreements, the instant case show the significant impact a minor drafting choice can have on the parties.

In *EEOC v. Halliburton Energy Services*, the charging party filed a discrimination charge alleging the defendant unlawfully fired him in violation of the ADA and ADEA because of a knee-related disability and his age.[702] The parties reached an agreement through the EEOC's alternative dispute resolution program whereby the EEOC would terminate its investigation of the employer, and the employer would pay the charging party $40,000 and, contingent on his passing pre-employment screening, rehire him into his original position.

The employer paid the $40,000, but did not rehire him. It contended that the agreement merely required it to offer the charging party a position, and the charging party failed to obtain the requisite medical clearance for the position. The EEOC sued for breach of contract. The defendant/employer moved for summary judgment.

The court found that the agreement was unambiguous, and its meaning was therefore a question of law. The agreement made no reference to vacancies; as such, if there was no appropriate vacancy, the defendant was obligated to create one for the charging party to fill. The sole factual question was whether the charging party passed the defendant's pre-employment screening. That screening consisted entirely of a medical clearance process. The parties disagreed as to whether he had in fact obtained the proper medical clearance for a position offered in Iraq. The defendant admitted, however, that the charging party was medically cleared to "work in a location that had Western-style medicine available for care." It was therefore undisputed that the charging party had passed the pre-employment screening applicable to positions in countries with Western-style medicine. Accordingly, the court found that the agreement obligated the defendant to hire him as an employee in one of these countries, and the company's refusal to do so breached the agreement. The court also rejected the defendant's argument that the absence of a hire-by date negated the agreement.

Lastly, in *EEOC v. Columbine Management Services*, the United States District Court for the District of Colorado admonished the EEOC for requiring a settlement agreement to be approved by the court in the form of a consent decree.[703] The matter before the court was the parties' Joint Motion for Entry of Consent Decree, which the court granted in part. Yet, the court offered some choice words on the EEOC's pursuit of a consent decree as opposed to a routine settlement agreement:

> It is unclear why a consent decree—and the concomitant burdens on the court from retaining jurisdiction to oversee that decree—is routinely justified and particularly justified in this case. There is nothing in Title VII or other applicable law that requires settlements in actions brought by the EEOC to be approved by a court.
>
> The EEOC chooses to seek consent decrees in cases as a matter of course, not because the particular circumstances of the case warrant such a decree.

702 *EEOC v. Halliburton Energy Servs.*, 2018 U.S. Dist. LEXIS 103509, at *2 (S.D. Miss. June 12, 2018).
703 *EEOC v. Columbine Mgmt. Servs.*, 2018 U.S. Dist. LEXIS 124406 (D. Colo. July 25, 2018).

The court further advised that consent decrees and judicial oversight are appropriate in cases of complex settlements that "must be effectuated over a long period of time or where one can readily anticipate heated disputes arising over the parties' compliance with their agreement." The court provided examples of cases in which the complexity of settlement may require consent decree and judicial oversight, including: "cases involving school desegregation or prison reform or reformation of wide-ranging public employment hiring systems." In contrast, the court advised that consent decrees and judicial oversight are not appropriate for "run-of-the-mill litigation" or to enforce "simple and non-controversial settlements." The court reasoned that such use of consent decrees was a waste of judicial resources and invites future litigation. Lastly, the court specifically criticized the EEOC, "[p]erhaps, the most troubling aspect of the EEOC's routine approach is that it inappropriately leverages its executive branch enforcement role." It is not clear that the approach in *Columbine Management Services* will be embraced by judges outside of Colorado. The opinion, however, may provide traction for employers in "run-of-the-mill" discrimination cases hoping to settle matters without a consent decree.

M. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party. . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[704] By its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[705]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[706] 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."[707] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[708] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[709]

In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $1.9 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[710] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees claiming to be sexually harassed. The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies (in this instance, the EEOC's failure to conduct an adequate pre-suit investigation). The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the

704 42 U.S.C. § 2000e-5(k).
705 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
706 *Id.* at 422.
707 *Id.*
708 *Id.* at 421.
709 *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)).
710 *EEOC v. CRST Van Expedited, Inc.*, 2017 U.S. Dist. LEXIS 155134, at *18 (N.D. Iowa Sept. 22, 2017).

EEOC's pre-lawsuit requirements.[711] In essence, a favorable ruling on the strict merits is not a predicate to an award of attorneys' fees under Section 706 of Title VII. The court, however, reduced the fee award to $1.9 million—from the initial $4.5 million award in 2009. The lower amount was warranted, the court reasoned, because not all of the EEOC's claims were deemed frivolous.

In *EEOC v. CVS Pharmacy, Inc.*, the EEOC sued defendant alleging a pattern or practice of preventing enjoyment of the rights and benefits of Title VII by virtue of severance terms restricting signatories from filing a charge or otherwise participating in EEOC proceedings.[712] Defendant filed a motion to dismiss or, in the alternative, for summary judgment, which was granted on October 7, 2014. On appeal, the Seventh Circuit upheld summary judgment in favor of CVS. CVS then sought attorney's fees before the district court, alleging that the lawsuit was frivolous because the factual premise of the EEOC's case was unreasonable and because the lawsuit was filed in violation of Title VII and the EEOC's regulations. The EEOC argued that the lawsuit was not frivolous or alternatively, that defendant's proposed fees were unreasonable. The district court granted in part and denied in part defendant's motion, finding that the EEOC failed to comply with its enabling statute and its regulations, which first required the EEOC to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred or is occurring (conciliation). This warranted a fee award. The court then reduced the amount of hours billed by defendant in support of its motion from 574.3 hours to 300 hours. The EEOC appealed that decision to the Seventh Circuit.

The Seventh Circuit reversed in part the $307,902 fee award, finding the EEOC's claims neither legally nor factually frivolous. The court noted the EEOC's legal position did not have to satisfy a high burden, but rather must simply have a "colorable legal argument" for its claims. "Comparing the EEOC's arguments to then-existing law shows that it met this low bar." Specifically, the EEOC had a "textual foothold" to pursue its claim, "modest" support in prior case law, and "no case squarely foreclosed the EEOC's interpretation." The court explained that, while precedent may not have favored the EEOC's position, "the fee statute does not punish a civil rights litigant for pursuing a novel, even if ambitious, theory." Moreover, the appellate court stated the lower court based its fee award not on the statute, but on the EEOC's own regulations regarding conciliation. "Regulations that parallel the statutory language cannot independently render the suit unreasonable."

711 *CRST Van Expedited, Inc. v. EEOC*, 136 S. Ct. 1642, 1646 (2016).
712 *EEOC v. CVS Pharmacy, Inc.*, 892 F.3d 307, 309 (7th Cir. 2018).

APPENDIX A - EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[713]

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$9.95 million	Disability Discrimination	The EEOC alleged an airline violated the ADA by requiring employees to have no restrictions before returning to work following medical leave. The airline agreed to pay $9.95 million, which the EEOC asserts is worth more than $14 million if cashed at the time of the agreement, to a class of an estimated 1,500 individuals. A Settlement Administrator will convert the stock into cash and handle the claim process for distribution to qualifying employees. Under the terms of the two-year consent decree, the airline is enjoined from future discrimination and retaliation on the basis of disability, must adopt policies on reasonable accommodations, and provide periodic training on the ADA.	U.S. District Court for the District of Arizona	11/20/2017
$4.4 million	Disability Discrimination	The EEOC alleged a railway steel manufacturer violated the ADA by failing to hire applicants who failed a third-party-administered nerve conduction test for carpal tunnel syndrome, instead of conducing individualized assessments of each applicant's ability to do the job safety. As part of the consent decree, the manufacturer will pay $4.4 million to a class of 40 job applicants who were denied employment as a result of the screening process. The company will also have to make job offers to some of the applicants, and adopt policies to prevent similar instances of discrimination.	U.S. District Court for the Southern District of Illinois	6/12/2018
$3.75 million	Harassment, National Origin And Race Discrimination	According to the EEOC, a poultry plant engaged in sexual harassment, national origin and race discrimination, and retaliation against classes of Hispanic and female employees. The EEOC contends supervisors touched and/or made sexually suggestive comments to female Hispanic employees, hit Hispanic employees and charged many of them for normal work activities. Employees who complained were allegedly fired or subject to other adverse actions. Under the terms of the three-year consent decree, the company will pay $3.75 million to the class of approximately 150 individuals, and provide various forms of injunctive relief to prevent future instances of discrimination. The company has agreed to implement new anti-discrimination policies and procedures, conduct anti-discrimination training, and create a 24-hour hotline for reporting discrimination complaints in English and Spanish.	U.S. District Court for the Southern District of Mississippi	8/1/2018

713 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2018. The significant consent decrees and conciliation agreements in Appendix A include those amounting to $500,000 or more. Notable conciliation agreements are included in the shaded boxes. Appendix A also includes significant jury verdicts and judgments awarding more than $100,000 to plaintiffs and more than $500,000 to defendants.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$3.5 million	Sexual Harassment	According to the EEOC, managers and coworkers subjected both male and female customer service employees to harassment, including a sexually hostile work environment. The EEOC alleged the charging parties complained about the harassment, but that human resources failed to take appropriate action. Under the terms of the three-year consent decree, the company will pay $3.5 million to a class of 44 victims, as well as provide injunctive relief, including hiring a third-party monitor, creating an internal equal employment opportunity consultant and internal compliance officer positions, and providing sexual harassment training. The company will also revise its anti-discrimination and retaliation policies and procedures, and maintain records of any future sexual harassment and retaliation complaints, audits, and reporting.	U.S. District Court for the Eastern District of California	8/1/2018
$3.5 million	Disability Discrimination	The EEOC alleged that a restaurant employer violated the ADA by requiring employees with disabilities or medical conditions to be 100% healed before returning to work. The EEOC contends this policy did not allow the employer and employees to engage in an interactive process to determine whether a reasonable accommodation was available. As a result, the Commission contends employees were fired or forced to quit because they were regarded as disabled, had a record of disability, and/or were associated with someone with a disability. Under the terms of the decree, the company will pay $3.5 million to a class of affected individuals. In addition to the financial payment, the company has agreed to hire an EEO specialist to revise its disability policy and procedures, and conduct ADA training. The decree also requires the company to track employee disability accommodation requests and give a hiring preference to former workers who are class members.	U.S. District Court for the District of Nevada	6/6/2018
$3.2 million	Sex Discrimination	The EEOC alleged a company's use of strength and fitness tests had a disparate impact on women job applicants. The EEOC's lawsuit alleged that women passed these tests at significantly lower rates than did men, disqualifying them from various positions, even those that had been awarded to the applicants prior to the administration of the tests. Under the terms of the consent decree, the company agreed to stop using both tests, and any future physical fitness tests without proving their necessity. The company agreed to hire the class members who had applied for positions for future job openings, so long as other applicants are not better-qualified.	U.S. District Court for the Southern District of West Virginia	6/13/2018
$2.85 million	Age Discrimination	The EEOC alleged a restaurant chain discriminated against applicants who were age 40 and older by denying them front-of-the-house and back-of-the-house positions. The consent decree resolving the case sets up a claims process that will identify and compensate those affected individuals age 40 and older who applied to the restaurant for front-of-the-house or back-of-the-house positions at 35 of the restaurants but were denied a position on the basis of age. In addition to the monetary relief, the decree requires significant changes to the restaurant's recruitment and hiring processes. It also includes an injunction preventing the restaurant from discriminating on the basis of age in the future and requires the company to pay for a decree compliance monitor who is charged with ensuring that the company does not discriminate further and complies with the decree's terms.	U.S. District Court for the Southern District of Florida	5/3/2018

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$2.66 million	Pay Discrimination	The EEOC alleged the defendant university paid female professors less than it paid male professors who were performing substantially equal work under similar working conditions. To settle the matter, the defendant agreed to pay $2.66 in monetary damages to seven female full-time professors who participated in the lawsuit. In addition, the university will publish annually salary and compensation information to tenure, tenure-track, and contract faculty, and will hire a labor economist to conduct an annual compensation equity study. The university will use an independent consultant to review its pay practices and standards used to issue raises. Finally, the consultant will assist the university with revising its anti-discrimination policies and training. The agreement will be in place for six years, but could terminate after five years if the university can demonstrate a record of compliance.	U.S. District Court for the District of Colorado	6/1/2018
$2.65 million	Sexual Harassment	The EEOC alleged a company's managers, human resource officials, and co-workers regularly subjected female employees to sexual harassment, including requests for sex and sexual favors. The company also allegedly retaliated against those who complained. As part of the conciliation agreement, the company will provide back pay, compensatory damages and remedial relief to the victims, and implement a new code of conduct, agree to third-party monitoring, creating of a sexual harassment complaint hotline, and increase training. The company must also create and maintain documents regarding sexual harassment complaints, and post notices at their facilities.	* 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 37 of the EEOC's FY 2018 Performance and Accountability Report.
$2.5 million	Race, Color, and National Origin Discrimination	The EEOC alleged black Haitian dishwashers at a hotel were wrongfully terminated on the basis of their race, color, and national origin and were replaced by a staffing agency workforce of mostly light-skinned Hispanics. The dishwashers claimed their supervising chefs called them "slaves" and admonished them for speaking Creole among themselves, while Hispanic employers were permitted to speak Spanish. After complaining to human resources, the dishwashers were terminated. As part of the three-year consent decree, the employer will pay $2.5 million to 17 black Haitian dishwashers. The hotel will also provide equitable relief, including training and the use of an independent consent decree monitor. The employer will also be required to provide data on terminations, layoffs, and involuntary separations that occur while the decree is in effect.	U.S. District Court for the Southern District of Florida	7/30/2018
$2.25 million	Disability Discrimination	The EEOC had lodged nine charges of discrimination against a company for allegedly failing to properly accommodate employees with disabilities. Under the terms of the settlement, the company has agreed to pay $2.25 million to the individual charging parties, and to provide annual financial support to selected "non-profit entities dedicated to helping individuals with disabilities find and keep employment." As part of the settlement agreement, the company has agreed to update its policies and procedures to improve accommodations provided to employees returning to work after disability-related absences. The company also agreed to establish a dedicated accommodation and leave management team to provide assistance to its employees.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	8/23/2018

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$2.2 million	Race Discrimination and Harassment	The EEOC alleged the company discriminated against and harassed a class of 420 African-American employees based on their race. The company allegedly discriminated against the class in hiring, assignment and promotion. In addition to paying $2.2 million to the class, the company has agreed to a claims administrator, and pay $180,000 to hire an outside expert. The company will also implement a new training program for promoting African Americans, and specialized training for Human Resources, supervisors, and employees on harassment (including civility and bystander intervention concepts). In addition, the company will revise its harassment policy, and establish new recordkeeping policies and controls to improve accuracy in HRIS data input. For three years, the company will submit quarterly reports to the EEOC on its hires, promotions, and complaints.	* 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 37 of the EEOC's FY 2018 Performance and Accountability Report.
$1.75 million	Disability Discrimination	The EEOC alleged a company's full duty return-to-work, maximum leave, and reassignment policies violated the ADA. The company will pay $1.75 million to resolve the matter, and agreed to revise its ADA policies, provide training, and share their ADA policies, training modules, relevant forms, and the press release, with entities that have contractual relationships with the company. The company also agreed to provide $250,000 per year to one or more non-profit entities dedicated to helping individuals with disabilities find and keep employment.	* 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 2018 Performance and Accountability Report.
$1.7 million	Disability Discrimination	The EEOC alleged a company did not permit employees who were on medical leave to be reinstated unless they could return to work without any restrictions, and routinely denied requests for reasonable accommodations. Under the terms of the conciliation agreement, the company agreed to end its return-to-work policy and cease requiring employees to disclose prescription medications. The company also revised its reasonable accommodation policy to comply with the ADA, and will provide ADA training to all supervisors and managers.	* 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 2018 Performance and Accountability Report.
$1.63 million	Race, National Origin, and Religious Discrimination, and Retaliation	The EEOC found reasonable cause to believe Somali, African and Muslim employees were harassed, denied their requests for prayer breaks, and fired from their employment at a beef processing plant. The company denied the charges, but agreed to settle the matter. Under the terms of the settlement, the company will continue conducting mandatory training for all management and hourly employees at the facility at issue on EEO law and provide translation services to employees.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	9/14/2018

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$1.1 million	Sex Discrimination	The EEOC alleged a company discriminated against more than 200 fathers by denying them the same leave benefits and return-to-work benefits as those provided to new mothers. The company has agreed to pay $1.1 million to the class. Under the terms of the one-year consent decree, the company will allow all new parents to take up to 20 weeks of paid leave and up to six weeks of flexible work arrangements upon return from leave. This child-bonding leave is separate from short-term disability leave that might be offered for pregnancy-related medical conditions. The company has also agreed to provide training and guidance on the parental leave.	U.S. District Court for the Eastern District of Pennsylvania	7/17/2018
$1 million	Disability Discrimination	The EEOC alleged an HVAC component manufacturer violated the ADA by maintaining attendance and leave policies discriminated against workers with disabilities. Under the agreement, which will be in place for two and a half years, the company will pay a class of individuals $1 million. In addition, the company has agree to take other non-monetary steps, including revising its leave and attendance policies, attempting to reinstate workers impacted by the policies, and appointing an ADA Coordinator to oversee the company's implementation of the terms of the consent decree. Among other tasks, the ADA Coordinator will assist the company in reviewing and, if necessary, revising its written policies and procedures regarding its complaint procedure for complaints of disability discrimination, and will create and maintain an Accommodation Log that documents any time off or leave requested by a qualified individual with a disability as an accommodation for that employee. The company is also barred from taking adverse action against employees who are absent due to their disability, and is ordered to conduct training on the ADA.	U.S. District Court for the Central District of California	7/17/2018
$975,000	Sexual Harassment	The EEOC alleged managers and coworkers at two restaurant franchises routinely sexually harassed over a dozen female employees, some of whom were teenagers. Under the four-year consent decree, the franchises will pay $975,000 to the victims of harassment, implement, distribute, and enforce tougher policies to prevent sexual harassment, establish procedures for investigating and addressing harassment complaints, and conduct sexual harassment training for all employees.	U.S. District Court for the Southern District of Illinois	7/19/2018
$850,000	Sexual Harassment and Retaliation	The EEOC alleged a supervisor at the defendant company routinely harassed six female janitors, and that two managers were unfairly criticized and disciplined in retaliation for supporting the sexual harassment claims, and one manager was forced to resign. Per the terms of the consent decree, the defendant will pay $850,000 to the claimants, revise its EEO policies and complaint and investigation procedures, institute supervisor accountability policies concerning discrimination issues, conduct workplace training, hire a consultant to monitor compliance, and provide reports to the EEOC regarding its compliance with the consent decree.	U.S. District Court for the Northern District of California	5/10/2018

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$832,500	Disability Discrimination	According to the EEOC, a grocery chain discriminated on the basis of disability by denying reasonable accommodations to employees with medical conditions. Such possible accommodations included additional leave, working with restrictions and reassignment. The EEOC claimed its investigation revealed the employer engaged in a practice of disciplining and/or firing employees because of their need for reasonable accommodation under the ADA. Among other alleged practices, the company maintained a policy requiring employees to have no restrictions or be 100% ready to return to work. As part of the settlement, the company agreed to pay $75,000 to the charging party, and $757,500 to other aggrieved individuals the EEOC identified during its investigation. In addition to the monetary payments, the company has agreed to amend its disability-related policies and procedures and conduct training for its human resources team, store directors, assistant store directors and employees.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	7/12/2018
$625,400	Sex Discrimination	The EEOC alleged the defendant failed to hire female applicants for its boxer/packer position, and that women were subjected to a hostile work environment on the basis of their sex. Under the terms of the consent decree, the defendant has agreed to pay $625,000 to a group of women who were denied employment as boxer/packers at the facility in question between January 2013 and December 2015, and to two employees who were allegedly subjected to gender-based harassment.	U.S. District Court for the Western District of Kentucky, Louisville Division	4/16/2018
$570,000	Sexual Harassment	The EEOC alleged that the male president of one of the defendant companies engaged in a pattern of sexually harassing male employees, many of whom allegedly quit on account of the harassment or were retaliated against. The defendants agreed to a three-year consent decree providing for $570,000 to a class of 18 male employees. The decree provides that the alleged harasser should have no further involvement with the operations should must divest control of the companies. In addition, the decree requires use of an independent complaint process and investigations, as well as a centralized system for tracking harassment and retaliation complaints. The defendants must conduct annual harassment training, and hold supervisors, managers, and company officers accountable for harassment and retaliation.	U.S. District Court for the District of Hawaii	5/30/2018

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$550,000	Sexual Harassment and Retaliation	The EEOC alleged an employer engaged in sexual harassment and retaliation from 2006 through 2012. Among other allegations, the EEOC claimed that the harassment included sexual assault, inappropriate and offensive sexual contact, and offensive and sexually explicit comments. The EEOC alleges also that the company retaliated against female employees who complained of harassment, including discipline, forcing them to quite, firing them, or subjecting them to unsafe working conditions. The EEOC and the Arizona Civil Rights Division of the Attorney General's Office (ACRD) filed similar cases, which were consolidated. The district court initially dismissed the claims on behalf of a class of women identified during the litigation and held that some of the allegations did not rise to the level of actionable harassment. The EEOC and ACRD appealed the decision to the Ninth Circuit, which reversed and remanded the case to the district court. Specifically, the appellate court held that the EEOC and ACRD must be allowed to discover additional aggrieved individuals during litigation when they conciliate on behalf of a class. Under the terms of the consent decree, the company will pay $550,000 to 16 women who were dismissed from the lawsuit in 2012. The company will also send letters of regret to the women and provide employment references for them. In addition, the company has agreed to review its equal employment opportunity policies, ensure that all complaints of sexual harassment and retaliation are immediately and thoroughly investigated by a neutral employee, and ensure that the complainant is informed of the results of the investigation. The company agreed to designate certain alleged harassers as ineligible for rehire, post notices of the consent decree in the affected facilities, conduct anti-discrimination training, and include EEO compliance when evaluating its managers.	U.S. District Court for the District of Arizona	1/8/2018

SELECT EEOC JURY AWARDS OR JUDGMENTS IN FY 2018

JURY OR JUDGMENT AMOUNT	CLAIM	DESCRIPTION	CASE CITATION	EEOC PRESS RELEASE
$5.1 million	Title VII Religious Discrimination and Retaliation	A federal jury in Brooklyn, NY unanimously found that an employer and its parent company violated Title VII when the employer forced 10 employees to engage in religious practices at work, creating a hostile work environment. The employer also terminated an employee who opposed these practices. The EEOC alleged the company forced the employees to participate in prayers, rituals and practices as part of a belief system called "Harnessing Happiness" or "Onionhead," which was created and administered by an aunt of the parent company's CEO. The jury awarded $5.1 million in compensatory and punitive damages to the 10 individuals.	*EEOC v. United Health Programs of America, Inc. and Cost Containment Group Inc.,* No. 14-CV-03673, (E.D.N.Y. Apr. 25, 2018) (verdict form)	4/26/2018
The jury awarded the charging party $27,565 in back pay and $250,000 in compensatory damages. The court awarded $445,322 in attorney's fees and $1,677 in expenses.	Disability Discrimination	The Sixth Circuit upheld a jury's verdict and award of damages in favor of a diabetic employee who was terminated for violating the company's anti-grazing policy during a hypoglycemic episode. The employer argued there were other ways the employee could have addressed her need to balance her blood sugar level, but the court found that it was reasonable for the jury to conclude the employee had reason to believe she would have been disciplined for taking those other measures. The Sixth Circuit panel affirmed in all respects, and also upheld the district court's fee award.	*EEOC v. Dolgencorp, LLC, No. 17-6278 (6th Cir. Aug. 7, 2018)*	n/a
$250,000	Title VII Sexual Harassment	The charging party was the victim of a customer's stalking for over a year. The EEOC claimed the store did not take steps necessary to shield the employee from the customer, such as banning the customer from the premises. Although the defendant won summary judgment on the EEOC's constructive discharge claim, the harassment claim advanced to trial, where the EEOC won a verdict for the charging party. Post-trial, the defendant sought to overturn the verdict, while the EEOC sought back pay. The Seventh Circuit upheld the verdict, and remanded the matter to the district court for additional back pay relief.	*EEOC v. Costco Warehouse Corp.*, No. 17-2432 (7th Cir. Sept. 10, 2018)	n/a

APPENDIX B – FY 2018 EEOC AMICUS AND APPELLANT ACTIVITY[714]

FY 2018 – APPELLATE CASES WHERE THE EEOC FILED AN AMICUS BRIEF

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Nieves-Borges v. El Conquistador Partnership	U.S. Court of Appeals for the First Circuit 18-1008	5/03/2018 (amicus filed)	Title VII	Harassment Sex **Result:** Pending
Background: Plaintiff filed his EEOC charge in February 2015, alleging defendant's director of human resources sexually harassed him and subjected him to a hostile work environment between 2011 and 2014. Plaintiff also claimed defendant retaliated against him when he was terminated after filing his EEOC charge. The district court granted summary judgment for defendant on both claims. The court held that plaintiff's sexual harassment and hostile work environment claims were untimely because there was no discriminatory anchoring event within the statute of limitations period. The court also held plaintiff failed to show that his protected activity was the "but for" cause of the alleged retaliation. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred by holding that incidents of harassment occurring prior to the charge-filing period are irrelevant unless there is an independent statutory violation occurring within the charge-filing period; and (2) Whether the district court erred in holding that plaintiff's retaliation claim failed because he could not show the hotel's proffered non-discriminatory reason was pretextual. **EEOC's Position:** The EEOC argued that all incidents of harassment, regardless of whether they independently constitute a violation of Title VII, can properly "anchor" the admissibility of other incidents of harassment that occurred outside of the statute of limitations. The EEOC also contended that "but for" causation does not require a party show that the protected activity was the sole cause of the alleged retaliation. Rather, once a plaintiff has established that retaliation was a but-for cause of an adverse employment action, the defendant is liable under Title VII, and plaintiff need not show that additional asserted reasons for the defendant's actions were pretextual. **Court's Decision:** Pending.				
Roy v. Correct Care Solutions	U.S. Court of Appeals for the First Circuit 18-1313	7/17/2018 (amicus filed)	Title VII	Sex **Result:** Pending
Background: Plaintiff worked as a nurse at Maine State Prison. Plaintiff alleged that she was subjected to a hostile work environment both because of her sex and for her whistleblowing activities. Plaintiff asserts that several male corrections officers made sexual jokes and demeaning comments to her as well as engaged in sexually suggestive behavior. Plaintiff claims that her complaints were unaddressed by defendant and that she was told to stop filing so many complaints. Plaintiff was terminated after her security clearance was revoked in response to a false complaint that she made about the response time of a corrections officer to a medical emergency. Plaintiff contends that she was fired because of her complaints about her alleged hostile work environment. The district court granted summary judgment for defendant. The court first determined that some of the alleged incidents cited by plaintiff in support of her hostile work environment and retaliation claims were not because of her sex, and thus would not be considered. The court analyzed the remaining incidents and determined that plaintiff could not establish a *prima facie* case of retaliation because she could not prove that she engaged in protected conduct under Maine law. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred by characterizing some incidents of harassment as based on plaintiff's sex and others as based on her whistleblowing; and (2) Whether the district court erred by applying state law, rather than federal law, to plaintiff's Title VII retaliation claim **EEOC's Position:** The EEOC argued that the district court erred in its determination that some of the incidents cited by plaintiff to support her Title VII claims were not motivated by her sex. The EEOC argued that the court should not have assigned either a sex-based or whistleblower-based motivation for each of the alleged incidents, and failed to consider that plaintiff's sex was the "but-for" cause of all of plaintiff's cited incidents. The EEOC further argued the court improperly applied Maine law, and not federal law, to the analysis of whether plaintiff engaged in protected activity. **Court's Decision:** Pending. Oral argument was heard on December 6, 2018.				

714 The information included in Appendix B, including the "*FY 2018 Appellate Cases Where the EEOC Filed an Amicus Brief*" and "F*Y 2018–Appellate Cases Where the EEOC Filed as the Appellant*" were pulled from the EEOC's publicly available database of appellate activity *available at* http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by circuit.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Cargian v. Breitling USA, Inc.	U.S. Court of Appeals for the Second Circuit No. 16-3592	2/2/2017 (amicus filed) 9/10/2018 (decided)	Title VII	Sexual Orientation Discrimination **Result:** Pro-Employee
Background: Plaintiff brought a cause of action for sex discrimination under Title VII. The district court granted summary judgment for defendant, holding that Title VII does not proscribe discrimination because of sexual orientation. The district court further held that plaintiff's claim that as a gay man he was treated as "one of the girls" impermissibly "conflates a sexual orientation discrimination claim with a gender-stereotyping claim." **Issue EEOC is Addressing as Amicus:** Whether the court should reconsider its precedent holding discrimination on the basis of sexual orientation is not cognizable under Title VII. **EEOC's Position:** The EEOC argued that sexual orientation discrimination necessarily involves sex stereotyping, which Title VII prohibits. The EEOC also argued that by definition, sexual orientation is discrimination "because of . . . sex" and therefore violates Title VII. The EEOC additionally contended that sexual orientation violates Title VII because it constitutes associational discrimination. Lastly, the EEOC argued the Second Circuit should revisit its precedent holding Title VII does not preclude sexual orientation discrimination because the legal landscape has shifted, and the precedent is both misplaced and leads to in consistent legal results. **Court's Decision:** The Second Circuit vacated and remanded the lower court's grant of summary judgment in the defendant's favor in light of the court's decision in *Zarda v. Altitude Express, Inc*., 883 F.3d 100 (2d Cir. 2018) (*en banc*), finding that Title VII's prohibition on discrimination based on "sex" also prohibited discrimination based on sexual orientation. "Because the legal framework for evaluating Title VII claims has evolved substantially in this Circuit, we conclude the district court should have the opportunity to consider in the first instance whether Cargian's claims can survive a motion for summary judgment after *Zarda* altered that legal landscape."				
Davis-Garett v. Urban Outfitters, Inc.	U.S. Court of Appeals for the Second Circuit No. 17-3371	2/9/2018 (amicus filed)	Title VII	Retaliation **Result:** Pending
Background: Plaintiff filed an action for age-based hostile work environment and retaliation in violation of the ADEA. Plaintiff worked for defendant from September 2012 until October 2013 and claimed that during this period she was called "Mommy," denied transfer requests, told her age did not fit the store's demographic, and disciplined more harshly than her younger coworkers. Plaintiff claimed that she was retaliated against and ultimately fired after calling the company's official hotline to complain about the alleged age discrimination. The district court granted summary judgment for defendant on all claims, holding that plaintiff failed to provide sufficient evidence that she was subjected to an "adverse employment action," and that incidents that occurred outside the 300-day statute of limitations were time-barred. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court applied the wrong standard for determining whether plaintiff adduced sufficient evidence to support a prima facie case of ADEA retaliation; and (2) Whether the district court erred in refusing to consider evidence of conduct that occurred prior the charge-filing period in connection with plaintiff's hostile work environment and retaliation claims. **EEOC's Position:** The EEOC argued that the district court applied the wrong legal standard in concluding that plaintiff failed to adduce sufficient evidence to support a prima facie case of ADEA retaliation. The EEOC argued that instead of applying the "adverse employment action" standard for substantive discrimination claims to plaintiff's claim, the district court should have required only that the challenged action "might well have dissuaded a reasonable worker from making or supporting a charge of discrimination." The EEOC further argued that the district court misconstrued Supreme Court precedent, and should have considered discrete acts that occurred outside the 300-day statute of limitations as background evidence to support an otherwise timely claim. **Court's Decision:** The matter is pending before the court. Oral argument was heard on October 23, 2018.				

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Lenzi v. Systemax, Inc.	U.S. Court of Appeals for the Second Circuit 18-979	8/16/2018 (amicus filed)	EPA Title VII	Retaliation Sex **Result:** Pending

Background: Plaintiff worked as the director of risk management for defendant. Plaintiff brought suit for pay discrimination under the EPA and Title VII, pregnancy discrimination under Title VII, and retaliation under the EPA and Title VII. Plaintiff alleged her base salary and bonuses were significantly lower than that of her male colleagues, and that defendant took adverse employment actions against her when she complained about these facts to the CEO. Further, plaintiff alleged she was the subject of sexist comments and behavior by defendant when she informed defendant that she was pregnant.

The district court concluded plaintiff did not prove a *prima facie* case of pay discrimination under the EPA and Title VII because the male colleagues with whom she compared base salaries did not perform "substantially equal" work, and thus could not be compared to her salary. Further, the district court rejected plaintiff's sex discrimination claim because she failed to establish that the positions held by her counterparts were substantially equal to the position that she held. The court went on to say that even if plaintiff did establish that her counterparts' jobs were substantially equal to her position, she did not produce evidence of discriminatory animus sufficient to establish a *prima facie* case of discriminatory pay based on sex. In regard to plaintiff's pregnancy discrimination claim, the court similarly concluded that plaintiff could not establish a *prima facie* case because the circumstances did not give rise to an inference of discrimination. Finally, the district court granted summary judgment to defendant on plaintiff's EPA and Title VII retaliation claims, reasoning plaintiff did not plead sufficient facts to establish that she engaged in protected activity.

Issue EEOC is Addressing as Amicus: (1) Whether the district court misapplied the relevant standard in analyzing plaintiff's Title VII pay discrimination claim; (2) Whether the district court erred when it determined that plaintiff failed to establish a *prima facie* case of pregnancy discrimination under Title VII; and (3) Whether the district court erroneously concluded that plaintiff failed to establish a *prima facie* case of retaliation under Title VII.

EEOC's Position: The EEOC argued that a Title VII pay discrimination plaintiff need not establish an EPA prima facie case or demonstrate "equal pay for equal work." The EEOC contended that the standard for Title VII pay discrimination on the basis of sex is different from the EPA standard, and encompasses situations that would not be actionable under the EPA, including plaintiff's claim. Instead, the EEOC argued that to survive summary judgment plaintiff only needed to present direct evidence of pay discrimination or may proceed under the *McDonnell Douglass* burden-shifting framework or indirect evidence approach. The EEOC further asserted that the district court erred in deciding that plaintiff failed to establish a *prima facie* case of pregnancy discrimination. The EEOC argued that though there were no explicit negative comments or criticism based on plaintiff's pregnancy, the proximity in time between learning of her pregnancy and an adverse employment action should be sufficient to establish pregnancy discrimination. Finally, the EEOC contended plaintiff established a *prima facie* case of retaliation because a jury could conclude that plaintiff's multiple complaints about her perceived salary disparity lead to termination.

Court's Decision: Pending

Zarda v. Altitude Express, Inc.	U.S. Court of Appeals for the Second Circuit No. 15-3775	6/23/2017 (amicus filed) 2/26/2018 (decided) 5/29/2018 (cert. petition filed)	Title VII	Sexual Orientation Discrimination **Result:** Pro-Employee

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

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

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

Court's Decision: On February 26, 2018, a majority of the entire U.S. Court of Appeals for the Second Circuit held that Title VII expressly prohibits workplace discrimination on the basis of sexual orientation.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Ruggiero v. Mount Nittany Medical Center	U.S. Court of Appeals for the Third Circuit No. 17-2227	6/27/2017 (amicus filed) 6/5/2018 (decided)	ADA	Disability Reasonable Accommodation Retaliation **Result:** Pro-Employee

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

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

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

On plaintiff's retaliation claim, the district court did not find that plaintiff participated in any protected activity.

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

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

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

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

Court's Decision: The Third Circuit panel vacated the district court's decision, finding the plaintiff's ADA claims were sufficient to survive a motion to dismiss. According to the court, the plaintiff's complaint "raised three plausible inferences: (1) plaintiff was a qualified individual with a disability; (2) defendant was on notice of plaintiff's alleged disability and request for an accommodation; and (3) defendant failed to satisfy its obligations to engage in the interactive process. At the pleadings stage, these inferences are sufficient to allow the failure to accommodate claim to proceed." The court also found the dismissal of the plaintiff's retaliation claim was premature. The plaintiff had identified protected activity (her request for an accommodation) and an adverse action (her termination). The court determined the temporal proximity between her request for an accommodation and her termination raises a plausible inference of causation.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Toney & Orr v. New Kensington-Arnold School District	U.S. District Court for the W.D. of Pennsylvania (in the 3d Cir.) No. 17-1285	2/20/2018 (amicus filed)	ADEA	Retaliation **Result:** Pending

Background: Plaintiff Toney filed an EEOC administrative charge alleging defendant discharged her because of her age. Shortly after, defendant suspended and discharged Toney's husband, Plaintiff Orr. Toney sued defendant for age discrimination and retaliation in violation of the ADEA and state law based in part on the suspension and discharge of her husband. Orr sued for retaliatory suspension and discharge under the ADEA and state law, which he alleged occurred because of his wife's pending administrative charge. Defendant filed a motion to dismiss Toney's and Orr's respective retaliation claims as implausible. Defendant also sought dismissal of Orr's claims of harassment based on a failure to exhaust, which the EEOC did not address in its amicus brief and is not pertinent to this report.

Issue EEOC is Addressing as Amicus: Whether or not Toney can bring a retaliation claim based on Orr's termination, and whether or not Orr can bring a retaliation claim since his wife was not a current employee at the time defendant suspended and fired him.

EEOC's Position: The ADEA makes it an unlawful employment practice to "discriminate" against an employee for filing a charge with the EEOC or engaging in other protected activity. The Supreme Court has broadly interpreted the anti-retaliation provision of the ADEA to cover any action that could dissuade a reasonable worker from making or supporting a charge of discrimination. The Supreme Court has extended this to anyone with an interest arguably sought to be protected by the statute to sue (fiancée in *Thompson v. North American Stainless*, 562 U.S. 170, 178 (2011)). Defendant argued that third-party retaliation claims can only be brought by the third party, and Orr, not Toney, is the third party, such that Toney cannot file a claim for retaliation based on the retaliation her husband claims to have suffered because of her own claim of discrimination under the ADEA. The EEOC argues that this is incorrect: firing an employee's spouse because of the employee's EEOC charge constitutes unlawful retaliation against the complaining employee (here, Toney), meaning Toney's retaliation claim is not a third-party claim, but rather, her claim is defendant unlawfully retaliated against *her* by firing her husband. The EEOC argues that a reasonable employee would be less likely to file an EEOC charge if she knew that doing so would lead her former employer to fire her husband, satisfying the *Burlington Northern* objective standard for a retaliation claim. The EEOC further argues that Toney has a plausible retaliation claim even though she is no longer an employee of the district because Title VII includes former employees and that, contrary to defendant's argument, this is not limited to only those employers who have allegedly interfered with former employee's ability to secure future employment.

The EEOC argues that Orr's retaliation claim is also plausible. Defendant argues that Orr's retaliation claim cannot stand because Toney was no longer employed when adverse employment actions were taken against Orr. The EEOC argues that the Supreme Court permits former employees to sue for retaliation, and further imposes no restriction that an adverse action need occur during the employment relationship of the party who engaged in the protected conduct.

Court's Decision: Pending.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Cooper v. The Smithfield Packing Co.	U.S. Court of Appeals for the Fourth Circuit No. 17-1002	3/27/2017 (amicus filed) 3/5/2018 (decided)	Title VII	Charge Processing Harassment Sex **Result:** Pro-Employer

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

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

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

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

Court's Decision: On March 5, 2018, in an unpublished opinion, the Fourth Circuit upheld the district court's decision. The court agreed that the plaintiff's complaint "simply failed to make out acts sufficiently extreme and outrageous to sustain an [intentional infliction of emotional distress] claim." Her complaint also failed to sufficiently allege that she suffered an adverse employment action or that similarly situated employees outside of her protected class received more favorable treatment to state a claim for disparate treatment. Moreover, the plaintiff voluntarily quit before the employer had a chance to properly investigate her complaints.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Kabba v. Rent-A-Center	U.S. Court of Appeals for the Fourth Circuit No. 17-1595	11/6/2017 (amicus filed) 4/13/2018 (decided)	ADA	Arbitration **Result:** Pro-Employee

Background: Plaintiff began working for defendant in 1996. In 2002, plaintiff and defendant entered into an arbitration agreement covering "all claims or controversies . . . past, present, or future, whether or not arising out of my application for employment, assignment/employment, or the termination of my assignment/employment . . . ." The agreement provided that "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforcement, or formation of this Agreement, including, but not limited to any claim that all or part of this Agreement is void or voidable." It also stated that it would "survive the termination of [plaintiff's] assignment/employment." Of special relevance to this case, the agreement provided that it could "only be revoked or modified by a writing signed by the parties which specifically states an intent to revoke or modify th[e] Agreement."

In 2008, plaintiff was robbed at gunpoint and assaulted while transporting cash from the store he managed to the bank. The incident caused permanent damage to his right hip, lower back, and right knee, as well as post-traumatic stress disorder. Plaintiff took medical leave and, after six months, defendant "administratively terminated" his employment. Defendant invited him to re-apply for employment when his medical condition allowed him to perform his job with "no restrictions." Plaintiff filled out an online application in 2012 for a new position with defendant. As part of that application, he was required to sign another arbitration agreement that was functionally identical to the 2002 agreement. Defendant did not contact plaintiff in response to his 2012 application.

In 2013, plaintiff applied in person for a job with defendant. The store manager contacted the district manager and, with his authorization, hired plaintiff. He gave plaintiff several forms to complete, including an arbitration agreement. Plaintiff signed the other forms but returned the arbitration agreement unsigned. The store manager allowed him to work anyway. At the end of plaintiff's first day of work, the store manager instructed him to help pick up furniture from a customer's third-floor apartment. Plaintiff advised the manager that he had medical restrictions precluding heavy lifting. The store manager called the district manager, who immediately called plaintiff and fired him. Plaintiff filed this lawsuit, alleging violations of the Americans with Disabilities Act and state law.

Citing the 2002 and 2012 arbitration agreements, defendant moved to dismiss or in the alternative to stay proceedings and compel arbitration pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-15. Plaintiff responded that the 2002 and 2012 agreements did not apply to his 2013 employment. Defendant replied that under the 2002 and 2012 agreements, the arbitrator and not the court should resolve questions of arbitrability. In the alternative, defendant argued that the 2002 and 2012 agreements cover the 2013 employment. Plaintiff responded that because defendant provided new arbitration agreements each time he applied for a new job, it could not have been believed that the 2002 agreement covered all future employment.

The district court converted defendant's motion to dismiss into a motion for summary judgment because both parties submitted evidence that was not integral to the complaint. The court defined the issue as "whether [plaintiff's] rejection of the 2013 Arbitration Agreement, and [defendant's] hiring him without a signed arbitration agreement, modified or revoked the 2002 and 2012 Arbitration Agreements such that they do not require arbitration of [plaintiff's] pending claims against [defendant]." Turning to this "gateway issue," the court observed that the parties' conduct may or may not have modified the 2002 and 2012 arbitration agreements. The parties' intentions, the court said, raise a genuine issue of material fact precluding summary judgment. The court ordered defendant to answer the complaint and indicated that the parties should proceed with discovery solely on the issue of arbitration. Defendant appealed the district court's decision.

Issue EEOC is Addressing as Amicus: (1) Whether the district court correctly found that it, rather than the arbitrator, should determine the arbitrability of plaintiff's discrimination claims because this is typically a question for judicial resolution and, based on their conduct in 2013, the parties cannot show a clear and unmistakable intent to have the arbitrator determine arbitrability instead; and (2) On the question of arbitrability, whether the district court correctly find a genuine issue of material fact regarding the parties' intentions to arbitrate claims arising from plaintiff's 2013 employment.

EEOC's Position: The EEOC argued that the district court correctly held that it, and not the arbitrator, should determine the arbitrability of plaintiff's discrimination claims, because arbitrability is generally a question for judicial resolution, and parties must "clearly and unmistakably" indicate a contrary intent to have an arbitrator decide the question instead. Here, EEOC contended that the parties indicated that they intended to have all future disputes resolved through arbitration, but their conduct in 2013 called this agreement into question with respect to plaintiff's 2013 employment.

The EEOC further argued that any doubts about the parties' intentions must be construed in favor of arbitrability. In examining the parties' intentions, the decisionmaker must apply Maryland law, which recognizes that parties may modify written contracts through their conduct even when the contracts provide that all modifications must be in writing. As such, the EEOC contended that if the parties intended to free plaintiff from the earlier arbitration agreements, an arbitrator would have no authority to resolve their substantive dispute.

Court's Decision: On April 13, 2018, in an unpublished opinion, the Fourth Circuit affirmed the district court's decision to deny defendant's motion for summary judgment and to compel arbitration. The Fourth Circuit agreed that a reasonable juror could find from the parties' actions that the parties agreed to modify the 2002 and 2012 arbitration agreements at issue to exclude covering any disputes relating to plaintiff's 2013 employment. Turning next to whether plaintiff's claims are arbitrable under the 2002 and 2012 agreements, the court concluded that, because a reasonable juror could conclude that no arbitration agreement exists with respect to plaintiff's claims arising from his 2013 employment, there is a genuine dispute of material fact precluding summary judgment. As such, the court found that the district court did not err in denying summary judgment and ordering discovery with respect to the parties' intent regarding the arbitrability of plaintiff's claims under the 2002 and 2012 agreements.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Parker v. Reema Consulting Services	U.S. Court of Appeals for the Fourth Circuit 18-1206	5/30/2018 (amicus filed)	Title VII	Charge Processing Harassment Retaliation Sex **Result:** Pending

Background: Plaintiff worked for defendant as a clerk in its Sterling, Virginia warehouse beginning in December 2014, and, after receiving several promotions, she ultimately became an assistant operations manager on March 1, 2016. Soon after her promotion, plaintiff learned that male employees were circulating a rumor that she had received the promotion because she had a sexual relationship with the deputy program manager. Several employees told plaintiff that a co-worker initiated the rumor. Male employees at various levels allegedly repeated the rumor, including the highest-level manager at the facility. According to plaintiff, her co-workers and subordinate employees were openly hostile and disrespectful to her after the rumor circulated. She confronted the person who started the rumor and requested that he speak to her directly about any of her conduct, and also met with other employees to assure them the rumors were false.

Plaintiff filed an internal sexual harassment complaint on April 25, 2016. A human resources manager arranged a meeting during which she urged the three managers to apologize to each other and move on. While plaintiff was on vacation from May 11 to 16, the person who allegedly started the rumor submitted an internal complaint accusing plaintiff of subjecting him to a hostile work environment. When plaintiff returned to the office on May 17, another employee told her that she was to have no contact with the complainer. Three weeks after plaintiff filed her internal complaint, she was called to a meeting and given two written warnings, one stemming from the allegations against her and one for poor management ability and insubordination, and subsequently fired her.

On August 24, 2016, plaintiff filed a charge of discrimination with the EEOC, which contained checked boxes for discrimination based on sex and retaliation. Plaintiff then filed suit against defendant, alleging she was subjected to a sexually hostile work environment, terminated in retaliation for complaining about the hostile work environment, and terminated because of her sex in violation of Title VII. Defendant moved to dismiss the complaint under Rule 12(b)(6), arguing that any hostile work environment arising from the rumors that she had received a promotion to manager because of sexual favors with a supervisor was not because of sex and instead was "based on her conduct." The company also argued that the facts alleged fall short of describing activity that is severe or pervasive enough to violate Title VII, and that plaintiff's retaliation claim should be dismissed because she did not have a reasonable belief that she was opposing conduct made unlawful by Title VII. Finally, defendant argued plaintiff's discriminatory termination claim is barred because her charge was insufficiently detailed.

The district court granted defendant's motion, and dismissed plaintiff's hostile work environment claim because her complaint as to the establishment and circulation of the rumor was not based upon her gender, but rather based upon her alleged conduct. The court added that plaintiff also failed to allege that the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere. The district court dismissed plaintiff's retaliation claim after concluding plaintiff's belief that she was opposing unlawful harassment was not objectively reasonable. The court also dismissed her discriminatory termination claim for failure to exhaust administrative remedies, on the grounds that her charge was premised upon false rumor of her having a relationship with a person who brought about her promotion. The district court denied plaintiff's motion for reconsideration and her request for leave to amend her complaint. Plaintiff appealed.

Issues EEOC is Addressing as Amicus: (1) whether plaintiff's Complaint stated a plausible claim for a hostile work environment where she alleged that male employees spread a false rumor that she had been promoted because she engaged in a sexual relationship with a supervisor, and she was subsequently harassed about the rumor; (2) whether plaintiff's complaint states a plausible retaliation claims where she alleged that she was fired three weeks after she filed an internal sexual harassment complaint, naming the managers who later fired her; and (3) whether plaintiff exhausted her administrative remedies as to her termination claim where her charge of discrimination fully comported with EEOC regulations by describing generally her allegations of a discriminatory discharge based on sex, and her complaint merely added additional facts concerning the discharge.

EEOC's Position: The EEOC argues that plaintiff's complaint alleges sufficient facts to support a plausible claim for a hostile work environment. More specifically, the EEOC contends that the district court failed to recognize that the conduct plaintiff complained of (the rumor) itself was gender-based. The EEOC cited *McDonnell v. Cisneros*, 84 F.3d 256, 259-50 (7th Cir. 1996) and *Spain v. Gallegos*, 26 F.3d 439 (3d Cir. 1994) for the propositions that rumors about a woman's promiscuity in the workplace can make the workplace so unbearable as to constitute a form of sexual harassment, and that such allegations met the "because of sex" element of a hostile work environment claim, respectively. Furthermore, the EEOC argues that plaintiff plausibly alleges that the harassment she experienced was sufficiently severe or pervasive to violate Title VII. According to the EEOC, the district court failed to consider the disparity between plaintiff and one of her alleged harassers, and that, while the rumors were in circulation for a few weeks, plaintiff was treated with open resentment and disrespect from co-workers, subordinates, and superiors during that time. With respect to her claim of retaliation, the EEOC asserts that plaintiff sufficiently alleged that she was opposing unlawful conduct when she filed an internal complaint with RCSI because she had an objectively reasonable belief that the alleged harassment violated Title VII. Additionally, the EEOC argues that the district court applied the wrong legal standard to plaintiff's claim because it is improper to retaliate against any employee for filing a complaint of a violation of Title VII, even if the claim does not have merit, but is not completely groundless. Finally, the EEOC contends that the district court erred in dismissing plaintiff's discriminatory discharge claim based on failure to exhaust, because her charge gave defendant and the EEOC sufficient notice of alleged violations, including sex discrimination and retaliation, and was reasonably related to all claims she brought against defendant.

Court's Decision: Pending. Oral argument was held on October 31, 2018.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Ray v. International Paper Co.	U.S. Court of Appeals for the Fourth Circuit No. 17-2241	12/18/2017 (amicus filed) 11/28/2018 (decided)	Title VII	Harassment Retaliation **Result:** Pro-Employee

Background: Defendant hired plaintiff in 2002 to work in its converting department. Plaintiff claims her supervisor started harassing her sexually sometime during 2003. Between 20 and 30 times, her supervisor allegedly offered her money (and one time a television set) for sex, and he threatened to have sex with her sister-in-law if she continued to refuse him. In 2013, plaintiff complained about the harassment to her supervisors, and on September 22, 2014, plaintiff met with the general manager of the facility and a human resources employee to complain that her supervisor was harassing her sexually. Defendant investigated plaintiff's allegations, but found no reason to discipline the supervisor. On December 21, 2015, plaintiff filed suit against defendant alleging that it had subjected her to a hostile work environment predicated on *quid pro quo* harassment by a supervisor and retaliated against her for complaining about the harassment.

The district court granted defendant's motion for summary judgment, finding that the alleged harassment did not lead to a tangible employment action and that defendant had established its *Faragher-Ellerth* affirmative defense by showing that it had exercised reasonable care to prevent and correct sexual harassment. Plaintiff appealed.

Issue EEOC is Addressing as Amicus: (1) Whether the employer establish as a matter of law that it exercised reasonable care to prevent and correct harassment when the plaintiff offered evidence that the company failed to train its staff on its harassment policy, that her supervisor failed to report her repeated complaints of harassment to management, and that the company disregarded substantial evidence corroborating her allegations; (2) Whether the district court erred in ruling that the plaintiff could not sue about the harassment that she timely brought to her employer's attention because she had failed to complain to the company about harassment that had happened earlier; and (3) Whether the district court would have erred in granting summary judgment to the defendant if it had applied a negligence theory of liability to the plaintiff's post-transfer harassment.

EEOC's Position: The EEOC argued that the district court erred in holding that defendant had carried its burden in showing that it was entitled to the *Faragher-Ellerth* affirmative defense because a reasonable jury could find that defendant did not adequately train its supervisors to comply with its anti-harassment policy and that defendant did not enforce its policy reasonably or promptly with respect to plaintiff. The EEOC also argued that the district court erred in ruling that plaintiff's failure to report the harassment to defendant prior to 2013 barred her from suing the company for the harassment she did report because such a ruling would obstruct the achievement of Title VII's goal of eliminating employment discrimination and protecting employees from resulting harm by deterring harassment victims who endure a period of harassment without complaining from ever using Title VII to challenge continuing harassment. Finally, the EEOC argued that summary judgment for defendant would also be inappropriate under the negligence paradigm applicable to coworker harassment cases because defendant had notice of the supervisor's harassment and it failed to take disciplinary actions reasonably calculated to stop the harassment.

Court's Decision: A three-judge Fourth Circuit panel vacated the district court's summary judgment award in favor of the employer and remanded the case. The appellate court determined that genuine disputes of material fact remain, and that "[a] reasonable jury could determine that [the supervisor's] ongoing harassment of [the plaintiff] and his direct involvement in the decision to deny her voluntary overtime work were sufficiently linked." The court also found there remains a dispute of material fact regarding whether the plaintiff's loss of voluntary overtime work was sufficiently severe to constitute an adverse employment action, and that a jury reasonably could determine that the supervisor retaliated against the plaintiff after learning that she had complained about him to other supervisors.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
O'Daniel v. Industrial Service Solutions	U.S. Court of Appeals for the Fifth Circuit 18-30136	5/2/2018 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff worked in the HR department for defendant. A few years into her employment, plaintiff posted a picture of a man (or possibly transgender woman) wearing a dress at a store and expressed her disapproval with the possibility of individuals being permitted to use the women's bathroom and/or dressing room at the same time as her young daughters. Shortly thereafter, plaintiff was reprimanded for the Facebook post and several other issues. She complained that she felt the company was discriminating against her because she was heterosexual. Plaintiff was directed to refrain from recruiting via social media, was required to take sensitivity training, received letter of reprimand, and was eventually terminated. She subsequently filed an EEOC charge and a lawsuit asserting Title VII retaliation. The district court dismissed plaintiff's retaliation claim on the grounds that she could not establish a reasonable belief that she opposed unlawful activity – *i.e.*, discrimination based on her sexual orientation as a heterosexual woman. The district court based its decision on the fact that the Fifth Circuit has specifically held that discharge based upon sexual orientation is not prohibited by Title VII, and noted that nearly all Circuits have held sexual orientation discrimination is not expressly prohibited by Title VII. Plaintiff appealed.

Issue EEOC is Addressing as Amicus: Whether an employee who has objected to discrimination based on sexual orientation could reasonably believe that he or she has opposed conduct that is unlawful under Title VII.

EEOC's Position: The EEOC argues that, given recent appellate decisions from other jurisdictions, an employee could reasonably believe that discrimination based on sexual orientation is unlawful under Title VII, and, consequently, complaints about such discrimination constitutes protected activity under the law. In support of its position, the EEOC emphasizes that the law on sexual orientation discrimination in employment has recently evolved, and stated three main reasons for recognizing that Title VII's prohibition on sex discrimination encompasses sexual orientation discrimination – (1) discrimination based on sexual orientation necessarily requires impermissible consideration of a plaintiff's sex, which Title VII prohibits; (2) sexual orientation discrimination involves gender-based associational discrimination, and courts have routinely found that race-based associational discrimination violated Title VII; and (3) sexual orientation discrimination may involve sex stereotyping, which could constitute sex discrimination under Title VII. The EEOC further asserts that the reasonable belief standard under Title VII recognizes that there is some zone of conduct that falls short of an actual violation of the statute, but could reasonably be perceived as a violation. Finally, the EEOC contends that Fifth Circuit precedent does not actually preclude a finding that a plaintiff can reasonably believe that discharge based on sexual orientation is unlawful under Title VII.

Court's Decision: Pending. Oral argument was held on January 9, 2019.

Wittmer v. Phillips 66	U.S. Court of Appeals for the Fifth Circuit 18-20251	8/6/2018 (amicus filed)	Title VII	Sex **Result:** Pending

Background: Plaintiff alleged defendant rescinded a job offer after defendant discovered she was a transgender woman. Defendant maintained that the job offer was rescinded because plaintiff represented that she was still employed by her former employer, when she was in fact terminated. Plaintiff sued for sex discrimination under Title VII, alleging that the job offer was rescinded "because of her sex (female) by not conforming to gender stereotypes."

The district court granted defendant's motion for summary judgment. The court acknowledged that Title VII would prohibit discrimination based on transgender status. However, the court determined that plaintiff failed to establish a *prima facie* case of discrimination because the record could not support an inference that the reasons for rescinding the job offer were pretextual, or that transgender discrimination was a motivating factor for the decision.

Issue EEOC is Addressing as Amicus: Whether transgender discrimination is a form of sex discrimination prohibited by Title VII because it involves impermissible consideration of sex and because it invokes sex stereotypes about how a woman or a man should behave.

EEOC's Position: The EEOC argued that to discriminate against transgender people in hiring decisions would violate the rule that "gender must be irrelevant to employment decisions." The EEOC contended that to discriminate against transgender people was necessarily discrimination on the basis of sex. Further, the EEOC argued transgender discrimination violates Title VII because the Supreme Court had determined that Title VII's prohibition against discrimination on the basis of sex included barring employers from taking adverse action based on an individual's failure to conform to sex stereotypes.

Court's Decision: Pending. Oral argument was held on January 8, 2019.

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

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

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

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

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

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

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Hubbell v. FedEx Smartpost, Inc	U.S. Court of Appeals for the Sixth Circuit 18-1373	8/15/2018 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Defendant hired plaintiff in 2006 and promoted her twice over the next four years. In 2010 she became a lead parcel sorter, and received position reviews for her performance. In 2011, plaintiff began reporting to a new manager, and in 2013, she complained to the HR department that she was being mistreated because of her sex. Plaintiff was subsequently demoted and replaced by a man. In late 2013, she filed a charge of discrimination and retaliation with the EEOC, and another charge alleging retaliation. In October 2014, plaintiff filed suit against defendant alleging sex discrimination and retaliation. She was terminated two months later. Plaintiff then filed a third charge, alleging retaliatory discharge. Defendant filed a motion for summary judgment, which the district court granted in part and denied in part. More specifically, the district court entered judgment in favor of defendant on plaintiff's claim for a hostile work environment, but denied summary judgment on her claims for gender discrimination, retaliation, and retaliatory discharge. In denying summary judgment, however, the district court applied an outdated legal standard to exclude more of plaintiff's alleged retaliatory conduct from its analysis. The case went to trial and the jury returned a verdict in favor of defendant on the discrimination claim and for plaintiff on the retaliation claim. The jury awarded plaintiff $403,950 in punitive damages, which the district court later reduced to $300,000 in accordance with Title VII's statutory caps. The district court denied defendant's subsequent motion for judgment as a matter of law and awarded attorney's fees to plaintiff. Defendant appealed, challenging the jury's verdict and the award of punitive damages. Plaintiff cross appealed, challenging the amount of attorney's fees awarded and the denial of costs.

Issues EEOC is Addressing as Amicus: (1) Whether the district court, and the defendant on appeal, misstate the applicable standard for Title VII's anti-retaliation provision by requiring the plaintiff to show a materially adverse change in the terms and conditions of her employment; and (2) Whether the defendant, on appeal, misstate the standard to recover punitive damages under Section 1981, by arguing that plaintiff needed to establish defendant engaged in egregious conduct.

EEOC's Position: The EEOC argues both the district court's summary judgment order and defendant's brief on appeal misstate the applicable standard for establishing a materially adverse action for a Title VII retaliation claim. According to the EEOC, both the district court and defendant incorrectly apply the standard for a discrimination claim, and that the relevant standard is whether the challenged action might well have dissuaded a reasonable worker from making or supporting a charge of discrimination. Furthermore, the EEOC argues that egregious conduct is not required for an award of punitive damages under Section 1981, and that a plaintiff must establish an employer engaged in a discriminatory practice with malice or reckless indifference to the federally protected rights of an aggrieved individual The EEOC cites the Supreme Court decision in *Kolstad v. American Dental Association*, 527 U.S 526, 535 (1999) in support of its position.

Court's Decision: Pending.

Logan v. MGM Grand Detroit Casino	U.S. Court of Appeals for the Sixth Circuit 18-1381	8/8/2018 (amicus filed)	Title VII	Charge Processing, Limitations **Result:** Pending

Background: Plaintiff worked in a culinary utility position for defendant for approximately seven years, and resigned after various incidents of alleged discrimination. When plaintiff applied for the job with defendant on February 20, 2007, plaintiff agreed to an electronic waiver within the application that any claims against defendant would be brought within six months, and any other statute of limitations to the contrary would be waived. Plaintiff resigned on November 26, 2014, and filed a charge alleging sex discrimination and retaliation 216 days later at the EEOC's Detroit Field Office on July 8, 2015.

The district court adopted the magistrate judge's recommendation that summary judgment be granted for the defendant on plaintiff's sex discrimination and harassment claims because the claims were barred by the six-month statute of limitations set forth in the online job application.

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred in ruling plaintiff's charge with the EEOC in Michigan 216 days after her resignation was untimely; and (2) Whether the district court erred in holding that a six-month statute of limitation period included in the plaintiff's employment application should displace the integrated enforcement scheme established by Congress in Title VII.

EEOC's Position: The EEOC argued that both the magistrate judge and the district court did not have a proper understanding of the Title VII administrative process, and that the district court erred when it determined that plaintiff's charge of discrimination was untimely. The EEOC argued that since Michigan is a deferral state, Michigan's 300-day filing deadline should have governed plaintiff's claims. According to the EEOC, because of the regulations and work-sharing agreement between the EEOC and the Michigan Department of Civil Rights (MDCR), plaintiff's EEOC charge was automatically filed with the MDCR, and thus the time limit on her claim is 300 days. The EEOC further argued that the district court erred in enforcing the six-month contractual limitation period on claims against defendant that plaintiff agreed to when completing her job application in 2007. Instead, the EEOC argued employers should not be allowed to displace Congress' judgment in Title VII by enforcing contractual limitation periods.

Court's Decision: Pending

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
McClellan v. Midwest Machining, Inc	U.S. Court of Appeals for the Sixth Circuit No. 17-1992	12/19/2017 (amicus filed) 8/16/2018 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff began working for defendant as a telemarketer in 2008 and subsequently received a promotion to the company's inside sales department. In 2015 she announced she was pregnant, and her supervisor allegedly made many negative comments in the following weeks and displayed annoyance at her absences for pre-natal appointments. Three months later, the company fired her, in spite of her good performance record and absence of any disciplinary issues. Plaintiff signed a severance agreement that contained a release of claims and severance pay. Plaintiff sued defendant for violations of Title VII as amended by the Pregnancy Discrimination Act and for violations of the Equal Pay Act. Defendant moved for summary judgment and argued that plaintiff had to return the severance payment if she wanted to sue. The district court found that there were genuine disputes of material facts about the enforceability of the severance agreement. Nevertheless, the district court granted summary judgment in favor of defendant on the ground that plaintiff ratified the settlement by failing to tender back the $4,000 before bringing suit. According to plaintiff, she offered to pay back the money, but only shortly after filing the complaint. She appealed.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in holding that the common-law "tender-back" doctrine applies to suits seeking relief under Title VII and the Equal Pay Act (EPA); and (2) Whether the district court erred in dismissing plaintiff's suit because she filed it before "tendering back" the money that she received as part of a severance agreement, even though she attempted to return the money after obtaining counsel and filing her law suit and her former employer refused.

EEOC's Position: The EEOC argued that the tender back doctrine does not apply to discrimination claims and that the district court's ruling was inconsistent with Supreme Court tender-back cases. More specifically, the EEOC asserted that the rationale underlying the decision in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 425 (1998) was relevant and applying the tender-back doctrine to Title VII and EPA claims would frustrate the statutes' practical operation and incentivize employers to pressure employees into executing waivers under duress. The EEOC also argued that the district court incorrectly held that *Hogue v. Southern Railway Co.*, 390 U.S. 516 (1968) was not controlling because the Federal Employers' Liability Act (FELA) contains a provision governing waivers of claims, unlike Title VII and the EPA, because the decision specifically disclaimed reliance on that provision. Finally, the EEOC argued plaintiff should not have been deemed to have ratified the release because she offered to tender back the money within a few weeks of filing suit, and there is no requirement that the tender back be contemporaneous with the filing of the complaint.

Court's Decision: The Sixth Circuit reversed the district court's decision, and held that the tender-back doctrine does not apply to claims brought under Title VII or the EPA. The court substantially relied on the Supreme Court's reasoning in *Oubre* and *Hogue* and explained that requiring recently discharged employees to return their severance before they could bring claims under either statute would serve only to protect malfeasant employers at the expense of employee's statutory protections. Moreover, the court specified that even if plaintiff were required to give the severance money back before filing suit, the district court erred in dismissing her suit because she offered to give the money back within a reasonable amount of time after learning that the severance agreement waived her right to pursue a discrimination claim.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Rogers v. Henry Ford Health System	U.S. Court of Appeals for the Sixth Circuit No. 17-1998	11/24/2017 (amicus filed) 7/31/2018 (decided)	Title VII	Retaliation **Result:** Mixed

Background: Plaintiff, who is African-American, was a consultant in the Organizational Human Resources Development Department for defendant. Plaintiff had a tumultuous relationship with her co-workers and supervisors, whom she claimed launched a series of discriminatory and retaliatory actions. Plaintiff complained about racial discrimination and eventually filed an EEOC charge alleging race discrimination and retaliation after she was transferred to a new position.

The EEOC investigated plaintiff's charge and found reasonable cause to believe that the paid administrative leave and reassignment were retaliatory. Plaintiff subsequently filed a Title VII suit, and defendant filed a summary judgment motion arguing that plaintiff failed to establish a *prima facie* case because she could not show an adverse action or a causal connection. The district court granted defendant's summary judgment motion, finding that plaintiff failed to show a factual question as to whether the reason given for the referral – that co-workers reported she was unstable and threatening – was a pretext for retaliation. The court also held that plaintiff's transfer did not constitute an "adverse employment action" because it was not a demotion, did not result in a pay decrease, and did not involve a less significant title or function.

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred by failing to apply *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S. Ct. 2405 (2006);and instead holding that only those actions that impact the terms and conditions of a plaintiff's employment are actionable; (2) Whether a jury could find that a reasonable employee would be dissuaded from complaining of discrimination by being suspended indefinitely with pay, referred to an Employee Assistance Program for a fitness-for-duty examination, escorted from the building and having her badge taken away, and/or being transferred to a less-prestigious position with less responsibility; and (3) Whether the plaintiff adduced sufficient evidence of causation to establish a *prima facie* case of retaliation where she suffered retaliatory acts within three months of filing her EEOC charge, and could a reasonable jury find on this record that the employer's stated reasons for the adverse actions were a pretext for retaliation.

EEOC's Position: The EEOC argued that summary judgment should be reversed because the district court applied an erroneous legal standard in evaluating plaintiff's Title VII retaliation claim. In making this argument, the EEOC note that although the actions plaintiff challenges concern her employment, the district court erred in stating that a *prima facie* case of retaliation requires an "adverse employment action," since *Burlington Northern* held that challenged acts need not concern employment. This court usually cites the standard correctly, but several post-*Burlington Northern* opinions mistakenly refer to an adverse "employment" action, even when otherwise applying *Burlington Northern*'s dissuade-a-reasonable-person standard.

Next, the EEOC argued that, viewed under the proper standard, a jury could find that plaintiff suffered materially adverse actions because after filing a charge of racial discrimination, plaintiff was called into a meeting and told she was being referred to EAP for a fitness-for-duty exam and was suspended with pay, escorted out of the office, had her badge taken away, was denied computer access, and had emails sent to her receive a reply message stating that she was no longer with defendant.

Lastly, the EEOC argued that a reasonable jury could also determine on this record that the reason defendant gave for transferring plaintiff was a pretext for retaliation because plaintiff passed the fitness-for-duty exam given by defendant's own doctor, who said he did not know why she was sent there and because the record made clear that plaintiff did not pose any kind of threat to her co-workers.

Court's Decision: The Sixth Circuit affirmed in part and reversed in part the district court's grant of summary judgment. The court affirmed the grant of summary judgment with respect to plaintiff's claim of racial discrimination and age discrimination, but reversed the grant of summary judgment with respect to plaintiff's claims of retaliation.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Frey v. Hotel Coleman	U.S. Court of Appeals for the Seventh Circuit No. 17-2267	10/23/2017 (amicus filed) 9/11/2018 (decided)	Title VII	Sex **Result:** Pro-Employee

Background: Plaintiff worked as a guest services representative at the defendant hotel. Plaintiff brought charges of sex-based harassment, pregnancy discrimination, and retaliation against both the hotel management company and hotel owner. Plaintiff claimed that the hotel's on-site manager, who was also the owner of the hotel management company, made unwelcome sexual advances and comments to her both before and after her pregnancy, and ultimately rescinded his promise to promote her after she was on maternity leave and complained about the harassment. Plaintiff believed that though her termination for allegedly stealing another employee's cellphone was pretext.

The district court granted the defendant hotel management company's motion for summary judgment, concluding that the management company was not plaintiff's employer for purposes of Title VII. The court decided that because plaintiff was on the hotel's payroll and not the management company's, and the source of the management company's degree of control over plaintiff came from the delegation of power from the hotel, the management company could not be considered plaintiff's employer. The court further held that because the management company was not the employer of those who worked at the hotel, including plaintiff, they did not employ the requisite number of employees to be subject to Title VII's requirements.

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred in finding that the hotel management company was not plaintiff's employer for purposes of Title VII liability; and (2) Whether the district court erred in determining that the management company was not a Title VII covered employer because it lacked the requisite number of employees (15)?

EEOC's Position: The EEOC argued that the district court applied the improper framework in its analysis of whether plaintiff was employed by the management company defendant. The EEOC believed that the district court should have applied the five-factor "economic realities" test, and determined that because of the degree of control that the management company defendant exercised over plaintiff, among other factors, the management company was plaintiff's employer for Title VII purposes. The EEOC further contended that if the district court applied the proper framework for determining whether the employees at the hotel were employees of the management company, then the management company defendant would exceed the 15 employee threshold of Title VII.

Court's Decision: The court vacated and remanded the district court's decision to grant summary judgment for defendant. The Seventh Circuit articulated that the five-factor economic realities test should be used on remand to determine whether defendant was in fact plaintiff's employer. The court further stated that should the district court determine that defendant was plaintiff's employer using the economic realities test, then defendant would also be the employer of the other hotel employees, and thus would meet the 15-employee threshold of Title VII.

Smith v. Rosebud Farmstand, Inc.	U.S. Court of Appeals for the Seventh Circuit No. 17-2626	4/3/2018 (amicus filed) 8/2/2018 (decided)	Title VII	Harassment Sex **Result:** Pro-Employee

Background: Plaintiff worked as a meat cutter for defendant. Plaintiff claims that he was subjected to several years of ongoing sexual and racial harassment from his male coworkers and supervisors. Plaintiff sued and the jury returned a verdict in his favor. Defendant appealed, arguing the district court erred in denying its motion for judgment as a matter of law and new trial. Specifically, defendant argues it was entitled to judgement on plaintiff's sex discrimination claim because to win, plaintiff had to show more than unwanted sexual touching or taunting. Rather, defendant contended the harassment had to occur because of his sex. Defendant contended the evidence demonstrated "sexual horseplay," not sex discrimination.

Issue EEOC is Addressing as Amicus: Did the district court correctly determine the jury rationally could have found that plaintiff was subjected to harassment based on sex, where the harassment was from male coworkers.

EEOC's Position: The EEOC argued the district court correctly determined the jury could have rationally concluded plaintiff suffered harassment based on sex for two reasons: (1) the sexual and gender-specific nature of the harassment suggests that the harassers would not have harassed plaintiff in the same way if he had not been male; and (2) plaintiff was treated worse than female employees. The EEOC argued that in cases of same-sex harassment, as long as the victim demonstrates he would not have been treated in the same way had he been a woman, he has proven sex discrimination.

Court's Decision: The Seventh Circuit upheld a jury verdict finding that "sexual horseplay" endured by an employee from his male colleagues constituted prohibited sex discrimination under VII.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Faidley v. United Parcel Service	U.S. Court of Appeals for the Eighth Circuit No. 16-1073	10/2/2017 (amicus filed) 5/11/2018 (decided)	ADA	Disability **Result:** Pro-Employer

Background: Plaintiff worked as a delivery driver at defendant for 25 years when he obtained a physician's restriction limiting him to eight-hour workdays for back and hip issues. Plaintiff could not work fewer hours in his position as a delivery driver because it conflicted with the collective bargaining agreement that was in place. Defendant did not offer plaintiff an alternative job that may have become vacant in the foreseeable future, but would have required plaintiff to work more than eight hours a day in violation of the physician's restriction. Plaintiff claimed that defendant believed plaintiff was qualified for the alternative position in spite of the restriction because while the workdays would have been more than eight hours, the position required significantly less heavy lifting.

The district court granted defendant's motion for summary judgment, holding that plaintiff was not qualified for the alternative position because it would have required him to work more than eight hours a day, in violation of his doctor's restriction. The court held that offering the alternative position to plaintiff was above and beyond what the ADA required of defendant, so defendant should not incur liability even if the eight-hour restriction was not the reason that the position was ultimately not offered to plaintiff. A divided Eighth Circuit panel reversed, concluding that the district court erred when it determined that plaintiff was unable to perform the essential functions of the alternative position. The panel also decided that "positions that the employer reasonably anticipates will become vacant in the immediate future" are to be considered available as a reasonable accommodation. The court vacated the panel decision and granted defendant's petition for rehearing *en banc*.

Issue EEOC is Addressing as Amicus: (1) Whether part of an employer's obligation under the ADA to consider reassigning a disabled employee to a vacant position includes both positions that are open immediately as well as positions that the employer can anticipate will become vacant within a reasonable period of time; and (2) Whether a doctor's note that stated that plaintiff could not work more than eight hours a day meant that plaintiff was unqualified for a job that would require him to exceed the hour restriction, but defendant believed he was physically capable of performing.

EEOC's Position: The EEOC argued that a "vacant" position within the ADA's reasonable accommodation provision includes both positions open immediately and positions that an employer can anticipate will become vacant within a short period of time. Thus, the district court properly held that the alternative position that defendant did not offer to plaintiff was "vacant" for reasonable accommodation purposes. The EEOC further argued that a question of fact existed as to whether plaintiff was qualified for the alternative position in spite of plaintiff's eight-hour workday restriction.

Court's Decision: The Eighth Circuit affirmed the district court's finding that the ability to work overtime was an essential function of plaintiff's position, and that the defendant did not violate the ADA or state law by refusing the plaintiff's request for an eight-hour day because that accommodation would have made him unqualified to perform the essential job functions of a package car driver. The full court also affirmed the panel decision that the employer did not violate the ADA when it refused to accommodate plaintiff's temporary restriction to working four hours a day for five weeks, as the employer was not obligated to reallocate the essential functions of the combined positions and plaintiff could not perform the essential functions of the job given his lifting restrictions.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Garrison v. Dolgencorp	U.S. Court of Appeals for the Eighth Circuit No. 18-1066	4/10/2018 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff was a full-time lead sales associate at defendant's store in Concordia, Missouri, where she was one of four employees with keys to the store. Plaintiff struggles with anxiety, depression, and migraine headaches. When these conditions required her to miss work, she would call her supervisor and explain what was happening. In early May 2014, plaintiff's doctor recommended that she take a few weeks off work and said that he could provide a note if necessary. Plaintiff texted her supervisor that day to ask how she could request a leave of absence. The supervisor contacted the district manager and explained plaintiff's request and her doctor's recommendations, but the district manager responded that there was no leave of absence. After several text messages from plaintiff, the supervisor responded that there was no leave of absence. As such, plaintiff asked her supervisor whether she could take leave under the Family and Medical Leave Act (FMLA). The supervisor instructed plaintiff to read the employee handbook for more information.

Plaintiff later texted her supervisor that she might need to have brain scans, as well as a mammogram for a lump in her breast. The supervisor replied that plaintiff should come to the office the following day so they could talk. When they met in person the next day, plaintiff said that she was seeking leave because of her worsening migraines, anxiety, and depression. She told her supervisor that she could provide a doctor's note if necessary and asked whether she should do so, but her supervisor said she did not need a note. Based on her supervisor's representation, plaintiff did not request a note from her doctor or provide defendant with medical documentation to support her leave request, and the request was denied.

After her leave request was denied, plaintiff indicated that she was going to have to quit, and had an anxiety attack and went to the emergency room. Plaintiff sued defendant for violations of the ADA, FMLA, and state law. She alleged under the ADA that defendant had failed to accommodate her disabilities and had retaliated against her by demoting and constructively discharging her. Defendant moved for summary judgment.

The district court granted summary judgment for defendant, after determining that plaintiff could not establish a *prima facie* case because she could not show an adverse employment action. The court also rejected plaintiff's contention that she was constructively discharged. Furthermore the court held that plaintiff had not requested a reasonable accommodation because she did not provide the relevant details about her disability and the reason that the disability required a leave of absence. Even assuming plaintiff had made an appropriate request for an accommodation, the court concluded that it was not reasonable, because it would have required the other store employees to cut their vacations short and/or work more hours. Finally, the court concluded that because plaintiff could not demonstrate that she suffered an adverse employment action, her retaliation claim also failed.

Issues EEOC is Addressing as Amicus: (1) Whether an employer's failure to accommodate a known disability is actionable under the Americans with Disability Act (ADA) without an additional adverse action, given that the statute defines discrimination to include a failure to accommodate; (2) Whether a reasonable jury could find that plaintiff adequately requested a reasonable accommodation where her supervisor knew that she sought paid vacation time following a hospitalization to deal with ongoing disability-related health issues; (3) Whether a reasonable jury could find that a short period of leave would have been a reasonable accommodation under the ADA where plaintiff's supervisor testified that if she had been entitled to leave under the FMLA, the supervisor would have found a way to make it work; and (4) Whether the district court erred by overlooking Supreme Court precedent defining an adverse action more expansively in the context of a retaliation claim than in the context of a substantive discrimination claim.

EEOC's Position: The EEOC argues that the district court misinterpreted the ADA's mandate that employers must provide a reasonable accommodation for a known disability, and that the failure to accommodate is an adverse action that is sufficient, standing alone, to support a disability discrimination claim. According to the EEOC, the ADA defines discrimination to include a variety of employer actions, including a failure to provide a reasonable accommodation. Furthermore, the EEOC contends that a failure of accommodate an employee or applicant's disability inherently discriminates with respect to the terms, conditions, and privileges of employment, and cites Eighth Circuit case law to this effect. With respect to other Eighth Circuit precedent that appears to require proof of an additional adverse action to establish a failure-to-accommodate claim, the EEOC contends that those decisions are incompatible with the plan language of the ADA and cannot stand. The EEOC also argues summary judgment was inappropriate because the plaintiff raised a genuine issue of material fact as to whether she requested a reasonable accommodation under the ADA and whether her request was reasonable. In support of this position, the EEOC emphasizes an employer's background knowledge is relevant in assessing the sufficiency of a request for an accommodation. Finally, the EEOC argues that the district court applied the wrong legal standard to assess whether plaintiff was subjected to an adverse action for purposes of her retaliation claim. According to the EEOC, in the context of a retaliation claim and as set forth in *Burlington Northern & Santa Fe Railways v. White*, 548 U.S. 53 (2006), plaintiff must show that a reasonable employee would have been dissuaded from making or supporting a charge of discrimination based on the challenged action.

Court's Decision: Pending. Oral argument is scheduled for February 13, 2019.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Horton v. Midwest Geriatric Management, LLC	U.S. Court of Appeals for the Eighth Circuit No. 18-1104	3/7/2018 (amicus filed)	Title VII	Sex **Result:** Pending

Background: Plaintiff is a gay man who has been legally married to his male spouse since 2014. In February 2016, while the plaintiff was working a competitor of defendant, he was contacted by an executive search firm for a position as the Vice President of Sales and Marketing for defendant. Plaintiff was offered the job, contingent upon a background check. The outside vendor conducting the check had trouble verifying plaintiff's education with two colleges. Plaintiff provided defendant and the vendor with an explanation and informed them that there would be a delay in procuring the necessary records. Defendant did not express concern about the delay. Before the completion of the background check, plaintiff signed the written job offer and returned it to defendant. One of the individuals who ran defendant responded that the company was excited to have him and inquired about his anticipated start date. Plaintiff began completing his pre-hire documentation and disclosed that he was in a same-sex relationship. Defendant subsequently informed him that because he did not complete his background and provide the necessary supporting documentation, the company was withdrawing his offer of employment. After he subsequently obtained the documentation, plaintiff reached back out to the company about the open position, but was informed that defendant was considering other candidates.

Plaintiff sued defendant under Title VII, alleging that the company unlawfully discriminated against him on the basis of his sexual orientation. Plaintiff's sex discrimination claim comprised three theories: (1) sexual orientation is necessarily discrimination based on sex; (2) discrimination on the basis of his association with a person of a particular sex (his male partner); and (3) nonconformity with sex stereotypes. Defendant moved to dismiss plaintiff's complaint for failure to state a claim. In granting defendant's motion, the district court cited Eighth Circuit precedent from a 1989 holding that Title VII does not cover discrimination based on sexual orientation, and concluded that both the sex discrimination claim was merely a refashioned sexual orientation discrimination claim.

Issues EEOC is Addressing as Amicus: (1) Whether sexual orientation discrimination is a form of sex discrimination prohibited by Title VII because it involved impermissible consideration of sex, gender-based associational discrimination and/or sex stereotyping; and (2) Whether *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69 (1989), which states that Title VII does not prohibit sexual orientation discrimination, has been abrogated by *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

EEOC's Position: The EEOC argues that sexual orientation discrimination is cognizable as sex discrimination under Title VII for several reasons. First, the EEOC contends that sexual orientation discrimination inherently involves consideration of an individual's sex. In support of this argument, the EEOC contends that an employer's failure to directly reference gender is not dipositive and emphasizes that the correct way to analyze the issue is to compare treatment of men attracted to men versus women attracted to men. Second, the EEOC asserts that when an employer's motivation for an adverse employment action is opposition to same-sex relationships, the employer is engaged in gender-based associational discrimination. According to the EEOC, the Title VII prohibition against adverse employment actions based on opposition to same-sex relationship stems inevitably from the statute's prohibition of discrimination based on opposition to interracial relationships. The EEOC argues that the rational underlying the *Loving v. Virginia*, 388 U.S. 1 (1967) is applicable and that discrimination based on same-sex association targets individuals based on sex, which violates Title VII. Additionally, the EEOC contends that when discrimination against a gay employee rests on that individual's failure to confirm to the societal expectation of opposite-sex attraction, the employer violated Title VII's prohibition on gender stereotyping. The EEOC alleges that the plain language of Title VII incorporated sexual orientation because the statute prohibits discrimination based on sex stereotypes, and that the holding in Oncale, requires the court to interpret the statute as written, without judicial carve-outs, even when the language goes beyond the principal evil that Congress sought to address. Finally, the EEOC argues that *Williamson* is no longer good law, because the decision relied on outdated precedent and did not consider the decision in *Price Waterhouse*, and, as such, does not prohibit of finding that discrimination based on sexual orientation violates Title VII.

Court's Decision: Pending.

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

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

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

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

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

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

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

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Anthony v. Trax International Corp	U.S. Court of Appeals for the Ninth Circuit No. 18-15662	7/25/2018 (amicus filed)	ADA	Disability **Result:** Pending

Background: Plaintiff was hired as a Technical Writer in April of 2010. Her job entailed compiling and formatting information into a technical document based on data provided by test engineers. She had a history of anxiety and PTSD pre-dating her employment with defendant. Plaintiff suffered a flare up of her PTSD and required time off to recuperate. She requested and was approved for time off in April 2012. Her physician said she would need two weeks off, and thereafter, would require 2-3 hours off per week until May 30. Then, for the next six months, she would likely experience flare-ups, necessitating approximately one day off every three weeks. It appears to be undisputed that the benefits coordinator told plaintiff that she would need a medical release "without restrictions" in order to return to work. Plaintiff was denied return to work with restrictions and was denied her request to work from home. She was thereafter terminated for failing to return from leave with a medical release.

During discovery, plaintiff admitted she lied on her application about having a bachelor's degree, which is a requirement for the technical writer position. Defendant filed for summary judgment, and the district court held that plaintiff could not establish a *prima facie* case of discrimination in violation of the ADA because she could not prove she was qualified based on the after-acquired evidence. The district court stated that it is required to follow a two-prong test under Ninth Circuit case law to determine whether she is qualified: (1) employee must have the technical skills, requisite education, training etc. for the position; and (2) employee must be able to perform the essential functions of the position. Plaintiff could not establish that she was qualified because she did not have the requisite college degree. The district court acknowledged that the after-acquired evidence could not be used to excuse discrimination after a *prima facie* case of discrimination has been established, but determined it could be used to negate one of the required elements (qualification for the position) such that plaintiff could not establish a *prima facie* case. The Supreme Court case *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995), addressed employee misconduct during employment in an ADEA case and found that allowing after-acquired evidence of the wrongdoing would limit liability, not excuse employer actions. The district found that *McKennon* was inapplicable to the facts of this case because it determined that in *McKennon*, the Court was establishing an affirmative defense after plaintiff had established a *prima facie* case; here, the employer was seeking to undercut the plaintiff's *prima facie* case, which the district court determined was permissible.

Issue EEOC is Addressing as Amicus: (1) Whether an employer may avoid responsibility for disability discrimination if, during discovery, the employer unearths evidence of wrongdoing by the employee— specifically, "after-acquired" evidence that the victim of the alleged discrimination misrepresented her credentials on her resume or application whenever it was that she applied for the job; and (2) Whether proving "qualification" for a position requires a two-prong test of (a) possessing requisite skill, education, training, etc., and (b) being able to perform the essential functions of the position with or without reasonable accommodation.

EEOC's Position: The EEOC argues that the Supreme Court resolved this issue over 20 years ago in *McKennon*, which involved an ADEA claim. The M*cKennon* Court unanimously held that because the employee's wrongdoing played no role in the employer's alleged discriminatory conduct and because the discrimination statutes are designed to eliminate discrimination, not punish errant employees, the evidence may affect relief, but not liability. Following the Supreme Court's holding in *McKennon*, the after-acquired evidence doctrine should only be used to determine the appropriate remedies. Specifically, if the employer proved it would have fired the plaintiff based solely on the wrongdoing uncovered in discovery, the equitable remedies of front pay and reinstatement would normally be inappropriate, and backpay might also be curtailed, although attorney's fees would still be available. But, the Court stated that an "absolute rule barring any recovery … would undermine the ADEA's objective of forcing employers to consider and examine their motives and of penalizing them for employment decisions that spring from age discrimination." *McKennon*, 513 U.S. at 362. The Court concluded that allowing the evidence to limit damages but not liability strikes the appropriate balance between the employer's "legitimate interests" and "the important claims of the employee who invokes the national employment policy mandated by the Act." *Id.* at 361. Although *McKennon* involved employee misconduct and an ADEA claim, the EEOC cites to various extra-jurisdictional cases from other circuits, where the courts have extended the holding in *McKennon* to other types of discrimination cases and to falsification of job applications and resumes based on the policy behind the decision. Moreover, the EEOC points out that virtually any type of wrongdoing, pre-employment or during employment, can be categorized as being unqualified for the position.

The EEOC further argues that the "two-step" test for qualifications that the court inserted into the *prima facie* case is inapplicable where the step one qualifications (education, skill, training, etc., required for the job) had nothing to do with the alleged discriminatory conduct (*i.e.*, where, as here, there is no allegation of failure to hire/discriminatory hiring practices/discriminatory termination based on an alleged lack of qualifications). Under the ADA statute and relevant case law, the employee can show she is qualified if she can do the essential functions of the job, with or without reasonable accommodation. The two-step test could apply where the alleged adverse action turns on the plaintiff's qualifications but should not be applied in cases like this one where the question is whether the employer violated the ADA by requiring that the plaintiff return to work without restrictions or not at all.

Court's Decision: Pending.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Baker v. Roman Catholic Archdiocese	U.S. Court of Appeals for the Ninth Circuit No. 16-55961	12/29/2016 (amicus filed) 2/27/2018 (decided)	ADA	Disability **Result:** Pro-Employee

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

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

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

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

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

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

Court's Decision: The court reversed and remanded the decision of the district court. The appellate court agreed with the plaintiff's contentions that the lower court applied an incorrect definition of disability, and that it did not properly consider various pieces of circumstantial evidence in its summary judgment ruling.

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

Background: Defendant is a Catholic school. In March 2013, defendant hired plaintiff as a long-term substitute for a part-time first-grade teacher on maternity leave who had been job-sharing with another teacher. Plaintiff taught two days per week. When the position ended in June 2013, the school hired plaintiff as a full-time fifth-grade teacher for the 2013-2014 school year. Plaintiff signed a Faculty Employment Agreement with the church pastor and the school principal. She was not required to be Catholic, but was required to model, teach, and promote behavior in conformity to the teachings of the Roman Catholic Church, pray with her students, and accompany them to mass once per month. She taught standard subjects and religion. Sister Mary Margaret observed her from time to time, like she did for other teachers, and periodically expressed concerns about her teaching – but she conducted only one formal evaluation and commented that it was a "good review." Plaintiff was diagnosed with breast cancer in April 2014, which she told the Sister, and requested time off in May to prepare for cancer treatments. Shortly after being informed of the diagnosis, Sister Mary Margaret prepared a letter that plaintiff would not receive a contract for the following year. Plaintiff never received it, and inquired as to the status of her contract. In July, she met with Sister Mary Margaret who said (1) she was not strict enough; and (2) it would be unfair to her students to have two teachers the following year.

The plaintiff filed suit under the ADA. The district court granted summary judgment on the ground that the school established a *prima facie* case that plaintiff was a minister within the meaning of the ministerial exception and there was no triable issue of fact that would preclude granting summary judgment based on the exception. The school also disputed pretext, which the court did not reach. Plaintiff appealed.

Issues on Appeal: Whether the court misapplied the Supreme Court's totality-of-the-circumstances approach in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), when it granted defendant summary judgment on the basis that plaintiff was a minster in her role as a fifth-grade teacher at the Catholic school, and therefore her discrimination claim fell within the ministerial exception.

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

Court's Decision: Pending.

Jackson v. Equifax Workforce Solutions	U.S. Court of Appeals for the Ninth Circuit No. 17-56831	3/9/2018 (amicus filed) 10/15/2018 (decided)	Title VII	Race **Result:** Pro-employer

Background: Pro se plaintiff filed claims for, *inter alia*, race discrimination in violation of Section 1981 and the California Fair Employment Housing Act (FEHA). Plaintiff bases his claims almost entirely on failing a drug test in one of defendant's facilities and passing it in another one of defendant's facilities the next day. He alleges he was set up to fail the first test by individuals he claims did not want him working for defendant because of his race. He further alleges that defendant was aware of the potential test discrepancy and used the first, failed test to terminate him despite the second, passed test. The magistrate judge screened the initial complaint and a subsequent first amended complaint, with a directive to correct the deficiencies. Plaintiff filed and served his second amended complaint on some of the defendants, who moved to dismiss. The magistrate judge issued a report and recommendation granting dismissal of the second amended complaint in its entirety, against served and unserved defendants, with prejudice. The magistrate judge expressly noted he had failed to remedy a vast majority of the deficiencies it had previously identified in its orders and that the second amended complaint lacked sufficient facts to allow it to draw an inference of discriminatory animus.

Issues on Appeal: Whether the magistrate judge erred in dismissing plaintiff's second amended complaint pursuant to 12(b)(6), with prejudice.

EEOC's Position on Appeal: The second amended complaint satisfied Rule 8(a) pleading requirements. The magistrate judge failed to accept plaintiff's allegations as true, failed to liberally construe the pro se pleading, and required more factual detail than the Rules and case law require. For example, it would be reasonable to infer that defendant terminated plaintiff as pretext because it knew about the two tests, one day apart, and the potential discrepancy in that he failed the first one and passed the second. The court required too much of plaintiff at the pleading stage.

Court's Decision: The Ninth Circuit affirmed the lower court's decision via an unpublished decision filed October 15, 2018. Plaintiff failed to plead sufficient facts to support his claim that his termination was based on racial animus, as it contained only conclusory allegations and failed to attribute conduct to any particular individual defendant.

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

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

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

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

Second, the EEOC argues the same-actor inference was wrongly applied. Unlike race or sex, aging is a constant and changes over time. An employer may harbor animus towards 58-year-olds and not 45-year-olds, or an employer's assumptions about an older person may change over time. The passage of time between hiring and firing should be especially short. Here, nine years passed between plaintiff's hiring and firing; a jury could easily find that there is a difference between being over and under age 60; and there is no evidence that the same individual made the decision both to hire/promote the plaintiff and to fire him.

Court's Decision: On December 7, 2017, the Ninth Circuit panel issued an unpublished memorandum disposition affirming the lower court's decision in favor of the employer.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Nunies v. HIE Holdings, Inc.	U.S. Court of Appeals for the Ninth Circuit No. 16-16494	4/13/2017 (amicus filed) 9/17/2018 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff was hired as a part-time warehouse worker at defendant's Kauai Branch in 2008. He was transferred to a full-time position in 2010, delivering five-gallon bottles of water. By 2013, plaintiff heard popping and pain in his shoulder any time he lifted the bottles, as well as numbness in his left shoulder when he lifted his left arm above his chest. In June 2013, he asked to change jobs with a part-time warehouse worker, which was approved on June 14 by defendant (defendant contends the approval was subject to plaintiff and defendant's agreeing on several administrative matters, including pay; plaintiff disputes that there was any discussion about administrative issues). Plaintiff reported shoulder pain to his manager three days after his job change was approved. On June 19, plaintiff told his manager he wanted to see his doctor before his medical benefits ran out, and the manager called the corporate office. Upon his return, the manager told plaintiff the part-time job no longer existed due to budget cuts and that the plaintiff could not have the warehouse position. Plaintiff saw the doctor on June 20, who provided a note directing him to be off work for two weeks. Plaintiff sent the note to defendant. Plaintiff was subsequently terminated because the part-time warehouse job no longer existed and plaintiff could not carry the five-gallon water bottles; plaintiff argued the part-time warehouse job he held was advertised shortly after he was terminated. One year later, in May 2014, plaintiff was cleared without restrictions. Plaintiff sued for ADA discrimination based on his termination and discrimination in employment in violation of the ADA. Defendant argued plaintiff did not have an ADA-covered disability. The district court agreed with defendant, based on defendant's argument plaintiff lacked evidence that his shoulder injury substantially limited him in any major life activity.

Issue EEOC is Addressing as Amicus: Whether plaintiff fell within the ADAAA's definition of regarded-as disabled.

EEOC's Position: The district court erred in finding that plaintiff offered insufficient evidence to establish a disability under the ADA's regarded-as definition. The district court relied on the more stringent definition of "regarded as" under the ADA. Plaintiff needed to establish that the employer believed he had an impairment, which he did. Plaintiff should not have been required to demonstrate that the employer subjectively believed that the plaintiff was substantially limited in a major life activity by the impairment, which is what the court required of him. The evidence was sufficient to allow a reasonable jury to conclude that defendant rescinded plaintiff's transfer and terminated him because of a shoulder impairment that defendant had learned about only two days before under the ADAAA's standard for "regarded as" disability.

Court's Decision: The Ninth Circuit panel reversed and remanded the district court's dismissal of both the ADA claims and plaintiff's state law discrimination claim. The court explained that under the expanded standard under the ADAAA, the plaintiff must show that he has been subjected to a prohibited action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." Applying the ADAAA in this case, the panel concluded that the plaintiff established a genuine issue of material fact as to whether his employer regarded him as having a disability.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Taylor v. BNSF Railway Co.	U.S. Court of Appeals for the Ninth Circuit No. 16-35205	8/3/2016 (amicus filed)	ADA	Disability **Result:** Pending (Certified Question to the Washington Supreme Court)

Background: Defendant extended a job offer to plaintiff for an Electronic Technician position, which was contingent on plaintiff's successfully completing a medical screening because the Electronic Technician position was a safety-sensitive position. During the medical screening, plaintiff disclosed various medical problems as a result of his service in the United States Marine Corps, including problems with his knees and back. The plaintiff was 5'6" and weighed 256 pounds. Defendant sent plaintiff a letter informing him that defendant was unable to determine plaintiff's medical qualification due to "significant health and safety risks associated with extreme obesity . . . and uncertain status of knees and back." Defendant did not hire plaintiff. Plaintiff filed a charge with the EEOC and subsequently filed a civil action in federal court alleging the defendant violated the Washington Law Against Discrimination because: (1) defendant discriminated against plaintiff because of his perceived disability; and (2) defendant discriminated against plaintiff based on his status as a veteran.

Issue EEOC is Addressing as Amicus: Whether the district court misinterpreted the EEOC's interpretive guidance when it relied on the EEOC's interpretive guidance to support its ruling that obesity can only be an impairment if it is caused by a physiological disorder.

EEOC's Position: Section 1630.2(h) of the EEOC's interpretive guidance states that the term "'impairment' does not include characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within 'normal' range and are not the result of a physiological disorder." The EEOC argues defendant incorrectly interpreted this sentence to mean that morbid obesity is not an impairment unless it is caused by a physiological disorder. First, the grammar of the sentence shows that the sentence means that extreme or morbid obesity, because it is well outside the "normal" range of weight, is an impairment regardless of whether it was caused by a physiological disorder. Second, context of the sentence supports the EEOC's interpretation of the sentence discussing morbid obesity. Finally, even if the sentence is ambiguous, the court should defer to the EEOC's interpretation of the "physical characteristics" sentence.

Court's Decision: The Ninth Circuit followed prior precedent and determined that refusing to pay for required medical screening as a condition of employment is discrimination based on a perceived disability in violation of the ADA. The Ninth Circuit further recognized that it has not yet addressed whether or when obesity qualifies as a disability or impairment under the ADA, and that other jurisdictions are divided on that question. The Ninth Circuit further recognized that, even if it were to decide that the ADA treats obesity as a disability in only limited circumstances, Washington law may provide broader coverage, noting that where the Washington Supreme Court has departed from federal antidiscrimination statute precedent, it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do. Because the Ninth Circuit found that the ADA's coverage of obesity is an open question in this circuit and, in any event, Washington law may be broader, on September 17, 2018 it certified the question of whether, and under what conditions, obesity constitutes an impairment under the WLAD to the Washington Supreme Court.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Karmid v. Midwest Regional Medical Center dba Alliance Health Midwest	U.S. District Court for the Western District of Oklahoma (in the 10th Circuit) No. CIV-17-929-M	8/1/2018 (amicus filed)	ADEA	Charge Processing **Result:** Pending

Background: On March 10, 2017, plaintiff filed a charge of discrimination alleging that her former employer violated the ADEA when it paid her less than her younger coworkers. That same day, and at plaintiff's request, the Commission issued plaintiff a notice of right to sue, informing her that it was closing her ADEA case and that she could bring a lawsuit 60 days after the filing of the charge, but no later than 90 days after the date of issuance of the right-to-sue notice. On May 25, 2017, 77 days later, plaintiff filed suit, alleging age discrimination.

Defendant filed a motion to dismiss or to stay the case arguing that plaintiff had failed to exhaust her administrative remedies because the EEOC had issued a right-to-sue notice on the same day it received plaintiff's charge, without notifying defendant of the charge or attempting to resolve it through informal means such as conciliation. Defendant alleged that the only notice it received of plaintiff's charge came from when she filed suit, and that defendant still had still not received a copy of the charge at the time it filed its motion. Defendant further argued that the ADEA's charge-processing requirements were to be interpreted as identical to Title VII's, and that precedent governing Title VII requirements applied with equal force to ADEA cases. Thus, defendant argued, the Title VII conciliation requirement announced by the Supreme Court in *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015), "applies with full force" to plaintiff's private ADEA suit. Because the Commission failed to satisfy the Mach Mining requirements as to plaintiff's charge, according to defendant, the case should be either dismissed or stayed pending conciliation.

The district court granted defendant's motion and stayed the litigation. In its order, the court first stated that under Title VII, a plaintiff must obtain a right-to-sue notice from the Commission as a prerequisite to suit. The Court then extended that rule to the ADEA, stating that the Supreme Court "has held courts must construe the charge filing requirements of the ADEA and Title VII consistently," and concluded that, "Title VII cases apply to ADEA cases, and vice versa."

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred in staying plaintiff's lawsuit given that the EEOC satisfied all of its charge-processing obligations as to plaintiff's ADEA charge, and because conciliation is not a prerequisite to suit by a private party; and (2) Whether the district court erred in finding that Title VII's pre-suit requirements for private parties applies to ADEA suits.

EEOC's Position: The EEOC argued that while both the ADEA and Title VII contain statutory prerequisites with which a private party must comply before suing in court, neither statute requires that the EEOC engage in conciliation in order for a private party to bring suit. Here, the EEOC argued that the ADEA provides three limitations on a private individual's right to sue in court once a charge has been filed: (1) if the Commission itself brings suit on the charge, such action terminates the individual's right to bring suit; (2) no civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the EEOC; and (3) in cases where the EEOC has issued a right-to-sue notice, no private lawsuit may be commenced more than 90 days after the individual receives it. Under Title VII, the EEOC argued, the only limitation is that a charging party must wait to initiate a private lawsuit until the Commission has provided her with notice of her right to sue. Citing to 29 U.S.C. § 626(b) and 42 U.S.C. § 2000e-5(f)(1), the EEOC did, however, note that both statutes require conciliation as a prerequisite for the EEOC itself to bring suit.

Turning to the second issue, the EEOC argued that the plaintiff should not be penalized if defendant did not receive an administrative notice of her charge. Citing to Tenth Circuit precedent, the EEOC argued that a private plaintiff may not be penalized for the EEOC's administrative errors, particularly where, as the court found here, the charging party had taken every step required of her to exhaust her administrative remedies.

Court's Decision: Pending.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
LaCount v. South Lewis SH OPCO, LLC	U.S. Court of Appeals for the Tenth Circuit No. 17-5075	11/16/2017 (amicus filed) 3/28/2018 (dismissed)	Title VII	Pregnancy **Result:** Order issued granting motion to dismiss

Background: Plaintiff's complaint alleged that after the plaintiff informed her employer she was pregnant and submitted a lifting restriction from her doctor, her employer told her that she was "a liability," placed her on involuntary medical leave, and then terminated her when her leave expired. Employer moved to dismiss plaintiff's claim of pregnancy discrimination, arguing that she failed to allege facts supporting her claim that the defendant treated non-pregnant employees who were similar in their ability or inability to work more favorably than it had treated her. The district court dismissed plaintiff's amended complaint, ruling that it failed to state a plausible pregnancy discrimination claim under Title VII.

Issue EEOC is Addressing as Amicus: Whether the district court misapplied the governing legal standards in determining the sufficiency of plaintiff's amended complaint.

EEOC's Position: By focusing on whether plaintiff's factual allegations constituted direct or circumstantial evidence and essentially on whether she satisfied elements of a *prima facie* case of discrimination, the court failed to inquire, as required at the motion to dismiss stage, whether the facts alleged support some theory of discrimination. Plaintiff's amended complaint contains factual assertions sufficient to allege a plausible claim that she was placed on involuntary medical leave and fired because of her pregnancy. Plaintiff alleges that she informed her supervisor she was pregnant and, approximately a month later, submitted a doctor's note restricting her lifting to 25 pounds because of her pregnancy. She states that "[o]n that same day" she submitted the lifting restriction, a human resources official placed her on involuntary leave, told her she was "a liability," and told her "no other options" were available to her. After her leave expired, she was terminated. Plaintiff further alleges that she could perform her job notwithstanding her lifting restriction. Whether viewed as direct or circumstantial evidence, a jury could find based on this statement defendant believed plaintiff to be a liability because of her pregnancy. Plaintiff's amended complaint also contains sufficient facts to state a plausible claim that she was treated less favorably than others similar in their ability or inability to work when defendant refused to accommodate her pregnancy-related lifting restriction based on their policies differentiating between a pregnant person and a disabled person. How or where the employee's limitation arose is irrelevant under the PDA and *Young*. The only relevant comparison is whether the pregnant worker and nonpregnant worker are similar in their ability or inability to work. Defendant's pregnancy policy instructs that pregnant employees are to be treated the same as other workers with "similar non-work-related limitations." It can be inferred from this that workers injured on the job, as well as those with disabilities, yet similar in their ability or inability to work, are treated more favorably, contrary to the PDA. Under the PDA, the inquiry is whether the employer treats pregnant employees the same as others similar in their ability or inability to work. The statute makes no exception for individuals with disabilities. Thus, the court erred when it determined that plaintiff could not compare her treatment to persons with disabilities.

Court's Decision: N/A. The parties stipulated to dismiss the appeal in March of 2018, ostensibly due to settlement.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Tabura v. Kellogg USA	U.S. Court of Appeals for the Tenth Circuit No. 16-4135	10/21/2016 (amicus filed) 1/17/2018 (decided)	Title VII	Religion Result: Pro-Employee

Background: Plaintiffs, both Seventh Day Adventists who observed Sabbath from sundown on Friday to sundown on Saturday, worked at defendant's plant in Clearfield, Utah. When plaintiffs first started working for defendant, they were able to avoid Saturday work. In early 2011, however, the company switched to a continuous crewing schedule, under which plaintiffs worked 12-hour shifts during the day, on a rotating schedule, and were required to work every other Saturday. Given that employee absences are inevitable, defendant cross-trains employees on various jobs and frequently hires more people than necessary for each shift to ensure adequate coverage.

Defendant maintained an attendance policy under which employees accumulated points for unauthorized absences. If an employee accumulated a certain number of points during a 12-month period, this triggered progressive discipline, starting with a verbal warning and ending with termination. Plaintiffs, and all other employees, were permitted to use vacation and/or sick days without penalty, as long as they submitted their requests 24 hours in advance. Defendant also permitted employees to take leave without pay for periods of at least seven days. Under the attendance policy, employees were able to swap their shifts, with some limitations.

After defendant switched to the new scheduling system, plaintiff contacted his supervisor to request a reasonable accommodation because he was unable to work on Saturdays. He was subsequently informed that he could use vacation or sick leave, or engage in a voluntarily shift swap, to avoid having to work on Saturdays or incurring attendance penalties for failing to do so. Plaintiff had difficulty finding another employee to swap his shift with and did not have enough sick or vacation time to cover all of the Saturdays he was required to work. The other plaintiff was initially able to switch her Saturday shifts with another employee who observed Sabbath on Sunday. However, the co-worker ultimately left the plant and she did not have sufficient sick or vacation leave to cover all of the Saturdays she was required to work. After both plaintiffs accumulated sufficient points under the attendance policy, they were terminated. The district court granted summary judgment in favor of defendant, after finding that the company had provided a reasonable accommodation to both plaintiffs. Additionally, the district court concluded that even if defendant had not granted plaintiffs reasonable accommodations, requiring the company to do more than it had done would have imposed an undue hardship.

Issue EEOC is Addressing as Amicus: (1) Whether an employer satisfies its Title VII obligation to provide a reasonable accommodation for the religious beliefs of its employees when it can eliminate the conflict between those beliefs and a neutral work rule without suffering an undue hardship but nevertheless only offers a partial accommodation; and (2) Would defendant have suffered an undue hardship by excusing plaintiffs from all Saturday shifts when it routinely hired more people than necessary for the purposes of covering employee absences?

EEOC's Position: The EEOC argues that the district court erred in concluding that defendant had provided a reasonable accommodation for plaintiffs, despite its failure to eliminate the conflict between their religious practice and the company's neutral work rule. More specifically, the EEOC contends defendant eventually terminated plaintiffs in part because of their Saturday absences and, as such, any accommodation granted was not reasonable. Additionally, because the company hired more people than necessary per shift for the express purpose of filling in for absent employees, the EEOC asserts that defendant could not establish that permitting the plaintiffs to take all Saturdays off would have imposed an undue hardship.

Court's Decision: A Tenth Circuit panel reversed the decision of the district court, finding questions of fact remain as to whether allowing workers to use paid time off and asking other employees to cover shifts for employees taking time off for religious reasons constituted a reasonable accommodation. According to the panel, "[t]he reasonableness of the shift-swapping accommodation … as well as the reasonableness of the combination of taking paid time off and swapping shifts, are critical disputed issues of material fact in this case that a jury must resolve."

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Bratwaite v. Broward County School Board	U.S. Court of Appeals for the Eleventh Circuit No. 17-13750	12/7/2017 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff, an African-American secretary employed by the School Board filed a complaint under Title VII alleging that another employee verbally harassed and physically bullied and threatened her because of her race, and that she suffered retaliation in the form of verbal and written reprimands after she filed a charge of discrimination with the EEOC and complained of discrimination to her supervisor. The School Board moved for summary judgment, arguing in relevant part that plaintiff could not establish a *prima facie* case of retaliation because she could not show that the School Board disciplined her because of her protected activity rather than for legitimate, non-retaliatory reasons, and because the issuance of a reprimand allegedly could not constitute a prohibited adverse employment action. The district court granted the School Board's motion for summary judgment and concluded that plaintiff's retaliation claim failed for two reasons. First, the court concluded that verbal and written reprimands "do not constitute 'adverse employment action' for Title VII purposes," because they do not effect "a serious and material change in the terms, conditions, or privileges of employment." Second, the district court held that the plaintiff's retaliation claim failed because she was unable to show a causal connection between the reprimands and any protected activity, such as filing her EEOC charge or submitting complaints to her supervisor.

Issue EEOC is Addressing as Amicus: Whether the district court erred in holding that the anti-retaliation provision of Title VII, 42 U.S.C. 2000e-3(a), requires a plaintiff to show a "serious and material change in the terms, conditions, or privileges of employment," when controlling Supreme Court law requires only that "a reasonable employee would have found the challenged action materially adverse," such that it "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

EEOC's Position: The EEOC argued that the district court erroneously applied an adverse action standard derived from substantive discrimination cases, not from retaliation cases. Specifically, the EEOC contended that the district court failed to apply the appropriate standard for adverse action established in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). The EEOC also argued that the Eleventh Circuit must disregard any case that contradicts *Burlington* because the court had already acknowledged that it was the appropriate standard to use for retaliation claims.

Court's Decision: Pending. Oral argument was held on November 8, 2018.

Gogel v. Kia Motors Manufacturing Georgia, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 16-16850	3/3/2017 (amicus filed) 9/24/2018 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: The district court granted summary judgment on plaintiff Team Relation Manager's retaliation claim, finding that plaintiff could not show defendant's reason for termination – namely its loss of confidence in her abilities to perform her job duties after an investigation showed she had solicited members of her team to file a charge of discrimination – was pretext for retaliation. The court determined that defendant, at the time plaintiff was terminated, honestly believed that plaintiff was no longer fit for the position, as defendant maintained a good-faith belief that plaintiff had solicited employees to file an EEOC charge, which not only conflicted with her job duties, but also critically harmed its posture in the defense of discrimination suits brought against the company.

Issue EEOC is Addressing as Amicus: Whether plaintiff presented facts sufficient to create a genuine dispute of fact as to whether defendant's reason for terminating her – its belief that her solicitation of members in her team to file an EEOC charge conflicted with her job duties – was pretextual.

EEOC's Position: Plaintiff's managerial and/or equal employment functions do not alter the conclusion that she engaged in protected activity. Plaintiff's prior filing of an EEOC charge and repeated complaints to managers about her non-promotion based on sex preceding that charge constitute statutorily protected activity. While the parties dispute whether plaintiff actually assisted another employee in filing an EEOC charge, even if plaintiff had done so, such activity is protected under Title VII.

Court's Decision: The Eleventh Circuit reversed the district court's decision to grant summary judgment in favor of defendant as to plaintiff's retaliation claims under Title VII and § 1981. The court found plaintiff's opposition reasonable and that were it not for her position as a human resources manager, her action of providing the name of an attorney in connection with her EEOC charge would be protected conduct, because it assisted a co-worker with filing her own charge.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Houston v. City of Atlanta	U.S. Court of Appeals for the Eleventh Circuit No. 17-12126	9/27/2017 (amicus filed) 8/24/2018 (decided)	Title VII	Retaliation **Result:** Pro-Employer

Background: Plaintiff, a Sergeant with the Atlanta Police Department, alleged that his employer retaliated against him for complaining about sexual harassment. According to plaintiff, his supervisor yelled at him, denied him sick leave—which another supervisor then granted—increased his work load, and filed a complaint against him that resulted in a written reprimand and a two-year suspension. Plaintiff claims that the Department denied his request to transfer, but did promote him to Sergeant, based on the results of a written and oral examination. Plaintiff subsequently filed suit and the Department moved for summary judgment.

A magistrate judge issued a final report and recommendation in favor of granting the motion for summary judgment, after concluding that plaintiff could not establish that he engaged in a protected activity and that, assuming he had engaged in a protected activity, plaintiff did not demonstrate that he had suffered a materially adverse employment action. The magistrate judge specified that the standing for finding an adverse action for purposes of a retaliation claim, plaintiff must show that he suffered a serious and material change in the terms, conditions, or privileges of employment. The district court approved and adopted the magistrate judge's report and recommendation, and granted summary judgment in favor of the Department.

Issue EEOC is Addressing as Amicus: Whether the district court erred in holding that the anti-retaliation provision of Title VII requires a plaintiff to show a "serious and material change in the terms, conditions, or privileges of employment, when the Supreme Court previously required only that a reasonable employee would have found the challenged action materially adverse, such that it might have dissuaded him or her from making or support a charge of discrimination.

EEOC's Position: The EEOC contends that in adopting the magistrate judge's report and recommendation, the district court disregarded controlling Supreme Court precedent and applied the wrong legal standard to plaintiff's retaliation claim. The EEOC argues that the magistrate judge erroneously applied the adverse action standard from substantive discrimination cases, which does require a demonstration of a serious and material change in the terms, conditions, or privileges of employment, to plaintiff's retaliation claim. According to the EEOC, plaintiff was only required to show that a reasonable employee would have found the challenged action materially adverse, such that it might have dissuaded him or her from making or supporting a charge of discrimination.

In support of its position, the EEOC cites to Supreme Court and Eleventh Circuit case law that established a relaxed standard for showing a materially adverse action in the retaliation context. While the EEOC acknowledges that the Eleventh Circuit has on occasion applied the adverse action standard for substantive discrimination cases to retaliation claims in non-precedential opinions, it argues that the court must now disregard any decision that contracts the Supreme Court's holding in *Burlington National*. Finally, the EEOC alleges that plaintiff's claims that he was denied a transfer, issued a written reprimand, and placed on probation for two years, could be sufficient to state a claim for retaliation under Title VII.

Court's Decision: In an unpublished decision, the Eleventh Circuit upheld the district court's decision.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Jefferson v. Sewon America, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 17-11802	8/3/2017 (amicus filed) 8/15/2018 (decided)	Title VII	National Origin Race Retaliation **Result:** Mixed

Background: Plaintiff worked as a clerical employee for defendant's finance department. She purportedly earned favorable performance reviews and raises and was promoted from her initial 90-day probation period. After probation ended, she expressed an interest in an IT position. She received a positive on-the-spot IT evaluation and was told that she would be a good fit for the position, pending her supervisor's approval.

Plaintiff's supervisor then issued a negative performance evaluation citing issues about her phone, her tardiness, and because she failed his own surprise IT test. After she inquired about her application twice, she was told that her current supervisor only wanted a Korean man to fill the vacancy. She complained to HR who told her to ignore the comments. Ultimately, a Korean male was hired for the position. The HR representative also placed a negative evaluation on her file because she did not go directly to her supervisor about the vacancy in IT. An HR representative testified that she had never completed such an evaluation before or after completing a below-average evaluation for plaintiff. Plaintiff completed 30-40 hours of IT training. Plaintiff was terminated seven days after her complaint because her evaluations from HR and her supervisor were below average. The district court found that the denial of the IT position was not actionable conduct under Title VII to warrant an objectively reasonable belief that defendant violated the act because plaintiff did not show she was qualified for the position.

Issue EEOC is Addressing as Amicus: (1) Whether the district court erred in holding that plaintiff's complaint to Human Resources was not protected activity under Title VII because she lacked a good-faith, reasonable belief she was opposing unlawful conduct, when the conduct she reported was a manager's statements that he was denying her a transfer because of her race and national origin; and (2) Whether a reasonable factfinder could conclude that defendant fired plaintiff in retaliation for her complaint, where the record includes evidence that defendant issued a negative evaluation the same day as her complaint, though her manager testified that plaintiff was performing her job well, and then fired her seven days later.

EEOC's Position: Title VII makes it unlawful for employers to discriminate against employees based on a protected characteristic, including race or national origin. *See* 42 U.S.C. §§ 2000e-2(a)(1); 2000e-2(m). When there is evidence that a manager expressly indicates discriminatory bias in an employment decision with respect to a protected characteristic, an employee is reasonable to believe her employer is acting unlawfully under the statute. The district court incorrectly omitted this fact entirely from its analysis, and instead held that plaintiff lacked a good-faith, reasonable belief because she could not have reasonably believed she was qualified for the IT position or had suffered an adverse action. Plaintiff's qualifications are immaterial to the determination of objective reasonableness here, where a company official told her she did not receive the transfer because she is not Korean or male. Moreover, a jury could find that plaintiff reasonably believed that she was qualified and that the denial of the IT position constituted an adverse action.

The pretext evidence warrants submission of plaintiff's retaliation claim to a jury. The company had given plaintiff a positive performance evaluation and had issued no written warnings about her performance prior to her complaint. The same day that she complained to HR, the company issued her a negative evaluation, and fired her seven days later. A reasonable jury could thus find that the company fired plaintiff in retaliation for her complaint, and not because of purported performance issues.

Court's Decision: The Eleventh Circuit reversed the district court's decision in part, finding that plaintiff presented direct evidence that defendant failed to transfer her on the basis of her race and nationality. The court further found that plaintiff presented circumstantial evidence that defendant fired her in retaliation for her complaint. The Eleventh Circuit affirmed the district court's decision regarding plaintiff's claim of discriminatory termination, finding that plaintiff failed to present substantial evidence that defendant fired her on the basis of her race or national origin.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
Monaghan v. Worldpay US, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 17-14333	12/29/2017 (amicus filed)	Title VII	Harassment Retaliation **Result:** Pending

Background: Plaintiff, a white woman over the age of 40, was an executive assistant for defendant for three months in 2014. During most of that time, she was supervised by a younger black woman. Shortly after plaintiff began working, her supervisor allegedly made a series of offensive race- and age-based comments to her. Plaintiff sued under Title VII and the ADEA, alleging a hostile work environment and illegal termination because of her race and age, retaliatory termination, and retaliatory harassment. She subsequently abandoned her substantive claims, leaving only the claims for retaliation. With respect to her retaliatory harassment claim, plaintiff argued that she endured an adverse action within the meaning of *Burlington Northern* because her supervisor's conduct "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The magistrate judge refused to apply *Burlington Northern*'s adverse action standard to plaintiff's retaliatory harassment claim, stating that when evaluating whether an employer's actions constitute an adverse employment action within the context of a claim of retaliatory hostile work environment, courts do not employ the standard typical of retaliation claims. The magistrate also speculated that plaintiff may not have engaged in protected activity for purposes of Title VII's anti-retaliation provision because the harassment that she opposed "[fell] well-short of an adverse employment action." The district court agreed with the magistrate, and in applying the substantive discrimination standard to plaintiff's retaliatory harassment claim, the court concluded that the threats of physical harm and job loss by plaintiff's immediate supervisor, albeit highly inappropriate, were not sufficiently severe or pervasive to alter the terms or conditions of her employment.

Issue EEOC is Addressing as Amicus: Whether retaliatory harassment is actionable regardless of whether it meets the standard for discriminatory harassment.

EEOC's Position: The EEOC argued that the district court erred by holding that retaliatory harassment is actionable only if it would also be substantively actionable as a hostile work environment. To support this argument, the EEOC cited the Supreme Court's decision in *Burlington Northern*, which held that Title VII's adverse action standards are broader for retaliation claims than for substantive claims. The EEOC also argued that nothing in *Burlington Northern* or the Eleventh Circuit's binding precedent exempts retaliatory harassment from this general rule.

Court's Decision: Pending.

FY 2018 – SELECT APPELLATE CASES IN WHICH THE EEOC WAS A PARTY

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. Baltimore County	U.S. Court of Appeals for the Fourth Circuit No. 16-2216	1/11/2017 (appeal filed) 9/19/2018 (decided)	ADEA	Age **Result:** Pro-EEOC

Background: Baltimore County maintains a compulsory defined-benefit pension plan for its employees. The county deducts a higher percentage from an employee's salary if the employee was older when hired, resulting in lower take-home pay, because their contributions would be earning compound interest for few years. This policy anticipated that employees would retire at age 65 and was not modified after Baltimore County reduced the retirement age to 60 and began permitting employees to retire after they had worked a certain number of years. Two county corrections officers for Baltimore County filed ADEA charges with the EEOC in 1999 and 2000. They alleged that the larger contribution the county required them to make discriminated against them on the basis of their age. Several years later, in March 2006, the EEOC issued a determination finding an ADEA violation against the class of employees who were 40 or older when they enrolled in the pension plan. In September 2007, the EEOC sued Baltimore County. The district court granted the county summary judgment in January 2009, but the decision was appealed and reversed in June 2010. The Fourth Circuit concluded that the higher contribution rates were not justified by the time value of money, at least with respect to employees of different ages who were hired at the same time and could retire after working the same number of years. In October 2012, on remand, the district court found that the county had not pointed to any non-age-based financial considerations that justified the higher contribution rates for older employees and granted the EEOC summary judgment.

In early 2016, the county negotiated new collective bargaining agreements with the six unions that represent employees to phase out the pension contribution rates. After the district court approved a joint consent order in April 2016, the EEOC requested that the county be held liable for monetary relief for those employees who had to pay more into the pension system because of their age at hire. The district court concluded that pre-judgment backpay was discretionary under the ADEA and that the monetary relief sought for post-judgment harm was not mandatory. The district court ultimately denied the EEOC any monetary relief.

Issues on Appeal: (1) Whether back pay is a mandatory legal remedy under the ADEA; (2) Whether the district court erred in ruling that its decision denying any monetary relief was justified by the union's actions, the Supreme Court's previous Title VII pension decision, and/or laches; and (3) Whether the district court abused its discretion in denying all monetary relief, even if back pay is a discretionary equitable remedy under the ADEA.

EEOC's Position on Appeal: The EEOC argued that back pay is mandatory, not discretionary, under the ADEA, which incorporates the FLSA's remedial scheme. The EEOC further contended that previous Fourth Circuit holdings that liquidated damages are a mandatory remedy for willful violations of the ADEA supports the mandatory nature of back pay. According to the EEOC, the district court's discretionary authority to grant legal or equitable relief to effectuate the purpose of the ADEA does not alter the mandatory nature of the back pay remedy provided by the statute. Furthermore, the EEOC asserted that the equitable doctrine of laches cannot be used to reduce or eliminate legal damages, and, even if it was applicable, the county did not meet its burden to establish that it was entitled to such relief. Although the EEOC recognized that the unions representing county employees negotiated the adoption of new contribution rates, it argued that this does not provide grounds for eliminating monetary relief in this case because ADEA rights cannot be compromised or bargained away. Given that the pension plan at issue in this case is particularly unique in that it requires higher contribution rates for older employees where others typically do not, the EEOC argued that any award of monetary relief in this case will not affect any other pension plans. As such, the EEOC asserted previous Supreme Court cases denying such relief in Title VII pension decisions are not prohibitive.

Finally, the EEOC alleged that the district court abused its discretion in denying all monetary relief in this matter because it is necessary to effectuate the central statutory purpose of the ADEA. More specifically, the EEOC contended that rather than eliminating the illegal contribution policy in October 2012 or March 2014, the county continued to discriminate against its older employees and will not eliminate the problem until 2018, as set forth in the CBA. The EEOC argued that one of the principal purposes of the ADEA is to make victims whole, and denying monetary relief prevents that from happening.

Court's Decision: The Fourth Circuit reversed and remanded the lower court's decision, finding that "[r]etroactive monetary awards, such as the back pay sought here, are mandatory legal remedies under the ADEA upon a finding of liability." The court reasoned that "[back pay is, and was at the time Congress passed the ADEA, a mandatory legal remedy under the FLSA . . . we presume that Congress was aware of judicial interpretations of the FLSA when drafting associated provisions of the ADEA."

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. Maryland Insurance Administration	U.S. Court of Appeals for the Fourth Circuit No. 16-2408	2/21/2017 (appeal filed) 1/5/2018 (decided)	EPA	Sex **Result:** Pro-EEOC

Background: EEOC initiated the action under the Equal Pay Act alleging that defendant discriminated against female employees by paying them less than their male counterparts for performing equal work. The district court granted defendant's motion for summary judgment. The court found that the male counterparts identified by the EEOC were not proper comparators because they were hired into higher levels than the female employees at issue. The district court also found that the male comparators had higher levels of certification and experience than the female employees. Lastly, the court held that other male counterparts referenced by the EEOC were also not proper comparators because they did not work in substantially similar positions as the female employees.

Issues on Appeal: (1) Did the district court err in ruling that claimants and male counterparts were not proper comparators because they worked in different job positions? (2) Did the district court err in concluding male counterparts with the same position as the claimants were paid higher due to their prior work experience and credentials?

EEOC's Position on Appeal: The EEOC argued that a reasonable jury could find that the claimants and the male comparators in different positions were comparable because they shared a common core of tasks, their primary purpose was the same type of fraud investigations, they worked under similar conditions, and they required substantially similar levels of skill, effort, and responsibilities. The EEOC also argued that there was a factual dispute regarding whether male counterparts in the same position were paid higher due to their prior experience and credentials, as opposed to gender. Lastly, the EEOC contended that defendant failed to meet its affirmative obligation in proving that its predetermined merit system prevented any inference of sex bias in salary determinations.

Court's Decision: A Fourth Circuit panel determined that the lower court erred in dismissing the case, finding that after the EEOC made its *prima facie* showing of pay discrimination, the state agency failed to "submit evidence from which a reasonable factfinder could conclude not simply that the employer's proffered reasons could explain the wage disparity, but that the proffered reasons do in fact explain the wage disparity."

EEOC v. McLeod Health Inc.	U.S. Court of Appeals for the Fourth Circuit No. 17-2335	3/8/2018 (appeal filed)	ADA	Disability **Result:** Pending

Background: On September 11, 2014, the EEOC filed a complaint alleging that defendant violated the ADA by requiring its employee to undergo two medical examinations and by discharging her due to her disability after first placing her on forced unpaid leave. Defendant moved for summary judgment, arguing that the medical examinations were appropriate in light of the employee's symptoms, and that the examinations showed the employee was no longer qualified for her position because she posed a threat to herself that could not be accommodated. On January 21, 2016, the magistrate judge issued a report and recommendation suggesting that the district court grant defendant's motion and dismiss the case. On March 31, 2016, the district court adopted the recommendation in part. It dismissed the illegal examination claim in its entirety, but rejected the magistrate judge's rationale for dismissing the wrongful termination claim and remanded the case for further consideration. Defendant moved for reconsideration, and the district court concluded, in an order dated November 18, 2016, that additional analysis of the wrongful termination claim was necessary. It instructed the magistrate judge to give "particular attention to the role of the futile gesture doctrine, as well as whether a failure to accommodate claim exists and survives summary judgment." On June 19, 2017, the magistrate judge again recommended summary judgment on the wrongful termination claim. In an opinion dated September 21, 2017, the district court adopted the recommendation and granted summary judgment in favor of McLeod on all remaining claims.

Issues on Appeal: (1) Does the record support a reasonable jury finding that defendant violated the ADA by forcing charging party to undergo two medical exams without any reasonable belief, based on objective evidence, that the employee's condition prevented her from performing essential job functions or posed a direct threat? (2) Could a reasonable jury find that, even if defendant was justified in subjecting the employee to one or more medical examinations, the examinations it gave the employee were neither job-related nor consistent with business necessity, in violation of the ADA? (3) Could a reasonable jury find that defendant discriminated against the employee in violation of the ADA by putting her on involuntary unpaid leave and subsequently terminating her employment based on the results of the improper medical examinations to which it had subjected her?

EEOC's Position on Appeal: The EEOC argued that a reasonable jury could find that defendant violated the ADA by requiring the employee to undergo two medical examinations because defendant lacked an objectively reasonable belief that the employee could not perform her essential job function or posed a direct threat. The EEOC also argued that there was a triable issue of fact that existed as to whether the medical exams were sufficiently tied to the employee's job requirements. Lastly, the EEOC also argued that a reasonable jury could find that defendant discriminatorily discharged the employee in violation of the ADA.

Court's Decision: Pending. Oral argument was held on November 15, 2018.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. BDO USA	U.S. Court of Appeals for the Fifth Circuit No. 16-20314	9/12/2016 (appeal filed) 11/16/2017 (decided)	EPA Title VII	Subpoena Enforcement **Result:** Mixed

Background: The EEOC issued a subpoena seeking communications related to the claimant's claims of discrimination as well as other discrimination claims not directly related to the claimant. The respondent and EEOC agreed to production of communications, except for 278 documents, which the respondent claimed as privileged. The EEOC subsequently moved to enforce the subpoena to obtain the allegedly privileged documents. The district court affirmed the magistrate judge's ruling that the documents were privileged.

Issues on Appeal: Did the district court err when it affirmed the magistrate judge's ruling that the documents were privileged, without an *in camera* inspection and without supporting documentation supporting why the documents were privileged?

EEOC's Position on Appeal: First, the EEOC argued that the district court erred in not requiring the respondent to articulate why each specific document was privileged. Second, the EEOC asserted that the district court erred in holding that advice from attorneys was *per se* privileged, without conducting a proper analysis into whether the attorney was providing business, as opposed to legal, counseling. Third, the EEOC contended that the district court should have required affidavits or other supporting information that explained and established why each document was privileged, as opposed to just relying on the respondent's privilege log.

Court's Decision: The Fifth Circuit panel vacated and remanded the case, finding the lower court used an overly broad definition of attorney-client privilege in determining the communications were shielded from disclosure. The appellate court did not, however, hold that a protective order was unwarranted, and therefore left the decision whether to grant such an order to the trial court.

EEOC v. Methodist Hospitals of Dallas	U.S. Court of Appeals for the Fifth Circuit No. 17-10539	8/1/2017 (appeal filed)	ADA	Disability **Result:** Pending

Background: Defendant is a large medical complex with over 7,500 full-time employees in the Dallas-Fort Worth Area. During the relevant time period, defendant did not have a written ADA policy concerning requests for reasonable accommodations or permanent reassignment due to a disability. Instead, employees seeking a disability-related permanent assignment had to monitor defendant's job bank, identify other positions for which they are qualified, and submit a transfer application if they can no longer perform the functions of their current position. These employees are required to compete with other internal and external applicants. Defendant's policy seeks to ensure that the most qualified candidates are hired for each vacancy.

The employee, a former PCT or nursing assistant for defendant, was terminated after she sustained a back injury and could no longer perform her job duties. Although she made multiple requests for permanent reassignment, defendant did not transfer her to a new position. She was, however, permitted to apply and compete for other jobs. Employee was ultimately terminated by defendant because she was not selected for another position and could no longer work in her previous role.

In September 2015, the EEOC filed suit against defendant alleging that it unlawfully refuses to reassign employees who become unable to work their current jobs even with accommodations, and requires them to compete against other applicants for open positions for which they are qualified. The EEOC further alleged that the company unlawfully refused to reassign plaintiff to a job for which she was qualified after a back injury prevented her from continuing to work as a patient-care technician. In November 2016, the district court granted summary judgment in favor of defendant after concluding that its policy did not run afoul of the ADA. The district court also found that plaintiff had failed to establish that she was qualified for a vacant position at the time she submitted an application, that she caused the breakdown in the interactive process for a reasonable accommodation, and that she did not seek permanent reassignment as a last resort.

Issues on Appeal: (1) Whether an employer can avoid its ADA duty to reasonably accommodate employees who, because of disability, can no longer perform the essential functions of their current jobs even with accommodation, by requiring them to compete for jobs with other applicants, instead of reassigning the disabled employees to vacant positions for which they are qualified; (2)Whether, absent undue hardship, an employer ordinarily has to make an exception to a best-qualified-selection policy, if necessary to reasonably accommodate a qualified disabled employee; and (3) Whether the district court erred in concluding that defendant did not violate the ADA by terminating plaintiff following her back injury, instead of providing her with a reasonable accommodation in the form of reassignment.

EEOC's Position on Appeal: The EEOC contends that defendant's policy violates the ADA, which explicitly identifies reassignment, not the opportunity to compete for another position, as an example of a reasonable accommodation. According to the EEOC, the district court improperly concluded that defendant was not required to violate its best qualified policy because it did not have a duty to provided disabled employees with preferential treatment. Instead, the EEOC asserts that Supreme Court precedent overrules the cases on which the district court relies, and establishes that defendant is only excused from providing a disabled employee with a reassignment by establishing that it would cause an undue hardship. The EEOC claims that defendant cannot demonstrate that permitting reassignment would cause an undue hardship or that such a request does not constitute a reasonable accommodation. While the EEOC acknowledges that there were limits on a duty to reassign, it argues that they do not apply to the claimant, given the facts of the case, and do not necessarily apply when a best-qualified policy is implicated.

Court's Decision: Pending.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.	U.S. Court of Appeals for the Sixth Circuit No. 16-2424	2/10/2017 (appeal filed) 3/7/2018 (decided)	Title VII	Charge Processing Sex (Transgender Status) **Result:** Pro-EEOC

Background: A transgender woman initially presented as a man who worked for a funeral home as an embalmer. During her employment, she notified her supervisor that she was transgender and would undergo gender-reassignment surgery to present as a woman. The funeral home also applied a very specific gender-based dress benefit through which it supplied male employees with suits and ties but rarely gave female employees any such privileges. When employee returned after surgery, defendant terminated her employment.

The EEOC filed a complaint alleging that the funeral home fired the employee because she transitioned from male to female and did not conform with the funeral home's gender-based dress policy or stereotypes and only provided a clothing benefit to men. Although the district court found that transgender status is not protected under Title VII, it found that the employee stated a claim for relief under the act based on unlawful sex-based stereotyping. Subsequently, the funeral home filed an amended answer alleging the Religious Freedom Restoration Act defense under Title VII, *i.e.*, permitting the employee to continue employment would violate closely held religious beliefs. The district court granted summary judgment to the funeral home on the basis of this defense.

Issues on Appeal: (1) Whether Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. § 2000e-2(a), encompasses discrimination based on transgender status and/or transitioning from male to female; (2) Whether the Religious Freedom Restoration Act. 42 U.S.C. § 2000bb-1, provides a defense to the EEOC's enforcement action, allowing the defendant to rely on its sincerely held religious beliefs to justify its termination of the employee because she is a transgender woman, thereby depriving the employee of her Title VII right to be free from sex discrimination; and (3) Whether the EEOC may pursue its clothing benefit claim for a class of women where the EEOC discovered the alleged violation during a reasonable investigation of employee's charge alleging sex-based discriminatory termination.

EEOC's Position on Appeal: Title VII's prohibition on discrimination "because of . . . sex" includes discrimination based on transgender status and/or transitioning as outlined in the text of Title VII and decisions of the Supreme Court that have long recognized that Title VII forbids employment decisions based on gender. The court also erred in ruling that RFRA provides the funeral home a defense to the EEOC's enforcement action in this case. Title VII permits religious organizations to prefer employees who hold the same religious beliefs, and the judicially created "ministerial exception" prohibits application of federal anti-discrimination laws to the employment relationship between a religious institution and its ministers. Neither exception applies here. RFRA does not provide a defense that exempts the funeral home from complying with Title VII's prohibition on sex discrimination based on the sincere religious beliefs of its owner. That is because the funeral home failed to meet its initial burden of showing that the EEOC's enforcement action imposed a "substantial burden" on the company's "exercise of religion."

Finally, the district court erred in granting summary judgment on the EEOC's clothing benefit claim as to female employees. The court applied the incorrect legal standard in ruling that the EEOC cannot seek relief for women denied a clothing benefit because that claim was not included in the charge. The Supreme Court has held that the EEOC may seek relief as to any violation determined during the course of a reasonable investigation. Here, the EEOC's investigation revealed that for years male employees were provided with free suits, ties, and tailoring, while women were given nothing. After conciliation efforts failed, the agency was therefore entitled to seek relief in court for a class of women denied the clothing benefit accorded their male co-workers.

Court's Decision: The Sixth Circuit reversed the district court's grant of summary judgment. Specifically, the Sixth Circuit determined that (1) the funeral home engaged in unlawful discrimination against the ex-employee on the basis of her sex; (2) the funeral home has not established that applying Title VII's proscriptions against sex discrimination to the funeral home would substantially burden the owner's religious exercise, and therefore the funeral home is not entitled to a defense under RFRA; (3) even if the owner's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against the ex-employee; and (4) the EEOC may bring a discriminatory-clothing allowance claim in this case because such an investigation into the funeral home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Appellant submitted to the EEOC. Importantly, the Sixth Circuit expressly held that "discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex" (884 F.3d 560, 571) and "discrimination on the basis of transgender and transitioning status violates Title VII" (*Id.* at 574-575).

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. CVS Pharmacy, Inc.	U.S. Court of Appeals for the Seventh Circuit No. 17-1828	7/17/2017 (appeal filed) 6/8/2018 (decided)	Title VII	Attorney's Fees Charge Processing **Result:** Pro-EEOC

Background: The EEOC sued defendant alleging a pattern or practice of preventing enjoyment of the rights and benefits of Title VII by virtue of defendant's severance terms in that its severance agreements restricted the signatory from filing a charge or otherwise participating in EEOC proceedings. Defendant filed a motion to dismiss or, in the alternative, for summary judgment, which was granted on October 7, 2014. On December 5, 2014, the plaintiff filed a notice of appeal. On December 17, 2015, the Seventh Circuit upheld summary judgment in favor of the defendant, whose petition for rehearing *en banc* was denied on March 9, 2016. Defendant then filed a motion for attorney's fees before the district court, alleging the lawsuit was frivolous because the factual premise of the EEOC's case was unreasonable and because the lawsuit was filed in violation of Title VII and the EEOC's regulations. The EEOC argued that the lawsuit was not frivolous or alternatively, that defendant's proposed fees are unreasonable. The district court granted in part and denied in part defendant's motion, finding that the EEOC failed to comply with its enabling act and its regulations, which first requires the EEOC to use informal methods of eliminating an unlawful employment practice where it has reasonable cause to believe that such a practice has occurred or is occurring (conciliation), which warrants a fee award. The court then reduced the amount of hours billed by defendant in support of its motion from 574.3 hours to 300 hours. Plaintiff appealed that decision to the Seventh Circuit.

Issues on Appeal: Whether the district court abused its discretion by awarding attorneys' fees to defendant based entirely on the EEOC's failure to conciliate before filing suit; and whether the amount of the award ($300k plus) is excessive in light of the legal issue and that no discovery was conducted.

EEOC's Position on Appeal: First, *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978) only allows attorneys' fees awards to a prevailing Title VII defendant if the court concludes that the plaintiff's claim was "frivolous, unreasonable, or without foundation." Public policy does not support regular awards of attorneys' fees against Title VII plaintiffs and in favor of defendants. Merely failing to prevail is an insufficient basis to support an award. Second, the EEOC's legal theory was based on a logical and plausible reading of Title VII, even if the court ultimately disagreed with it. Third, the court abused its discretion in concluding that the EEOC's purported failure to comply with its regulations by not entering into conciliation first justified a fee award (other courts have allowed EEOC to proceed without conciliation under similar circumstances) – the difference in opinion demonstrates the EEOC's theory was at least plausible. Fourth, and in the alternative, the fee award was too high because the case involved only a single legal issue in both the district court and court of appeals, with no discovery and a minimal record, and the hours allocated for work on the dispositive motion, the work done on the appeal, and the preparation of the motion for fees are excessive on their face.

Court's Decision: The Seventh Circuit reversed in part the $307,902 fee award, finding the EEOC's claims neither legally nor factually frivolous. The court noted the EEOC's legal position did not have to satisfy a high burden, but rather must simply have a "colorable legal argument" for its claims. "Comparing the EEOC's arguments to then-existing law shows that it met this low bar." Specifically, the EEOC had a "textual foothold" to pursue its claim, "modest" support in prior case law, and "no case squarely foreclosed the EEOC's interpretation." The court explained that while precedent may not have favored the EEOC's position, "the fee statute does not punish a civil rights litigant for pursuing a novel, even if ambitious, theory." Moreover, the appellate court stated the lower court based its fee award not on the statute, but on the EEOC's own regulations regarding conciliation. "Regulations that parallel the statutory language cannot independently render the suit unreasonable."

EEOC v. CRST Van Expedited	U.S. Court of Appeals for the Eighth Circuit No. 18-1446	6/08/2018 (appeal filed)	Title VII	Attorney's Fees Harassment Sex **Result:** Pending

Background: CRST was awarded $3.3 million in attorney's fees from the EEOC after prevailing at the district court level. CRST alleged that they were entitled to a fee award as a prevailing party.

Issues on Appeal: Whether the district court abused its discretion in awarding $3.3 million in attorney's fees in the Title VII enforcement action.

EEOC's Position on Appeal: The EEOC argued that simply because the defendant prevailed in the district court Title VII action does not necessarily entitle defendant to a fee award. Instead, the EEOC argued that in order to be entitled to fees, the EEOC action would needed to have been "frivolous, unreasonable, or without foundation." The EEOC asserted that it was not required to investigate each individual's claim in a class of claimants, and the investigation into the widespread practices of defendant as a whole was sufficient for the EEOC to have found that the claim was not meritless. Further, the EEOC argued that it had a non-frivolous basis to believe each of the claims asserted in the action, and thus defendant was not entitled to a fee award.

Court's Decision: Pending

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. North Memorial Health Care	U.S. Court of Appeals for the Eighth Circuit No. 17-2926	11/8/2017 (appeal filed) 11/13/2018 (decided)	Title VII	Religion Retaliation **Result:** Pro-Employer

Background: The EEOC filed suit against defendant alleging that it violated the anti-retaliation provision of Title VII when it withdrew an offer of employment after an employee requested that she be exempt from working the Friday night shift because working that shift conflicted with her beliefs as a Seventh-day Adventist. Defendant moved for summary judgment, arguing that a request for a religious accommodation is not considered protected activity under Title VII. Defendant further argued that even if the request was considered protected activity, the employee requested to be exempt from the Friday night shift so she would not be too tired for church, not because working the shift conflicted with her religion, and, as such, the request was not reasonable. Additionally, defendant alleged that the EEOC could not establish that its justification for withdrawing the offer, even after she expressed willingness to work on Friday nights, was pretext for discrimination because it was legitimately concerned that she would not come to work on Friday nights. The district court granted defendant's motion and enter summary judgment in its favor. The EEOC appealed.

Issues on Appeal: Whether a request for a religious accommodation constitutes protected activity within the meaning of Title VII's anti-retaliation provision.

EEOC's Position on Appeal: The EEOC argued that the district court's holding that the employee did not engage in protected activity within the meaning of Title VII's anti-retaliation provision was erroneous, and conflicted with Eighth Circuit precedent and rulings from sister courts. The EEOC cited to the Eighth Circuit's decision in *Ollis v. HearthStone Homes*, 495 F.3d 570, 576 (8th Cir. 2007) to uphold a jury verdict for a plaintiff on his Title VII retaliation claim where he had asked to be excused from employer-sponsored religious sessions and was later fired. Moreover, the EEOC argued that the court should follow the extensive case law under the Americans with Disabilities Act, which recognizes requests for accommodations constitute protected activity, because the language in both anti-retaliation provisions is the same and courts use the same framework for ADA and Title VII claims. Finally, the EEOC argued that Title VII's broad statutory scheme strongly favors interpreting requests for religious accommodations as protected activity. More specifically, the EEOC contended that because Title VII required employers to reasonably accommodate the religious beliefs and practices of their employees, with limited exception, interpreting requests for religious accommodations as outside the scope of protected activity would be contrary to the purpose of the law.

Court's Decision: The 8th Circuit affirmed the lower court's grant of summary judgment in the employer's favor, agreeing with the district court that the EEOC failed to establish a *prima facie* case of opposition-clause unlawful retaliation because "merely requesting a religious accommodation is not the same as opposing the allegedly unlawful denial of a religious accommodation," and that the charging party's initial request for a religious accommodation "simply does not 'implicitly' constitute opposition to the ultimate denial of the requested accommodation."

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. Global Horizons, Inc.	U.S. Court of Appeals for the Ninth Circuit No. 16-35528	1/30/2017 (appeal filed)	Title VII	Harassment National Origin Retaliation Attorneys' fees **Result:** Pending (oral argument heard and submitted 6/13/18)

Background: The First Amended Complaint alleges that the growers, as joint employers with defendant, engaged in discrimination, harassment, and constructive discharge against a group of Thai guest workers on the basis of their national origin and retaliated against them for complaining. The district court partially dismissed the FAC on July 27, 2012, holding that the growers could only be liable for "orchard-related" Title VII violations involving the workers. The district court also found that there were no facts alleged to support a plausible finding of joint employment regarding "non-orchard-related matters" which included recruitment, transportation, subsistence and housing, or "paycheck issues." The district court also dismissed the national origin discrimination claim against the growers for failure to state a claim. On May 28, 2014, the district court granted summary judgment to the growers on EEOC's remaining claims (national origin-based hostile work environment, constructive discharge, and retaliation as against on farm defendant). Default was entered against defendant on March 3, 2015 for failure to defend. The growers filed a motion for attorneys' fees on March 19, 2015, and on November 2, 2015, the district court awarded $986k against the EEOC in the growers' favor. The district court entered final judgment on April 26, 2016, after entering default judgment against defendant in favor of the EEOC in the amount of $7.7 million. The EEOC appealed.

Issues on Appeal: Whether the district court applied the wrong legal standard when it partially dismissed the First Amended Complaint as to the growers' liability for "non-orchard-related" conduct and national-origin-based disparate treatment and in denying the EEOC's related discovery motions; whether the district court erred in granting summary judgment to the growers on the EEOC's Title VII hostile work environment and constructive discharge claims; and whether the district court abused its discretion in awarding the growers attorneys' fees under *Christiansburg*.

EEOC's Position on Appeal: The EEOC adequately pled that the growers were liable as joint employers of the claimants as to "non-orchard-related" matters under this court's legal standard on joint employment in *EEOC v. Pacific Maritime Association* and *Iqbal/Twombly*. The EEOC adequately pled a plausible national-origin-based disparate treatment claim, as it set forth numerous, specific allegations regarding how the claimants were treated differently from non-Thai workers, often related to the orchards, including being given fewer breaks, harder jobs, could not leave when they wished, had to work in the rain, etc. The district court also abused its discretion in denying the EEOC's discovery motions pertaining to non-orchard-related issues because it precluded the EEOC from making any factual showing as to the growers' involvement in the non-orchard-related aspects of the case and fed directly into the court's ruling that the lawsuit was frivolous (in that the EEOC was unable to show the non-orchard-related conduct). The district court also erred in awarding summary judgment on the EEOC's hostile work environment claims because it applied the wrong standard and simply concluded – without support – that the conduct the claimants suffered was not sufficiently severe to create an abusive working environment and failed to view the evidence in the light most favorable to the EEOC. The district court thereafter erred in granting summary judgment on the constructive discharge claims based on its erroneous hostile work environment ruling. Finally, the district court erred in awarding attorneys' fees under *Christiansburg* because it (1) erred in reviewing the scope and sufficiency of EEOC's administrative investigation of the charges in the case, which are not subject to judicial review and may not form the basis of an award of fees; and (2) the court erred in ruling that the litigation itself was frivolous, unreasonable, or without foundation – including the EEOC's theory of joint liability, remedies sought, and the merits of the claims.

Court's Decision: Pending. Argued and submitted on June 13, 2018.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. VF Jeanswear, LP	U.S. Court of Appeals for the Ninth Circuit 17-16786	12/11/2017 (appeal filed)	Title VII	Subpoena Enforcement **Result:** Pending

Background: This is a subpoena enforcement action brought by the EEOC in its attempt to subpoena information from defendant in pursuit of its investigation in a potential systemic, classwide claim of gender discrimination, initially brought by a charging party. The subpoena asks defendant to produce information relevant to investigating whether women in specified portions of defendant's operations were deprived of opportunities to advance to higher-level positions within the company. Defendant employs 2,500 individuals across the country in the manufacture and sale of its jeans and other clothing for various retailers. Charging party worked out of her home in sales. She received various promotions, culminating in an Account Executive position. She worked for defendant for 20 years, eventually resigning in lieu of agreeing to a demotion. She filed a charge of discrimination after. Charging party alleged that male employees dominated executive-level positions, young men moved up through the ranks more quickly than women, and that women were denied the same or similar promotional opportunities. The charge also alleges that while working at defendant, she was harassed and demoted based on her sex and her age and was paid less than men performing the same work, in violation of Title VII, the Equal Pay Act (EPA), and the Age Discrimination in Employment Act (ADEA). Defendant's position statement requested that the charge be dismissed because, *inter alia*, charging party had filed a private lawsuit under the EPA. The EEOC sent a request for information, identifying 10 categories of information it required. Charging party requested a right-to-sue, and the EEOC informed the parties that it would continue its investigation of the charge nonetheless. Defendant responded to the request for information, providing only that information which it believed related to charging party's allegations of personal harm, including providing information on 13 account executives, but refusing to produce information on all other employees the EEOC had requested. The EEOC modified its request and narrowed the category of employees, but defendant still refused to produce the information requested, stating it was still overbroad and not limited to the processing of the charge and allegations of personal harm. The EEOC then issued an administrative subpoena, directing defendant to "[s]ubmit an electronic database identifying all supervisors, managers, and executive employees at VF Jeanswear's facilities during the relevant period, January 1, 2012, to present" including personal identifying information, gender, location, etc. Defendant petitioned the Commission to revoke the subpoena, which was denied, stating that charging party had identified classwide gender discrimination that it was investigating and required the information it had requested as part of its investigation.

The EEOC then moved to enforce the subpoena in district court. Defendant stated that, besides being overbroad and outside the scope of the charge, it would take a full-time employee eight weeks of complete dedication, costing $10,700, to retrieve the information requested. The EEOC narrowed the scope of the subpoena; defendant said would likely take five weeks for one employee to retrieve the same information. The district court determined that the requested information was not relevant to the charge based on its views that (1) Title VII limits the EEOC to investigating discrimination that the charging party alleges she experienced personally, and (2) charging party did not allege that defendant excluded her from, or denied her an opportunity to obtain, a top-level position.

Issues on Appeal: Did the district court abuse its discretion and err as a matter of law both when it denied enforcement on the ground that the requested information is not relevant to charging party's allegations of personal harm and when it ruled, in the alternative, that defendant would be unduly burdened by full compliance?

EEOC's Position on Appeal: The district court erred when it ignored charging party's explicit statement that defendant never offered her anything higher than an executive sales representative position when it determined she, unlike a potential class, did not complain of failure to promote. The district court further erred in relying on her private lawsuit as modifying and limiting the EEOC's authority to investigate based on her chosen claims in the litigation. The district court also erred in believing that the EEOC's authority is limited to when the charging party alleges she experienced the same form of discriminatory harm as the class and that the allegations must satisfy a specified level of certainty before the EEOC can investigate. The district court also applied the wrong standard in determining undue burden – it should have required that defendant show that the subpoena would cause serious disruption of normal business operations or imposition of undue operations costs (as compared to normal operation costs). The district court further erred by opining that the value of the information the EEOC seeks is "attenuated at best."

Court's Decision: Pending.

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. JetStream Ground Services, Inc.	U.S. Court of Appeals for the Tenth Circuit No. 17-1003	5/8/2017 (appeal filed) 12/28/2017 (decided)	Title VII	Religion **Result:** Pro-Employer

Background: The EEOC sued defendant under Title VII, alleging that it refused to hire five Muslim women because they would not remove their headscarves ("hijabs") at work, hired two other women only after they agreed to work without wearing their hijabs, and then laid off one of those two women several months later because she wore her hijab during breaks. For several years, defendant asserted that it did not hire these women based on their applications or interviews. When this was found to be untrue, defendant presented a new reason when it contended that it relied exclusively on recommendations from a supervisor who worked at a vendor. Defendant admitted that it destroyed key evidence that could have countered this new explanation and that it had provided false information to the government for several years. The district court denied the EEOC's motion for spoliation sanctions. Ultimately, the jury ruled in defendant's favor. The district court also denied the EEOC's motion for a new trial.

Issues on Appeal: (1) Did the district court abuse its discretion by not imposing any spoliation sanction where defendant violated the EEOC's recordkeeping regulation, destroyed or lost every document that could have contradicted its asserted reason for not hiring the claimants, and prejudiced the EEOC? (2) Did the district court abuse its discretion by not excluding evidence regarding documents that defendant destroyed or lost in violation of its duty to preserve them, where the absence of those documents prejudiced the EEOC? (3) Having decided to admit evidence regarding the destroyed documents, did the district court abuse its discretion by refusing to instruct the jury that it should infer that the missing documents would have supported the EEOC's case?

EEOC's Position on Appeal: By destroying documents that could have disputed its claims, defendant violated 29 C.F.R. § 1602.14. Its actions prejudiced the EEOC—precisely the situation that 29 C.F.R. § 1602.14 is intended to prevent. Violation of the EEOC recordkeeping regulation, coupled with prejudice to the EEOC, required the district court to sanction defendant for spoliation.

At a minimum, the district court should have excluded all testimony related to the missing documents, especially since bad faith is not required to exclude evidence as a sanction for spoliation. Alternatively, the district court should have granted an adverse inference instruction. Bad faith is not required for an adverse inference instruction when an employer destroys documents in violation of 29 C.F.R. § 1602.14 and the destruction prejudices the opposing party.

Court's Decision: On December 28, 2017, the Tenth Circuit rejected the EEOC's position that the trial court erred in its jury instruction. The appellate court held that the EEOC's "argument that the exclusion sanction should have been applied was waived in their opening statement at trial. And the district court did not abuse its discretion in refusing to give an adverse-inference instruction after Plaintiffs conceded that destruction of the records was not in bad faith."

CASE NAME	COURT AND CASE NUMBER	DATE OF AMICUS FILING AND/OR COURT DECISION	STATUTES	BASIS/ISSUE/RESULT
EEOC v. STME dba Massage Envy	U.S. Court of Appeals for the Eleventh Circuit No. 18-12277-GG	7/27/2018 (appeal filed)	ADA	Disability **Result:** Pending

Background: In September 2014, an employee requested time off to visit her sister in Ghana and was told by her supervisor that she would be terminated if she went ahead with the trip. Lowe's supervisor said he was worried she would contract the Ebola virus if she went to Ghana and would "bring it home to Tampa and infect everyone." Despite the threat, the employee went on her previously planned vacation. Upon her return, the employee was not permitted to resume working for defendant. The employee filed a charge of discrimination with the EEOC alleging she was terminated because defendant perceived her as disabled or as having the potential to become disabled, in violation of the ADA.

After conciliation efforts failed, the EEOC filed suit on April 26, 2017. Defendant moved to dismiss the FAC on the grounds that the EEOC had failed to exhaust its administrative remedies and that the FAC failed to state a cognizable claim under the ADA. The district court granted defendant's motion to dismiss, explaining that it "decline[d] to expand the regarded as disabled definition in the ADA to cover cases, such as this one, in which an employer perceives an employee to be presently healthy with only the potential to become disabled in the future due to voluntary conduct." Similarly, the court dismissed the EEOC's association-based claim because it concluded that such claims require an actual association with someone known to have a disability, rather than "a potential future association" with such a person, and rather than an association with people "who are merely regarded as disabled."

Issues on Appeal: (1) Whether an employer violates the ADA's prohibition on discrimination against individuals "regarded as" disabled when it terminates an employee because it believes she will imminently contract a disabling condition; and (2) Whether an employer violates the association provision of the ADA when it terminates an employee because it believes the people with whom she will imminently associate have a communicable disability.

EEOC's Position on Appeal: The EEOC argued that defendant violated the ADA when it terminated the employee based on its unfounded fear that she would contract Ebola after she refused to forego visiting her sister in Ghana. Here, the EEOC noted that if defendant wanted to exclude the employee from the workplace because it believed she posed a "direct threat" to others, it would first need to make "an individualized assessment of the individual's present ability" to safely perform her job, based on "a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." Contrary to the district court's ruling that defendant did not violate the ADA because it terminated the employee before she left for her vacation, the EEOC further argued that the ADA does not shield employers who anticipatorily terminate employees to avoid their statutory obligations because the goals of the ADA and the settled means of interpreting its language make clear that such an insignificant temporal distinction cannot and should not lead to a different outcome. Lastly, the EEOC argued that the district court erred as a matter of law in requiring that the association be with someone with an actual, as opposed to a perceived, disability. Here, the EEOC explained that by requiring the existence of an actual disability, and refusing to recognize a cause of action for discrimination based on association "with people who are merely regarded as disabled," the district court read the "regarded as" portion of the definition out of the statute.

Court's Decision: Pending.

APPENDIX C – SELECT SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2018[715]

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
11/28/2017	WA	USDC Western District of Washington 2:17cv1864 Hon. James L. Robart	Smart Talent Inc.; Ross Farr	Individual Charging Party	Defendant ordered to comply with part I of the subpoena
Commentary: The EEOC filed an application to show cause why its administrative subpoena should not be enforced arising from an investigation of sex discrimination and retaliation. The charging party alleges that Respondent staffing agency informed her of its company policy to honor requests for applicants of a specific gender and fired the charging party after she suggested the policy was unlawful. On March 17, 2017, the EEOC issued the subpoena, which sought a description of Respondent's software system(s) or system component(s) that stores computerized or machine-readable information related to placing temporary workers, client requests, temporary worker information, and other related data. For each system or system component, the following information was requested: the name and version of the system/software and relevant components; the date on which the company began using the system, and the name of its predecessor; an estimate of the number of records in each system; a description of the categories of any employees or temporary workers excluded from the system or component; the name and commonly understood description of each data field or variable on the system component(s); the definition of all codes used in each system or component identified; a database file or other commonly used software if the system data cannot be written into a comma-delimited file; and if any system or components are maintained by a third party, the system or components with the name and address of the third party and the dates of the contract or arrangement. The subpoena covers all of the above information Respondent stored from January 2014 to the present. The subpoena also sought all email correspondence between the Respondent and its clients. Respondent claimed that complying with the second part of the subpoena, the request for email correspondence, was overbroad and placed an undue burden on the Respondent. The court withheld judgement on the second part of the subpoena, but ordered the Respondent to comply with the first part of the EEOC subpoena, requiring information be pulled from the Respondent's information tracking system for temporary workers, by May 7, 2018, and ordered a 30(b)(6) deposition or an alternative solution to the deposition by May 17, 2018.					
12/28/2017	MI	USDC Eastern District of Michigan 2:17mc51715 Hon. Avern Cohn	Detroit Police Department	Individual Charging Party	Voluntarily dismissed based upon compliance
Commentary: The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of age discrimination and retaliation. On October 26, 2017, the EEOC requested certain information related to the charge, and when the defendant did not respond, it issued a subpoena. The subpoena was received on November 27, 2017, and requested that the Detroit Police Department submit a complete copy of the charging party's complete personnel file in electronic format; copies of employee handbook and all written rules, policies, and procedures in effect during the period of January 1, 2014, to present, in electronic format; a complete unredacted copy of the internal investigation file(s) into the charging party's complaint; any documentation in electronic format that identifies each individual who participated in the decision to assign, not assign and or reassign the charging party; a copy of the organization's two most recent EEO-1 reports for the facility at which the charging party was employed; and a copy of all emails referencing the charging party from December 1, 2015 through the present. Respondent failed to comply with the subpoena, and the application for the Order to Show Cause was filed December 28, 2017. Order to show cause was issued, but the application was later withdrawn by the EEOC after the Detroit Police Department complied with the subpoena.					

715 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2018. According to the FY 2018 PAR, the EEOC filed 18, and resolved 15, subpoena enforcement actions during this period. EEOC FY 2018 PAR, p. 35. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
3/7/2018	MI	USDC Eastern District of Michigan 2:18mc50393 Mag. Anthony P. Patti	All Pro Nissan / Dearborn Motors LLC	Individual Charging Party	Voluntarily dismissed based upon compliance

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of discrimination and retaliation. On October 6, 2016, charging party filed a charge of discrimination alleging that Respondent unlawfully retaliated against an employee for filing a previous charge of discrimination. To investigate this claim, on September 8, 2017, the EEOC issued a Request for Information. When Respondent failed to respond, the Commission issued a subpoena. The Respondent initially failed to comply. The subpoena requested a copy of the work schedules of all mechanics, express techs, and oil techs, from January 1, 2015 to present; a list with the name of the individual responsible for making the work schedule and scheduling the employees; a list of each individual working on May 2, 2017, the charging party's last day of employment; and all individuals Respondent claims in its Position Statement witnessed the charging party quit. For each such individual, the EEOC requested the Respondent identify each by full name, title, last known mailing address, and telephone number. The subpoena was received October 20, 2017. The Respondent again did not respond. After filing the Application for Order to Show Cause, however, the Respondent complied with the subpoena.

4/10/2018	NY	USDC Western District of New York 1:18cv427 Judge Unassigned	Thermo Fisher Scientific	Systemic Investigation	Pending

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of age discrimination. The Respondent is an employer doing business in New York. The charging party alleges that Respondent discriminated against the charging party and other individuals on the basis of age by terminating the charging party and other employees over the age of 40 and replacing them with younger workers. The EEOC issued a Request for Information to the employer on June 1, 2017. After receiving an extension, the employer failed to comply with the RFI and instead served "Objections and Responses to the EEOC's Request for Documents" on July 13, 2017. Respondent provided some of the requested information but objected to supplying an employee list, job postings, application materials, and replacement employee lists. On November 28, 2017, an Investigator with the EEOC made a phone call to the employer to explain why the requested documentation was necessary for its investigation, and that the EEOC would be forced to subpoena the information. The employer again failed to comply with the RFI. On December 5, 2017, The EEOC issued a subpoena to require the Respondent to produce information needed as part of the EEOC's investigation of a charge of unlawful employment practices. The subpoena requested (1) a list of all individuals employed between January 1, 2015 and the present, including name, date of birth, date of hire, job title, contact information, name of immediate supervisor and, any date of and reason for termination; (2) Job postings for any employee hired between January 1, 2014 and the present; (3) application materials for each individual who applied for an open position with Respondent during the relevant time period; (4) personnel records for 21 former employees identified as potential harmed parties; and (5) a list of the individuals who replaced the former employees identified as potential harmed parties, including their name, date of birth, date of hire, job title, contact information, name of immediate supervisor, and any date of and reason for termination. The employer failed to comply with the subpoena by the deadline date, instead of filing "Objections and Responses to the EEOC's Subpoena." The EEOC investigator further requested the documentation in person after the employer failed to comply with the subpoena, but the employer refused to comply. The Respondent has refused to comply fully with subpoena.

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
4/25/2018	ND	USDC North Dakota 1:18mc3 Mag. Charles S. Miller, Jr.	Riverdale High Lodge	Individual Charging Party	Voluntarily dismissed based upon compliance

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of racial discrimination, national origin discrimination, and retaliation. The employer hired the charging parties on J-1 visas to work as hospitality management interns. Employer changed the charging party's place of work to a sports bar without notice and paid them at a rate lower than what they had contracted. When the charging parties complained, the employer threatened them with deportation. EEOC served Respondent with Notice of Charge of Discrimination on September 13, 2017, which the EEOC followed up with an email to the employer. The employer informed the EEOC it had contacted a deportation officer and would not respond to the EEOC charges. On December 5, 2017, the EEOC issued a Request for Information on the employer. On December 27, 2017, the EEOC issued and served a subpoena on Respondent requiring Respondent to produce information needed as part of the EEOC's investigation of a charge of unlawful employment practices, which has been filed against Respondent. On January 16, 2018, the EEOC issued and served an Amended Subpoena on Respondent requiring Respondent to produce information needed as part of the EEOC's investigation of two charges of unlawful employment practices, which have been filed against Respondent. The two charges are related and involve similar facts and claims. On February 1, 2018, Respondent produced some information responsive to the subpoena. However, Respondent's response was incomplete. On February 6, 2018, the EEOC notified Respondent that its response to the subpoena was incomplete and that Respondent had failed to provide all of the requested information. The EEOC outlined specifically what information was not provided, and requested that Respondent produce the requested documents by February 13, 2018. The EEOC informed Respondent that if the information was not produced, the EEOC would move to enforce the subpoena in federal court. On February 6, 2018, Respondent responded to the EEOC by email, requesting that the case be moved to North Dakota from the EEOC Minneapolis Area Office, which investigated the charges. The EEOC explained to Respondent that the EEOC has no office in North Dakota, and the Minnesota office has jurisdiction to investigate charges in North Dakota. The court granted the order to show cause, after which the Respondent agreed to furnish the requested information. The EEOC filed for voluntary dismissal based upon compliance with the subpoena.

6/7/2018	CA	USDC Central District of California 2:18mc72 Mag. John E. McDermott	Broadway Financial Corporation	Systemic Investigation	Court granted the EEOC's application to show cause

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of disability discrimination. The EEOC is investigating a charge of disability discrimination filed against the Respondent under the ADA. The charging party filed a charge of discrimination under the ADA against the Respondent, alleging that it failed to engage in the interactive process and to provide reasonable accommodation to her and a class of similarly situated individuals. During its investigation, the EEOC issued on December 8, 2016, a Request for Information. The RFI includes Request No. 16, which sought the identity, contact information, and other employment-related information of all employees discharged during the period of January 1, 2014, to the present. Respondent refused to comply with Request No. 16, and the EEOC issued a subpoena to obtain the information sought by Request No. 16. The Respondent objected and filed a petition to revoke and/or modify the subpoena, which the EEOC denied. The Respondent then missed its deadline to produce responsive documents and stated its intention not to comply with the subpoena. The court issued an order to show cause, and the Respondent agreed to comply with the subpoena.

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
7/5/2018	NV	USDC Nevada 2:18cv1227 Mag. Cam Ferenbach	Sbeeg Holdings Llc Dba Hyde Bellagio; Spoonful Management	Systemic Investigation	Court granted EEOC's application to show cause

Commentary:

The EEOC brings this subpoena enforcement action seeking an Order to Show Cause why the EEOC's subpoena should not be enforced. The EEOC is investing a charge of sexual harassment and retaliation against an applicant who applied for a cocktail waitress position. The hiring manager allegedly requested sex and nude pictures. The charging party did not respond and was not hired. After the charging party filed a claim with the EEOC, the EEOC sent a Request for Information (RFI) to the Respondent. The RFI included requests for an organizational chart reflecting Respondents' national and/or local organizational structure; total number of employees; documents submitted to Respondents by any persons who sought employment from July 29, 2014 to the present; all documents created as part of the selection process; documents reflecting job openings, their job descriptions, rates of pay, and the names and job titles of the screening officials from July 29, 2014 to the present; a list of Respondents' employees from July 29, 2014 to the present, including their names, addresses, sex, telephone numbers and email addresses; complaints Respondents received regarding their hiring process and/or harassment; the complete personnel file, including any informal desk files or notes kept by managers, for charging party and other company personnel; and all documents reflecting any agreements between Respondents and charging party. Respondents provided the hiring process policy, the total number of employees in 2017, and an excerpt from their employee handbook's anti-harassment policy. The Respondents refused, however, to provide any further information and instead objected to the remaining requests in the RFI on various grounds. Then the EEOC issued a subpoena upon the Respondents. The EEOC claims that while Respondents intermittently produced some responsive information and documents, their refusal to fully comply has delayed and hampered the investigation of this charge. The subpoena seeks documents and information relevant to the EEOC's investigation into whether Respondents subjected the charging party and similarly situated employees to sexual harassment and retaliation. The EEOC then applied for an Order to Show Cause why the EEOC's subpoena should not be enforced, which was granted by the court. The Respondent then complied with the EEOC's requests before filing a reply brief to the Order to Show Cause. EEOC moved to have the order for a hearing and reply brief regarding the Order to Show Cause be vacated, which the court granted. The parties are now filing joint status reports with the court to show the parties are working together to ensure compliance with the subpoena.

7/20/2018	CA	USDC Central District of California 2:18mc96 Mag. Michael R. Wilner	Nationwide Janitorial Services Inc.	Systemic Investigation	Court granted EEOC's application to show cause

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex discrimination and retaliation. The Charging Parties each filed a charge of discrimination alleging that Respondent subjected Charging Parties and a class of similarly situated individuals to sexual harassment and retaliation by supervisors, including allegations of sexual assault. The EEOC issued a Request for Information (RFI) to gather information related to the charges. The Respondent provided responsive documents, but failed to provide an adequate response to Request #31, and objected to it as overbroad. Accordingly, the EEOC subpoenaed the information sought by Request #31. The subpoena sought a list of all employees employed by Respondent in California from January 1, 2014 to the present, including their name; sex; job title; full time or part time status; worksite or location; name of their supervisor; date of hire; date of separation; reason for separation; and last known address and telephone number. The EEOC alleges the Respondent's refusal to fully comply has delayed and hampered the investigation of this charge. The Respondent filed a Petition to Revoke the subpoena, which was denied by the EEOC. The Respondent then failed to comply with the subpoena. The EEOC applied for an Order to Show Cause why the Subpoena should not be enforced. This order was granted. The parties filed a joint status report, showing that Respondent had partially submitted the requested documents. The EEOC, by October 19, 2018, will file either a notice of dismissal or a status update informing the court of the status of the production, if incomplete.

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
8/3/2018	PA	USDC Middle District of Pennsylvania 1:18cv1539 Hon. Christopher C. Conner	Service Tire Truck Centers	Individual Charging Party	Court granted EEOC's application to show cause
Commentary: The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex and pregnancy discrimination. The charging party alleges that she was denied a promotion because of her sex and pregnancy and that she was paid less than male employees performing comparable work because of her sex. The EEOC served Respondent with a Request for Information (RFI) seeking documents and data relevant to the investigation. Respondent requested several extensions to respond to the RFI, and while they issued a position statement on the charge, the Respondent never replied to the first RFI. Based on statements made in the Respondent's position statement, the EEOC filed a second RFI seeking information on the application procedures used to fill the position, and the qualifications of, sex, and procedures followed by the individual hired for the position. The Respondent did not respond to the second RFI. On May 14, 2018, the EEOC issued a subpoena requiring the Respondent to produce a subset of the evidence requested in the EEOC's RFIs. The Respondent then provided a limited set of information, insufficient to comply with the subpoena. The EEOC then filed an Application for an Order to Show Cause, which was granted by the court. The Respondent has not yet complied with the subpoena.					
9/6/2018	IN	USDC for the Southern District of Indiana, Indianapolis Division 1:18mc57 Mag. Doris L. Pryor	Indiana Center For Recovery, LLC	Individual Charging Party	Court granted EEOC's application to show cause
Commentary: The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex discrimination. The charging party was offered a position as with Respondent and discovered she was pregnant after the offer. Respondent told charging party she could not work while pregnant, but that she should come back after having her baby. The EEOC received the charge and investigated by sending a Request for Information (RFI) to the Respondent. The RFI sought the name, address, and basic information about the facility named in the charge; the Respondent's hiring policies; the receiving, screening, and processing methods for applications for employment; the total applications received for this position; the reason the charging party was not selected for this position; why the person selected for the position was selected instead of the charging party; the job description for the position; the names of hiring decision makers; and a complete copy of all correspondence with the charging party. The Respondent did not reply to the RFI. On June 8, 2018, the EEOC issued a subpoena to the Respondent, which requested the production of much of the same information requested in the RFI. The Respondent failed to respond to the subpoena. The court granted the Order to Show Cause, to which the Respondent filed a Notice of Intent to Comply. The EEOC and Respondent then filed a joint motion to establish a timeframe for compliance with the subpoena.					
9/18/2018	OH	USDC Northern District of Ohio 1:18mc88 Hon. Christopher A. Boyko	Sterling Infosystems Inc.	Systemic Investigation	Court granted EEOC's application to show cause
Commentary: The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of racial discrimination. The EEOC is investigating a charge alleging that an employer failed to hire the charging party and other applicants due to their race, since at least May 16, 2014, in violation of Title VII of the Civil Rights Act of 1964. The charging party received a hiring offer from the Alcoa Forging and Extrusions but, upon a background investigation conducted by Respondent, was denied due to information discovered in the background report. In this investigation, the EEOC issued a subpoena to Respondent for documents relating to this investigation. The requested information includes Respondent's contracts with Alcoa and communication between the two; background reports or other results of screenings Respondent has performed for Alcoa; documents regarding any Alcoa applicant or employee that Respondent has accessed, compiled, obtained, or relied upon; all documents Respondent has received from or provided to Alcoa about its applicants and employees; documents reflecting communications between Respondent and Alcoa's applicants; documents reflecting the race, gender, and/or national origin of Alcoa applicants or employees; an electronic database identifying all Alcoa applicants for which Respondent prepared any background check from January 1, 2009 to present. Respondent submitted objections to the subpoena and an untimely petition to revoke or modify the subpoena. While Respondent has given partially responsive documents, Respondent has refused to produce any documents related multiple requests in the subpoena. The court granted EEOC's application to show cause.					

FILING DATE	STATE	COURT NAME / CASE NUMBER / JUDGE	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	RESULT
9/24/2018	MS	USDC Southern District of Mississippi 3:18mc663 Mag. Linda R. Anderson	Express Services, Inc.	Systemic Investigation	Court granted EEOC's application to show cause

Commentary:

The EEOC filed an application to show cause why an administrative subpoena should not be enforced arising from an investigation of sex discrimination. The charging party was interested in a laborer position with Respondent to work at Advanced Drainage. Charging party alleges that Respondent's representative told her they do not send women to work at Advanced Drainage. On November 13, 2015, the EEOC informed Respondent it was expanding the investigation to determine whether other individuals had been similarly aggrieved. The EEOC sent a Request for Information (RFI) to Respondent on several occasions, seeking data regarding job applicants at Respondent's Vicksburg location from January 1, 2012, to the present. Respondent provided data regarding applicants over a two-year period but did not provide information on the applicants' gender, contact information, or any data about applicants referred, and not referred, to other clients of Respondent. Respondent also refused to describe the data available in its Human Resources Information System (HRIS), because the information was highly confidential and proprietary. The EEOC also requested applicant data in the HRIS system that detailed applicant contact data, demographic data, and employment history. Respondent notified the EEOC it would not provide any data from the HRIS system, as it was confidential, proprietary, and beyond the scope of the investigation. The EEOC issued a subpoena to seek additional information regarding the strength assessment in use for employment selection and data regarding the personal information, employment history, education, training, and availability of all applicants and referral employees to the Respondent's Vicksburg location (where the charge took place) from January 1, 2012 to present. Respondent served a petition to revoke subpoena, which the EEOC allowed for information relating to the strength assessment, but denied for all other requests in the subpoena. Respondent objects because the subpoena is beyond the scope of the charge, too vague, overbroad, and too indefinite, and that the data the subpoena seeks is confidential and proprietary. The court granted the EEOC's application to show cause and set a hearing date for December 6, 2018.

APPENDIX D - FY 2018 SELECT SUMMARY JUDGMENT DECISIONS BY CLAIM TYPE(S)

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Age Discrimination Disability Discrimination	Halliburton Energy Services	U.S. District Court for the Southern District of Mississippi Civil Action No. 3:16-CV-233-CWR-FKB	2018 U.S. Dist. LEXIS 103509 (S.D. Miss. June 12, 2018)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion for summary judgment, finding the employer breached its mediation agreement.	Did the employer breach its mediation agreement with the EEOC? Is the employer entitled to summary judgment on the issue of whether the agreement required it to rehire the charging party?

Commentary:

The charging party filed a charge of discrimination alleging the defendant unlawfully fired him in violation of the ADA and ADEA because of a knee-related disability and his age. The parties availed themselves of the EEOC's alternative dispute resolution program. An agreement was reached whereby the EEOC would terminate its investigation of the defendant, and the defendant would pay the charging party $40,000 and, contingent on his passing pre-employment screening, rehire him with a $100,000-a-year salary and duties comparable to those of Project Specialist Safeguard III, his original position.

The charging party passed the pre-employment screening. The defendant paid the $40,000, but did not rehire him. The defendant's position was that the agreement merely required it to offer the charging party a position. The EEOC sued for breach of contract. The defendant moved for summary judgment.

The court found that the agreement was unambiguous, and its meaning is therefore a "question of law." The agreement made no reference to vacancies; as such, if there was no appropriate vacancy, the defendant was obligated to create one for the charging party to fill. The sole question was one of fact: whether the charging party passed the defendant's pre-employment screening. That screening consisted entirely of a medical clearance process. The parties disagreed whether he had in fact obtained the proper medical clearance for the position offered in Iraq. The defendant admitted, however, that the charging party was medically cleared to "work in a location that had Western-style medicine available for care." Therefore, it is undisputed that the charging party had passed the pre-employment screening for positions in countries with Western-style medicine. The agreement thus obligated the defendant to hire him as an employee in one of these countries. The company's refusal to do so constitutes breach of contract, the court held.

The court also found that the absence of a hire-by date did not negate the agreement. The court therefore found the defendant in breach, and denied the defendant's motion.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Disability Discrimination Retaliation	Big Lots Stores, Inc.	U.S. District Court for the Northern District of West Virginia Civil Action No. 2:17-CV-73	2018 U.S. Dist. LEXIS 167382 (N. D. W. Va. Sept. 27, 2018)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant employer's motion.	Should the employer's motion for summary be granted as to whether the charging party is disabled under the ADA, whether the conduct at issue was sufficiently severe and pervasive, and whether the employer can be held liable for the alleged disability-based harassment?

Commentary:

The EEOC brought suit against the defendant, a retail store, claiming it allowed employees to harass the charging party, a cashier who has a hearing impairment, because of that impairment, and retaliated against the charging party and a coworker who complained about the treatment.

The defendant asserted a number of claims in favor of its motion for summary judgment: (1) the charging party was not disabled under the ADA; (2) she was not harassed because of a disability; (3) any harassment was not severe or pervasive; (4) defendant was not liable for the harassment; (5) the coworker's and the charging party's retaliation claims fail; (6) punitive damages are not available; and (7) any claim for punitive damages fails as a matter of law.

The court denied all claims. Regarding her status as a disabled individual, the court applied the ADAAA standards, and noted it was "readily apparent" she has an actual disability, or at least presented a genuine issue of fact for a jury. She was completely deaf in one ear, and partially deaf in the other. As a result, she had a speech impairment and hearing impairment that imposed substantial limitations on her life activities, including hearing, speaking, and communicating.

The court also determined there is evidence that the charging party was harassed, her harassment was because of her disability, and that the harassment was severe and pervasive. She testified co-workers mocked her speech and called her "stupid" and "retard," among other things. The court found that such derogatory terms targeted her disability. That one of the harassers might have targeted non-disabled employees as well did not show that the treatment of the charging party was unmotivated by disability-based animus. "The ADA does not insulate employers from liability for a disability-motivated hostile work environment simply because the perpetrators of the hostile work environment are occasionally mean to someone other than the disabled worker for other reasons. The evidence of disability-based motivation for the harassment directed at [charging party] is overt and permits a reasonable inference of disability motivation."

The court also found the defendant was liable for the harassment, as it took insufficient action after it was reported. Evidence showed complaints were first made in 2012, and that a reasonable jury could conclude that an "investigation" and "retraining" conducted years later in response were not reasonably calculated to end the harassment. The human resources representative conducted a cursory investigation, and did not even ask the alleged harassers whether they committed the conduct in question.

With respect to retaliation, after a co-worker complained to management about the harassment, she was given an ultimatum to leave her second job, or her position at the defendant's. The supervisor also purportedly said during this conversation, "I told you we didn't want them [corporate] down here." In that context, a reasonable juror could infer direct evidence of retaliatory motivation in that ultimatum. The EEOC was also able to put forth evidence that the defendant denied the charging party a promotion to a management role even though she had been groomed for such a position.

The court disagreed with the defendant's claim that it was entitled to judgment as a matter of law regarding its good-faith efforts affirmative defense under *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 535, 119 S. Ct. 2118, 144 L. Ed. 2d 494 (1999). The court explained that Fourth Circuit case law does not automatically bar an award of punitive damages where an employer maintains and communicates an anti-harassment policy. Instead, "an employer maintaining such a compliance policy must also take affirmative steps to ensure its implementation."

Finally, the court denied the defendant's argument that injunctive relief is not warranted. The court found the defendant did not carry its burden to show there was no reasonable probability of future ADA violations.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Disability Discrimination	BNSF Railway Company	U.S. Court of Appeals for the Ninth Circuit No. 16-35457	2018 U.S. App. LEXIS 25852 (9th Cir. Sept. 12, 2018) (amended)	Employer's Appeal of the District Court's Grant of Summary Judgment in Favor of EEOC **Result:** Generally Pro-EEOC The appellate court affirmed the lower court's imposition of liability under the ADA, but vacated the nationwide injunction that prohibited the employer from engaging in certain hiring practices, and remanded with instructions	Can an employer require a job applicant to pay for a post-offer medical test when the employer believes that the applicant has a medical impairment?

Commentary:

In this case, the company had extended a job applicant a conditional offer of employment as a patrol officer. The company's medical contractor then conducted a physical examination and reported that the applicant was fit for the position. Because the applicant informed the employer that he had a prior back jury, the employer required him to obtain a current magnetic resonance imaging scan (MRI). The applicant declined to take the test on affordability grounds; the company therefore rescinded the conditional offer.

The company and the EEOC cross-moved for summary judgment. The company argued that its request for a current MRI was consistent with ADA statutory provisions and EEOC regulations and interpretive guidance addressing post-offer pre-employment medical examinations. The EEOC, moving for partial summary judgment on liability, argued that requiring the applicant to procure a follow-up MRI at his own expense after the company's contract doctor had examined him and found him medically qualified "functioned as a screening criterion that screened out an applicant with a disability by imposing an expensive additional requirement not imposed on other applicants."

The district court sided with the EEOC, finding the undisputed facts demonstrated its pre-employment medical examination showed the applicant was fit for the job, the offer was nonetheless rescinded because the applicant was unable to procure additional medical testing, and the company failed to establish any ADA-authorized defense for rescinding the job offer. The district court also permanently enjoined the company "from engaging in the unlawful employment practice found in this case to constitute intentional disparate treatment discrimination."

On appeal, the Ninth Circuit panel found that the EEOC demonstrated all three elements of a 42 U.S.C. § 12112(a) claim by showing (1) the applicant had a "disability" within the meaning of the ADA because company perceived him to have a back impairment; (2) the applicant was qualified for the job; and (3) the company impermissibly conditioned the job offer on the applicant's procuring an MRI at his own expense because it assumed he had a back impairment. The company offered no affirmative defense on appeal. The Ninth Circuit thus affirmed the district court's holding that the EEOC made a prima facie case for a violation of ADA, and was entitled to summary judgment. "Requiring that an applicant pay for an MRI—or else lose his or her job offer—because the applicant has a perceived back impairment is a condition of employment imposed discriminatorily on a person with a perceived impairment."

The panel explained that "An employer would not run afoul of § 12112(a) if it required that everyone to whom it conditionally extended an employment offer obtain an MRI at their own expense … Where, however, an employer requests an MRI at the applicant's cost only from persons with a perceived or actual impairment or disability, the employer is imposing an additional financial burden on a person with a disability because of that person's disability."

The appellate court, however, vacated the district court's injunction, as the lower court did not review the standard four-factor test for providing injunctive relief. The panel remanded the matter back to the district court to make further factual findings to support the scope of the injunction.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Disability Discrimination	Midwest Gaming & Entertainment, LLC, d/b/a Rivers Casino	U.S. District Court for the Northern District of Illinois, Eastern Division Civil Action No. 17 C 6811	2018 U.S. Dist. LEXIS 88367 (N.D. Ill. May 25, 2018)	Employer's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion for summary judgment without prejudice on the grounds the motion was premature.	Can the defendant move for summary judgment on the grounds the charging party—who sought an extended leave of absence for medical treatment—is not a qualified individual with a disability, or is the EEOC entitled to additional discovery?

Commentary:

The charging party, a former casino slot technician who has cancer, sought an additional two months of leave for additional treatment of his illness following a six-month leave of absence. The casino employer terminated his employment, relying on the Seventh Circuit's decision in *Severson v. Heartland Woodcraft, Inc.*, 872 F.3d 476 (7th Cir. 2017), *cert. denied,* 138 S. Ct. 1441, 200 L. Ed. 2d 717 (2018), that "an employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA," and therefore did not need to provide an accommodation.

The employer moved for summary judgment, and the EEOC filed a motion pursuant to Rule 56(d), arguing that it "cannot fairly and adequately respond to [Defendant's] summary judgment motion without discovery." The court agreed, finding the defendant's motion premature.

The court agreed that while *Severson* undercuts the EEOC's argument that the employer violated the ADA by failing to accommodate the charging party and terminating his employment, it distinguished the case by noting *Severson* was decided on a fully developed record. The court noted that because this case was still in the preliminary stages, the EEOC has not yet had a chance to fully development evidence in support of its claim that the charging party's request was reasonable under the circumstances. The EEOC was entitled to conduct discovery to determine the scope of the charging party's job duties, and thus whether regular presence was an essential job function. The EEOC was also entitled to discovery as to whether the charging party's absences were excessive in relation to his job duties, whether additional leave could have been a reasonable accommodation, and whether other non-disabled slot technicians were provided more generous leave. In addition, the court found that "further factual development is needed to determine exactly who in the company made the decision to terminate [charging party], and the precise reason for that decision."

The court denied the defendant's motion for summary judgment without prejudice.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Disability Discrimination	UPS Ground Freight	U.S. District Court for the District of Kansas Case No. 2:17-CV-2453-JAR-JPO	2018 U.S. Dist. LEXIS 125625 (D. Kan. July 27, 2018)	Motion on the Pleadings **Result:** Pro-EEOC The court found the EEOC made out a *prima facie* case of disability discrimination.	Did a collective bargaining agreement that provided different levels of pay for freight drivers who lost their commercial driver's licenses for medical versus nonmedical reasons violate the ADA?

Commentary:

The EEOC alleged the defendant company violated the ADA by maintaining a facially discriminatory policy against disabled drivers in its current collective bargaining (CBA) agreement with the co-defendant Teamsters Union. The CBA at issue allowed drivers who could no longer perform driving duties but were otherwise able to work to displace the least senior inside employee or casual worker. Non-driving workers whose commercial driver's licenses were suspended for nonmedical reasons were paid at full pay, while those workers who were unable to drive due to disabilities and thus performed "inside" work received only 90% of their pay for their work classification.

The EEOC claimed the CBA established a *prima facie* case of a discriminatory policy because it paid drivers disqualified for non-medical reasons 100% of pay rate, while paying drivers disqualified for medical reasons 90% of the appropriate rate of pay for the work being performed. The defendant employer countered that judgment on the pleadings was inappropriate because: 1) the EEOC relied upon a selective and erroneous interpretation of the CBA; 2) the CBA contains ambiguities that preclude judgment; 3) "whether the CBA works to the benefit or detriment of a medically disqualified driver depends entirely on the particular factual scenario in each case," which requires the court to engage in a case-by-case analysis to determine if an employee has been discriminated; and 4) the CBA did not limit the opportunities available to individuals with disabilities, but provided additional opportunities beyond what the ADA requires.

The court was not persuaded by this argument, finding the EEOC made a *prima facie* case that the CBA is discriminatory. Among other reasons, the court found the CBA unambiguous; a case-by-case impact analysis was not required to show that a policy is facially discriminatory; and the defendant's reliance on *Eckles v. Consolidated Rail Corp.*, 94 F. 3d 1041 (7th Cir. 1996), was misplaced. In that case, the plaintiff demanded certain accommodations for his epilepsy that infringed on the seniority rights of other employees under the union's collective bargaining agreement. The employer allowed the plaintiff to "bump" a more senior employee, but later rescinded the agreement. The plaintiff then sued his employer and the union, claiming they violated the ADA by refusing to provide a reasonable accommodation for his disability. The court ruled against the plaintiff because the ADA does not require "bumping rights" for individuals, thus the employer could not be liable for failing to provide something that is not compelled by law. *Eckles* was therefore inapposite because it does not deal with paying less based on disability classification, nor does it deal with a facially discriminatory bumping policy.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Disability Discrimination	Wynn Las Vegas, LLC	U.S. District Court for the District of Nevada Civil Action No. 2:16-cv-02187-RFB-PAL	2018 U.S. Dist. LEXIS 115042 (D. Nev. July 10, 2018)	Parties' Motions for Summary Judgment **Result:** Mixed The court denied both parties' motions for summary judgment.	Did the employer violate the ADA by failing to accommodate an employee with a disability, and then by retaliating against him for taking leave he claims was to address his PTSD? Was the charging party responsible for the breakdown in the interactive process?

Commentary:

The EEOC alleged a casino violated the ADA by failing to provide a reasonable accommodation for an employee who suffered from post-traumatic stress disorder and to engage in the interactive process. The EEOC alleged that the employer also unfairly disciplined the charging party in retaliation.

The charging party worked as a security officer at the defendant-casino. After a few years on the job, the charging party told his employer he needed to take periodic leave to deal with his PTSD. He was provided with FMLA medical certification forms to be completed by his health care provider. A nurse provided some paperwork, but did not complete all forms, including information on the duration of leave needed. For example, when asked in the medical certification whether the charging party's condition would cause episodic flare-ups that would prevent him from performing his job functions, the nurse stated: "PTSD symptoms often present, negative behavior therefore leaving [sic] for short times and/or changing hours are important." The nurse was asked to estimate the "frequency of flare-ups and the duration of related incapacity" the charging party may have over the next 12 months. In response, she wrote, "NA. Not a concrete time span or limit can be predicted."

During this time the casino was experiencing a staffing shorting, requiring security officers to work mandatory overtime hours. The charging party continued to request intermittent FMLA leave. He was not asked if he would like an ADA accommodation for intermittent leave. After not showing up to work following time off, the charging party was placed on suspension pending investigation ("SPI") for his failure to return to work/job abandonment. An employee placed on SPI can subsequently be: (1) returned to work with no discipline and paid for any time lost, (2) returned to work with some form of discipline imposed, or (3) terminated. The employer attempted to contact the charging party about the incomplete medical forms and related requests, but he did not respond, and eventually resigned.

In the instant lawsuit, both parties filed motions for summary judgment. The EEOC moved for summary judgment on the issue of the charging party's being a qualified individual under the ADA. The defendant argued that the job required consistent in-person attendance, and that requests to take leave at will ran contrary to this essential job function. The court denied summary judgment, as it found there remained a factual dispute whether the charging party could perform the essential functions of the bike security officer job from the time he disclosed his diagnosis to the time he resigned from defendant's employ.

The defendant argued in its motion for summary judgment that it engaged in the interactive process in good faith, and that any breakdown in the process was caused by the charging party's failure to provide the requisite information. The court found, however, that there are genuine issues of fact regarding the interactive process and potential reasonable accommodations that must be left to the jury, and that there exists a genuine dispute as to whether the charging party's request was considered under the ADA, or whether it was simply treated as an FMLA request.

As for the retaliation charge, the court found that there is a genuine dispute of fact as to whether the SPI amounted to a retaliatory adverse employment action. The parties' motions, therefore, were denied.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Arbitration Agreements	Doherty Group, Inc.	U.S. District Court for the Southern District of Florida Case No. 14-81184-CIV-MARRA	2018 U.S. Dist. LEXIS 31665 (S.D. Fla. Feb. 26, 2018)	Parties' 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 mandatory arbitration agreement can be interpreted to deprive applicants or employees of their right to file a charge with the EEOC and the state Fair Employment Practices agencies?

Commentary:

At issue in this case was the employer's mandatory arbitration agreement, in which the parties agreed that "any claim, dispute and/or controversy (including but not limited to any claims of employment discrimination, harassment, and/or retaliation under Title VII and all other applicable federal, state, or local statute, regulation or common law doctrine)" which would otherwise require or allow a plaintiff to bring a claim in court or other dispute resolution forum "shall be submitted to and determined exclusively by binding arbitration."

The EEOC alleged this provision interferes with applicants' and employees' rights to file charges with the EEOC and the Fair Employment Practices Agencies ("FEPAs") and to communicate and participate in proceedings conducted by the EEOC and FEPAs. The defendant contended the plain language of the agreement does not restrict the filing of any claims or charges.

The court agreed with the defendant, finding the agreement's language was intended to inform all of defendant's applicants or employees that any and all disputes would be resolved solely by arbitration. "The intent of the agreement was to ensure that any employment dispute by an applicant or employee would be subject to mandatory arbitration and no final decision could be reached in any other forum, with the exception of those forums which the agreement carved out." The court looked at the language of the agreement, and noted it "does not address the filing of charges with or investigations by the EEOC or FEPAs. Filing of charges and participating in investigations do not resolve disputes and therefore the agreement does not address these activities. Nor is there any requirement that the agreement affirmatively state that it is not a waiver of the right to file charges with the EEOC or FEPAs." Each paragraph provides that arbitration is the sole forum for applicants or employees to obtain a final determination on the merits of any employment dispute. "Nothing else can be read into this clear, unambiguous language."

Title VII Criminal History	State of Texas (*plaintiff in this case*)	U.S. District Court for the Northern District of Texas Civil Action No. 5:13-CV-255-C	2018 U.S. Dist. LEXIS 30558 (N.D. Tex. Feb 1, 2018)	Parties' Motions for Summary Judgment **Result:** Pro-Employer The court granted the State of Texas' motion.	Is the EEOC's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 lawful?

Commentary:

The court enjoined the EEOC and U.S. Attorney General from enforcing against the State of Texas the EEOC's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (the "Guidance"). The motion was granted on the narrow basis of the EEOC's issuance of the Guidance without providing notice to the public and an opportunity to comment, as required under the Administrative Procedures Act (APA).

The Guidance at issue sets forth the EEOC's position that employers should carefully consider criminal records in making hiring decisions to avoid running afoul of Title VII. Among other requirements, the Guidance takes the position that in almost all circumstances, an employer must make an "individualized assessment" before disqualifying an individual for employment based on past criminal conduct.

The State of Texas argued that the Guidance was unlawful on various grounds. In moving for summary judgment, Texas asked the district court to declare that Texas has an absolute right to bar convicted felons from working for the state or legislature in any manner. The district court declined to do so, acknowledging that, although felons would pose too great a risk for "many categories of employment," there may be other positions where felons pose no objectively reasonable risk to the interests of Texas and its citizens such that Texas's broad rule denies meaningful opportunities of employment. The court also denied Texas's request for an injunction preventing the EEOC from issuing right-to-sue letters in charges alleging discrimination based on criminal history information since issuance of those letters is not a ruling on the merits by the EEOC.

The court agreed with Texas, however, that the Guidance did not comply with the APA requirements for promulgating substantive rules. Specifically, the district court agreed that the EEOC issued the Guidance – a substantive rule – without providing notice and the opportunity for comment. As such, the district court blocked the EEOC and the U.S. Attorney General from enforcing the guidance against the State of Texas until the EEOC complies with the APA's notice and comment requirements for substantive rules. The court declined to rule on Texas's arguments that the Guidance is also unlawful because it is outside the scope of statutory authority given to the EEOC and an unreasonable interpretation of Title VII, holding that such a ruling would be moot and premature.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Independent Contractor Analysis	Danny's Restaurant, LLC	U.S. District Court for the Southern District of Mississippi Civil Action No. 3:16-CV-00769-HTW-LRA	2018 U.S. Dist. LEXIS 154500 (S.D. Miss. Sept. 11, 2018)	EEOC's Motion for Partial Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion for partial summary judgment on the issue of the charging parties' correct classification.	Can the defendant be held liable for Title VII violations against the charging parties as employees, or are they independent contractors?

Commentary:

A class of exotic dancers filed suit against defendant strip club alleging race discrimination in violation of Title VII. The defendant argued it could not be held liable under Title VII, as the dancers were independent contractors, not employees. The EEOC filed a motion for partial summary judgment on the issue of the dancers' proper classification.

Although the dancers earned money though tips, stage performances, and private dances, and the defendant did not pay a salary, minimum wage or overtime, the EEOC contends the defendant exercised a degree of control over the dancers that rendered them employees. For example, it set requirements for their hours, regulated their conduct while at work, set the fees charged for private dances, approved the music used, and generally controlled their ability to earn money.

The court analyzed Fifth Circuit precedent governing independent contractor analysis, *Reich v. Circle C Investments*, 998 F.2d 324 (5th Cir. 1993). The appellate court examined five key factors in making the employee/independent contractor determination: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the worker and alleged employer; (3) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship.

In the instant case, the court found that the EEOC met its initial burden in "informing the Court of the basis of its motion" and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." The non-moving party was then required to "go beyond the pleadings" and designate "specific facts" in the record showing that there is a genuine issue for trial. The court determined the defendant failed to do so. Instead, it made the following broad arguments:

First, the defendant argued that because the complainants refused to provide tax returns in response to discovery requests, there is no proof that they earned any money as dancers during the applicable time period. The court noted, however, that *Reich* and other cases have determined that exotic dancers are employees even though they were paid only through tips from customers and not directly compensated by their alleged employers. Second, the defendant pointed to an "Entertainment Lease" the dancers signed that designated them as independent contractors. The court pointed out that the Fifth Circuit has held that an agreement on its own cannot render an employee an independent contractor. Third, the defendant claimed the dancers are required to supply their own tools of the trade – *i.e.*, makeup, outfits, etc. – and that the defendant did not control the days they worked. The court countered that the EEOC provided extensive documentation via declarations and deposition testimony that the defendant did in fact exercise significant control over the dancers. For example, the defendant established work schedules, implemented rules and expectations, imposed fine for tardiness, and set rates. The court explained the defendant failed to provide specifics or proof that it lacked control over the dancers.

Because no material issue remained for a fact-finder to determine the dancers' correct classification, the court was able to review the record in the light most favorable to the non-moving party. Given the facts on record, the court determined the dancers were in fact employees, and thus granted the EEOC's motion for partial summary judgment on this point.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Successor Liability	Danny's Restaurant, LLC	U.S. District Court for the Southern District of Mississippi Civil Action No. 3:16-CV-00769-HTW-LRA	2018 U.S. Dist. LEXIS 163364 (S.D. Miss. Sept. 24, 2018)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion.	Is the defendant entitled to summary judgment because it was allegedly not the owner/employer during the period of the alleged violations?

Commentary:

The EEOC alleges that the defendant strip club discriminated against five African American exotic dancers by subjecting them to disparate terms and conditions on account of their race. The defendant is a limited liability company formed in March of 2016 by Danny McGee Owens and his son, who were the only members. The Title VII violations purportedly occurred in 2013, when the club was then called Baby O's. Owens was in prison at the time. The officers and directors of Baby O's included Owens' best friend, girlfriend at that time, stepfather, and son.

The defendant first argued it was entitled to summary judgment because it was not the owner/employer during the period of the alleged violations. It contended that, as purchaser of the club's assets in 2016, it could not be held liable for acts committed under the ownership of Baby O's. The EEOC countered that as the new owner of the club, the defendant is liable for the Title VII infractions that occurred under the previous owner under the successor liability doctrine. The court noted the defendant "did not cite a single case, statute, regulation or legal authority of any kind to support its contentions to the contrary."

The doctrine of successor liability "allows the aggrieved employee to enforce against the successor a claim he could have secured against the predecessor." *Rojas v. TK Communs., Inc.*, 87 F.3d 745, 750 (5th Cir. 1996) (quoting *Brennan v. Nat'l Tel. Directory Corp.*, 881 F. Supp. 986, 992 (E.D. Pa. 1995)). In *Rojas*, the Fifth Circuit set forth nine factors courts should consider in deciding whether successor liability applies to the purchasing company. The first two factors are: (1) whether the successor company had notice of the charge or pending lawsuit before acquiring the assets of the predecessor; and (2) the ability of the predecessor to provide relief. The other seven factors help to establish whether there was a "substantial continuity" of business operations between the two entities.

Relying on these factors, the court was persuaded that the defendant is indeed liable as the successor in interest for Title VII violations that allegedly occurred during the prior ownership. The fact that Owens was in prison during the time was not dispositive, as the defendant provided no evidence he was not involved in the business while incarcerated. Although he provided copies of the prison policies and handbook in an effort to show he was unable to conduct business from the prison because that would violate prison policies, Owens did acknowledge he conducted other business while in prison.

The defendant also alleged it did not have at least 15 employees each day for 20 calendar weeks. The basis for this contention was that the dancers were independent contractors, not employees, an issue that the court dispensed with earlier.

Another argument was that there were no genuine issues of material fact concerning whether any adverse job action was taken against any of the complainants. The court pointed out that this two-sentence assertion was made without any legal authority or factual support.

Finally, the defendant alleged it should have been provided an opportunity for corrective action in this disparate treatment case. The defendant relied on *Jansen v. Packaging Corp. of America*, 123 F.3d 490 (7th Cir. 1996), in support of this proposition. The court found this case was not applicable, however, as that case dealt with hostile work environment sexual harassment. "An employer's defense that an employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer, is limited to vicarious liability sexual harassment cases."

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Successor Liability	Danny's Restaurant, LLC	U.S. District Court for the Southern District of Mississippi Civil Action No. 3:16-CV-00769-HTW-LRA	2018 U.S. Dist. LEXIS 164062 (S.D. Miss. Sept. 25, 2018)	EEOC's Motion for Partial Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion for partial summary judgment, finding that the defendant is a successor in interest to the entity alleged to have engaged in discrimination.	Should the court grant the EEOC's motion for partial summary judgment on the issue of successor liability? Was the defendant equitably estopped from claiming it was not the successor in interest?

Commentary:

The EEOC brought suit alleging the defendant strip club, Danny's of Jackson, is liable for race discrimination against a class of African American exotic dancers. The EEOC brought a motion for partial summary judgment on the issue of whether the defendant is the successor in interest and liability to Baby O's, the predecessor entity which operated the strip club during the time the alleged discrimination occurred. The EEOC contended there was no genuine issue of fact remaining to challenge the imposition of successor liability, and that in a prior judicial proceeding, the defendant conceded that it is the successor in interest to Baby O's for Title VII purposes and is, therefore, judicially estopped from contending otherwise.

The defendant's sole owner, Danny McGee Owens, was incarcerated when the alleged discrimination occurred. The club in question underwent several name changes, but the club continued to operate in the same way and at the same location. Per the court, "[t]he names of the corporations changed, the incorporators changed, and the officers changed; but all of these incorporators and officers had close personal ties with Owens." Moreover, Owens' former girlfriend testified in her deposition that Baby O's was formed to hold the club for Owens while he was in prison.

The court discussed the law of successorship liability, which was grounded in labor law. The court explained that this policy "protects employees in cases involving the purchase of assets by one corporate entity from another." Many courts have applied the successor liability doctrine to employment discrimination cases. The court cited the Fifth Circuit case *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 750 (5th Cir. 1996) in which the court explained:

The successor doctrine arises in the context of discrimination cases in situations where the assets of a defendant employer are transferred to another entity. Thus, the purpose of the doctrine is to ensure that an employee's statutory rights are not "vitiated by the mere fact of a sudden change in the employer's business." The doctrine allows the aggrieved employee to enforce against the successor a claim he could have secured against the predecessor.

The *Rojas* court set forth nine factors (the first two being the most critical) to be considered in assessing whether successor liability should be imposed in a Title VII case: (1) whether the successor company had notice of the charge or pending lawsuit prior to acquiring the business or assets of the predecessor; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer uses the same plant; (5) whether he uses the same or substantially the same work force; (6) whether he uses the same or substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether he uses the same machinery, equipment, and methods of production; and (9) whether he produces the same product.

Applying these factors to the case at hand, the court noted the defendant had notice of the charging party's discrimination charge prior to execution of the "Bill of Sale and Assignment and Assumption Agreement" by which the defendant purportedly purchased the assets of Baby O's. Owen's son testified he was running the club's day-to-day operations while Owens was incarcerated, and testimony indicated the two conferred before the agreement was signed.

Regarding the second factor, the former entity, Baby O's, was no longer a viable entity and had no ability to provide relief.

The court also found there existed a substantial continuity of business operations between the old corporation and the new corporation, thus warranting the imposition of liability to the defendant.

With respect to the EEOC's claim that the defendant should be judicially estopped from claiming it is not the successor in interest, the court looked at two factors: whether party's position was clearly inconsistent with its previous position, and whether the previous court accepted the party's earlier position.

In a lawsuit filed in 2012, Baby O's entered into a consent decree whereby it agreed, among other things, to pay damages to the complainants, to implement certain changes, to make periodic reports to the EEOC, and to conduct an Equal Employment Opportunity training program. Subsequent allegations that Baby O's had violated the decree resulted in additional litigation. Years passed, and counsel for Baby O's eventually notified the court that the entity was administratively dissolved and taken over by the defendant. A Second Amended Consent Decree was signed and entered by the defendant. The court was therefore persuaded that by entering into the consent decree, defendant formally acknowledged that it is the successor in interest to Baby O's. Moreover, the court found the defendant did not provide any legal authority to counter the EEOC's argument on equitable estoppel. Therefore, the court held that the doctrine of judicial estoppel applies *sub judice* to prevent the defendant from claiming that it is not the successor in interest and liability to Baby O's.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Race Discrimination	Danny's Restaurant, LLC	U.S. District Court for the Southern District of Mississippi Civil Action No. 3:16-CV-00769-HTW-LRA	2018 U.S. Dist. LEXIS 168641 (S.D. Miss. Sept. 30, 2018)	EEOC's Motion for Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion for summary judgment as to liability.	Do any material questions of fact remain in a lawsuit alleging the defendant engaged in race discrimination against a class of African American dancers?

Commentary:

The EEOC filed the lawsuit on behalf of a class of African American exotic dancers who alleged they were subject to adverse treatment on account of their race. Allegations of race discrimination include the maintenance of a quota for African American dancers on any given shift, and requiring African American dancers to dance only if scheduled to do so. The club maintained a "dance sheet" that listed the dancers' names, race, and number of dances sold per shift. If an African American dancer did not show up for work during a scheduled shift, she was fined. The same policies did not apply to white dancers. A manager testified that if he saw too many African American dancers, he was to send some home.

In addition, African American dancers were required to work at the grand opening of Black Diamonds, an affiliated strip club located across the street that purportedly catered to African American clients. The owner and general manager was the son of the owner of the defendant's club. Dancers who declined were fined. A dancer who refused to pay a fine was fired. White dancers were not similarly required to work at Black Diamonds or fined for declining the work. Dancers at Black Diamonds typically earned less. African American dancers also alleged they were subject to racially offensive comments (n-word, "black bitches," "black ass," "half breeds"), from the defendant's owners and managers.

The court determined the EEOC produced sufficient evidence of discrimination via deposition testimony of numerous witnesses, declarations and documents that established that the defendant: "limited complainants' work hours by imposing a schedule; sent complainants home; forced complainants to work at a less desirable location; imposed fines on complainants for acts that other dancers were allowed to commit; forbade complainants to perform immediately before or after another Black performer, and took other actions that adversely affected the terms and conditions of the complainants' employment."

The court also considered the offensive language to constitute direct evidence of discrimination, as the offensive comments (1) related to the plaintiff's protected characteristic; (2) proximate in time to the challenged employment decision; (3) made by an individual with authority over the challenged employment decision; and (4) related to the challenged employment decision.

The court found that most of these allegations were undisputed, and that the defendant failed to articulate any legitimate, nondiscriminatory reason for its actions.

Therefore, the court granted the EEOC's motion with respect to liability, and ordered the case to proceed to trial on the issue of damages only.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Pregnancy Discrimination	P.C. Iron, Inc.	U.S. District Court for the Southern District of California Case No.: 16-cv-02372-CAB-(WVG)	2018 U.S. Dist. LEXIS 73521 (S.D. Cal. May 1, 2018)	Parties' Motions for Partial Summary Judgment **Result:** Pro-Employer The court granted most of the defendant-employer's motions for summary judgment.	Should the court grant the defendant's motion for partial summary judgment on the grounds that the claims for hostile environment are time-barred?

Commentary:

The charging party alleges that when she informed her employer of her pregnancy, it subjected her to negative comments regarding the pregnancy, and terminated her employment when her maternity leave expired. The EEOC sued, alleging the employer discharged the charging party because of her sex (female, pregnancy) in violation of Title VII. Following an investigation, the EEOC added allegations that the charging party was subjected to a hostile work environment because of her sex.

The parties moved for partial summary judgment on various grounds. First, the employer argued the EEOC's hostile work environment claim was time-barred. Specifically, the defendant argued it was entitled to summary judgment because the charging party did not file her charge within the period required by statute. In order for such a charge to be timely, the employee must file a charge within 180 or 300 days of any act that is part of the hostile work environment claim. The court therefore needed to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period.

In this case, the charging party filed her charge on August 24, 2012. The date 300 days before August 24, 2012, is October 29, 2011. The only contact with the employer at that time consisted of (1) the employer's telephone call on or around December 2, 2011, asking whether the charging party intended to return to work at the end of her maternity leave; (2) the charging party's visit to the employer's offices on December 5, 2011, to ask her supervisor to complete forms for low-income childcare; (3) the charging party's telephone call to her supervisor asking if the forms had been completed; and (4) the supervisor's telephone call on December 9, 2011, notifying the charging party that she was being terminated. The allegedly more inappropriate comments concerning her pregnancy occurred prior to this period. The court determined such inquiries / phone calls were not discriminatory or abusive, and did not interfere with the charging party's conditions of employment. Therefore, since these actions that fall within the 300-day window do not constitute a hostile work environment, the employer's motion for summary judgment on this claim is granted.

The court also held the charging party's state law claims were similarly untimely. Under California EEO law, "[t]he time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the Department of Fair Employment and Housing, whichever is later."

The defendant argued that the federal right-to-sue period expired when the EEOC filed its complaint in this action based on the Supreme Court's pronouncement that when "the EEOC files suit on its own, the employee has no independent cause of action, although the employee may intervene in the EEOC's suit." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). The charging party, however, argued that the federal right-to-sue period did not expire until her ability to intervene as a matter of right in a lawsuit filed by the EEOC expired. The court sided with the defendant.

When the EEOC filed its complaint, the charging party no longer had a right to commence a civil action on her Title VII claims. Thus, pursuant to section 12965(d)(2), her time for commencing a lawsuit on her FEHA claims, to the extent those claims were tolled pursuant to 12965(d)(1), expired on that date as well. Accordingly, the charging party's claims were untimely even with the statutory tolling provided by section 12965(d)(1). In addition, the charging party's state law claims were also subject to equitable tolling during the period of the EEOC's investigation. This raises the question of when this equitable tolling period expired.

The court explained that when a plaintiff is pursuing a remedy in another forum, the statute of limitations is equitably tolled when three factors are satisfied: "(1) timely notice to defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim." The court noted, however, that the charging party conflates the statutory tolling period in section 12965(d)(2) with the "judicially created doctrine" of equitable tolling.

In this case, the court determined there was no justification for the charging party's delay. Because she "did not act reasonably and in good faith by waiting more than a year after the EEOC issued its letter of determination and almost 11 months after the EEOC filed its complaint to assert her FEHA claims, the doctrine of equitable tolling does not save her FEHA claims from being time-barred. Accordingly, the defendant was entitled to summary judgment on the state law claims for sex discrimination, pregnancy discrimination, harassment, failure to prevent discrimination, and wrongful discharge on the grounds that they are time-barred.

The defendant also argued for summary judgment on the grounds the charging party was an at-will employee. The court held, however, that this is "entirely irrelevant" to the dispute. It noted, however, that the burden is on the EEOC to prove that the defendant is liable for discrimination on the wrongful termination claim.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Race Discrimination: Pattern-or-Practice	South Dakota Department of Social Services	U.S. District Court for the District of South Dakota Civil Action No. 15-5079-JLV	2018 U.S. Dist. LEXIS 163804 (D.S.D. Sept. 25, 2018)	Defendant's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment, and granted the EEOC's motion for partial summary judgment on the issue of whether the defendant engaged in a pattern or practice of race discrimination.	In support of its pattern-or-practice claim, is the EEOC required to provide statistical evidence involving all of the defendant's offices? Did the EEOC provide sufficient evidence to make out a *prima facie* case of pattern-or-practice race discrimination?

Commentary:

The EEOC alleged the South Dakota Department of Social Services (DSS) engaged in a pattern or practice of discrimination against Native American job applicants because of their race. According to the EEOC, a Native American with supervisory experience as a social worker, as well as several other well-qualified Native Americans, applied for an Employment Specialist position at DSS's Pine Ridge Office. The complaint alleges that after interviewing the charging party and the other Native American candidates who met the employer's objective job qualifications, DSS removed the vacancy and hired no one. Per the complaint, the following day the DSS reopened the position and ultimately selected a white applicant with inferior qualifications and no similar work experience. The EEOC contends the agency removed job postings and used subjective, arbitrary hiring practices to reject qualified Native American applicants for Specialist positions.

The defendant filed a motion for summary judgment, and the EEOC filed a motion for partial summary judgment.

The defendant argued the EEOC could not make out a *prima facie* showing of an intentional pattern-or-practice of discrimination because the evidence is limited to one of the 64 DSS offices in South Dakota and, within that one office, is further limited to only three positions. The defendant claimed "the discriminatory policy must be the 'company's standard operating procedure rather than the unusual practice.'" The EEOC countered that per this reasoning, "it would not violate Title VII to condone rampant discrimination by managers in one department so long as not all managers in all other departments engaged in discrimination. This bald attempt to severely limit the protections offered by Title VII must be rejected."

The court noted courts generally permit an examination of discrimination both company-wide, within one or more facilities or within a single department of a business.

The court determined that at this stage, the defendant is not entitled to summary judgment as a matter of law. At the initial liability stage of a pattern-or-practice lawsuit, the EEOC is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. "Its burden is to establish a prima facie case that such a policy existed."

As for the EEOC's motion, the Commission sought partial summary judgment on its *prima facie* case that defendant engaged in a pattern or practice of intentional discrimination against Native Americans when hiring Specialists at its Pine Ridge office from 2007 through 2013. The EEOC asserted that the undisputed material facts "show[] a statistically significant difference in the treatment of Native Americans and white applicants aggregated for all positions over this time period." The EEOC also claimed that "[i]ndividual examples of qualified Native American applicants whom DSS rejected . . . support the bare numbers," and that taken together, these "undisputed facts raise the inference that discrimination infected DSS's 'standard operating procedure' when hiring at Pine Ridge . . . such that the United States is entitled to summary judgment on its *prima facie* case."

The defendant countered that the EEOC was not entitled to summary judgment "because its statistical evidence is not significant enough to support a prima facie pattern-or-practice claim, and because there are genuine issues of material fact regarding its statistical and anecdotal evidence." The defendant claimed the EEOC's motion is inappropriate because it "seeks to shift the burden of production to DSS at trial."

The court disagreed, finding that the EEOC's statistical evidence considered in conjunction with the other relevant undisputed facts indicate unlawful racial discrimination. The court took into consideration evidence that (1) the defendant's Pine Ridge Office hired no Native Americans during five of the seven years under scrutiny in this case, and (2) the anecdotal evidence from the nine Native American applicants who were unable to gain employment with the DSS Pine Ridge Office. "This additional evidence brings the cold statistical data to life." Thus, the EEOC was able to establish a *prima facie* case, and granted its motion for partial summary judgment on this issue.

At trial, the defendant will have the opportunity "to defeat the prima facie showing by demonstrating that the [EEOC's] proof is either inaccurate or insignificant."

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Retaliation	HP Pelzer Automotive Systems, Inc.	U.S. District Court for the Eastern District of Tennessee Case No.: 1:17-CV-31-TAV-CHS	2018 U.S. Dist. LEXIS 133741 (E.D. Tenn. Aug. 3, 2018)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Should the court grant the defendant's motion for summary judgment on the grounds the EEOC failed to show the charging party engaged in protected activity, and that it could not show the defendant's reason for terminating the charging party was pretextual?

Commentary:

The EEOC alleged the charging party was unlawfully terminated in violation of Title VII because she made a harassment complaint against her supervisor. The charging party alleged the supervisor made a disparaging remark about women and told her to drop her pants during an employee orientation that discussed appropriate dress codes.

The charging party complained to HR, which investigated. According to the employer, the witnesses it interviewed did not corroborate the incidents. The employer subsequently determined the allegations were false, and pursuant to company policy, which disciplined employees who "purposefully falsified a claim of harassment," terminated the charging party.

In its defense of the retaliation claim, the employer argued it conducted a thorough investigation of the sexual harassment allegations, did not find any evidence to support them, and formed a good-faith belief that the charging party had filed a false complaint. In its motion for summary judgment, the employer argued the charging party did not engage in protected activity under Title VII. Specifically, because the report was allegedly false, the charging party was not engaging in protected activity. The employer argued also that that dishonesty is a legitimate, nondiscriminatory and non-retaliatory reason for termination. Under the honest-belief rule, "an employer is entitled to summary judgment on pretext even if its conclusion is later shown to be mistaken, foolish, trivial, or baseless."

The plaintiff argued, however, that regardless of whether the charging party was actually subject to sexual harassment, she only needed a good-faith belief that she suffered sexual harassment for her complaint to be considered protected activity.

The court acknowledged that the case was unique, in that both parties agreed the employer terminated the charging party because she filed a sexual harassment complaint. The employer said the complaint was false. Plaintiff said the complaint was true and that defendant's explanation that the complaint was false was actually pretext. The court noted that under the summary judgment standard, the court is required to make inferences in a light most favorable to the nonmoving party. Therefore, the court had to infer that the charging party's complaint was true.

The court noted further that "it is not the role of the Court to determine whether this interaction actually happened or evaluate the credibility of [the charging party]—that is a job left to the factfinder."

The court explained also that the "honest belief" rule is in tension with the summary judgment standard. Because a reasonable jury could believe plaintiff's version of events, plaintiff has met its burden at the pretext stage. The quality of the investigation becomes material, as, if plaintiff allege, it was flawed, then the employer would not have had a basis to believe the charging party was lying.

The court, therefore, declined to apply the "honest belief" rule to this case, as doing so would undermine the summary judgment standard.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Sexual Harassment	Draper Development LLC 1:15-cv-877 (GLS/TWD)	U.S. District Court for the Northern District of New York	2018 U.S. Dist. LEXIS 115124 (N.D.N.Y. July 11, 2018)	Employer's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment **Result:** Mixed The court denied all motions.	Did a manager's texts offering jobs in exchange for sex constitute *quid pro quo* sexual harassment, even if he did not have the authority to hire for the positions?

Commentary:

The EEOC alleged a restaurant franchisee violated Title VII by engaging in *quid pro quo* sexual harassment with two teenage job applicants. Specifically, a manager sent two job applicants sexually explicit texts. In one instance, the manager expressly solicited sex in exchange for a job; in the other, he sent the text shortly after the applicant's job interview and application submission.

For the analysis of *quid pro quo* sexual harassment, the court explained that if the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the charging party unreasonably failed to take advantage of the preventive or corrective opportunities that the employer provided. An employee is considered a supervisor if he or she is empowered by the employer to take tangible employment actions against the victim. An employer may be held liable where a supervisor's quid pro quo threat exceeds his actual authority, but the victim reasonably relies on the supervisor's threat because of his apparent authority. Therefore, "only where it would be reasonable for a victim of harassment to believe that the authority used to harass had been delegated to the supervisor would liability ensue."

In its motion for summary judgment, the defendant alleged the employee's actions did not result in any tangible employment action, but the court disagreed. "Such a refusal to hire [the applicant] for a position clearly constitutes a tangible employment action."

The court also rejected the defendant's argument that the manager never explicitly said he would offer one of the charging parties a job if she had sex with him. The court held that evidence on the record shows "[a] jury could find, based on its cumulative perceptions and backgrounds, that requests for sexual activity are not always made explicitly, and failure to directly demand sexual favors as a condition for . . . employment does not negate indirect pressure." In other words, a supervisor's sending sexually explicit texts to an applicant shortly after the interview may constitute *quid pro quo* sex discrimination, "especially when she is not hired after refusing such an advance."

The court left it to a jury to decide whether the applicant reasonably believed that the manager had the authority to hire her.

With respect to the job applicant to whom the manager expressly offered a job in exchange for sex, the defendant alleged the manager did not have the authority to hire her. However, the court noted that a reasonable factfinder could determine that even if the manager did not have actual authority to hire the applicant, it was reasonable to believe he had apparent authority to offer her the position based on the circumstances: she was a teenager, had applied for a position, provided her contact information on her application, the defendant empowered the manager to access and review applications, and the manager held himself out as having such authority to hire the applicant for the assistant manager position. The court determined that it was "undisputed" that the applicant refused the manager's advances, she was qualified for the job, and that the manager did not hire her. This refusal "clearly constitutes a tangible employment action." Therefore, the claim hinges on the factual issue of whether the charging party reasonably believed the manager had the authority to hire her, a question for the jury.

Because questions of fact remained, the court also denied the EEOC's motion.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION AND RESULT	GENERAL ISSUES
Title VII Sexual Harassment	Indi's Fast Food Restaurant, Inc., and Evanczyk Brothers, LLC	U.S. District Court for the Western District of Kentucky Civil Action No. 3:15-CV-00590-JHM	2017 U.S. Dist. LEXIS 177363 (W.D. Ky. Oct. 26, 2017)	Parties' Cross Motions for Partial Summary Judgment **Result:** Mixed The court denied the EEOC's motions, and granted in part and denied in part the defendants' motions.	Are the complainants' allegations of harassment sufficiently severe and pervasion to be actionable? Can the defendants raise a *Faragher/Ellerth* affirmative defense when they did not specifically plead this defense? Are the defendants a single employer/integrated enterprise?

Commentary:

Several women sued their fast-food restaurant employer and another entity allegedly affiliated with the restaurant for sexual harassment. The EEOC and the defendants filed motions for partial summary judgment on a variety of issues. Both parties sought summary judgment—with respect to various plaintiffs—on whether the alleged conduct was sufficiently severe and pervasive to constitute actionable sexual harassment under Title VII. The EEOC also sought summary judgment on whether the employer could raise a *Faragher/Ellerth* affirmative defense, and whether the defendants acted as an integrated enterprise.

The alleged conduct varied in severity, running from a supervisor's alleged pressing up against several employees so that they could feel his genitals, and a co-worker's purportedly boorish and sexist comments.

Notably, with respect to those claimants who alleged they were harassed by a co-worker and not a direct supervisor, the court emphasized that the employer can only be held vicariously liable if the claimant proves the employer knew or should have known about the harassment and acted negligently in correcting the issue.

According to the court, "Overall, none of these plaintiffs have claims that strongly favor one party or the other. Each woman has shared a story of harassment that a jury may or may not find severe and pervasive, as the analysis for finding a hostile work environment is not a mathematically precise test. Further, the stories of harassment told by the plaintiffs are discredited by managers for the Defendants who claim that they were not aware any of these claimants were harassed. These considerations, along with the reliability and subjective experiences of the claimants, are best left to a fact finder. Therefore, finding that a reasonable jury could find for either the Plaintiff or for the Defendants, summary judgment for either party on these claims inappropriate."

As for the employer's use of the *Faragher/Ellerth*, the EEOC sought to exclude this attempt because the defendants did not specifically cite to this defense. The court, however, found that while the defendants' pleadings did not specifically raise this defense, it put the EEOC on notice when it responded that the claimants did not report any allegations of harassment to the company per policy. The court held that the "better approach is to hear all the evidence related to the implementation of the policy and its effectiveness, and then decide how to instruct the jury on it."

Finally, as to the EEOC's allegations that the two entities operate as a single employer and/or integrated enterprise, the court stated it will use the following factors in making this determination: (1) interrelation of operations, *i.e.* common offices, common record keeping, shared bank accounts and equipment; (2) common management, common directors and boards; (3) centralized control of labor relations and personnel; and (4) common ownership and financial control. The weight and determination of these factors is best left for the jury, the court held, so it is not appropriate for summary judgment in this case.

The court therefore denied the EEOC's motions for partial summary judgment, and granted in part and denied the defendants' motions for partial summary judgment.

U.S. OFFICE LOCATIONS

Albuquerque, NM
505.944.9680

Anchorage, AK
907.561.1214

Atlanta, GA
404.233.0330

Austin, TX
512.982.7250

Birmingham, AL
205.421.4700

Boston, MA
617.378.6000

Charleston, WV
304.599.4600

Charlotte, NC
704.972.7000

Chicago, IL
312.372.5520

Cleveland, OH
216.696.7600

Columbus, OH
614.463.4201

Dallas, TX
214.880.8100

Denver, CO
303.629.6200

Detroit, MI
313.446.6400

Fayetteville, AR
479.582.6100

Fresno, CA
559.244.7500

Greenville, SC
864.775.3190

Houston, TX
713.951.9400

Indianapolis, IN
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

Madison, WI
608.287.3700

Memphis, TN
901.795.6695

Miami, FL
305.400.7500

Milwaukee, WI
414.291.5536

Minneapolis, MN
612.630.1000

Nashville, TN
615.383.3033

New Haven, CT
203.974.8700

New York, NY
212.583.9600

Newark, NJ
973.848.4700

Orlando, FL
407.393.2900

Overland Park, KS
913.814.3888

Philadelphia, PA
267.402.3000

Phoenix, AZ
602.474.3600

Pittsburgh, PA
412.201.7600

Portland, ME
207.774.6001

Portland, OR
503.221.0309

Providence, RI
401.824.2500

Reno, NV
775.348.4888

Rochester, NY
585.203.3400

Sacramento, CA
916.830.7200

Salt Lake City, UT
801.401.8312

San Diego, CA
619.232.0441

San Francisco, CA
415.433.1940

San Jose, CA
408.998.4150

San Juan, PR
787.765.4646

Santa Maria, CA
805.934.5770

Seattle, WA
206.623.3300

St. Louis, MO
314.659.2000

Tysons Corner, VA
703.442.8425

Walnut Creek, CA
925.932.2468

Washington, D.C.
202.842.3400

GLOBAL OFFICE LOCATIONS

Brussels, Belgium
+32(0)2 739 46 10

Mechelen, Belgium
+32(0)15 63 66 53

Toronto, Ontario, Canada
416.865.0504

Barranquilla, Colômbia
+57 5 385 6071

Bogotá, Colômbia
+57 1 317 4628

San José, Costa Rica
+506 2545 3600

Santo Domingo, Dominican Republic
+809 472 4202

San Salvador, El Salvador
+503 2206 9642

Lyon, France
+33 (0)4 78 62 15 00

Paris, France
+33 (0)1 44 51 63 80

Berlin, Germany
+49 30-259 25 89-0

Duesseldorf, Germany
+49 211-13 06 56-0

Hamburg, Germany
+49 40-5 54 34 56-0

Munich, Germany
+49 89-41 611 63-0

Guatemala City, Guatemala
+502 2335 2179

San Pedro Sula, Honduras
+504 2516 1133

Milan, Italy
+39 (0)2 82879600

México City, México
+5255 5955 4500

Monterrey, México
+5281 8851 1200

Amsterdam, Netherlands
+31 20 8200 330

Managua, Nicarágua
506.2545.3651

Oslo, Norway
+47 23 89 75 70

Panamá City, Panamá
+507 830 6552

Lima, Peru
+511 226 1600

London, United Kingdom
+44 (0)203 375 0330

Caracas, Venezuela
+58-212 610-5450

Valencia, Venezuela
+58-241 824-4322

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