

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2014

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

January 2015

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ABOUT OUR FIRM

Littler Mendelson is the world's largest labor and employment law firm devoted exclusively to representing management. With over 1,000 attorneys and more than 60 offices throughout the U.S. and globally, Littler has extensive knowledge and resources to address the workplace law needs of both U.S.-based and multi-national clients. Littler lawyers practice and have experience in more than 36 areas of employment and labor law. The firm is constantly evolving and growing to meet and respond to the changes that impact the workplace.

ABOUT OUR EEO & DIVERSITY PRACTICE GROUP

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

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2014

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

INTRODUCTION

When noteworthy cases are decided or rules issued involving federal anti-discrimination law, Littler often publishes timely articles on these events, particularly when they involve the Equal Employment Opportunity Commission (EEOC or “the Commission”). Littler recognizes, however, that employers benefit also from a yearly overview of these legislative and regulatory activities.

This **Annual Report on EEOC Developments—Fiscal Year 2014** (hereafter “Report”), our fourth annual Report, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also offers an analysis of what the EEOC has and has not accomplished, and the implications of those outcomes. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One, entitled, “Looking Back at FY 2014: A Review of EEOC Successes and Failures, and Significant Cases and Developments to Watch for in FY 2015,” provides an overview of key EEOC initiatives, accomplishments and shortcomings; offers predictions on where the agency is headed in the coming year; and highlights litigation likely to come to fruition in FY 2015. This chapter sets forth the EEOC’s stated priorities from its Strategic Plan, and evaluates how well the Commission adhered to these target goals. This introductory section is intended as a preview of the more detailed discussions on specific issues included in subsequent chapters.

Part Two discusses EEOC charge activity, litigation and settlements in FY 2014, 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.

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

Part Four summarizes the EEOC’s investigations and subpoena enforcement actions, particularly where the EEOC has made broad-based requests to conduct class-type investigations. Case law addressing the EEOC’s authority to do so is discussed in this chapter as well. Appendix C to this Report is a companion guide, summarizing select subpoena enforcement actions undertaken by the EEOC during FY 2014.

Part Five of the Report features in-depth discussions of FY 2014 litigation involving a number of topics, including: (1) pleading deficiencies raised by employers; (2) unreasonable delay by the EEOC in its investigation and use of the laches defense in subsequent litigation; (3) statutes of limitations cases involving both pattern-or-practice and other types of claims; (4) employer challenges based on the EEOC’s alleged failure to meet its conciliation obligations prior to filing suit, paying particular attention to the pending Supreme Court review of the *Mach Mining* case; (5) intervention-related issues, both when the EEOC attempts to enter a case through intervention and when third parties attempt to join in as plaintiffs in litigation filed by the EEOC; (6) class discovery issues in EEOC litigation, including the scope of discovery in class-based or pattern-or-practice cases, the use of experts, spoliation, and discovery of EEOC-related documents; (7) favorable and unfavorable summary judgment rulings and lessons learned; (8) trial-related issues; and (9) circumstances in which courts have awarded attorneys’ fees to prevailing parties.

Appendices A-D are a useful resource that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury awards. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief, and decided appellate cases in FY 2014. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2014. Finally, **Appendix D** highlights notable summary judgment decisions by claim type.

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

I. LOOKING BACK AT FY 2014: A REVIEW OF EEOC SUCCESSES AND FAILURES, AND SIGNIFICANT CASES AND DEVELOPMENTS TO WATCH FOR IN FY 2015

As the number of large-scale discrimination lawsuits by the private bar has decreased in recent years since *Dukes v. Wal-Mart*,¹ the EEOC has continued to expand its focus on systemic discrimination, particularly since the 2012 adoption of the EEOC's Strategic Plan and related Strategic Enforcement Plan.² The EEOC is also front-and-center in two cases before the U.S. Supreme Court, *EEOC v. Mach Mining* and *EEOC v. Abercrombie & Fitch Stores, Inc.*³

As discussed below, in looking back over the past year, the EEOC has had mixed results in both its enforcement and litigation efforts. It scored a major win regarding procedural requirements before filing suit, as demonstrated by its success before the U.S. Court of Appeals for the Seventh Circuit in *Mach Mining*, and continued its trend in filing fewer lawsuits in order to have sufficient resources to focus on large-scale litigation. Notwithstanding, the EEOC experienced several significant losses over the past year in pursuing pattern-or-practice or class-type claims tied to its strategic plan, particularly claims dealing with hiring barriers⁴ and equal pay.⁵ Federal appeals courts also affirmed attorneys' fee awards against the EEOC in at least two cases, but also potentially limited the circumstances in which attorneys' fees may be awarded where the EEOC files multiple claims against an employer and only certain actions are viewed as unwarranted by the court.

While this Annual Report provides a comprehensive update of both regulatory and litigation developments over the past fiscal year, this section is intended as a preview of some key developments.

A. Key Statistics

There was a surprising decrease in the number of discrimination charges filed in FY 2014 from the prior year (88,778 in FY 2014, down nearly 5,000 charges from the 93,727 charges filed in FY 2013), the lowest number of charges filed since FY 2007.⁶ The significance of this statistic should be viewed in tandem with the FY 2013 Performance and Accountability Report ("FY 2013 PAR") which reported, "In FY 2013, the EEOC received 93,727 charges. This is approximately a 6,000 charge decrease from the prior three fiscal years."⁷

Despite the substantial decrease in the number of charges filed with the agency, the EEOC's backlog of charges increased over the past year. According to the FY 2014 Performance and Accountability Report ("FY 2014 PAR"), "After reducing the inventory an aggregate 18.6 percent in FY 2011-2012, the inventory increased by less than one percent in FY 2013. In FY 2014, the inventory increased from 70,781 to 75,935 (an Agency estimate), a 7.2 percent increase."⁸ The agency attributed the increase to the shutdown of the federal government in early FY 2014 and decrease in the number of investigators from prior years.⁹ This increase in the agency's backlog is somewhat surprising in view of the fact that the FY 2014 agency appropriation was \$20 million more than that for FY 2013, and "(t)his infusion of funds allowed the EEOC to lift a two year hiring freeze" and "agency wide hire more than 200 external candidates for front-line and support positions."¹⁰

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

2 EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC PLAN FOR FISCAL YEARS 2012-2016 (2012), available at http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm. The Strategic Enforcement Plan (SEP) was approved by the Commission on December 17, 2012. See EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (Dec. 17, 2012) available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

3 *EEOC v. Mach Mining*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013), cert. granted, No. 13-1019 (U.S. June 30, 2014); *EEOC v. Abercrombie & Fitch Stores*, 2013 U.S. App. LEXIS 20028 (10th Cir. Oct. 1, 2013), cert. granted, No. 14-86 (U.S. Oct. 2, 2014).

4 *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014). *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013) (oral argument heard Oct. 29, 2014).

5 *EEOC v. Port Auth. of N.Y. & N.J.*, Case No. 10 Civ. 7462 (NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012), aff'd, 2014 U.S. App. LEXIS 18533 (2d Cir. Sept. 29, 2014).

6 The number of charges decreased in FY 2014 to 88,778 from 93,727 charges filed in FY 2013. The last year there were fewer than 90,000 charges was 2007, when 82,792 charges were filed. See page 7 of the FY 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, which the EEOC refers to as the "PAR" for FY 2014 (hereinafter cited as the "EEOC 2014 Annual Report" or "FY 2014 PAR"), available at <http://www.eeoc.gov/eeoc/plan/2014par.pdf>; see also Press Release, EEOC, *EEOC Issues FY 2014 Performance Report* (Nov. 18, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>.

7 See EEOC's FY 2013 PERFORMANCE AND ACCOUNTABILITY REPORT at 27, available at www.eeoc.gov/eeoc/plan/upload/2013par.pdf.

8 See FY 2014 PAR at 46.

9 *Id.*

10 *Id.* at 49.

The EEOC has also moved to a new “normal” in decreasing the number of lawsuits filed. In FY 2014, the agency filed only 133 merits lawsuits,¹¹ which is similar to the number filed in FY 2013 (*i.e.*, 131 merits lawsuits) and FY 2012 (*i.e.*, 122 merits lawsuits), and in sharp contrast to the number of suits filed in prior years (*i.e.*, 250 or more).¹²

While the agency has continued to increase its focus on systemic investigations and related litigation, a comparison of results as reviewed in the FY 2013 PAR and FY 2014 PAR is particularly notable, as best illustrated by excerpts from each report.

FY 2014 PAR:

In FY 2014, the EEOC’s field offices completed work on 260 systemic investigations resulting in 78 settlements and conciliation agreements and recovering approximately \$13 million. In addition, reasonable cause findings were issued in 118 systemic investigations in FY 2014.¹³

The agency continued to achieve a high level of results in its systemic investigations. In FY 2014, the EEOC completed 260 systemic investigations. Thirty percent (78) of those investigations were resolved by voluntary agreements, either a pre-determination settlement before a finding of discrimination was made or a conciliation agreement. When the agency makes a finding of discrimination, the EEOC’s conciliation process affords employers an opportunity to come into compliance with the anti-discrimination laws without an EEOC lawsuit being filed. In FY 2014, the agency obtained pre-determination settlements in 34 systemic investigations and conciliation agreements in 44 systemic investigations. The EEOC secured \$13 million in monetary relief.¹⁴

The agency filed 133 merits lawsuits during FY 2014 through its field legal units. These included 105 individual suits, 11 non-systemic class suits, and 17 systemic suits. Legal staff resolved 136 merits lawsuits for a total monetary recovery of \$22.5 million. At the end of FY 2014, the EEOC had 228 cases on its active docket, of which 31 (14 percent) were non-systemic class cases and 57 (25 percent) involved challenges to systemic discrimination—the largest proportion of systemic suits since tracking began in FY 2006.¹⁵

FY 2013 PAR:

In FY 2013, the EEOC’s field offices completed work on 300 systemic investigations resulting in 63 settlements or conciliation agreements, recovering approximately \$40 million. In addition, 106 reasonable cause determinations in systemic investigations were issued in FY 2013. Systemic suits comprised 16 percent of all merits filings, and by the end of the year represented 23.4 percent of all active merit suits—the largest proportion since tracking started in FY 2006.¹⁶

Despite limited resources available to carry out its enforcement work, the Commission continued to achieve a high level of results in its systemic investigations. In FY 2013, the EEOC resolved 300 systemic investigations. Twenty one percent (or 63) of those investigations were resolved through the EEOC’s conciliation process, which affords employers an opportunity to come into compliance with the anti-discrimination laws without an EEOC lawsuit being filed. In cases where the EEOC’s systemic investigation was hampered by a respondent’s failure to comply with requests for relevant evidence, the EEOC continued its practice of relying on its subpoena authority and, where necessary, application to the federal courts to enforce subpoenas. In all, over \$40 million in relief was secured through the Commission’s systemic investigative work for more than 8,300 individuals.¹⁷

¹¹ *Id.* at p.27.

¹² For a more detailed discussion, see Section II .D. of this Report.

¹³ FY 2014 PAR at 3.

¹⁴ *Id.* at 29.

¹⁵ *Id.* at 3.

¹⁶ FY 2013 PAR at 3.

¹⁷ *Id.* at 32.

Field legal units of the agency filed 131 merits lawsuits during FY 2013. These included 89 individual suits, 21 non-systemic class suits, and 21 systemic suits. Legal staff resolved 209 merits lawsuits for a total monetary recovery of \$39 million. At the end of FY 2013, the EEOC had 231 cases on its active docket, of which 46 (20 percent) were non-systemic class cases and 54 (23 percent) involved challenges to systemic discrimination.¹⁸

The upshot is that the agency fell dramatically short in its systemic initiative compared to FY 2013. The agency completed fewer systemic investigations (*i.e.*, 260 v. 300), recovered less despite more settlements (*i.e.*, recovered \$13 million in monetary relief in 78 voluntary agreements v. \$40 million in 63 voluntary agreements) and filed fewer systemic lawsuits (*i.e.*, 17 v. 21 systemic lawsuits). On the other hand, the risks of a “reasonable cause” finding of discrimination increased when faced with a systemic investigation. The agency issued reasonable cause determinations in 118 of the 260 systemic investigations in FY 2014 (*i.e.*, 45%) as compared to 106 reasonable cause determinations based on 300 systemic investigations in FY 2013 (35%). The likelihood of a reasonable cause finding stemming from a systemic investigation is particularly troublesome when compared to the fact that the EEOC historically has issued reasonable cause findings in less than 5 percent (5%) of the charges filed with the agency.¹⁹

On a more favorable note, from the EEOC’s perspective, the agency now has the largest proportion (25%) of systemic lawsuits on its active docket, based on 57 of the 228 cases involving systemic claims, which is “the largest proportion of systemic suits since tracking began in FY 2006.”²⁰

B. Scope of EEOC Investigations

Employers continue to grapple with the scope of the EEOC’s investigative authority, and an ongoing concern is whether a particular charge might lead to a “systemic” investigation by the EEOC.²¹ While a systemic charge can arise as a “pattern-or-practice” charge, Commissioner’s charge or “directed investigation” involving potential age discrimination or equal pay violations,²² the most frequent issue of concern is when the EEOC expands an individual charge into a systemic investigation.

In recent years, the courts, including the U.S. Courts of Appeals, frequently have sided with the EEOC based on broad-based requests for information.²³ Some federal appeals courts, however, have placed limits on the EEOC’s subpoena power. In 2010, the Third Circuit in *EEOC v. Kronos Incorporated*, limited a subpoena beyond the protected class (but otherwise enforced a broad-based subpoena).²⁴ In 2012, in *EEOC v. Burlington Northern Santa Fe Railroad*,²⁵ the Tenth Circuit ruled that the EEOC was entitled only to evidence relevant to the charges under investigation, and rejected enforcement of a subpoena seeking data on a nationwide basis in connection with a charge of disability discrimination filed by two men who applied and were rejected for the same type of job in the same state.

In 2014, in *EEOC v. Royal Caribbean Cruises, Ltd.*,²⁶ the Eleventh Circuit joined ranks with the Tenth Circuit in limiting the scope of a subpoena in an Americans with Disabilities Act (ADA)²⁷ claim, in which the EEOC attempted to discover information to support a pattern-or-practice claim against an employer when it was faced solely with an individual ADA claim. The court sided with the employer on both “relevance” and “burdensomeness” grounds. The favorable impact of this decision should be tempered based on the Eleventh Circuit’s view that the EEOC had the option of seeking such information in a Commissioner’s charge, but the EEOC had not elected that option in dealing with the matter under investigation.

18 *Id.* at 3.

19 See EEOC statistics, “All Statutes, FY 2007- FY 2013,” available at <http://eeoc.gov/eeoc/statistics/enforcement/all.cfm>.

20 FY 2014 PAR at 3.

21 The EEOC has defined systemic cases as “pattern-or-practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.” See EEOC SYSTEMIC TASK FORCE REPORT (Mar. 2006) at 1, available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm.

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

23 See Barry A. Hartstein, *An Employer’s Guide to EEOC Systemic Investigations and Subpoena Enforcement Actions*, Littler Report (Aug. 1, 2011), available at <http://www.littler.com/files/press/pdf/AnEmployersGuideToSystemicInvestigationsAndSubpoenaEnforcementActions.pdf>; see also Littler’s *Annual Report on EEOC Developments* for Fiscal Years 2011, 2012 and 2013, Scope of EEOC Investigations and Subpoena Enforcement Actions, available through Littler.com’s Publications and Press page: <http://www.littler.com/publication-press>.

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

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

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

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

The impact of a more limited investigation in subsequent litigation is also currently before the Second Circuit in *EEOC v. Sterling Jeweler's, Inc.*²⁸ This lawsuit was based on an investigation in which the charging parties were 19 women at stores in eight states. The lawsuit that followed was a nationwide sex discrimination claim. While the magistrate underscored that courts “will not review the sufficiency of the EEOC’s pre-suit investigation... courts will review whether an investigation occurred,” and “in determining whether a particular claim may be asserted in an EEOC complaint, ‘the relationship between the complaint and the scope of investigation is central.’” Because the EEOC never considered nationwide data in support of its reasonable cause findings, the magistrate recommended the EEOC’s nationwide pattern-or-practice claim be dismissed with prejudice, and this finding was adopted by the district court.

These two cases certainly suggest that the scope of a charge and scope of an EEOC’s investigation will continue to be issues that are carefully considered by both employers and the EEOC moving forward.

C. Conciliation Obligations

The significance of the U.S. Supreme Court’s decision in *EEOC v. Mach Mining*,²⁹ which will issue in 2015, is being debated in briefing before the Court and most likely will continue even after a decision is issued.

The EEOC has argued that the “failure to conciliate” defense is merely a tactic to delay getting to the merits of equal employment litigation against an employer. From an employer’s perspective, to the extent that the Court affirms the Seventh Circuit’s opinion, which effectively held that the courts will not “second guess” the EEOC’s conciliation efforts, there are no safeguards to ensure that the EEOC engages in good-faith conciliation. Thus, employers could be faced with the dilemma of unreasonable settlement demands by the EEOC in conciliation or unwanted costly litigation to defend themselves.

While the Second, Fifth and Eleventh Circuit Courts of Appeals have required the courts to evaluate the “reasonableness and responsiveness of the EEOC’s conduct” during the conciliation efforts and other courts have taken a more nuanced different view,³⁰ there is no doubt that further clarification from the Supreme Court will be forthcoming during 2015. On balance, however, even in the event the Court applies a literal reading to the statute and does not apply a good-faith standard, it clearly is in the best interests of the EEOC to engage in good-faith conciliation prior to bringing suit, particularly based on the limited number of lawsuits now being filed by the agency and the incredible costs and manpower needed for any large-scale litigation.

D. The EEOC’s Strategic Plan and Related Enforcement Plan

In FY 2012, the EEOC introduced its Strategic Plan,³¹ which focused on strategic enforcement, and the Strategic Enforcement Plan (“SEP”), approved by the Commission on December 17, 2012. The SEP reaffirmed the EEOC’s focus on pursuing systemic cases.³² As significantly, the EEOC identified various priorities where it would devote the time and resources of the agency.

National Priorities³³

The Commission identifies the following issue priorities, with the goal and expectation that a concentrated and coordinated approach will result in reduced discrimination in these areas.

1. Eliminating Barriers in Recruitment and Hiring. The EEOC will target class-based intentional recruitment and hiring discrimination and facially neutral recruitment and hiring practices that adversely impact particular groups.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers. The EEOC will target disparate pay, job segregation, harassment, trafficking and other discriminatory practices and policies affecting immigrant, migrant and other vulnerable workers, who are often unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.

28 *EEOC v. Sterling Jeweler's, Inc.*, 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014) (Magistrate Judge recommendation), *enforced*, 2014 U.S. Dist. LEXIS 31524 (W.D.N.Y. Mar. 10, 2014), *appeal filed*, No. 14-1782 (2d Cir. Sept. 4, 2014).

29 *EEOC v. Mach Mining*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013), *cert. granted*, No. 13-1019 (U.S. June 30, 2014).

30 See Annual Report on EEOC Developments: Fiscal Year 2013, *supra* note 22, at 45-49.

31 For general background on the Strategic Plan, see Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2012*, at 8-10 (2012), available at <http://www.littler.com/publication-press/publication//annual-report-eeoc-developments-fiscal-year-2012>. For the details of the Strategic Plan, see Press Release, EEOC, *EEOC Approves Strategic Plan For Fiscal Years 2012-2016* (Feb. 22, 2012) available at <http://www.eeoc.gov/eeoc/newsroom/release/2-22-12.cfm>.

32 The details of the SEP are available on the EEOC website at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

33 See Section III.B of the Strategic Enforcement Plan at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

3. Addressing Emerging and Developing Issues. As a government agency, the EEOC is responsible for monitoring trends and developments in the law, workplace practices, and labor force demographics. For example, the Commission recognizes that elements of the following issues are emerging or developing: 1) certain ADA issues, including coverage, reasonable accommodation, qualification standards, undue hardship, and direct threat, as refined by the Strategic Enforcement Teams; 2) accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA)³⁴ and the Pregnancy Discrimination Act (PDA); and 3) coverage of lesbian, gay, bisexual and transgender individuals under Title VII's sex discrimination provisions, as they may apply.

4. Enforcing Equal Pay Laws. The EEOC will target compensation systems and practices that discriminate based on gender.

5. Preserving Access to the Legal System. The EEOC will also target policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions, overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination, and failure to retain records required by EEOC regulations.

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach. Harassment is one of the most frequent complaints raised in the workplace.... While investigation and litigation of harassment claims has been successful, the Commission believes a more targeted approach that focuses on systemic enforcement and an outreach campaign aimed at educating employers and employees will greatly deter future violations.

In pursuing litigation involving issues on its list of priorities, the agency had very mixed results in large-scale litigation over the past year.

1. Eliminating Barriers in Recruitment and Hiring

While employers should expect the EEOC to continue to focus on class-based investigations and litigation involving hiring practices, the EEOC did not fare well in its litigation efforts over the past year. The two cases that stand out are *EEOC v. Kaplan*³⁵ and *EEOC v. Freeman*.³⁶ As discussed below, there also has been significant activity in several recent lawsuits involving criminal background checks over the past year, which will be actively litigated in FY 2015. One additional noteworthy case implicating criminal background checks involved a challenge to portions of the EEOC's Criminal History Guidance. In this case, the EEOC prevailed. The EEOC otherwise has been involved in several noteworthy large-scale lawsuits involving alleged intentional discrimination in recruitment and hiring, and these cases may get further traction in FY 2015.

As reported in Littler's *2013 Report on EEOC Developments*,³⁷ in *Kaplan* the EEOC challenged the employer's reliance on credit history as part of the hiring process and alleged the practice had an unlawful discriminatory impact on African Americans. The employer prevailed on summary judgment because the EEOC failed to provide reliable statistical evidence of discrimination and successfully attacked the EEOC expert's findings, which led to the summary judgment ruling.

In disparate impact cases, a central focus is reliance on statistics in determining whether a neutral employment practice has an adverse impact on a protected class. In *Kaplan*, the Sixth Circuit underscored that the EEOC's case focused on expert testimony. The dispute in the case concerned the reliability, or lack thereof, of the process—which the EEOC called “race rating”—by which the EEOC's expert witness, Kevin Murphy, who holds a doctorate in industrial and organizational psychology, purported to identify the race of each person based on review of drivers' license photos. According to the appeals court, “the district court considered every one of the *Daubert* factors³⁸—

34 Pub. L. No. 110-325 (2008), codified at 42 U.S.C. § 12101.

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

36 *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013). Although the employer prevailed on summary judgment, the EEOC remains hopeful that based on its appeal, the court will reverse and remand the case.

37 See Littler's *2013 Annual Report on EEOC Developments: FY 2013* at 69.

38 See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

and found that Murphy's methodology flunked them all." In a major blow to the EEOC, the court did not mince words in affirming the summary judgment finding, explaining, "The EEOC brought this case on the basis of a homemade methodology, crafted by a witness with no particular expertise to craft it, administered by persons with no particular expertise to administer it, tested by no one, and accepted only by the witness himself. The district court did not abuse its discretion in excluding Murphy's testimony."

In the *Freeman* case, which dealt with both the use of credit and criminal history in the hiring process, oral argument was held before the Fourth Circuit on October 29, 2014.³⁹ This appeal followed the district court ruling in which the employer also prevailed on summary judgment. In this second disparate impact lawsuit, the EEOC again relied on expert Kevin Murphy, and the district court in Maryland disregarded the expert report in its summary judgment ruling in favor of the employer. In the *Freeman* case, however, the district court focused on numerous errors throughout the expert report filed in support of the EEOC's case. In oral argument before the Fourth Circuit, the EEOC candidly admitted that the EEOC may not have had the best expert in their case, but nevertheless argued that reliability of the report should be an issue for trial, and therefore dismissing the lawsuit at the summary judgment stage was improper.⁴⁰

An additional blow to the EEOC's background check litigation came from the Sixth Circuit's stinging rebuke of the EEOC's first major criminal background check lawsuit against an employer, *Peplemark*. The case was initially filed in 2008. On March 10, 2014, the Sixth Circuit denied the EEOC's request for *en banc* review, following the appellate panel's October 2013 ruling that upheld a \$752,000 award to reimburse Peplemark for attorneys' and expert fees.⁴¹ In the underlying lawsuit, the EEOC failed to timely produce an expert report in support of its claim that reliance on criminal background checks in the hiring process had an adverse impact on African Americans, and the employer timely produced an expert report demonstrating there was no adverse impact based on the employer's reliance on criminal background checks. The employer filed the motion for fees after the EEOC agreed to voluntarily dismiss the case.⁴²

Despite these series of setbacks for the EEOC in challenging an employer's reliance on criminal history information, the EEOC had one favorable outcome in an attack on its Criminal History Guidance. In *State of Texas v. EEOC et al*,⁴³ the state filed a complaint for declaratory and injunctive relief, arguing the EEOC's guidance ignored state and local law that disqualified convicted felons from holding certain jobs based. On August 20, 2014, in rejecting that argument, the court dismissed the lawsuit and held that the guidance was not a final agency action and the lawsuit was premature because no action had been brought against the State of Texas based on the guidance. On August 25, 2014, the State of Texas filed a Notice of Appeal with the Fifth Circuit.⁴⁴

During the coming year, it is anticipated that an employer's reliance on criminal background checks will continue to be front and center in the EEOC's review of employer hiring practices. Two lawsuits to closely monitor in FY 2015 are: *EEOC v. BMW Manufacturing Co. LLC*, which is pending in the district court in South Carolina,⁴⁵ and *EEOC v. Dolgencorp LLC*, which is pending in the Northern District of Illinois.⁴⁶ Based on these lawsuits, the EEOC has alleged that the respective policies disproportionately screened out African Americans, were not job-related or consistent with business necessity, and failed to include an individualized assessment prior to screening out applicants for employment.⁴⁷

The EEOC has also continued to pursue numerous class-based "failure to hire" lawsuits involving claims of alleged intentional discrimination, and it is clear that the EEOC has not singled out any type of discrimination in such large-scale litigation, which include

39 The oral argument in the Fourth Circuit in *EEOC v. Freeman*, Case No. 13-2365, was heard on October 29, 2014 and can be accessed from the website of the Fourth Circuit at <http://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments>.

40 Additional issues that may be considered by the Fourth Circuit involve: (1) whether the EEOC must focus on exclusion for specific crimes that have a specific impact as opposed to merely focusing on disparate impact based on an applicant's criminal history; and (2) the applicable limitations period for pattern-or-practice cases brought under Section 707 of Title VII of the 1964 Civil Rights Act.

41 *EEOC v. Peplemark, Inc.*, 2014 U.S. App. LEXIS 4881 (6th Cir. Mar. 10, 2014); *EEOC v. Peplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).

42 *EEOC v. Peplemark Inc.*, Case No. 1:08-cv-907 (W.D. Mich. 2011).

43 Case No. 5-13-cv-00255 (Filed: 11/4/13, N.D. Texas, Lubbock Division).

44 Case No. 14-10949 (5th Cir.).

45 See Case No. 13-cv-01583 (Filed: June 11, 2013, D.S.C., Spartanburg Division).

46 Case No. 13-cv-04307 (Filed: June 11, 2013, N.D. Ill.)

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

lawsuits alleging race, national origin, age and sex discrimination.⁴⁸ These cases are illustrative of the broad range of issues that are faced on both sides of the table in such litigation, and should be closely monitored by the employer community during the coming year.⁴⁹

In cases of intentional discrimination, whether they involve hiring barriers or the other strategic priorities, a critical issue has been the method of proving discrimination in support of these claims. Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate sections of Title VII: Section 706 and Section 707.⁵⁰ The plain language of these two sections appears to differ significantly because Section 706 authorizes the EEOC to sue on behalf of a person or group of aggrieved individuals, whereas Section 707 authorizes the EEOC to file a lawsuit when “it has reasonable cause to believe that [an employer] is engaged in a “pattern-or-practice” of unlawful discrimination, and pursuing an action on each these sections is significant because jury trials and compensatory and punitive damages are available only under Section 706. Even so, the EEOC has been successful in recent litigation in convincing various courts that it should be permitted to prove discrimination under Section 706 by: (1) presenting circumstantial evidence under the familiar *McDonnell Douglas*⁵¹ burden-shifting analysis; or (2) meeting a heightened *prima facie* standard to establish pattern-or-practice discrimination under *International Brotherhood of Teamsters v. United States*.⁵² Relying on the latter theory can be significant because the burden of proof shifts to the employer on the question of individual liability if the EEOC is able to establish a pattern-or-practice of discrimination under *Teamsters*.

2. Protecting Immigrant, Migrant and Other Vulnerable Workers

Issues involving immigrant, migrant and other vulnerable workers have had limited application to most employers. The EEOC has placed the most attention on protecting agricultural workers and attacking what has been described as “human trafficking,” which the EEOC defines as “a crime involving the exploitation of someone for the purposes of compelled labor or a commercial sex act through the use of force, fraud, or coercion.”⁵³

The EEOC’s General Counsel has spent a fair amount of time addressing this topic, including frequently referring to the \$264 million verdict in the *Hill Country Farm* case (which involved a finding of discrimination concerning intellectually disabled workers) as the largest verdict in the EEOC’s history, although the total award was reduced to \$1.6 million based on the damage caps under Title VII.⁵⁴

On March 24, 2014, in one of the EEOC’s human trafficking cases, a Hawaii federal judge granted summary judgment to the EEOC based on findings that included statements to claimants that anyone who ran away would be shot, deported, or arrested, and threats to claimants of physical abuse and deportation if they did not work faster or harder, tried to escape, or complained about or questioned the working or living conditions.⁵⁵ A trial is being set to determine the employer’s liability. Other defendants prevailed in a partial summary judgment motion on the pattern-or-practice claim of harassment, but were denied summary judgment to the extent they were viewed as joint employers.⁵⁶ The remaining defendants subsequently entered into settlement agreements with the EEOC.⁵⁷

48 See, e.g., *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4-11-cv-03425 (S.D. Tex., Filed Sept. 21, 2011) (race and national origin discrimination); *EEOC v. Texas Roadhouse*, Case No. 1:11-cv-11732 (D. Mass., filed Sept. 30, 2011) (age discrimination); *EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61425 (D. Md. Mar. 11, 2014) (sex discrimination); *EEOC v. Cintas*, Case No. 2:04-cv-40132 (filed: May 10, 2004) (sex discrimination).

49 While all of these lawsuits involve extremely contentious litigation with the EEOC, one particularly noteworthy issue involves a separate FOIA lawsuit filed in *Texas Roadhouse*, an age discrimination lawsuit, in which the employer filed suit for a declaratory action on September 30, 2014, seeking among other items, disclosure of various documents, including, documents relating to all investigations and complaints since January 1, 2007, leading to the filing of the lawsuit against the employer. This lawsuit apparently stems from a “directed investigation,” in which there was no specific charge that led to initiation of the initial investigation of the company. See *Texas Roadhouse, Inc. et al v. EEOC*, Case No. 3:14-cv-652 (W.D. Ky. filed Sept. 30, 2014).

50 For a more detailed discussion of this issue, see Section V.A.2 of this Report, which addresses key issues in class-related allegations. A comprehensive discussion of this topic and related issues is included in Section I of Littler’s *Annual Report on EEOC Developments: Fiscal Year 2013*, “Reflection on Fifty Years of Title VII of the Civil Rights Act of 1964 and Unsettled Issues Involving Systemic Claims and Class-Based Litigation by the EEOC,” at 3-10.

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

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

53 EEOC, Human Trafficking Information Sheet, available at <http://www1.eeoc.gov/eeoc/interagency/trafficking.cfm?renderforprint=1>.

54 See HR Professionals Magazine, *EEOC Training in Hot Springs July 22*, available at <http://hrprofessionalsmagazine.com/eeoc-training-in-hot-springs-july-22/>. See also Littler’s *Annual Report on EEOC Developments: Fiscal Year 2013*, at 15-16, which discussed the *Hill Country Farm* case, a lawsuit in the Southern District of Iowa. The \$1.6 million award was affirmed by the Eighth Circuit following appeal of the jury finding. *EEOC v. Hill Country Farms*, 2014 U.S. App. LEXIS 8650 (8th Cir. May 5, 2014). A prior summary judgment ruling in September 2012 based on a finding of discrimination and lower wages paid to these workers involved an additional award of \$1.3 million. See *EEOC v. Hill Country Farms, Inc.*, No. 3-11-CV-41 (S.D. Iowa Sept. 18, 2012).

55 See *EEOC v. Global Horizons et al*, 2014 U.S. Dist. LEXIS 36207 (D. Haw. Mar. 19, 2014).

56 *EEOC v. Global Horizons, et al.*, 2014 U.S. Dist. LEXIS 72866 (D. Haw. May 28, 2014) (Order Granting in Part and Denying in Part Motion for Summary Judgment).

57 See Appendix A to Littler’s *Annual Report on EEOC Developments: Fiscal Year 2014*.

The EEOC cases in this area primarily have been handled by the EEOC's Regional Attorney for the Los Angeles District Office, Anna Park, who is responsible for Southern California, Central California, Southern Nevada, Hawaii, Guam, Wake Islands, and the Northern Mariana Islands.⁵⁸

3. Emerging and Developing Issues

The past year has seen a continued focus on emerging and developing issues, including pregnancy discrimination, religious accommodation, ADA claims, and LGBT issues, and the EEOC has taken a fairly aggressive stance on such issues. As an example, in dealing with pregnancy discrimination, the Supreme Court granted *certiorari* on July 1, 2014 in *Young v. UPS*,⁵⁹ and two weeks later, on July 14, 2014, the EEOC issued guidance addressing one of the very issues being addressed by the Court in that case.⁶⁰ In *EEOC v. Abercrombie*,⁶¹ a case involving alleged religious accommodation, the EEOC is a party to the litigation.

a. Pregnancy Discrimination

Young v. UPS involves an appeal from the Fourth Circuit, which upheld summary judgment in favor of the employer. In that case, the plaintiff brought suit because she was denied a "light duty" assignment during her pregnancy. She was treated the same as any employee (male or female) who was off work due to a non-work related illness or injury. The plaintiff claimed she was discriminated against based on pregnancy status because light duty was made available to employees injured on the job, those with disabilities, and employees who lost DOT certification. The heart of the dispute involved who are the appropriate "comparables" in the case. The focal point is a proviso in the definition of sex discrimination in Title VII of the Civil Rights Act of 1964,⁶² which was modified based on the Pregnancy Discrimination Act of 1978.⁶³ The PDA includes a stipulation that pregnancy "shall be treated the same for all employment related purposes... as other persons not so affected but similar in their ability or inability to work." In reviewing the proviso, the Fourth Circuit concluded that pregnant employees were not entitled to any special accommodation. Rather, the employer had the right to treat the plaintiff the same way it treated similarly affected non-pregnant employees, and because anyone with a temporary disability based on a non-related injury or illness (male or female) did not get light duty, there was no discrimination against the plaintiff merely because she was pregnant. In the petition for *certiorari* to the Supreme Court, the plaintiff argued that the proviso "provided additional protection" to pregnant workers and cited certain case authority to supported her position. On July 1, 2014, the Supreme Court agreed to consider the issue.

Notwithstanding, two weeks later on July 14, 2014, the EEOC issued sweeping guidance on pregnancy discrimination, which included addressing "light duty" and *Young v. UPS*. In its guidance, the EEOC flatly rejected the ruling of the Fourth Circuit and stated:

The Commission rejects the position that the PDA does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA. Some courts have reached this conclusion based on the premise that employees covered by such policies are not proper comparators to the pregnant worker for the purposes of the *McDonnell Douglas* analysis.⁶⁴ This analysis is flawed because it rejects the PDA's clear admonition that pregnant workers must be treated the same as non-pregnant workers similar in their ability or inability to work.⁶⁵

58 One additional case that should be closely monitored is *EEOC v. Signal International*, Case No. 2:12-cv-00557 (E.D. La. filed Apr. 20, 2011), which also initially was filed in the Southern District of Mississippi (Case 1:11-cv-179), and then transferred to the Eastern District of Louisiana, which involves an action by the EEOC on behalf of 500 Indian nationals, who allegedly were required to live in "man camps" and sign employment and housing agreements in which they had to reimburse the company for food and accommodations and the facility was accessible only by a single guarded entrance.

59 *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, No. 12-1226 (U.S. July 1, 2014). Oral argument was heard on Dec. 3, 2014.

60 See EEOC ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

61 *EEOC v. Abercrombie & Fitch Stores*, 2013 U.S. App. LEXIS 20028 (10th Cir. Oct. 1, 2013), *cert. granted*, No. 14-86 (U.S. Oct. 2, 2014).

62 Pub. L. No. 88-352 (1964), *codified at* 42 U.S.C. § 2000e *et seq.*

63 Pub. L. No. 95-555 (1978), *codified at* 42 U.S.C. § 2000e(k).

64 In footnote 107 of the Enforcement Guidance, the EEOC commented, "See, e.g., *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013) (holding that a policy limiting light duty to employees injured on the job, employees who have disabilities within the meaning of the ADA, and employees who have lost their certification to drive commercial motor vehicles is a neutral 'pregnancy blind' policy that neither constitutes direct evidence of pregnancy discrimination nor raises an inference of discrimination), *cert. granted*, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226)."

65 EEOC ENFORCEMENT GUIDANCE, PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 60 at Example 12, § c.

It should be noted, however, that the Commission approved the guidance in a 3-2 vote over the strong objections by Commissioners Constance Barker and Victoria Lipnic.⁶⁶ In the event the Court affirms the Fourth Circuit ruling, serious questions will be raised regarding key sections of the recently issued guidance, aside from the wisdom in even adopting the guidance in view of the pending Supreme Court decision.

b. Religious Discrimination

While religious discrimination was not expressly referenced as one of the emerging issues to be addressed in the updated guidance, it certainly has become clear that such concerns have been one of the emerging issues that has gained traction with the EEOC.

On March 6, 2014, the EEOC announced the issuance of technical guidance on “Religious Garb and Grooming in the Workplace: Rights and Responsibilities” as well as an accompanying “Fact Sheet.”⁶⁷ Consistent with this guidance, on September 25, 2014, the EEOC filed a religious discrimination lawsuit based on the alleged failure to hire an individual who refused to cut his hair on religious grounds.⁶⁸

Certainly the most notable religious discrimination case over the past year is *EEOC v. Abercrombie & Fitch Stores, Inc.*, which is currently pending before the Supreme Court. The Court granted *certiorari* following the Tenth Circuit reversal of a summary judgment ruling in favor of the EEOC. In *Abercrombie*, the charging party was denied employment based on the employer’s appearance policy, but she never specifically requested an accommodation based on her religion. In reversing the district court, the appeals court ruled, “Abercrombie is entitled to summary judgment as a matter of law because there is no genuine dispute of material fact that [the claimant] never informed Abercrombie prior to its hiring decision that she wore her headscarf or ‘hijab’ for religious reasons and that she needed an accommodation for that practice, due to a conflict between the practice and Abercrombie’s clothing policy.”⁶⁹ In its petition for *certiorari*, the EEOC focused on its argument and supporting case law, explaining, “The district court rejected this explicit notice rule, adopting instead the position of the EEOC and other courts that ‘the notice requirement is met when an employer has enough information to make it aware there exists a conflict between the individual’s religious practice or belief and a requirement for applying for or performing the job.’”⁷⁰ Regardless of the outcome in the pending case, there is little doubt that the EEOC will continue to vigorously challenge employer policies that fail to make reasonable accommodations to those with “sincerely held religious beliefs.”

On the other hand, over the past year, the courts have balanced employer and employee interests when dealing with religious discrimination. In *EEOC v. JBS USA*,⁷¹ in which the EEOC brought a pattern-or-practice claim alleging religious discrimination, the employer was faced with a claim that a substantial group of Muslim employees required one to three extra breaks per day for Somali Muslim prayer practice, in addition to restroom breaks. The employer took exception with the requested breaks on the grounds that such breaks imposed costs and burdens, including jeopardizing food safety in the slaughter plant; raised employee safety concerns that the remaining employees on the assembly line would have to work harder and faster to keep up with movement of product; and affected operational efficiency because the employees working faster were less likely to be able to trim product with precision to meet required specifications. The parties agreed that the proposed accommodations were for the employer to (1) “allow Muslim employees to take unscheduled breaks to pray;” and/or (2) “move the meal break during the remainder of Ramadan 2008 (a two-week period) to a time that coincided closely with such employees’ sunset prayer time.” In granting partial summary judgment to the employer on the pattern-or-practice claims, the district court concluded that either accommodation would have resulted in an undue hardship on the employer.

66 The details of Commissioner Lipnic’s objections and a link to her comments is available on Littler’s Workplace Policy Update blog at <http://www.littler.com/workplace-policy-update/eec-issues-new-enforcement-guidance-pregnancy-discrimination-over-commissio>.

67 See Press Release, EEOC, *EEOC Issues New Publications on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm>.

68 See *EEOC v. Mims Distributing Company, Inc.* Case No. 5-14-cv-00538 (E.D.N.C., filed Sept. 25, 2014). The EEOC has actively challenged grooming practices, such as how employees wear their hair at work. However, in March 2014, the EEOC lost a race discrimination case in federal court in Alabama based on an employer’s refusal to hire a woman with dreadlocks based on the view that there was no basis to conclude she was singled out based on her race. See *EEOC v. Catastrophe Management Solutions*, 2014 U.S. Dist. LEXIS 50822 (S.D. Ala. Mar. 27, 2014).

69 *Abercrombie*, 2013 U.S. App. LEXIS 20028, at *2.

70 See the EEOC’s *Petition for Certiorari*, filed on July 25, 2014, available at http://www.scotusblog.com/case-files/cases/equal-employment-opportunity-commission-v-abercrombie-fitch-stores-inc/?wmp_switcher=desktop.

71 *EEOC v. JBS USA*, 2013 U.S. Dist. LEXIS 176963 (D. Neb. Oct. 11, 2013). After the EEOC initially appealed the decision, the court certified as appealable its judgment on “Phase I” of the case, which involved the pattern-or-practice claim. 2014 U.S. Dist. LEXIS 9635 (D. Neb. Jan. 27, 2014). Thereafter, the court granted the employer’s motion to stay the proceeding based on the EEOC’s Notice of Appeal to the Eighth Circuit, which was filed on March 27, 2014. 2014 U.S. Dist. LEXIS 73238 (D. Neb. May 29, 2014). The EEOC thereafter dropped its appeal of the summary judgment ruling in May 2014, electing to proceed with individual religious discrimination claims on behalf of various Somali Muslim workers, and parties have continued to have numerous disputes regarding the merits of the case. See Case Docket, 8:10-cv-00318 (D. Neb.).

c. ADA Claims

Reasonable accommodation under the ADA has been a critical issue for the EEOC, as best illustrated by the agency's attacks on several fronts over the past year.

As an example, *EEOC v. Ford Motor Company*, currently under review by the Sixth Circuit, focuses on whether refusing to permit telecommuting as a requested accommodation ran afoul of the ADA.⁷² The case involved a position in which interaction with co-workers was viewed as a critical component of the job. Although the employee, who suffered from a disability, was permitted to telecommute on a temporary basis, permission was withdrawn based on the view she could not effectively perform her job without on-site interaction with co-workers. After the employer won on summary judgment, on April 22, 2014, the three-judge panel of the Sixth Circuit reversed the summary judgment ruling for the employer. The panel acknowledged that “[f]or many positions, regular attendance at the work place is undoubtedly essential.” Yet, it challenged the assumption “that the ‘workplace’ is the physical worksite provided by the employer,” and that “the workplace and an employer’s brick-and-mortar location [are] synonymous.” It reasoned that “as technology has advanced in the intervening decades, and an ever-greater number of employers and employees utilize remote work arrangements, attendance at the workplace can no longer be assumed to mean attendance at the employer’s physical location. Instead, the law must respond to the advance of technology in the employment context, as it has in other areas of modern life, and recognize that the ‘workplace’ is anywhere that an employee can perform her job duties.” This, the court noted, is a “highly fact specific question.” However, on August 29, 2014, Sixth Circuit vacated the panel decision and agreed to rehear the case, leaving open the question whether the employer or EEOC will prevail on this important reasonable accommodation issue of required attendance to perform one’s job.⁷³

The scope of what is a “reasonable” accommodation under the ADA based on extended leaves of absence also continues to be an issue championed by the EEOC. The agency has taken the view that setting a maximum leave period may violate the law.⁷⁴ The most recent large-scale lawsuit on this issue, *EEOC v. UPS, Inc.*,⁷⁵ focuses on a policy in which the employer maintained a leave policy providing that an employee would be “administratively separated after twelve months of leave.” During FY 2014, after prior successful motions to dismiss by the employer, on February 11, 2014, the Northern District of Illinois denied the employer’s motion to dismiss the second amended complaint, adopting the EEOC’s view that the employer’s reported “100% healed requirement on those seeking to return to work” could be challenged under the ADA as a “qualification standard” to screen out individuals with disabilities. There is little doubt that this issue will continue to be vigorously debated over the coming year.

In dealing with the ADA, aside from reasonable accommodation issues, certainly one of the most significant issues over the past year involves the EEOC having pitted itself against the health care community and taking a position at odds with the Affordable Care Act (ACA)⁷⁶ by targeting and challenging wellness programs. Under the ACA, wellness programs are generally encouraged for both large and small employers. For example, the ACA provides grants for up to five years to small employers that establish wellness programs. It also permits employers to offer employee rewards in the form of discounts and waivers in connection with wellness programs and increases the amount of the incentive that can be offered.⁷⁷

72 *EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014), *reh’g granted*, *EEOC v. Ford Motor Co.*, No. 12-2484, 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

73 See Section V.J.2 of this Report, which focuses on summary judgment decisions, for a more detailed discussion of the *Ford Motor Company* case and other related ADA litigation. The risks sometimes faced in such litigation are discussed in Section V.M.1 of this Report in which a “Trial Spotlight” reviews a recent ADA case in which there was a favorable jury verdict for the EEOC.

74 The EEOC has long held this view, and the end result after contentious litigation typically has been a substantial settlement and consent decree entered into with the EEOC. See *EEOC v. SuperValu*, Case (\$3.2 Million), Press Release, EEOC, *SuperValu / Jewel-Osco to Pay \$3.2 Million under Consent Decree for Disability Bias* (Jan. 5, 2011). Although the employer challenged the recommended contempt ruling by the magistrate involving alleged violations of the consent decree, on Dec. 2, 2014, the U.S. District Court for the N.D. of Illinois upheld the magistrate’s ruling. *EEOC v. SuperValu*, 09-cv-5637 (N.D. Ill. July 15, 2014) (magistrate report and recommendation order filed) (N.D. Ill. Dec. 2, 2014) (Order upholding magistrate’s ruling and recommendation with respect to the EEOC’s contempt charge); *EEOC v. Sears Roebuck and Co.*, Press Release, EEOC, *Sears, Roebuck To Pay \$6.2 Million For Disability Bias* (Sept. 29, 2009) (\$6.2 million Consent Decree).

75 *EEOC v. UPS, Inc.*, 2014 U.S. Dist. LEXIS (N.D. Ill., Feb. 11, 2014) (court denied motion to dismiss second amended complaint) BL 35887, N.D. Ill., No. 1:09-cv-05291, 2/11/14.

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

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

Since August 2014, the EEOC has filed three lawsuits challenging wellness programs.⁷⁸ While the EEOC has not issued guidance to address wellness programs since enactment of the ACA, as early as July 2000, when issuing guidance on disability-related inquiries, the EEOC issued a “Q&A” on wellness programs.⁷⁹ In discussing whether it was permissible for an employer to make disability-related inquiries or conduct medical examinations as part of a voluntary wellness program, the EEOC addressed the meaning of the term “voluntary” in the context of wellness programs and stated that a program will only be voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate.”⁸⁰

In a lawsuit filed on August 20, 2014, the EEOC alleges that the employer “violated federal law by requiring an employee to submit to medical exams and inquiries that were not job-related and consistent with business necessity as part of a so-called ‘wellness program,’ which was not voluntary, and then by firing the employee when she objected to the program.”⁸¹ In the second lawsuit, filed on October 1, 2014, according to the EEOC, the “wellness program” required that employees submit to biometric testing and a “health risk assessment,” or face cancellation of medical insurance, unspecified “disciplinary action” for failing to attend the scheduled testing, and a requirement to pay the full premium in order to stay covered. The most recent action, filed on October 27, 2014, was brought at the investigation stage based on the ADA and Genetic Information Nondiscrimination Act (GINA)⁸² prior to even making a determination whether there was reasonable cause to believe the employer violated these laws.

While the first two cases will proceed through normal discovery, the most recent lawsuit was initiated through a seldom used but extremely aggressive tactic of filing a petition for a temporary restraining order and preliminary injunction in which the EEOC argued in relevant part:

The proposed medical testing is not voluntary, and therefore violates the Americans with Disabilities Act. The testing imposes penalties on employees whose spouses do not provide their medical information, and therefore violates the Genetic Information Nondiscrimination Act. The testing, if allowed to go forward, will cause irreparable harm to the EEOC because it will interfere with the EEOC’s processes under the statutes. The EEOC will be irreparably harmed because it will be unable to prevent imminent violations of anti-discrimination laws that it is tasked with enforcing. Honeywell employees will be irreparably harmed because they will be forced to go through an unlawful test without knowing whether their rights will be remedied in the future. If the employees are forced to take the medical tests (which include a blood draw), they can never be made whole through monetary remedies. Honeywell will not be harmed by the granting of preliminary relief. The public interest supports granting the preliminary relief.⁸³

Notwithstanding, less than one week later, on November 6, 2014, the court denied the EEOC’s motion, explaining, “Recent lawsuits filed by the EEOC highlight the tension between the ACA and the ADA and signal the necessity for clarity in the law so that corporations are able to design lawful wellness programs and also to ensure that employees are aware of their rights under the law.”⁸⁴

d. LGBT Issues

Although Title VII does not expressly provide coverage prohibiting discrimination on the basis of sexual orientation or sexual identity, the EEOC has been relying on a theory of “sexual stereotyping” as an impermissible form of sex discrimination. In FY 2013, the EEOC set the stage for litigation filed in FY 2014 based on the agency’s earlier legal opinion applicable to federal workers in *Macy v. Holder*.⁸⁵ This case involved the denial of a job to the claimant at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) after she advised them that she was in the process of transitioning from male to female. In an appeal of the claim to the EEOC, applicable to federal employees, the EEOC issued a lengthy opinion taking the view that whether the ATF relied on sexual stereotyping or other theories, based on the plain language of Title VII, the claimant had a viable claim of sex discrimination.

78 See Press Release, EEOC, *EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee* (Aug. 20, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-20-14.cfm>; Press Release, EEOC, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), available at <http://www1.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>; and *EEOC v. Honeywell Int’l Inc.*, Case No. 14-cv-04517 (D. Minn., filed Oct. 27, 2014).

79 EEOC, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (July 27, 2000), available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

80 *Id.* at Q22.

81 See *EEOC Lawsuit Challenges Orion Energy Wellness Program and Related Firing of Employee*, *supra* note 78.

82 Pub. L. No. 110-233 (2008), codified at 42 U.S.C. §2000ff *et seq.*

83 *EEOC v. Honeywell Int’l Inc.*, Case No. 14-cv-04517 (D. Minn., filed Oct. 27, 2014), Docket #1. *Id.* at 2.

84 *Id.*, Docket #24 at 10.

85 See *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

At the end of FY 2014, on September 25, 2014, the EEOC filed two lawsuits against employers that allegedly discriminated against transgender individuals, clearly relying on the rationale of the *Macy* decision.⁸⁶ The EEOC also filed an amicus brief and requested rehearing following affirmance by the Seventh Circuit of a summary judgment ruling in favor of the employer in a case involving alleged sex- and race-based harassment that included alleged anti-gay remarks.⁸⁷ Although the rehearing was denied on October 16, 2014, the EEOC claimed a partial victory because “the panel issued an amended opinion removing its original rulings regarding the scope of Title VII coverage,” and “(t)he opinion no longer repeats or relies upon statements from prior Seventh Circuit decisions that Title VII does not prohibit sexual-orientation discrimination or retaliation for related opposition conduct.”⁸⁸

It also should be noted that there has been a significant influx of discrimination charges received at the agency involving alleged discrimination based on sexual orientation and sexual identity. During FY 2014, based on available data, “during the first three quarters of FY 2014, the EEOC had received 663 charges alleging sex discrimination related to sexual orientation and 140 charges alleging sex discrimination on the basis gender identity/transgender status.”⁸⁹

Thus, this is an area in which further activity clearly should be anticipated during FY 2015.

4. Enforcing Equal Pay Laws

Similar to prior years, the EEOC filed only a small number of Equal Pay Act (EPA)⁹⁰ cases (*i.e.*, two lawsuits).⁹¹ While the EEOC publicized a \$100,000 settlement in favor of female managers and cashiers/sandwich makers involving a fast-food restaurant and franchise⁹² and a \$75,800 settlement involving four workers from a hotel chain,⁹³ the EEOC suffered a major loss in its one chief equal pay lawsuit.

In *EEOC v. Port Auth. of N.Y. & N.J.*,⁹⁴ an individual EPA and Age Discrimination in Employment Act (ADEA)⁹⁵ charge was expanded into a broad-based, three-year investigation by the EEOC, which resulted in a reasonable cause finding and lawsuit filed on behalf of 14 non-supervisory female attorneys. With respect to the EPA claim, the EEOC essentially asserted that the female attorneys were paid less than male attorneys for “jobs the performance of which requires equal skill, effort, and responsibility.” Shortly thereafter, the employer requested leave to move for judgment on the pleadings. In an unusual move, the court noted that, at most, such a motion typically would simply result in the EEOC filing an amended complaint. As a result, the court directed the EEOC to respond to contentious interrogatories so the employer could better determine the grounds of the EPA claim. Despite being given such leeway, in the subsequent dismissal of the lawsuit, the court took sharp exception to the complaint, stated that the EEOC merely came forward with “conclusory allegations,” and that “The EEOC has thus failed—despite a three-year investigation—to state an EPA claim upon which relief may be granted in its complaint as supplemented by the Responses, and we therefore dismiss that claim.”

The EEOC did not fare any better on appeal before the Second Circuit, and in its May 27, 2014 opinion affirming the district court decision, in a somewhat harshly worded opinion, the appellate court stated, “We conclude that the EEOC’s failure to allege *any* facts concerning the attorneys’ actual job duties deprives the Court of any basis from which to draw a reasonable inference that the attorneys performed ‘equal work,’ the touchstone of an EPA claim.”⁹⁶

86 See EEOC, *Fact Sheet on Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII*, last updated Oct. 31, 2014, available at http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm (hereinafter referred to as “EEOC LGBT Fact Sheet”).

87 See *Muhammad v. Caterpillar*, Appeal No.12-173 (7th Cir. 2014).

88 See EEOC LGBT Fact Sheet, *supra* note 86.

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

90 Pub. L. No. 88-38 (1963), codified at 29 U.S.C. § 206.

91 See FY 2014 PAR at 27.

92 Press Release, EEOC, *Checkers Franchise Will Pay \$100,000 to Settle EEOC Pay Discrimination Lawsuit* (Apr. 2, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-2-14.cfm>.

93 Press Release, EEOC, *Extended Stay Hotels Will Pay \$75,800 to Settle EEOC Pay Discrimination Lawsuit* (Feb. 19, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/2-19-14.cfm>.

94 *EEOC v. Port Auth. of N.Y. & N.J.*, Case No. 10 Civ. 7462 (NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012), *aff’d*, 2014 U.S. App. LEXIS 18533 (2d Cir. Sept. 29, 2014).

95 Pub. L. No. 90-202 (1967), codified at 29 U.S.C. § 621 *et seq.*

96 *Port Authority*, 2014 U.S. App. LEXIS 18533, at *4.

5. Preserving Access to the Legal System

Over the past year, the employer community was particularly critical of the EEOC's approach to issues the EEOC has described as "preserving access to the legal system," which primarily has focused on the EEOC proactively attacking settlement agreements entered into between employers and employees or former employees. The EEOC has further asserted in these cases that it can unilaterally challenge such agreements even without a charging party, with only a requirement that it have "reasonable cause" for proceeding in the action.⁹⁷

While *EEOC v. CVS Pharmacy, Inc.*,⁹⁸ filed in federal court in the Northern District of Illinois, is the leading and most high-profile case in FY 2014 involving the EEOC's challenge to release agreements entered into between an employer and employee, a prior lawsuit filed by the EEOC in that same court, *EEOC v. Baker and Taylor*,⁹⁹ challenged a severance agreement that allegedly conditioned severance on not filing any claims or administrative charges against the company. The EEOC filed the complaint on May 20, 2013, based on Section 707 of Title VII without a supporting charge of discrimination, and quickly and quietly settled via a consent decree two months later on July 20, 2013.

In contrast, following the EEOC's lawsuit against CVS filed in the Northern District of Illinois on February 7, 2014, in which the complaint included a section-by-section attack of the release agreement, the lawsuit was the subject of significant media attention due to the EEOC's challenge to common provisions included in many standard severance agreements.¹⁰⁰ The EEOC alleged, on the other hand, that the company's severance agreement violated Title VII because it allegedly interfered with employees' rights to file charges, communicate voluntarily and participate in investigations with the EEOC and other government agencies.

While the district court ruled against the EEOC, the court did not reach the merits. Rather, it granted summary judgment in favor of the employer because of the EEOC's failure to engage in conciliation before filing suit.¹⁰¹ Thus, despite the EEOC's loss in this matter, employers need to carefully consider the language in settlement agreements in view of the EEOC's current position that it may challenge such agreements.¹⁰² The EEOC has also continued to challenge other severance and arbitration agreements in which it believes employers are overreaching and interfering with an individual's right to file a charge and/or communicate with the EEOC.¹⁰³

6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

EEOC Commissioner Victoria Lipnic has frequently stated, "If we wanted to, we could have a docket of nothing but sexual harassment cases."¹⁰⁴ Harassment investigations and related litigation have remained at the forefront in recent years, and for this reason, it was not surprising that "preventing harassment" was included as one of the EEOC's priorities in its Strategic Enforcement Plan. Further, the SEP broadens its focus beyond sexual harassment.

During FY 2014, the three largest EEOC settlements involved harassment claims, two of which exceeded \$2 million.¹⁰⁵ It is noteworthy that one of the \$2 million settlements involved a claim of same-sex harassment.

97 See *EEOC v. CVS Pharmacy, Inc.*, Case No. 1:14-cv-00863, EEOC Memorandum in Opposition to Motion to Dismiss, or Alternative, Motion for Summary Judgment, Docket #2, at 19-20 (N.D. Ill., June 6, 2014). The EEOC relies on Section 707 to bring "pattern-or-practice" claims, which the EEOC argues is authority previously exercised by the Department of Justice prior to the 1972 amendments to Title VII, and claims that because the Justice Department did not require a charge to pursue such claims, neither does the EEOC. It should be noted that although the EEOC received an adverse ruling in the CVS case, the district court did agree with the EEOC on this point and concluded that the EEOC could act without a charge when pursuing a claim under Section 707. (See *EEOC v. CVS Pharmacy, Inc.*, 2014 U.S. Dist. LEXIS 142937 (N.D. Ill. Oct. 7, 2014)).

98 *Id.* The EEOC has filed a notice of appeal announcing its intent to appeal this case to the 7th Circuit. *EEOC v. CVS*, No. 1:14 cv 00863, Docket #38 (N. D. Ill.) (Notice of Appeal filed Dec. 5, 2014).

99 See *EEOC v. Baker & Taylor*, Case No. 1:13 cv 03729 (N.D. Ill., July 10, 2013).

100 See Kerry Notestine, Terri Solomon, and Daniel Thieme, *Recommendations in Response to the EEOC's New LawsUIT on Severance Agreement*, Littler ASAP (Mar. 20, 2014), available at <http://www.littler.com/publication-press/publication/recommendations-response-eeocs-new-lawsuit-severance-agreements>

101 *Id.* See also *CVS Pharmacy*, 2014 U.S. Dist. LEXIS 142937. For a detailed discussion of the decision, see Kerry Notestine, Terri Solomon, and Dan Thieme, *Littler ASAP, EEOC Lawsuit Against CVS Pharmacy Challenging Severance Agreements Dismissed* (Oct. 20, 2014) available at <http://www.littler.com/publication-press/publication/eeoc-lawsuit-against-cvs-pharmacy-challenging-severance-agreements-dis>.

102 See recommended guidelines as discussed in Kerry Notestine, Terri Solomon, and Daniel Thieme, *Recommendations in Response to the EEOC's New LawsUIT on Severance Agreement*, Littler ASAP (Mar. 20, 2014), available at <http://www.littler.com/publication-press/publication/recommendations-response-eeocs-new-lawsuit-severance-agreements>.

103 Employers also should closely monitor another severance agreement case, *EEOC v. College America*, Case No. 1:14-cv-01232 (D. Colo. Apr. 30, 2014), in which the employer filed a motion to dismiss on June 30, 2014 (See Docket #6) and Notice of Supplemental Authorities, filed on Oct. 9, 2014 (Docket #15). Another case worth watching is *EEOC v. Doherty Enterprises, Inc.*, Civil Action No. 9:14-cv-81184-KAM (S.D. Fla. filed Sept. 18, 2014), in which the EEOC alleges an employer's mandatory arbitration agreement requiring employees to resolve their employment-related claims via binding arbitration violates their rights to file charges of discrimination with the agency.

104 *EEOC Commissioner: Nation still plagued by huge number of workplace sexual harassment cases*, The Spokesman Review (Sept. 10, 2014) available at <http://www.spokesman.com/blogs/boise/2014/sep/10/eeoc-commissioner-nation-still-plagued-huge-number-workplace-sexual-harassment-cases/>.

105 See Appendix A—EEOC Consent Decrees, Conciliation Agreement and Judgments.

The EEOC has not been reluctant to litigate harassment litigation, but the cases in which they have prevailed in litigation, as occurred in FY 2014, involved lawsuits on behalf of an individual or small group of employees.¹⁰⁶ The EEOC has been less successful in recent years in bringing large-scale harassment litigation, as best demonstrated by *EEOC v. CRST Van Expedited*. Following the filing of the *CRST* lawsuit in 2007, the EEOC suffered numerous setbacks during seven years of litigation. Most recently, the case made its way up to the Eighth Circuit after a notice of appeal was filed on October 1, 2013, based on the district court judge awarding attorneys' fees to the employer (for the second time), the most recent award totaling \$4,694,442.14. The sole focus of the recent appeal was the fee award by the district court. On December 22, 2014, a three-judge panel of the Eighth Circuit reversed the attorneys' fee award and remanded the case for further proceedings.¹⁰⁷ Based on the remand, the EEOC still remains at risk for an award of attorneys' fees to the employer. As significantly, despite nearly a decade of litigation in which the EEOC sought relief on behalf of 154 individuals, and at one point as many as many as 270 "similarly situated" female employees, the EEOC lost the entire litigation, except the claim of the original charging party in which the EEOC and *CRST* agreed to resolve for \$50,000.

E. Proactive Efforts to Challenge the EEOC's Authority

While members of the employer community are sometimes frustrated by EEOC actions, which at times appear to involve overreaching in making unreasonable requests for information or documents or improperly expanding the scope of an EEOC investigation or lawsuit against an employer, employers have been most successful by attempting to negotiate narrower requests for information or documents during an investigation or making appropriate motions to limit the scope of a lawsuit or scope of discovery by the EEOC. Proactive efforts over the past year to challenge the EEOC's authority have been less successful.

The recent unsuccessful effort by the State of Texas to challenge the EEOC's criminal history guidance demonstrates the difficulties faced in challenging EEOC administrative actions.

Similar obstacles arose in *Case New Holland, Inc. v. EEOC*,¹⁰⁸ in which the employer filed a complaint in federal court in the District of Columbia on August 1, 2013, seeking declaratory and injunctive relief after the EEOC sent emails to 1,330 "business email addresses of [the plaintiffs'] employees."¹⁰⁹ The emails were sent out as part of the EEOC investigation of an ADEA claim, and the "email[s] contained a link to a series of questions" which the EEOC viewed as being relevant to the EEOC's "investigation into allegations that [the plaintiffs] discriminated against job applicants and current and former employees."¹¹⁰ The employer filed suit and asserted the EEOC violated the Administrative Procedure Act (APA)¹¹¹ and also included various constitutional claims. The employer further alleged that: (1) the EEOC's email disrupted its business operations; and (2) the EEOC's blast email trolled for class action plaintiffs to sue the employer and force a monetary settlement regardless of the merits of any claim.

On October 17, 2014, in a ruling dismissing the employer's lawsuit in *Case New Holland*, the court ruled the employer's claims were merely "conclusory," and the employer had not "demonstrated a cognizable injury resulting from the [EEOC's] alleged conduct, the [employer] do[es] not have standing and the Court lacks jurisdiction to review the merits of their claims." A Notice of Appeal to the D.C. Circuit Court was filed on November 21, 2014.¹¹² Whether the employer will be given a second chance to challenge the EEOC's efforts to communicate with current employees via email as part of their investigation of an ADEA charge against the employer is now up to the D.C. Circuit.

F. Attorneys' Fees

Finally, in dealing with attorneys' fees, while the EEOC has continued to suffer setbacks based on attorneys' fees awards, as shown by two recent federal appellate court decisions, the recent decision by the Eighth Circuit in *EEOC v. CRST* may be viewed by the EEOC as "raising the bar" prior to the imposition of attorneys' fees against the agency.

106 *Id.* As indicated in the review of jury awards, three jury awards were reviewed, including one affirmed on appeal. In *EEOC v. EmCare*, 3:11-cv-02017 (N.D. Tex), the jury awarded an executive assistant \$250,000 in punitive damages, plus nearly \$250,000 to two other employees in compensatory damages.

107 *EEOC v. CRST Van Expedited, Inc.*, No. 13-3159 (8th Cir. Dec. 22, 2014).

108 *See* Case No. 1:13-cv-01176-RBW (D.D.C., filed Aug. 1, 2013).

109 *Id.*, Docket #1, Complaint ¶¶ 2-3, 18.

110 *Id.* Docket #32 (Order dismissing Complaint).

111 Pub. L. No. 79-404 (1946), codified at 5 U.S.C. §500 *et seq.*

112 *Id.*, Docket #35.

The starting point by a court in deciding whether to award attorneys' fees to an employer is application of the "*Christianburg* standard,"¹¹³ based on the Supreme Court's view that a prevailing defendant is only entitled to attorneys' fees and out-of-pocket expenses when "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."¹¹⁴

Based on application of the *Christianburg* standard, both the Fourth and Sixth Circuits affirmed attorneys' fees awards against the EEOC.

In January 2014, the Fourth Circuit in *EEOC v. Propak Logistics, Inc.*¹¹⁵ affirmed an award of \$189,113.50 based on a finding by the district court that at the time the EEOC filed a "class case" stemming from a charge filed six years earlier: (1) the EEOC had failed to identify the class of victims that would be entitled to monetary relief, and (2) injunctive relief was unavailable because the employer had closed the facility prior to the time the lawsuit was filed. The appeals court concluded that the district court had not abused its discretion in finding that the EEOC "unreasonably initiated the lawsuit."

In March 2014, the Sixth Circuit denied a petition for rehearing of an attorneys' fee award in *EEOC v. Peoplemark*.¹¹⁶ As a result, the initial 2013 decision by the Sixth Circuit was upheld, which had affirmed an employer award of \$751,942.48. In *Peoplemark*, the EEOC pursued a race discrimination pattern-or-practice case based on the employer's use of background checks in the hiring process. In the initial 2013 decision, the appellate court concluded that the lawsuit was not groundless when filed because it was based on an incorrect statement made by a company representative during the investigation process. However, "when discovery clearly indicated [the individual's] statements belied the facts, the Commission should have reassessed its claim. From that point forward, it was unreasonable to continue to litigate the Commission's pleaded claim because the claim was based on a companywide policy that did not exist."

While the December 22, 2014 panel decision by the Eighth Circuit in *EEOC v. CRST* also applied the *Christianburg* standard,¹¹⁷ the appeals court was of the view that it was faced with a scenario not addressed in which "(s)ome charges are frivolous; [and] others (even if not ultimately successful) have a reasonable basis," explaining, "(L)itigation is messy, and courts must deal with this untidiness in awarding fees." The Eighth Circuit also relied on a more recent Supreme Court decision, *Fox v. Vice*,¹¹⁸ which involved a "multiple-claim scenario," and relied on the holding in *Fox* that a court may grant reasonable fees to the defendant [where the plaintiff asserts both frivolous and non-frivolous claims], but only for the costs that the defendant would not have incurred but for the frivolous claims.¹¹⁹ According to *Fox*, "(a) defendant need not show that every claim in a complaint is frivolous to qualify for fees," but a defendant may not obtain compensation for work unrelated to a frivolous claim."¹²⁰ The Eighth Circuit thus concluded that the fee award had to be reversed and remanded for further findings and needed to make "particularized findings of frivolousness, unreasonableness, or groundlessness as to each claim upon which it granted summary judgment on the merits to CRST."¹²¹

G. Opening Wrap-Up and What to Watch for in FY 2015

This opening section is intended solely to highlight significant developments over the past year, particularly focusing on the EEOC's Strategic Plan, related Strategic Enforcement Plan and systemic initiative. A detailed review, update and analysis of regulatory developments, EEOC investigations and key developments in EEOC-related litigation is included throughout this Annual Report on EEOC Developments.

As discussed above, during Fiscal Year 2015, key developments to watch for include:

- The Supreme Court weighing in on the nature and extent of the EEOC's obligations during the conciliation process in its upcoming ruling in *Mach Mining*;

113 See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

114 *Id.* at 421.

115 2014 U.S.App. LEXIS 5463 (4th Cir. Mar.25, 2014).

116 584 F. 3d 584, 591-92, *reh'g denied*, 2014 U.S. App. LEXIS 4881 (6th Cir. Mar. 10, 2014).

117 *EEOC v. CRST Van Expedited, Inc.*, No. 13-3159 (8th Cir. Dec. 22, 2014).

118 *Fox v. Vice*, 131 S. Ct. 2205 (2011).

119 *Id.* at 2211.

120 *Id.*

121 The Eighth Circuit also determined that certain ruling by the district court could not be considered in any fee award: (1) the appeals court concluded that the district court improperly determined the case involved a "pattern or practice" claim and no fees could be awarded based on that finding; and (2) the claims that were dismissed "based on the EEOC's failure to satisfy its presuit obligations" (*i.e.* failure to conciliate the claims of certain individuals prior to bringing suit) could not be considered in the fee award because the dismissal could not be viewed as a decision "on the merits" of the claims.

- Various cases involving hiring barriers, including the impact of the Fourth Circuit’s decision in *EEOC v. Freeman* involving the use of criminal history in the hiring process as well numerous cases of alleged intentional discrimination in the hiring process involving race, national origin, age and sex discrimination;
- An employer’s obligations involving pregnancy leave under the Pregnancy Discrimination Act based on the upcoming ruling by the Supreme Court in *Young v. UPS* as well as the nature and extent to which the courts will obligate employers to make reasonable accommodations to pregnant workers under the ADA;
- The courts’ approach to required accommodation under the ADA, including whether the courts will begin to challenge required attendance on the job based on cases such as *EEOC v. Ford Motor Company*, currently pending before the Sixth Circuit;
- The manner in which the courts will reconcile the ACA’s encouragement to develop wellness programs to help contain medical costs versus the EEOC’s focus on the “voluntariness” of participation in such programs;
- The scope of reasonable accommodation involving religious discrimination based on the Supreme Court’s upcoming decision in *Abercrombie* and whether an individual has to make a specific request for an accommodation in circumstances where an employer arguably has enough information to believe there may be a potential conflict between the individual’s religious practices and employer policies;
- The nature and extent to which courts adopt the view of the EEOC and expand the rights of LGBT workers under Title VII, despite the absence of legislation to cover sexual orientation and sexual identity;
- Challenges to employer releases by the EEOC in litigation similar to *EEOC v. CVS* (in which the EEOC’s claim was dismissed on technical grounds based on the failure to conciliate prior to filing suit) and the extent to which the courts provide clarification to employers in drafting enforceable releases;
- Equal Pay Act challenges by the EEOC and whether the EEOC will be able to successfully address the deficiencies identified by the Second Circuit in *EEOC v. Port Auth. of N.Y. & N.J.*; and
- Continued pattern-or-practice litigation by the EEOC, including harassment litigation, and the extent to which a lawsuit by the EEOC will be limited based on the scope of its investigation and/or the failure to identify purported victims prior to bringing suit.

Finally, employers should continue to monitor the above developments and be mindful of the EEOC potentially expanding the scope of its investigative authority, particularly if the claim involves one of the EEOC’s priorities.¹²²

122 It also should be noted that on November 24, 2014, Senator Lamar Alexander (R-TN), Ranking Member of the U.S. Senate Committee on Health, Education, Labor and Pensions, issued a Minority Staff Report, entitled, “EEOC: An Agency on the Wrong Track? Litigation Failures, Misfocused Priorities and Lack of Transparency Raise Concerns About Important Anti-Discrimination Agency,” available at http://www.help.senate.gov/imo/media/FINAL_EEOC_Report_with_Appendix.pdf.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

On November 18, 2014, the EEOC announced the publication of its FY 2014 Performance and Accountability Report (referenced herein as the “EEOC 2014 Annual Report” or “FY 2014 PAR”).¹²³ The release of this year’s EEOC 2014 Annual Report comes nearly a month earlier than last year’s EEOC 2013 Annual Report, which was released on December 16, 2013.¹²⁴ As discussed in the EEOC’s 2014 Annual Report, the Commission received 88,778 private-sector charges. The FY 2014 charge figure represents the third straight year that the EEOC has seen a decrease in the number of private-sector charges that have been filed. As shown by the following chart, the number of charges for FY 2014 represents a 5% decrease from FY 2013 and an 11% decrease from FY 2011:¹²⁵

| FISCAL YEAR | NUMBER OF CHARGES | % INCREASE/DECREASE |
|-------------|-------------------|---------------------|
| 2006 | 75,768 | -- |
| 2007 | 82,792 | +9.27% |
| 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% |

In its FY 2014 PAR, the EEOC described its private-sector charge inventory (*i.e.*, its charge “backlog”) as one of its main challenges for FY 2015.¹²⁶ For FY 2014, the EEOC saw its charge backlog increase by 7.28% with the total number of backlog charges at 75,935.¹²⁷ According to the Commission, this increase in the backlog is a result of “the shutdown of the federal government in early FY 2014 and the decrease of investigators from FY 2012 to FY 2013.”¹²⁸ Moreover, the Commission also resolved a total of 87,442 charges in FY 2014. This number represents a second consecutive year the EEOC has shown a decline in the total number of resolved charges.¹²⁹ To combat this shortfall in the resolution of charges, the EEOC announced in the FY 2014 PAR that it intends to use technology “to streamline charge intake and investigation.” Specifically, “the EEOC is developing systems that will allow customers to check the status of their charge, provide self-service and online-scheduling options for potential charging parties; and transform the current paper process into a digital charge system.”¹³⁰

B. Continued Focus on Systemic Investigations and Litigation

In March 2006, as part of the EEOC’s Systemic Task Force Report, the Commission reported that “combating systemic discrimination should be a top priority at [the] EEOC and an intrinsic, ongoing part of the agency’s daily work.” While the EEOC had been involved in systemic investigations long before the Task Force was formed, the Commission clearly has been committed to expanding this initiative since 2006. The EEOC’s Systemic Task Force defined systemic cases as “pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location.”¹³¹

¹²³ See *supra* note 2. EEOC, FISCAL YEAR 2014 PERFORMANCE AND ACCOUNTABILITY REPORT (Nov. 18, 2014), available at <http://www.eeoc.gov/eeoc/plan/upload/2014par.pdf>; see also Press Release, EEOC, *EEOC Issues FY 2014 Performance Report* (Nov. 18, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-18-14.cfm>. In this section of the Report, data from the EEOC’s FY 2014 Annual Report is compared to the EEOC’s FY 2012 Annual Report (herein cited as “EEOC 2013 Annual Report” or “FY 2013 PAR”). EEOC, FISCAL YEAR 2012 PERFORMANCE AND ACCOUNTABILITY REPORT (DEC. 16, 2013) available at <http://www.eeoc.gov/eeoc/plan/2013par.cfm>.

¹²⁴ The EEOC’s FY 2014 commenced on October 1, 2013 and ended on September 30, 2014.

¹²⁵ See FY 2014 PAR at 26.

¹²⁶ *Id.* at 45.

¹²⁷ *Id.* at 46.

¹²⁸ *Id.* at 46.

¹²⁹ In FY 2013, the EEOC reported that it had resolved 97,252 charges. Likewise, in FY 2012, the EEOC stated that it had resolved 111,139 private-sector charges.

¹³⁰ FY 2014 PAR at 26.

¹³¹ *Id.* at 15.

Building off of the EEOC's 2013 Annual Report, and specifically, the Commission's Strategic Plan for Fiscal Years 2012 through 2016 ("Strategic Plan"),¹³² newly appointed EEOC Chair Jenny Yang reaffirmed the EEOC's commitment to its systemic initiatives.¹³³ The FY 2014 PAR outlines several "achievements" of the Commission's adherence to its systemic initiative, including:

- In FY 2014, in furtherance of the Strategic Enforcement Plan, the Chair approved District Complement Plans (DCPs) in which each office has an individualized plan that has "systemic focus areas and issues for priority law enforcement through the district's systemic program and in combination with other districts."¹³⁴ These specific areas include: barriers to recruitment and hiring, discriminatory policies that affect vulnerable workers, discriminatory pay practices, retaliatory practices and policies, and systemic harassment.
- The Commission has continued its expansion of its use of *Systemic Watch List*, a software application designed to coordinate the investigation of multiple charges filed against the same employer involving similar issues.¹³⁵
- The EEOC has doubled the number of Lead Systemic Investigators from 9 to 18 during FY 2014. These individuals work exclusively on the development and coordination of systemic investigations. Similarly, in FY 2014, the Commission is running a pilot program in which some of the district offices have "systemic units" in order to assess whether the EEOC should implement having systemic units in all of its field offices.
- Moreover, the EEOC has sustained its expanded use of webinars to provide training on systemic investigations and litigation, including use of technology to facilitate systemic work.¹³⁶
- Lastly, the Commission has continued its development of the *CaseWorks* system, which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery in order to support greater collaboration in development of cases for litigation. The storage capacity of *CaseWorks* has increased 150% and now hosts over 30 million pages of documents.¹³⁷

C. Systemic Investigations—Comparison Between FY 2013 and FY 2014

A review of the Commission's Annual Reports in FY's 2012, 2013, and 2014 demonstrates that although there was a significant increase in the number of systemic investigations, there was a decrease in terms of results achieved:

| SYSTEMIC INVESTIGATIONS | 2012 | 2013 | 2014 |
|---|-------------------|--------------|--------------|
| Number Completed | 240 | 300 | 260 |
| Settlements or Conciliation Agreements | 65 ¹³⁶ | 63 | 78 |
| Monetary Recovery | \$36.2 million | \$40 million | \$13 million |
| Reasonable Cause Findings | 94 | 106 | 118 |
| Percentage of "Reasonable Cause" Findings | 39.1 % | 35.3% | 45.4% |
| Systemic Lawsuits Filed | 12 | 21 | 17 |

The data from FY 2014, when compared to that of FY 2012 and FY 2013, presents a number of trend-defying statistics. For example, while the number of reasonable cause findings and settlements or conciliation agreements increased from that of previous years, the monetary recovery decreased by 67%.¹³⁹ Although the percentage of "reasonable cause" findings was somewhat comparable in FYs 2012 and 2013, the EEOC's findings of reasonable cause exceeded 45% in FY 2014.

132 The Strategic Plan was approved by the Commission on February 22, 2012. *See supra* note 2.

133 *Id.* at v.

134 *Id.* at 28.

135 *Id.* at 28-29.

136 *Id.* at 29.

137 *Id.*

138 As stated in the FY 2014 PAR, "[i]n FY 2014, the agency obtained pre-determination settlements in 34 systemic investigations and conciliation agreements in 44 systemic investigations." FY 2014 PAR at 29. According to the EEOC's 2013 Annual Report, 63 of the agency's systemic investigations were resolved through the EEOC's conciliation process. FY 2013 PAR at 32. In FY 2012, there were 46 successful conciliations of investigations and pre-determination settlements in 19 systemic investigations. FY 2012 PAR at 28.

139 FY 2012 PAR at 28; *see also* FY 2013 PAR at 32.

As discussed elsewhere in this Report, the Commission has continued to seek assistance from the courts during the course of various investigations, particularly systemic investigations. For FY 2014, the Commission referred to having filed 34 “subpoena enforcement actions.”¹⁴⁰ This was an increase in the number of subpoena enforcement actions that were filed from FY 2012 (33 “subpoena enforcement and other actions”)¹⁴¹ and FY 2013 (17 “subpoena enforcement and other actions”).¹⁴²

In support of its strategic initiative, the Commission reports that it maintained active relationships with a number of federal agencies, the Office of Management and Budget, and the White House.¹⁴³ Particularly noteworthy are cross-agency efforts involving the Federal Interagency Reentry Council, which comprises 20 federal agencies whose work includes working to reduce barriers to employment for previously incarcerated individuals, so that these individuals can compete for appropriate work opportunities.¹⁴⁴ To that end, the EEOC reports that its enforcement and guidance on the use of arrest and conviction records remains an important model for agency partners as they take steps to ensure that constituent employers, workers, and job applicants are educated about the use of criminal records.¹⁴⁵ Moreover, the EEOC is exploring further collaboration with the Reentry Council with respect to joint training, presentations, and the development of related educational materials.¹⁴⁶

D. EEOC Litigation and Systemic Initiative

For FY 2014, consistent with the EEOC’s current focus on “strategic law enforcement,” the EEOC filed 133 “merits” lawsuits, 2 more than in FY 2013, which included 105 individual suits, 11 non-systemic class suits and 17 systemic suits.¹⁴⁷ Until FY 2013, there had been a steady decrease in the number of merits lawsuits filed since FY 2005—a total of 381 suits were filed in that year.¹⁴⁸ Overall, however, there has been a dramatic decrease (by about 50%) in merits lawsuits filed over the past three years: 261 merits lawsuits were filed in FY 2011 compared to the 131 merits suits filed in FY 2013 and the 133 merits suits filed in FY 2014.¹⁴⁹

| YEAR | INDIVIDUAL CASES | “MULTIPLE VICTIM” CASES (INCLUDING SYSTEMIC CASES) | PERCENTAGE OF MULTIPLE VICTIM LAWSUITS | TOTAL NUMBER OF EEOC “MERITS” ¹⁴⁷ 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 |

¹⁴⁰ FY 2014 PAR at 27.

¹⁴¹ *Id.* at 27.

¹⁴² *Id.* at 39.

¹⁴³ *Id.* at 32-33.

¹⁴⁴ *Id.* at 33.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ FY 2014 PAR at 27.

¹⁴⁸ See EEOC, EEOC LITIGATION STATISTICS, FY 1997 THROUGH FY 2013, available at <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm>.

¹⁴⁹ 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.

Particularly noteworthy is that a vast majority of the EEOC's lawsuits are filed during the last two months of the EEOC's fiscal year. As an example, between August 1, 2014 and September 30, 2014, the EEOC filed 75 lawsuits, which was 56% of the lawsuits filed during the entire fiscal year.¹⁵⁰ Similarly, during FY 2013, of the 131 lawsuits filed, 70 suits (47%) were filed during the last two months of the fiscal year.

In reviewing all new court filings, the EEOC lawsuits included 76 Title VII claims, 49 Americans with Disabilities Act (ADA) claims, 12 Age Discrimination in Employment Act (ADEA) claims, two Equal Pay Act (EPA) claims, and two Genetic Information Non-Discrimination Act (GINA) claims.¹⁵¹ Based on a review of reported filings by the EEOC and Littler's tracking of all EEOC filed lawsuits, a more detailed breakdown indicates the following:

| CAUSES OF ACTION | NUMBER OF LAWSUITS |
|--|--------------------|
| ADA Claims | 49 |
| Multiple Claims | 24 |
| Retaliation | 23 |
| Sex Discrimination or Related Harassment | 34 |
| Pregnancy Discrimination | 13 |
| Racial Discrimination or Related Harassment | 9 |
| Age Discrimination | 12 |
| Religious Discrimination or Related Harassment | 7 |
| National Origin Discrimination or Related Harassment | 10 |

The top 11 states for EEOC lawsuits filed over the past fiscal year are as follows:¹⁵²

| STATE | NUMBER OF LAWSUITS |
|----------------|--------------------|
| Illinois | 13 |
| Texas | 11 |
| Michigan | 9 |
| Georgia | 7 |
| North Carolina | 7 |
| Florida | 6 |
| Maryland | 6 |
| Wisconsin | 6 |
| California | 5 |
| New York | 5 |
| Virginia | 5 |

150 Littler monitored EEOC court filings over the past fiscal year, and the information reported on the Commission's timing for filing its lawsuits in FY 2014 is based on the firm's tracking.

151 FY 2013 PAR at 27.

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

With respect to the Commission's efforts on behalf of non-systemic class suits and its systemic initiative, the FY 2014 PAR described active EEOC lawsuits as follows:

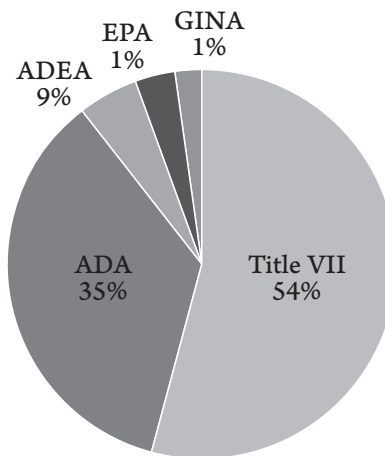
- Among the 228 lawsuits on its active docket at the end of FY 2014, 31 (14%) were non-systemic class cases and 57 (25%) involved challenges to systemic discrimination,¹⁵³ thus showing that 39% of all pending matters involve claims on behalf of more than one purported victim.¹⁵⁴
- In FY 2014, the Commission filed 17 systemic lawsuits.
- The Commission resolved 136 merits lawsuits during FY 2014 and recovered \$22.5 million, which included 87 Title VII claims, 47 ADA claims, 13 ADEA claims, five EPA claims, and one GINA claim.¹⁵⁵

Based on the EEOC's new Strategic Plan, a central aim is "combat[ing] employment discrimination through strategic law enforcement."¹⁵⁶ A key performance measure has been the establishment of a "baseline" by examining the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against that baseline. For FY 2012, the Commission established a baseline of 20%; the FY 2014 target was to increase the percentage of systemic cases on the agency's litigation docket to approximately 19-21% of all active cases.¹⁵⁷ In FY 2014, the EEOC "reported that 57 out of 228, or 25% of the cases on its litigation docket were systemic, exceeding the annual target."¹⁵⁸ By FY 2016, "the agency projects that 22-24% of cases on its active litigation docket will be systemic cases."¹⁵⁹

E. Highlights of EEOC Litigation Statistics

As mentioned previously, for FY 2014 the Commission reported that of the 133 merit lawsuits filed, 76 of those claims implicated Title VII, 49 contained ADA claims, 12 contained ADEA claims, two lawsuits involved EPA claims, and two contained GINA claims.¹⁶⁰

EEOC New Filings



As the Commission has continued its enforcement of statutes traditionally under its purview, FY 2014 marks the second time the Commission has pursued litigation based on genetic information since the Commission issued its final regulations on GINA in 2010.¹⁶¹ In all five lawsuits, the EEOC focused on the fact that the defendant companies requested family medical history when conducting physical

¹⁵³ The EEOC considers "systemic cases" as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." EEOC, SYSTEMIC TASK REPORT TO THE CHAIR OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, available at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm#II.

¹⁵⁴ FY 2014 PAR at 28.

¹⁵⁵ *Id.* at 28.

¹⁵⁶ *Id.* at 2.

¹⁵⁷ *Id.* at 15.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ FY 2013 PAR at 27.

¹⁶¹ FY 2011 PAR at 5. The EEOC issued its final rule implementing the GINA employment provisions on November 9, 2010.

examinations.¹⁶² In three of the cases, physical examinations occurred after an offer of employment had been made to the candidates, whereas the remaining cases involved the company requiring a mandatory physical exam as part of the employees' continued employment. Also of note, in two of the five GINA lawsuits filed by the Commission, the agency alleged pattern or practice violations by the company, which further highlights the EEOC's efforts in this new, untapped area.¹⁶³ Moreover, in all five lawsuits, the EEOC included claims of disability discrimination based on the ADA.¹⁶⁴

F. Mediation Efforts

In its FY 2014 PAR, the EEOC stated that its mediation program has "continued to be a very successful part of enforcement operations and an integral part of the agency's work pursuant to the Strategic Plan."¹⁶⁵ Out of a total of 10,221 mediations conducted, the EEOC was able to obtain 7,846 mediated resolutions. Moreover, the Commission secured \$144.6 million in monetary benefits for complainants through its mediation program. Comparatively, the number of mediated resolutions has decreased since FY 2013 in which there were a total of 8,890 mediated resolutions out of 11,513 conducted. Moreover, in FY 2013, \$160.9 million was acquired through mediation resolution, which remains the second highest sum obtained in the EEOC mediation program's history.¹⁶⁶

G. Significant EEOC Settlements and Monetary Recovery

There were eight reported settlements involving the EEOC that reached \$1 million or more over the past fiscal year. Three settlements in this category involved race and national origin discrimination, three included sex discrimination and/or harassment claims, one settled an age discrimination claim, and one resolved a claim of failure to accommodate on the basis of disability.

The greatest settlements resulted in a total award of \$3.6 million against several farms in Hawaii that used a labor contractor that allegedly engaged in a pattern or practice of harassing, discriminating, or retaliating against approximately 550 Thai farmworkers based on national origin and race. The EEOC alleged that the six farms were liable as joint employers with the labor contractor. The monetary settlements paid by the various farms ranged from \$100,000 to \$1.6 million.

The second-highest settlement of \$2,091,666 was with an automobile dealership in New Mexico. This case involved same-sex harassment and retaliation. Specifically, the EEOC alleged that a former lot manager, under direction of a general manager, subjected a class of men to egregious forms of sexual harassment. The EEOC also alleged that the company retaliated against male employees who objected to the sexually hostile work environment.

Another notable settlement involved a healthcare entity. Here, the EEOC alleged the employer's fixed-leave policy failed to consider a leave of absence as a reasonable accommodation. The EEOC contended the employer's policy merely tracked the requirements of the FMLA, so employee leaves were limited to a maximum of 12 weeks. As a result, employees who were not eligible for FMLA leave were fired after being absent for a short time, and many more were fired once they were out more than 12 weeks. The parties resolved this case for \$1,350,000.

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.¹⁶⁷

¹⁶² See *EEOC v. Fabricut, Inc.*, No. 4:13-cv-248 (N.D. Okla. Apr. 29, 2013); *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013); *EEOC v. All Star Seed*, No. 2:13-cv-7196 (E.D. Cal. Sept. 30, 2013); *EEOC v. Cummins Power Generation, Inc.*, No. 14-cv-03408-SRN-SER (D. Minn. Sept. 8, 2014); *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014).

¹⁶³ *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013), *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014).

¹⁶⁴ See *EEOC v. Fabricut, Inc.*, No. 4:13-cv-248 (N.D. Okla. Apr. 29, 2013); *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013); *EEOC v. All Star Seed*, No. 2:13-cv-7196 (E.D. Cal. Sept. 30, 2013); *EEOC v. Cummins Power Generation, Inc.*, No. 14-cv-03408-SRN-SER (D. Minn. Sept. 8, 2014); *EEOC v. BNV Home Care Agency, Inc.*, No. 14-cv-05441-JBW-RML (E.D.N.Y. Sept. 17, 2014).

¹⁶⁵ FY 2014 PAR at 26.

¹⁶⁶ FY 2013 PAR at 28.

¹⁶⁷ Littler monitored EEOC press releases regarding settlements during FY 2014. The significant settlements as summarized in Appendix A, include settlements over \$500,000 in systemic, pattern or practice and class cases, and are organized by settlement amount. Although the EEOC settled single claimant claims as well as some systemic, pattern or practice and "class" litigation for amounts well under \$500,000, this report provides a snapshot of the areas where employers might be most exposed based on their policies and practices.

With respect to monetary recovery for merit lawsuits, which include direct and intervention suits by statute, the EEOC secured \$15.3 million in Title VII resolutions; \$3.7 million in ADA resolutions; \$1.9 million in ADEA resolutions; \$125,000 in EPA resolutions; and \$1.5 million in resolutions involving more than one statute.¹⁶⁸

The majority of the EEOC litigation remains “single victim” suits, with a sharp increase from 89 individual suits in FY 2013 to 105 in FY 2014. Although the EEOC continues its trend of filing and settling systemic, pattern or practice and “class” claims, there was a marked decrease in such claims in FY 2014 from the year prior. Notwithstanding, as previously mentioned, twenty-five percent (25%) of all pending lawsuits by the EEOC are systemic cases, and the EEOC expects this overall trend to continue. Employers should consider this trend when evaluating their corporate policies or practices that may be susceptible to an EEOC challenge.

H. Appellate Cases

Analyzing the cases in which the EEOC appealed or filed an amicus brief is a good way to determine which issues and legal theories the Commission deems most important. The agency has created a searchable database on its website where it posts such amicus and appellate information.¹⁶⁹ According to the FY 2014 PAR, at the end of FY 2014, the Commission was handling 38 appeals in EEOC enforcement actions and participating in 22 appeals in private suits as amicus curiae.¹⁷⁰ In addition, a number of other significant appellate cases that were filed in prior fiscal years were decided in FY 2014.

Notably, in recent years the EEOC has increased its focus on the use of background checks in hiring, filing appeals in both *EEOC v. Kaplan Higher Learning Education Corp.* (involving reliance on credit history)¹⁷¹ and *EEOC v. Freeman*¹⁷² (which dealt with background checks by the employer involving both credit and criminal history). With respect to the former case, however, the U.S. Court of Appeals for the Sixth Circuit thwarted the EEOC’s efforts to halt the use of the type of background check used by the prospective employer, which the Sixth Circuit noted the EEOC itself uses. In *Kaplan*, the EEOC filed an action against the prospective employer asserting that its use of credit reports during hiring violated Title VII because of its alleged disparate impact on African Americans. Typically, disparate impact cases rely on statistics presented in the form of an expert report to establish a *prima facie* case. However, the EEOC in *Kaplan* failed to present evidence demonstrating that its expert’s methodology satisfied the factors outlined in Federal Rule of Evidence 702. Moreover, the EEOC’s expert admitted to using a sample that did not reflect the prospective employer’s applicant pool. Accordingly, the prospective employer moved for summary judgment, which the Northern District of Ohio granted. On appeal, the Sixth Circuit affirmed the district court’s decision, noting that the EEOC brought its case using a “homemade methodology,” which was drafted by an individual lacking the requisite expertise.

In *Freeman*, the EEOC alleged a company’s use of credit and criminal checks to make hiring decisions constituted race and sex discrimination. The district court first granted Freeman’s partial motion to dismiss, limiting the EEOC’s suit to acts within 300 days of the charge, which alleged the credit checks were discriminatory. The district court later granted Freeman’s motion for partial summary judgment, limiting the criminal checks allegations to acts within 300 days of the EEOC’s formal notice to the company of its expanded investigation. Finally, the district court granted Freeman’s motion to exclude EEOC’s expert reports as unreliable and/or untimely and granted summary judgment in its favor, holding the EEOC failed to establish a *prima facie* case without those reports and failed to identify the “specific employment practice” under challenge. The EEOC appealed to the Fourth Circuit, arguing the district court made a threshold error in holding it failed to identify the “specific employment practice” at issue. The EEOC also contends that the district court abused its discretion in excluding as untimely and unreliable the supplemental reports of the EEOC’s experts. Finally, the EEOC argues the district court failed to properly consider the continuing violations theory in applying the statute of limitations. Oral argument in this case was heard on October 29, 2014. Employers that use background checks are watching this case closely.

In *EEOC v. Exxon Mobil Corp.*,¹⁷³ the Fifth Circuit resolved an ADEA case in the employer’s favor, following an eight-year legal battle. The EEOC claimed the employer’s mandatory retirement age of sixty (60) for corporate pilots violated the statute, however, the employer asserted that the age requirement constituted a bona fide occupational qualification (BFOQ) and cited the Federal Aviation Administration’s

¹⁶⁸ FY 2014 PAR at 28.

¹⁶⁹ Commission Appellate and Amicus Briefs, <http://www1.eeoc.gov/eeoc/litigation/briefs.cfm?redirected=http://www.eeoc.gov/eeoc/litigation/index.cfm>.

¹⁷⁰ FY 2014 PAR at 28.

¹⁷¹ *EEOC v. Kaplan Higher Learning Education Corp.*, 748 F.3d 749 (6th Cir. 2014).

¹⁷² *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013) (oral argument heard Oct. 29, 2014).

¹⁷³ *EEOC v. Exxon Mobil Corp.*, 560 Fed.Appx. 282 (5th Cir. 2014).

Age 60 Rule, which does not apply to corporate pilots, as analogous in its defense.¹⁷⁴ The Northern District of Texas granted the employer's motion for summary judgment on this basis. This decision was subsequently reversed by the U.S. Court of Appeals for the Fifth Circuit, which held that the district court erred when it limited discovery and summary judgment pleadings to the issue of congruency between the employer's corporate pilots and those pilots to whom the FAA's Age 60 Rule applies. On remand, the district court allowed additional discovery regarding the validity of the FAA's mandatory retirement policy's safety rationale, and ultimately granted the employer's motion for summary judgment for a second time. The EEOC appealed, but the Fifth Circuit concurred with the district court upon renewed consideration. Significantly, the Fifth Circuit held that pilots regulated by the FAA's Age 60 Rule and corporate pilots have occupations that are substantially similar and congruent. In addition, the Fifth Circuit cited the inability to test or predict an individual's risk of sudden incapacitation, which increases with age, as a demonstration of the "continuing validity" of the FAA's rule. Accordingly, the Fifth Circuit upheld the lower court's decision that the employer established that its mandatory retirement age was a BFOQ.

With respect to reasonable accommodations in disability discrimination, a noteworthy case to watch is the Sixth Circuit's decision to rehear *en banc* its earlier three-judge panel decision in *EEOC v. Ford Motor Co.*¹⁷⁵ In this case, the Sixth Circuit reviewed the district court's grant of the employer's motion for summary judgment, in which the lower court held that an employee's request to work from home four days per week because of her irritable bowel syndrome was not a reasonable accommodation given the essential functions of her position as a resale steel buyer. The EEOC appealed, and the Sixth Circuit reversed the lower court's decision despite the employer's argument that the employee had previously exhibited attendance problems, that the employee would need to engage in client site visits, that physical attendance in the workplace was required given the need to interact with team members, and that she would only be able to access certain business information on-site during non-"core" hours. Following the Sixth Circuit's decision, the employer requested a rehearing *en banc*, which was granted, and the Sixth Circuit's opinion has since been vacated. As requests to telecommute increase for employers, the Sixth Circuit's decision following the rehearing *en banc* will be one to watch.

EEOC v. Exel, Inc. is another case on many employers' radar. In *Exel*, the EEOC filed a brief on the issue of punitive damages under 42 U.S.C. § 1981a. Specifically, the EEOC argued that the Eleventh Circuit's current standard for imputing liability for punitive damages under that statute conflicts with U.S. Supreme Court precedent. The Eleventh Circuit's standard is that liability for punitive damages may be imposed only when the discriminating employee was sufficiently "high up the corporate hierarchy" or when "higher management countenanced or approved" the conduct. In the Supreme Court's leading decision on punitive damages, *Kolstad v. American Dental Association*,¹⁷⁶ the Court underscored that in order for an employer to be liable for punitive damages, the conduct must be attributed to someone in a "managerial capacity." Notwithstanding, in *Kolstad*, the Court did not go as far as the recent Eleventh Circuit standard and merely cited the Restatement (Second) of Torts and provided excerpts from the Restatement that "*that an employee must be 'important,' but perhaps need not be the employer's 'top management, officers, or directors,' to be acting 'in a managerial capacity.'*"¹⁷⁷ Depending on the outcome of the Eleventh Circuit opinion in *Exel* case, if the Eleventh Circuit elects to uphold the current standard, the EEOC may decide to file another appeal to the Supreme Court due to a purported conflict between *Kolstad* and the Eleventh Circuit.

Another noteworthy case, *EEOC v. Allstate Insurance Company*,¹⁷⁸ deals with employers requiring employees to release claims under certain statutes in order to continue working. The Third Circuit must decide whether an employer can lawfully mandate its employees to release all their claims under Title VII, the ADEA, and the ADA in order to continue working. The EEOC argues that the defendant is violating the anti-retaliation provisions of those statutes. While the EEOC acknowledges that the general rule is that employers may lawfully seek releases from terminated employees in exchange for enhanced severance benefits, that rule does not fit this case because these employees are not being terminated and have not received any severance benefit.

Of additional note is the U.S. Supreme Court's decision to grant the employer's petition for writ of *certiorari* following the Seventh Circuit's December 2013 decision in the EEOC's favor in *EEOC v. Mach Mining*.¹⁷⁹ There, the EEOC challenged the employer's affirmative defense of "failure to conciliate" and moved for partial summary judgment on the issue. Although the district court relied upon decisions

174 See FAA Age 60 Rule, 24 Fed. Reg. 9772 (Dec. 4, 1959).

175 *EEOC v. Ford Motor Co.*, 752 F.3d 634 (6th Cir. 2014), *reh'g granted*, *EEOC v. Ford Motor Co.*, No. 12-2484, 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

176 *Kolstad v. American Dental Association* 527 U.S. 526, 119 S. Ct. 2118 (1999).

177 *Kolstad*, 119 S. Ct. at 2128, *citing* RESTATEMENT (SECOND) OF TORTS §909. (emphasis added).

178 *EEOC v. Allstate Insurance Company*, No. 14-2700 (3d Cir.) (brief filed Aug. 12, 2014).

179 *EEOC v. Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, *Mach Mining, LLC v. EEOC*, 134 S.Ct. 2872 (U.S. June 30, 2014).

from other circuits that allowed challenges to the EEOC's conciliation efforts in denying the EEOC's partial motion for summary judgment, the Seventh Circuit reversed the lower court decision, stating that it was "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate" and holding that "[t]he language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit." Oral argument before the Supreme Court is scheduled for January 13, 2015.

A full discussion of noteworthy appellate and amicus cases can be found in Appendix B of this Report.¹⁸⁰

¹⁸⁰ See section V.R of this Report for a more detailed discussion of attorneys' fees.

III. EEOC REGULATORY AGENCY AND RELATED DEVELOPMENTS

A. Update on the Commission

During the first half of 2014, following the Senate's confirmation of Commissioner Chai Feldblum (D) to another five-year term, the Commission operated with a full five-member panel with a Democratic majority.¹⁸¹ The three Democrats took advantage of their majority status and advanced an aggressive agenda, including current enforcement priorities as detailed in the Strategic Enforcement Plan¹⁸² and more worker-friendly guidance.

On July 1, 2014, the term of the Chair, Jacqueline Berrien (D), expired.¹⁸³ The remaining commissioners and their term expirations are as follows:

- Constance Barker (R) (July 1, 2016)
- Charlotte Burrows (D) (July 1, 2019)
- Chai Feldblum (D) (July 1, 2018)
- Victoria Lipnic (R) (July 1, 2015)
- Jenny Yang (D) (July 1, 2017)

President Barack Obama subsequently appointed Commissioner Jenny Yang (D) as EEOC Chair.¹⁸⁴ Yang was unanimously confirmed by the U.S. Senate on April 25, 2013.¹⁸⁵ She had served as Vice Chair since April 2014.¹⁸⁶

Days after announcing that Yang would fill departing Chair Berrien's seat on the Commission, President Obama nominated Department of Justice (DOJ) Associate Deputy Attorney General Charlotte Burrows to become a new Democratic member to complete the five-member board.¹⁸⁷ After the expiration of Berrien's term, the Commission was left with an evenly divided four members, effectively precluding actions without bipartisan support. Accordingly, the confirmation of Burrows to fill the vacant seat was an Administration priority for the post-election "lame-duck" session of Congress before control of the Senate shifted to Republican control in the 114th Congress.

Burrows has held various legal counsel roles within the DOJ and U.S. Senate committees. On November 13, 2014 the Senate Health, Education, Labor and Pensions Committee held a hearing on Burrows' nomination to the Commission. During the same hearing, the Committee also considered the re-nomination of David Lopez to serve another four-year term as General Counsel of the EEOC. On December 3, 2014, the Senate confirmed both Burrows' and Lopez's nominations.

The EEOC's regulatory and enforcement agenda came under criticism from Congress in 2014. On June 10, 2014, the House Subcommittee on Workforce Protections held a hearing scrutinizing the agency's regulatory and enforcement actions.¹⁸⁸ Meanwhile, proposed legislation was introduced in the U.S. House of Representatives that would restrict the EEOC's authority and increase transparency and accountability at the Commission. The legislation under consideration includes the EEOC Transparency and Accountability Act (H.R. 4959), the Litigation Oversight Act of 2014 (H.R. 5422), and the Certainty in Enforcement Act (H.R. 5423).¹⁸⁹ H.R. 4959, introduced by

181 Ilyse Wolens Schuman, *Senate Confirms Chai Feldblum to Another Five-Year Term*, Littler Workplace Policy Update (Dec. 13, 2013), <http://www.littler.com/dc-employment-law-update/senate-confirms-chai-feldblum-another-five-year-term>.

182 EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (Dec. 17, 2012) available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

183 Ilyse Wolens Schuman, *Senate Confirms Chai Feldblum to Another Five-Year Term*, *supra* note 181.

184 Press Release, EEOC, *President Appoints Jenny R. Yang EEOC Chair* (Sept. 2, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/9-2-14.cfm>.

185 *Id.*

186 *Id.*

187 Ilyse Wolens Schuman, *President Nominates Charlotte Burrows to be a new EEOC Commissioner*, Littler Workplace Policy Update (Sept. 16, 2014), <http://www.littler.com/workplace-policy-update/president-nominates-charlotte-burrows-be-new-eeoc-commissioner>.

188 See Hearing, Subcommittee on Workforce Protections, *The Regulatory and Enforcement Priorities of the EEOC: Examining the Concerns of Stakeholders* (June 10, 2014), available at <http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=383368>.

189 EEOC Transparency and Accountability Act, H.R. 4959, 113th Cong. (2d Sess. 2014); Litigation Oversight Act of 2014, H.R. 5422, 113th Cong. (2d Sess. 2014); Certainty in Enforcement Act, H.R. 5423, 113th Cong. (2d Sess. 2014). See also Ilyse Wolens Schuman, *House Subcommittee Holds Hearing on EEOC Reform Legislation*, Littler Workplace Policy Update (Sept. 18, 2014), <http://www.littler.com/workplace-policy-update/house-subcommittee-holds-hearing-eeoc-reform-legislation>; Ilyse Wolens Schuman, *Bills Seek to Blunt EEOC Activities*, Littler Workplace Policy Update (Sept. 11, 2014), <http://www.littler.com/workplace-policy-update/bills-seek-blunt-eeoc-activities>.

U.S. Representative Richard Hudson (R-NC), would increase EEOC transparency by, among other provisions, requiring the Commission to post on its website and in its annual report any case in which the Commission was required to pay court-sanctioned fees or costs.¹⁹⁰ H.R. 5422, introduced by Rep. Tim Walberg (R-MI), would require EEOC Commissioners to approve by majority vote all EEOC-initiated litigation involving multiple plaintiffs or allegations of systemic discrimination.¹⁹¹ The third bill, H.R. 5423, also introduced by Rep. Walberg, would provide a safe harbor to employers complying with federal, state and local mandates, such as laws requiring criminal background checks.¹⁹²

On September 17, 2014, the House Subcommittee on Workforce Protections held a hearing to discuss the proposed legislation.¹⁹³ No further action on the three bills occurred in 2014, although this may change in 2015, as Republicans will hold a majority in both chambers of the 114th Congress. Even with a Republican-controlled Senate beginning in January 2015, such legislation would still require some bipartisan support to overcome a potential filibuster from opponents. Even if the legislation were to pass both Houses of Congress, it could face a Presidential veto. Nonetheless, the prospects for legislation to reform the EEOC certainly were bolstered by the midterm election results. Even if these bills do not become law, scrutiny of the agency will surely increase under a Republican-controlled House and Senate.

B. EEOC Strategic Plan and Related Enforcement Plan

In FY 2012, the EEOC introduced its Strategic Plan for Fiscal Years 2012—2016 (“the Strategic Plan”),¹⁹⁴ which sets forth its strategy for achieving its fundamental mission to stop and remedy unlawful employment discrimination, and directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC’s private, public, and federal sector enforcement.¹⁹⁵ The purpose of the SEP is to focus and coordinate the EEOC’s programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.

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

On December 17, 2012, the EEOC approved the SEP for Fiscal Years 2013—2016.¹⁹⁶ The SEP reaffirms the agency’s objective of strategic enforcement. It is intended to promote more strategic use of agency resources to advance the EEOC’s mission of stopping and remedying unlawful discrimination and focus and coordinate the EEOC’s programs so they have a sustainable impact in reducing and deterring workplace discrimination.¹⁹⁷ The SEP identifies six priorities for nationwide enforcement in the private and public sectors, including: (1) eliminating systemic barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging and developing employment discrimination issues, such as ADA Amendment Act issues, LGBT (lesbian, gay, bisexual and transgender individuals) coverage under Title VII, and accommodating pregnancy; (4) enforcing equal pay laws to target practices that discriminate based on gender; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.¹⁹⁸

190 EEOC Transparency and Accountability Act, H.R. 4959, 113th Cong. (2d Sess. 2014).

191 Litigation Oversight Act of 2014, H.R. 5422, 113th Cong. (2d Sess. 2014).

192 Certainty in Enforcement Act, H.R. 5423, 113th Cong. (2d Sess. 2014).

193 Ilyse Wolens Schuman, *House Subcommittee Holds Hearing on EEOC Reform Legislation*, Littler Workplace Policy Update (Sept. 18, 2014), <http://www.littler.com/workplace-policy-update/house-subcommittee-holds-hearing-eEOC-reform-legislation>.

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

195 EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC PLAN FOR FISCAL YEARS 2012-2016 (2012), available at http://www.eEOC.gov/eEOC/plan/strategic_plan_12to16.cfm.

196 EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (Dec. 17, 2012), available at <http://www.eEOC.gov/eEOC/plan/sep.cfm>.

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

198 STRATEGIC ENFORCEMENT PLAN FY 2013-2016, *supra* note 2; See also Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?*, Littler ASAP (Nov. 7, 2012), available at <http://www.littler.com/publication-press/publication/how-will-2012-election-results-impact-labor-employment-and-benefits-po>.

As part of the initiative, the EEOC intends to focus on screening tools that may adversely impact groups protected under the law (e.g., pre-employment tests, background screens, date of birth screens in online applications).¹⁹⁹ The EEOC plans also to target disparate pay, job segregation, harassment, trafficking, and discriminatory language policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.²⁰⁰

To implement these priorities, the EEOC intends to continue prioritizing certain types of charges filed with the agency and to give preference to litigation involving SEP or EEOC district enforcement priority issues. Additionally, the SEP reaffirms the EEOC's focus on pursuing systemic cases—"pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."²⁰¹ With respect to systemic enforcement, the SEP specifically notes that the EEOC district offices are expected to coordinate with each other so as to avoid duplication and to improve efficiencies through collaboration, consultation and strategic partnerships among the offices. While the EEOC developed the SEP as a strategy for reducing discrimination, the SEP, as a whole, places more emphasis on enforcement and litigation than on prevention efforts and conciliation.

In November 2014, the EEOC released its much-anticipated Performance and Accountability Report (PAR) for FY 2014.²⁰² The PAR summarizes the agency's assessment of its program and financial performance for FY 2014, including the number of private-sector charges received, federal lawsuits filed, and monetary awards recovered. A few highlights of the PAR include the following:

- In FY 2014, the EEOC continued its focus on systemic cases, filing 17 systemic lawsuits (13% of all merit suit filings), and completing 260 systemic investigations. Systemic lawsuits represented 25% of all active merit suits by the end of FY 2014, the largest percentage on the EEOC's active docket since the agency started tracking such suits in 2006.²⁰³
- The agency filed 133 merits lawsuits, and obtained \$22.5 million in monetary relief for charging parties through litigation.²⁰⁴
- The EEOC secured \$296.1 million in monetary relief for public- and private-sector employees through mediation, conciliation and other administrative enforcement efforts.²⁰⁵
- A total of \$144.6 million in benefits was secured through mediation.²⁰⁶

In FY 2014, the EEOC made additional progress to implement the SEP in the federal sector by approving the Federal Sector Complement Plan (FCP).²⁰⁷ The FCP describes strategies for implementing the SEP's priorities and the federal sector's complementary priorities, and recommends strategies to improve communication, oversight, and consistency across the federal sector.²⁰⁸ The FCP proposes several strategies for achieving the SEP's goal of preserving access to the legal system, including ensuring that federal employees are aware of their rights and preventing improper agency procedural dismissals of Equal Employment Opportunity (EEO) complaints.²⁰⁹ In September 2014, the EEOC took additional steps to implement these strategies by issuing guidance to federal agencies regarding methods for ensuring that employees and applicants are aware of their rights under EEO laws and regulations.²¹⁰ In an effort to reduce the number of incorrect procedural dismissals of EEO complaints, the EEOC also issued a report that identifies common errors federal agencies made in dismissing EEO complaints.²¹¹

199 STRATEGIC ENFORCEMENT PLAN FY 2013-2016, *supra* notes 2, 196.

200 *Id.*

201 See Barry A. Hartstein, *EEOC Seeks Feedback on Draft Strategic Enforcement Plan*, Littler Workplace Policy Update (Sept. 6, 2012), <http://www.littler.com/dc-employment-law-update/eec-seeks-feedback-draft-strategic-enforcement-plan>.

202 FY 2014 PERFORMANCE AND ACCOUNTABILITY REPORT, *supra* note 6. For a more detailed discussion of the FY 2014 PAR's findings, see Section II of this Report.

203 *Id.*, at 29.

204 *Id.*, at 3.

205 *Id.*, at v.

206 *Id.*, at 26.

207 EEOC, OFFICE OF FEDERAL OPERATIONS AND OFFICE OF FIELD PROGRAMS FEDERAL SECTOR COMPLEMENT PLAN TO THE STRATEGIC ENFORCEMENT PLAN (2013), available at http://www.eeoc.gov/eeoc/plan/federal_complement_plan.cfm.

208 *Id.*

209 *Id.*

210 EEOC, PRESERVING ACCESS TO THE LEGAL SYSTEM: A PRACTICAL GUIDE TO PROVIDING EMPLOYEES WITH ADEQUATE INFORMATION ABOUT THEIR RIGHTS UNDER FEDERAL EQUAL EMPLOYMENT OPPORTUNITY (EEO) LAWS AND REGULATIONS (Sept. 2, 2014), available at http://www.eeoc.gov/federal/preserving_access.cfm.

211 EEOC, PRESERVING ACCESS TO THE LEGAL SYSTEM: COMMON ERRORS BY FEDERAL AGENCIES IN DISMISSING COMPLAINTS OF DISCRIMINATION ON PROCEDURAL GROUNDS (Sept. 15, 2014), available at <http://www.eeoc.gov/federal/reports/dismissals.cfm>.

C. Noteworthy Regulatory Activities

1. Initial Planned Agenda and Significant Anticipated Guidance

The EEOC began FY 2014 with an aggressive agenda of regulatory activity and guidance designed to advance its enforcement priorities as detailed in the Strategic Enforcement Plan. The Commission was successful in executing many of its agenda items, including its guidance regarding employment background checks,²¹² pregnancy discrimination and related issues,²¹³ and religious dress and grooming practices.²¹⁴ The agency also continued its collaboration with Mexico to provide Mexican nationals and their employers with guidance and information regarding their rights and responsibilities under the laws enforced by the EEOC.²¹⁵

Although the Commission advanced several of its initiatives, it did not ultimately release a much-anticipated proposed rule amending regulations under the Genetic Information Nondiscrimination Act of 2008 (GINA). According to the EEOC's Fall 2014 Regulatory Agenda, by February 2015 the agency plans to release a proposed rule to address whether employers may offer inducements to employees' spouses and family members who answer questions about their current medical conditions on a health risk assessment (HRA).²¹⁶ Also by this date the EEOC is slated to issue a proposed rule to amend the ADA's regulations "to address the interaction between title I of the ADA and financial inducements and/or penalties as part of wellness programs offered through health plans." The EEOC intends to address other aspects of wellness programs that may be subject to the ADA's nondiscrimination provisions in this regulatory proposal.²¹⁷

2. Employment Background Checks

In FY 2012, the EEOC issued updated guidance regarding the use of arrest and conviction records by employers in hiring and employment decisions.²¹⁸ After the EEOC subsequently initiated lawsuits challenging employer background check policies and reliance on criminal history, the attorneys general of numerous states criticized the suits and called on the EEOC to rescind its guidance and drop its lawsuits.²¹⁹ To alleviate employer confusion, at the end of FY 2013, the EEOC clarified its guidance on Title VII liability concerning criminal background checks.²²⁰ In part, the EEOC's guidance addressed concerns over applying disparate impact analysis to an employer's use of criminal history screens. Notably, the EEOC stated it "was not illegal for employers to conduct or use the results of criminal background checks" and that employers were not required to use individualized assessments instead of bright-line screens.²²¹

In March 2014, the EEOC and the U.S. Federal Trade Commission (FTC) co-published further guidance about employer use of background checks.²²² The EEOC published these regulations while cases are still pending before the courts that could impact this area of the law.²²³ The EEOC and the FTC provided "best practice" guidelines regarding: the steps employers should take before they obtain

212 EEOC, BACKGROUND CHECKS, WHAT EMPLOYERS NEED TO KNOW (Mar. 10, 2014), available at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

213 EEOC PREGNANCY DISCRIMINATION GUIDANCE, *supra* note 60.

214 EEOC, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (Mar. 6, 2014), available at http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

215 Press Release, EEOC, *EEOC to Sign National Memorandum of Understanding with Mexico* Aug. 29 (Aug. 26, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-26-14.cfm>.

216 See Ilyse Wolens Schuman & Michael J. Lotito, *Some Federal Agency Rules Delayed, Others Imminent, According to Newly Released Fall Regulatory Plans*, Workplace Policy Update (Nov. 24, 2014), available at <http://www.littler.com/workplace-policy-update/some-federal-agency-rules-delayed-others-imminent-according-newly-released-f>. See also EEOC Agency Rule List— Fall 2014, available at http://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3046&Image58.x=52&Image58.y=11.

217 *Id.*

218 Barry Hartstein, Rod Fliegel, Marcy McGovern, and Jennifer Mora, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012), <http://www.littler.com/publication-press/publication/criminal-background-checks-evolution-eeocs-updated-guidance-and-implic>.

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

220 Ilyse Wolens Schuman, *EEOC Clarifies Guidance on Criminal Background Checks*, Littler Workplace Policy Update (Sep. 25, 2013), <http://www.littler.com/dc-employment-law-update/eeoc-clarifies-guidance-criminal-background-checks>.

221 *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, *supra* note 218.

222 Ilyse Wolens Schuman, *EEOC & FTC Issue Joint Guidance on Employment Background Checks*, Littler Workplace Policy Update (Mar. 11, 2014), <http://www.littler.com/workplace-policy-update/eeoc-ftc-issue-joint-guidance-employment-background-checks>.

223 See, e.g., *EEOC v. Freeman*, No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013).

background information; the legal use of background information; and recommendations for disposing of background information.²²⁴ The EEOC warned that employers should not make employment decisions based on background issues that may be more common among individuals of certain protected categories, thereby causing a disparate impact based on race, color, national origin, sex, or religion.²²⁵ The FTC also provided guidance regarding how the Fair Credit Reporting Act applies to employer-conducted background checks. Employers must provide applicants and employees with written notice that a report may be obtained for employment purposes and that the information contained in the report may be used in employment decisions.²²⁶

Although employers should continue to closely monitor their hiring policies as they relate to criminal background checks, some courts have provided support for the continued use of employer background checks. For instance, in *EEOC v. Kaplan Higher Education Corp.*, which dealt with credit background checks, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court's decision that the EEOC failed to meet its threshold burden of proving the employer's screening practices disproportionately excluded protected class members.²²⁷ In that case, the EEOC had sued the defendants for using the same type of background check that the EEOC itself uses.²²⁸ Employers, however, should be cautious about the extent to which they rely on *Kaplan* because the Sixth Circuit's review was limited to the issue of whether the EEOC's expert testimony on disparate impact analysis was correctly excluded in the lower court.²²⁹ As significant is *EEOC v. Freeman*,²³⁰ which involved both credit and criminal background checks, currently pending before the Fourth Circuit, in which the EEOC appealed the district court's summary judgment ruling in favor of the employer.

3. Pregnancy Discrimination

On July 14, 2014, the EEOC issued Enforcement Guidance on Pregnancy Discrimination and Related Issues (Pregnancy Guidance).²³¹ The Pregnancy Guidance explains the EEOC's position regarding the protections afforded by law to pregnancy and pregnancy-related conditions and how the EEOC will seek to enforce those protections.²³² The guidance comprises four sections addressing the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), other laws affecting pregnant workers, and best practices.²³³

The pregnancy guidance reveals the EEOC has adopted the controversial view that pregnant and lactating employees are entitled to accommodation under both the PDA and the ADA, even if the employee does not have an accompanying medical condition.²³⁴ In other words, the EEOC is seeking to incorporate ADA law into the PDA. To support its position, the EEOC appears to be relying on the PDA's requirement that pregnant individuals be treated the same as others similar in their ability or inability to work, and the EEOC's regulations implementing the ADA, which state that impairments arising from pregnancy may be eligible for accommodation.²³⁵

The pregnancy guidance states, among other things:²³⁶

- The PDA requires accommodations for pregnant women, regardless of the severity of their pregnancy-related work limitations, if the types of accommodations are provided to other employees with similar abilities or disabilities to work. The guidance incorporates the concepts of "reasonable accommodation" and "undue hardship" into the analysis of an accommodation request.
- The ADA requires accommodation of pregnancy-related disabilities, regardless of their relationship to a healthy and routine pregnancy.

224 *EEOC & FTC Issue Joint Guidance on Employment Background Checks*, *supra* note 222.

225 EEOC, BACKGROUND CHECKS, WHAT EMPLOYERS NEED TO KNOW (Mar. 10, 2014), available at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

226 *Id.*

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

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

229 *Id.* at 751.

230 *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013).

231 EEOC PREGNANCY DISCRIMINATION GUIDANCE, *supra* note 60.

232 *Id.*

233 *Id.*

234 *Id.*

235 *Id.*

236 *Id.* See also Ilyse Wolens Schuman, *EEOC Issues New Enforcement Guidance on Pregnancy Discrimination Over Commissioner Objections*, Litter Workplace Policy Update (July 14, 2014), <http://www.littler.com/workplace-policy-update/eeoc-issues-new-enforcement-guidance-pregnancy-discrimination-over-commissio>.

- An employer may not confine light duty to those suffering from workplace injuries, but must provide light duty to pregnant employees who need it as well. In doing so, the EEOC explicitly rejects contrary cases from at least four federal circuit courts of appeals.²³⁷
- Employers must give a lactating employee the “same freedom to address . . . lactation-related needs that she and her co-workers would have to address other similarly limiting medical conditions. For example, if an employer allows employees to change their schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then it must allow female employees to change their schedules or use sick leave for lactation-related needs under similar circumstances.”
- “To comply with Title VII, an employer’s health insurance plan must cover prescription contraceptives on the same basis as prescription drugs, devices, and services that are used to prevent the occurrence of medical conditions other than pregnancy.”

In connection with the pregnancy guidance, the EEOC issued a fact sheet for small businesses as well as a Q&A document explaining the law and policy changes.²³⁸

The pregnancy guidance was approved by a 3-2 vote along party lines, with Commissioners Constance Barker and Victoria Lipnic voting against it. According to Lipnic, the pregnancy guidance—which was not presented to the public for comment before the EEOC issued it—“adopts new and dramatic substantive changes to the law” regarding workplace treatment of pregnancy.²³⁹ Lipnic criticized also the release of the guidance before the U.S. Supreme Court has ruled in *Young v. United Parcel Services, Inc.*,²⁴⁰ which involves the issue of whether and to what extent an employer must provide pregnant employees with work accommodations, such as light duty, under the PDA. The Fourth Circuit ruled that the PDA did *not* mandate the type of accommodations for pregnant employees that are set forth in the guidance.²⁴¹ *Young* will be considered during the Court’s 2014-2015 term and it remains to be seen whether the Court will align itself with the EEOC.

4. Religious Grooming Practices

With an increasingly diverse workforce, employers face various issues regarding religious garb and grooming practices. The EEOC noted that it received 3,721 charges alleging religious discrimination in FY 2013 and that filings have steadily increased over the years.²⁴² To provide guidance in this area, the EEOC issued a practical guide to assist employers and employees on March 6, 2014, titled “Religious Garb and Grooming in the Workplace: Rights and Responsibilities.”²⁴³

The guidance comprises 16 questions and answers, covering a variety of topics including: employer inquiries about the sincerity of the religious beliefs behind a garb or grooming practice, and whether an employer may take customer preferences into consideration and conflicts with employer uniform or image policies.²⁴⁴ Specifically, the EEOC advises that the relevant distinction in this context is whether such practices are motivated by religion and thus protected under Title VII, or are a mere symptom of “personal preference,” which is not protected under Title VII.²⁴⁵ Notably, the EEOC stated also that applicants and employees need not use “magic words” when requesting

237 See, e.g., *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, No. 12-1226, 81 U.S.L.W. 3602 (U.S. July 1, 2014); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 643 (6th Cir. 2006); *Spivey v. Beverly Enters.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Serednyj v. Beverly Healthcare, LLC*, 2010 U.S. Dist. LEXIS 38221 (N.D. Ind. Apr. 16, 2010), *aff’d*, 656 F.3d 540 (7th Cir. 2011).

238 EEOC, FACT SHEET FOR SMALL BUSINESSES: PREGNANCY DISCRIMINATION (July 14, 2014), available at http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm; EEOC, QUESTIONS AND ANSWERS ABOUT THE EEOC’S ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm.

239 Victoria A. Lipnic, Statement of EEOC Comm’r Victoria A. Lipnic, Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), available at [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/\\$File/lipnic.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf). See also Constance S. Barker, Public Statement of EEOC Comm’r Constance S. Barker, Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), available at [http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp5/\\$File/barkerdissent.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp5/$File/barkerdissent.pdf). The U.S. Supreme Court is scheduled to hear two cases this term that address whether agencies subject to the Administrative Procedure Act can revise their interpretive rules without first engaging in notice and comment rulemaking. See, e.g., *Perez v. Mortg. Bankers Ass’n*, No. 12-5246, 2013 U.S. App. LEXIS 20178 (D.C. Cir. Oct. 2, 2013), *cert. granted*, No. 12-5146, 82 U.S.L.W. 3719 (U.S. June 16, 2014); *Nickols v. Mortg. Bankers Ass’n*, 720 F.3d 966 (D.C. Cir. 2013), *cert. granted*, No. 12-5246, 82 U.S.L.W. 3719 (U.S. June 16, 2014).

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

241 *Id.*

242 Press Release, EEOC, *EEOC Issues New Publication on Religious Garb and Grooming in the Workplace* (Mar. 6, 2014), available at <http://www1.eeoc.gov/eeoc/newsroom/release/3-6-14.cfm>.

243 EEOC, RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES (Mar. 6, 2014), available at http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

244 Jane Ann Himsel, *EEOC Issues New Guidance on Religious Dress and Grooming in the Workplace*, Littler Workplace Policy Update (Mar. 10, 2014), <http://www.littler.com/workplace-policy-update/eeoc-issues-new-guidance-religious-dress-and-grooming-workplace>.

245 RELIGIOUS GARB AND GROOMING IN THE WORKPLACE: RIGHTS AND RESPONSIBILITIES, *supra* note 243.

an accommodation.²⁴⁶ Additionally, the EEOC cites specific examples of religious garb and grooming practices of which employers should be aware, including: wearing religious articles like a Muslim hijab (headscarf), a Sikh turban, or a Christian Cross; observing a religious prohibition against wearing certain garments (e.g., a Muslim, Pentecostal Christian, or Orthodox Jewish woman's practice of not wearing pants or short skirts); and adhering to shaving or hair length observances (e.g., Sikh uncut hair and beard, Rastafarian dreadlocks, or Jewish peyes (sidelocks)).²⁴⁷

The EEOC published these guidelines at a time when many issues related to religious garb/grooming practices remain unresolved in the courts. The U.S. Supreme Court, however, is expected to provide additional guidance this coming term. On October 2, 2014, the Supreme Court granted *certiorari* in *EEOC v. Abercrombie & Fitch*.²⁴⁸ In *Abercrombie*, the Tenth Circuit determined that an employer had no duty to accommodate an applicant's religious garb/grooming practice where the applicant did not personally and explicitly notify the employer that the practice was religious and sought an accommodation.²⁴⁹ This decision is in direct conflict with the EEOC's position that such explicit notice from an applicant is unnecessary.²⁵⁰ Although it remains to be seen how far the Court's ruling will extend, the Court's decision will likely address, at least in part, the validity of the EEOC's guidelines.

5. Other Activity: Continued Collaboration with Mexican Consulate

The EEOC is continuing its collaboration with Mexican nationals to provide information, guidance, and access to anti-discrimination resources in the workplace. This trend started in 2013 with a series of the EEOC's field offices, including Detroit, New Orleans, Cleveland, Birmingham, Jackson, and Dallas, signing outreach agreements and memorandums of understanding with the Mexican Consulate and providing information and counseling to the Consulate regarding the laws enforced by the EEOC.²⁵¹

The collaboration has now become a national endeavor. On August 26, 2014, the EEOC issued a press release stating that it officially agreed to join forces with the Mexican Ministry of Foreign Affairs to create programs that will benefit both Mexican nationals working in the United States, as well as their employers.²⁵² On August 29, 2014, the EEOC and Eduardo Mora, the U.S. Ambassador to Mexico, signed a Memorandum of Understanding committed to strengthening outreach on workplace rights and reducing violations of the non-discrimination laws enforced by the EEOC.²⁵³ The EEOC described the Memorandum as "designed to further strengthen their collaborative efforts to provide immigrant, migrant, and otherwise vulnerable Mexican workers and their employers with guidance and information and access to education relative to their rights and responsibilities under the laws enforced by the EEOC."²⁵⁴

6. Fair Pay and Safe Workplaces Executive Order

The EEOC's enhanced enforcement efforts come at a time when the stakes have never been higher for federal government contractors. On July 31, 2014, the White House issued the "Fair Pay and Safe Workplaces" Executive Order ("Executive Order").²⁵⁵ The Executive Order requires federal contractors for contracts worth more than \$500,000 to disclose during the bid process any labor violations committed

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), *cert. granted*, 83 U.S.L.W. 3183 (U.S. Oct. 2, 2014).

²⁴⁹ *Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106.

²⁵⁰ *Id.*

²⁵¹ Press Release, EEOC, *EEOC's Dallas District Signs Historic Agreement with Mexican Consulate* (Aug. 26, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-26-13.cfm>; Press Release, EEOC, *EEOC's Jackson Office and Mexican Consulate Sign Historic Outreach Agreement* (May 21, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/5-21-13a.cfm>; Press Release, EEOC, *EEOC Birmingham Office Signs Memorandum of Understanding with Mexican Consulate* (Apr. 16, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/4-16-13a.cfm>; Press Release, EEOC, *EEOC Cleveland Field Office Signs Memorandum of Understanding with Mexican Consulate* (Mar. 19, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-19-13b.cfm>; Press Release, EEOC, *EEOC New Orleans Signs Memorandum of Understanding with Mexican Consulate* (Mar. 11, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-11-13.cfm>; Press Release, EEOC, *EEOC's Detroit Field Office Director and Mexican Consulate Sign Historic Outreach Agreement* (Nov. 29, 2012), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-29-12.cfm>.

²⁵² Press Release, EEOC, *EEOC to Sign National Memorandum of Understanding with Mexico Aug. 29* (Aug. 26, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/8-26-14.cfm>.

²⁵³ Press Release, EEOC, *EEOC and Mexican Ministry of Foreign Affairs Sign National Memorandum of Understanding* (Aug. 29, 2014), available at <http://www1.eeoc.gov/eeoc/newsroom/release/8-29-14c.cfm?renderforprint=1>.

²⁵⁴ *Id.*

²⁵⁵ See Ilyse Schuman, Linda Jackson and Maury Baskin, *New "Fair Pay and Safe Workplaces" Executive Order Dramatically Increases Risks for Government Contractors*, Littler ASAP (Aug. 1, 2014), available at <http://www.littler.com/publication-press/publication/new-fair-pay-and-safe-workplaces-executive-order-dramatically-increa-0>.

within the past three years, including violations of Title VII, the ADA and ADEA. Specifically, the disclosure requirement extends to any “administrative merits determination, arbitral award or decision, or civil judgment” rendered in the preceding three years, which may be considered in the contracting decision. The Executive Order also requires contractors to certify that each of their subcontractors whose compensation exceeds \$500,000 meets the newly imposed standards. Timing for the effective date of the Executive Order remains uncertain, although the Federal Acquisition Regulation (FAR) proposed rule to implement the Executive Order is scheduled for release in January 2015.²⁵⁶ The practical effect of this Executive Order for federal contractors and subcontractors is that EEOC enforcement actions would bring even greater risk and cost.

D. Current and Anticipated Trends

The EEOC is likely to continue pursuing initiatives related to recruiting and hiring procedures and practices, equal pay laws, LGBT protection under Title VII, genetic discrimination, social media, wellness programs, national origin discrimination, and federal sector disability discrimination laws that may eventually impact private-sector ADA compliance. However, with Republicans in control of both the Senate and House, the EEOC could face new obstacles—or at least greater scrutiny—in pursuing its agenda.

1. Recruiting and Hiring Issues

For the past several years, the EEOC has focused on the impact certain hiring practices may have on protected groups, and has included eliminating systemic barriers in recruitment and hiring as an enforcement priority in the SEP.²⁵⁷ Now that the Commission has issued updated guidance concerning criminal background checks in hiring and employment, the EEOC is expected to continue its focus on other hiring practices that may disproportionately impact certain protected groups. In a recent “ADA Update” event, the EEOC discussed barriers in hiring and recruitment. Further, in the guidance it co-published with the FTC about employment background checks, the EEOC included a list of medical-type questions related to criminal backgrounds that would run afoul of Title VII and the ADA.²⁵⁸ The EEOC warns employers not to “ask medical questions” unless the employer has objective evidence the employee cannot do the job or poses a safety risk because of a medical condition.²⁵⁹

However, despite the EEOC’s detailed guidance on background checks, it has received some legislative backlash regarding its position.²⁶⁰ Rep. Tim Walberg (R-MI), Chairman of the House Subcommittee on Workforce Protections, has stated that the EEOC’s guidance on criminal background checks is “flawed,” and he criticized the agency for denying the public the opportunity to comment on the guidance it issued in 2012.²⁶¹ Significantly, during a House subcommittee panel in June 2014, witnesses testified there was a clear disconnect between the EEOC’s policy and the litigation it brought.²⁶² For example, the EEOC has brought two lawsuits against companies for their use of criminal background checks for failure to include individualized assessments, yet former leaders of the EEOC had stated that such individualized assessments were unnecessary.²⁶³

The EEOC has faced hurdles litigating background check policy cases.²⁶⁴ On January 28, 2013, the district court in *EEOC v. Kaplan Higher Education Corp.*, granted Kaplan’s motion for summary judgment, holding the EEOC failed to meet its threshold burden as the plaintiff to prove that Kaplan’s screening practices disproportionately excluded protected class members.²⁶⁵ As previously discussed, on April 9, 2014, the U.S. Court of Appeals for the Sixth Circuit affirmed the district court’s decision that the EEOC had failed to prove disparate impact in the first instance and its expert testimony was unreliable.²⁶⁶ The opinion is significant because it indicates that background checks

²⁵⁶ Federal Acquisition Regulation (FAR); FAR Case 2014-025, Fair Pay and Safe Workplaces, RIN: 9000-AM81.

²⁵⁷ See EEOC, UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION STRATEGIC ENFORCEMENT PLAN FY 2013-2016 (Dec. 17, 2012), available at <http://www.eeoc.gov/eeoc/plan/sep.cfm>.

²⁵⁸ EEOC, BACKGROUND CHECKS, WHAT EMPLOYERS NEED TO KNOW (March 10, 2014), available at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

²⁵⁹ *Id.*

²⁶⁰ Ilyse Wolens Schuman, *House Subcommittee Hearing Examines EEOC’s Position on Criminal Background Checks*, Littler Workplace Policy Update (June 10, 2014), <http://www.littler.com/workplace-policy-update/house-subcommittee-hearing-examines-eeocs-position-criminal-background-check>.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Kaplan Higher Educ. Corp.*, 748 F.3d 749 at 750.

²⁶⁵ *EEOC v. Kaplan Higher Educ. Corp.*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013).

²⁶⁶ *Kaplan Higher Educ. Corp.*, 748 F.3d 749 at 750.

policies remains high on the EEOC's agenda, and, at the same time, the EEOC may face more hurdles proving disparate impact than it expected. The Sixth Circuit left some questions unanswered, such as whether the EEOC can challenge an employer's use of credit history information and whether Title VII obligates an employer to collect information regarding the race of its applicants.²⁶⁷

The EEOC will likely continue to pursue litigation against employers while it further refines its methods of proof and expert techniques. Credit checks still remain high on the EEOC's agenda as evidenced by the Senate bill prohibiting pre-employment credit checks.²⁶⁸ Sen. Elizabeth Warren (D-MA) introduced a bill that would prohibit employers from asking prospective employees about their credit histories or obtaining such information through a consumer or credit report.²⁶⁹ Importantly, the Equal Employment for All Act (S. 1837) would amend the Fair Credit Reporting Act (FCRA) to prevent employers from discriminating against employees for the basis of their credit worthiness.²⁷⁰ The EEOC's goal of "eliminat[ing] barriers in recruitment and hiring" is directly aligned with this new bill.²⁷¹ Sen. Warren will likely re-introduce this measure in 2015.

Another anticipated issue high on the EEOC's agenda is unemployment discrimination. In 2011, the EEOC held a public hearing regarding discrimination based on unemployment status.²⁷² Several members of Congress requested that EEOC's then-Chair Jacqueline Berrien address this issue and make a statement detailing how employers could open themselves up to disparate impact claims for discriminating against the unemployed, a group largely comprising minorities.²⁷³ In line with these concerns, on January 29, 2014, Reps. Rosa DeLaura (D-CT) and Hank Johnson (D-GA), with Sen. Richard Blumenthal (D-CT), co-sponsored the Fair Employment Opportunity Act of 2014 (H.R. 3972, S. 1972) in both Houses of Congress.²⁷⁴ The bill would prevent employers and employment agencies from refusing to consider or offer a job to an unemployed individual; prohibiting the publication in any medium of an advertisement or announcement for a job that includes language indicating the unemployed need not apply; and entitling those subjected to discrimination to bring a civil action against the employer or employment agency for actual, compensatory and punitive damages.²⁷⁵ This bill did not advance in 2014, and is not expected to in 2015. Many states and localities, however, have introduced similar legislation. Such bills are more likely to gain traction at the local level.

2. Equal Pay Laws

In 2010, President Obama created the National Equal Pay Task Force, which brought together the EEOC, Department of Justice, the U.S. Department of Labor and the Office of Personnel Management to address issues of gender pay disparities.²⁷⁶ In the past few years, the Commission has paid increased attention to employer pay practices that disproportionately affect women.²⁷⁷

More recently, on April 1, 2014, the Senate Committee on Health, Education, Labor and Pensions held a hearing to discuss the merits of the Paycheck Fairness Act (S. 2199).²⁷⁸ Believing the Lilly Ledbetter Fair Pay Act needed reinforcement, Sen. Barbara A. Mikulski (D-MD) sponsored the legislation to change current wage law.²⁷⁹ The Paycheck Fairness Act proposed the following: expanding damages under

²⁶⁷ Rod Fliegel and Jennifer Mora, *Sixth Circuit Upholds Dismissal of EEOC Suit Against Employer Screening Applicants Based on Credit History Information*, Littler Publications (April 17, 2014), <http://www.littler.com/publication-press/publication/sixth-circuit-upholds-dismissal-eEOC-suit-against-employer-screening-a>.

²⁶⁸ *Bill Prohibiting Pre-Employment Credit Checks Introduced in Senate*, Littler Workplace Privacy Counsel (Dec. 30, 2013), <http://www.littler.com/workplace-privacy-counsel/bill-prohibiting-pre-employment-credit-checks-introduced-senate>.

²⁶⁹ Equal Employment for All Act of 2013, S. 1837, 113th Cong. (1st Sess. 2013).

²⁷⁰ *Id.*

²⁷¹ STRATEGIC ENFORCEMENT PLAN FY 2013-2016, *supra* note 2.

²⁷² Ilyse Wolens Schuman, *EEOC Holds Public Hearing on Unemployment Discrimination*, Littler Workplace Policy Update (Feb. 17, 2011), <http://www.littler.com/dc-employment-law-update/eeoc-holds-public-hearing-unemployment-discrimination>.

²⁷³ *Id.*

²⁷⁴ Fair Employment Opportunity Act of 2014, H.R. 3972, S. 1972, 113th Cong. (2d Sess. 2014). *See also* Ilyse Wolens Schuman, *Bill Would Prohibit Employment Discrimination Based on Unemployment*, Littler Workplace Policy Update (Jan. 31, 2014), <http://www.littler.com/dc-employment-law-update/bill-would-prohibit-employment-discrimination-based-unemployment>.

²⁷⁵ Fair Employment Opportunity Act of 2014, H.R. 3972, S. 1972, 113th Cong. (2d Sess. 2014). *See also* *Bill Would Prohibit Employment Discrimination Based on Unemployment*, *supra* note 274.

²⁷⁶ White House, National Equal Pay Task Force, <http://www.whitehouse.gov/webform/national-equal-pay-task-force-submit-your-question> (last visited Oct. 27, 2014).

²⁷⁷ For additional background regarding the EEOC's focus on pay practices, *see* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2013*, at 20, 29, *supra* note 22.

²⁷⁸ Ilyse Wolens Schuman, *Senate Committee Discusses Paycheck Fairness Act*, Littler Workplace Policy Update (April 2, 2014), <http://www.littler.com/workplace-policy-update/senate-committee-discusses-paycheck-fairness-act>.

²⁷⁹ *Id.*

the Equal Pay Act (EPA) to include unlimited compensatory and punitive awards for wage discrimination; easing the requirements for bringing a class action lawsuit under the EPA; prohibiting an employer from preventing employees from discussing salaries; and weakening an employer's ability to raise the "factor other than sex" affirmative defense in a wage discrimination case.²⁸⁰ Another failed vote for cloture on September 15, 2014 signaled the death of the bill in the Senate during the 113th Congress.²⁸¹ With passage of the Paycheck Fairness Act effectively dead for the 114th Congress as well, the Administration will likely turn to executive action to try to accomplish the same objectives.

3. Sexual Orientation and Gender Identity Discrimination

Sexual orientation and gender identity are other emerging issues the EEOC has indicated it will continue targeting in the next several years.²⁸² The EEOC has primarily approached this issue through efforts to apply Title VII sex discrimination provisions to lesbian, gay, bisexual and transgender individuals.

In line with its previous trailblazing decision in *Macy v. Holder*,²⁸³ on September 25, 2014, the EEOC filed its first lawsuits over alleged sex discrimination against transgender individuals.²⁸⁴ The EEOC sued two separate employers, alleging violations of Title VII because their actions were based on gender stereotyping.²⁸⁵ The EEOC asserts the employers allegedly terminated the employees only after they were notified that the employees were transgender and would begin to present as women.²⁸⁶

Meanwhile, the Employment Non-Discrimination Act (ENDA)—which would ban workplace sexual orientation and gender identity discrimination—cleared the Senate on November 7, 2013.²⁸⁷ If passed, ENDA would offer more consistent and reliable protection for lesbian, gay, bisexual and transgender workers than the EEOC's current strategy of relying on Title VII's sex discrimination provisions.²⁸⁸ On September 17, 2014, the House of Representatives filed a discharge petition to force a vote on ENDA, although this effort was ultimately unsuccessful.²⁸⁹

4. Genetic Discrimination

The Genetic Information Nondiscrimination Act went into effect on November 21, 2009, and prohibits employers from using genetic information in employment decisions, restricts acquisition of genetic information, strictly limits disclosure of genetic information, and prohibits retaliation against employees who complain of genetic discrimination.²⁹⁰ GINA's restrictions apply to the genetic information of applicants, employees, and family members of applicants and employees.²⁹¹ Two recently filed class action lawsuits demonstrate that many employers may unwittingly violate GINA even if they conduct no genetic tests.²⁹² The proliferation of genetic information, and requests for it, make compliance with GINA's most basic privacy protection potentially difficult for employers.²⁹³

280 Paycheck Fairness Act, S. 2199, 113th Cong. (2d Sess. 2014).

281 *All Actions, Including Floor Amendments: S.2199 – 113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/2199/all-actions-with-amendments> (last visited Oct. 27, 2014).

282 STRATEGIC ENFORCEMENT PLAN FY 2013-2016, *supra* note 2.

283 *Macy v. Holder*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

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

285 *Id.*

286 *Id.*

287 Ilyse Wolens Schuman, *Senate Advances Employment Non-Discrimination Act*, Littler Workplace Policy Update (Nov. 4, 2014), <http://www.littler.com/dc-employment-law-update/senate-advances-employment-non-discrimination-act>.

288 See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (1st Sess. 2013).

289 Jared Polis, MOTION TO DISCHARGE A COMMITTEE FROM THE CONSIDERATION OF A RESOLUTION, H.R. DOC. No. 0011 (Sept. 17, 2014), available at <http://clerk.house.gov/113/lrc/pd/petitions/DisPet0011.xml>.

290 Genetic Information Nondiscrimination Act of 2008, *supra* note 82.

291 *Id.*

292 Philip L. Gordon, *Recent Class Action Lawsuits Shine The Spotlight On the Camouflaged Privacy Law: GINA*, Littler Workplace Privacy Counsel (Dec. 10, 2013), <http://www.littler.com/workplace-privacy-counsel/recent-class-action-lawsuits-shine-spotlight-camouflaged-privacy-law-gina>.

293 *Id.*

In FY 2013, the EEOC filed its first systemic lawsuit alleging violations of GINA against a nursing and rehabilitation care facility.²⁹⁴ Just ten months later, the agency settled the case for \$370,000.²⁹⁵ The lawsuit alleged the facility violated GINA by conducting a post-offer, pre-employment medical exam that included questions about the applicant's family medical history and required employees to repeat this exam annually.²⁹⁶ This litigation is significant because it reaffirms the Commission's focus on the six national priorities set forth in its SEP, which include addressing "emerging and developing issues" such as genetic discrimination.²⁹⁷ As further discussed below, the EEOC is increasing its review of employer-sponsored wellness programs for GINA violations.

5. Social Media

The EEOC has joined the National Labor Relations Board in expressing concern regarding social media's impact in the workplace. On March 12, 2014, the EEOC held a panel discussion to gather more information regarding the use of social media in the workplace and the impact it may have on the laws enforced by the EEOC.²⁹⁸ Panelists discussed employers' use of social media for recruiting and knowledge sharing, as well as a source of discovery in employment discrimination litigation.²⁹⁹ The agency has expressed concern regarding employers' increased efforts to access employees' private social media communications and its potential chilling effect on individuals seeking to exercise their rights under federal anti-discrimination laws.³⁰⁰ Although the EEOC has no tangible plan to issue guidance on social media issues in the near future, employers should assess the impact, if any, their use of social media may have on the laws the EEOC enforces.

6. Wellness Programs

With the prevalent use of employer-sponsored wellness programs, the EEOC has signaled an interest in focusing on those programs and their compliance with federal laws, including the ADA, GINA, and other statutes enforced by the EEOC. In 2014, the EEOC began directly challenging employer-sponsored wellness programs. On August 20, 2014, the agency filed suit against an employer in a Wisconsin district court, alleging the company administered a wellness program in violation of the ADA.³⁰¹ Specifically, the EEOC's complaint states that the employer required the plaintiff to pay the full cost of her health insurance premiums after she refused to participate in the wellness program and also terminated her employment for complaining to management about the program. The EEOC claims that the wellness program violated the ADA because: (1) it was not voluntary; and (2) it was not job-related or subject to business necessity.

Just over a month later, on September 30, 2014, the EEOC filed a lawsuit challenging another Wisconsin employer's wellness program after conciliation efforts failed.³⁰² The agency claims that the employer violated the ADA when it cancelled an employee's medical insurance and later discharged him because he did not complete the voluntary biometric testing and health risk assessment components of its wellness program.³⁰³ The EEOC's view is that the biometric testing and health risk assessment constituted prohibited disability-related inquiries and medical examinations that were not job-related or consistent with business necessity, as required by the ADA.³⁰⁴ Further, John Hendrickson, Regional Attorney for the EEOC's Chicago District, explained that, in his view, participation in the wellness program was not voluntary: "Having to choose between complying with such medical exams and inquiries, on the one hand, or getting hit with cancellation or a penalty,

294 *EEOC v. Founders Pavilion, Inc.*, 13-CV-01438 (W.D. N.Y.). See also Elizabeth Tempio Clement, *EEOC Files First Genetic Discrimination Class Action Against Nursing and Rehabilitation Center*, Littler Health Care Employment Counsel (May 21, 2013), <http://www.littler.com/2013/05/21/eec-files-first-genetic-discrimination-class-action-against-nursing-and-rehabilitation-center>.

295 Elizabeth Tempio Clement, *EEOC Settles First Systemic GINA Lawsuit Against Nursing Home*, Littler Health Care Employment Counsel (Jan. 17, 2014), available at <http://www.littler.com/healthcare-employment-counsel/eec-settles-first-systemic-gina-lawsuit-against-nursing-home>.

296 *Id.*

297 *Id.*

298 EEOC Meeting, *Social Media in the Workplace: Examining Implications for Equal Employment Opportunity Law* (Mar. 12, 2014), available at <http://www.eeoc.gov/eeoc/meetings/3-12-14/>.

299 Press Release, EEOC, *Social Media Is Part of Today's Workplace but Its Use May Raise Employment Discrimination Concerns* (Mar. 12, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/3-12-14.cfm>.

300 *Id.*

301 *EEOC v. Orion Energy Systems, Inc.*, No. 14-cv01019 (E.D. Wis. Aug. 20, 2014). See also Russell D. Chapman, *EEOC Directly Challenges Wellness Program for the First Time*, Employment Benefits Counsel (Aug. 29, 2014), <http://www.littler.com/employment-benefits-counsel/eec-directly-challenges-wellness-program-first-time>.

302 *EEOC v. Flambeau, Inc.*, No. 3:13-cv-00638 (W.D. Wis. Sept. 30, 2014).

303 Press Release, EEOC, *EEOC Lawsuit Challenges Flambeau Over Wellness Program* (Oct. 1, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/10-1-14b.cfm>.

304 *Id.*

on the other hand, is not voluntary and is not a choice at all.”³⁰⁵ Not long after, the EEOC took issue with another company’s employee wellness program, claiming it violates the ADA and GINA because it withholds up to \$4,000 annually from employees and their spouses who refuse to undergo medical testing as part of the company’s wellness program.³⁰⁶ The EEOC alleges that the penalties render the program involuntary and, therefore, a violation of the ADA. The EEOC alleges also that because the program includes the testing of an employee’s spouse—considered family medical history of the employee—the program violates GINA. The EEOC’s motion to enjoin the company from withholding the annual amount failed, but the agency will likely continue to focus on this area. Despite the EEOC’s increasing attention to employer-sponsored wellness programs and listing in its Fall 2014 Regulatory Agenda, it is unclear whether or when the EEOC will issue guidance on employers’ use of these programs.³⁰⁷

7. National Origin Discrimination

The EEOC has also continued to focus on national origin discrimination. On November 13, 2013, the agency held a public meeting to address the challenges of enforcing Title VII’s protection against national origin discrimination.³⁰⁸ Panelists included EEOC employees, representatives of ethnic advocacy groups, and management-side attorneys.³⁰⁹ Many panelists highlighted the growing number of immigrants in the workforce, as well as the dispersion of immigrant populations to smaller cities throughout the United States that have not traditionally had high immigrant populations.³¹⁰ After the meeting, EEOC Commissioner Jenny R. Yang stated: “National origin discrimination . . . should be tackled through coordinated enforcement, outreach, and training efforts. We are confident that the Commission will benefit from the information obtained [at the meeting],” signaling the EEOC may continue concentrating its efforts in this area.³¹¹

8. Disability Discrimination Law

On May 15, 2014, the EEOC called for input regarding revisions to the regulations implementing Section 501 of the Rehabilitation Act of 1973, which requires both nondiscrimination and affirmative action with respect to federal employees and applicants for federal employment who are individuals with disabilities.³¹² The EEOC explained that the new regulations were necessary because “[a]lthough Commission regulations already contain a detailed explanation of the standards for determining whether an agency has violated section 501’s nondiscrimination provisions, and of the process by which those provisions may be enforced, they do not explain what the model employer obligation entails.”³¹³ The period for submitting comments closed on July 14, 2014.³¹⁴ Although the regulations apply only to federal employees, private-sector employers should take note of any revisions the EEOC implements as the rules may eventually also impact private-sector ADA compliance.

305 *Id.*

306 *EEOC v. Honeywell International Inc.*, 2014 U.S. Dist. LEXIS 157945 (D. Minn. Nov. 6, 2014).

307 Ben James, *Don’t Expect Wellness Program Guidance: EEOC Commish*, EMPLOYMENT LAW360 (Oct. 2, 2014).

308 Press Release, EEOC, *EEOC Meeting Highlights Challenges to Title VII National Origin Enforcement* (Nov. 13, 2013), available at <http://www.eeoc.gov/eeoc/newsroom/release/11-13-13.cfm>.

309 *Id.*

310 *Id.*

311 *Id.*

312 EEOC, *The Federal Sector’s Obligation To Be a Model Employer of Individuals With Disabilities*, 79 Fed. Reg. 27824 (proposed May 15, 2014).

313 *Id.*

314 *Id.*

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement action in the event of an employer's failure or refusal to provide requested information or data or to make requested personnel available for interview.³¹⁵ The EEOC continues to exercise this option, particularly when dealing with systemic investigations.

A brief review of the scope and limits on the EEOC's investigative authority follows, including procedural rules in challenging such authority, and federal court decisions over the past year. Appendix C of this Report provides a detailed summary of select subpoena enforcement actions filed during FY 2014. Notably, the number of subpoena enforcement actions doubled over the past fiscal year from 17 in FY 2013 to 34 in FY 2014. The number of subpoena enforcement actions filed in FY 2014 was more consistent with the filings in prior years. As an example, in FY 2011 and FY 2012, a total of 36 and 33 subpoena enforcement actions were filed, respectively.³¹⁶

A. EEOC Authority to Conduct Class-Type Investigations

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

The Commission enjoys expansive authority to investigate systemic discrimination stemming from its broad legislated mandate.³¹⁷ Unlike individual litigants asserting class action claims, the EEOC need not meet the stringent requirements of Rule 23 to initiate a pattern or practice lawsuit against an employer. Thus, the EEOC "may, to the extent warranted by an investigation reasonably related in scope to the allegations of the underlying charge, seek relief on behalf of individuals, beyond the charging parties, who are identified during the investigation."³¹⁸

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, Commissioner's Charges),³¹⁹ based upon an aggregation of the information gathered pursuant to individual charge investigations. Under a Commissioner's Charge, the EEOC is entitled to investigate broader claims.

Finally, the EEOC may initiate a systemic investigation under either the Age Discrimination in Employment Act or the Equal Pay Act. Under both statutes, the Commission can initiate a "directed investigation" even in the absence of a charge of discrimination, seeking data that may include broad-based requests for information and initiating a lawsuit for violation of the applicable statute.³²⁰

B. Scope of EEOC's Investigative Authority

The Commission's requests for information arise 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."³²¹ The leading case interpreting this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,³²² which is frequently cited in subpoena enforcement litigation, particularly for the proposition that the EEOC is "entitled to access only evidence 'related' to the charge under investigation . . . courts have generously construed the term 'relevant' and have afforded

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

316 FY 2011 PAR, at 19; FY 2012 PAR at 27.

317 See 42 U.S.C. § 2000e-5(b).

318 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). But see *EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals).

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

320 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").

321 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.

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

the Commission access to virtually any material that might cast light on the allegations against the employer.³²³ However, in *Shell Oil*, the Court noted also, “Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity.”³²⁴

Challenges to subpoena enforcement actions typically focus on two issues: (1) relevance and (2) burdensomeness. Though the relevance standard for EEOC subpoenas is interpreted broadly when compared with the standard for admissibility of evidence, courts have refused to enforce administrative subpoenas that would result in a “fishing expedition.”³²⁵ With respect to burdensomeness, courts begin by presuming that compliance should be enforced to further the EEOC’s legitimate inquiry into matters of public interest. Thus, an employer must demonstrate the demands are unduly burdensome or unreasonably broad, such as by showing that “compliance would threaten the normal operation of a respondent’s business.”³²⁶

C. 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 fails to timely move to challenge or modify the subpoena.³²⁷ 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.³²⁸

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*,³²⁹ 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 providing the EEOC with approximately 13,000 pages of documents in response to the subpoena, the agency claimed the company failed to provide additional requested information. The district court held that Aerotek filed its Petition to Revoke or Modify the subpoena six days after the subpoena was issued, instead of the statutorily-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.”³³⁰

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

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

324 *Id.*

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

326 *EEOC v. United Airlines*, 287 F.3d at 653.

327 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).

328 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).

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

330 *Aerotek*, 498 Fed. Appx. at 648.

D. Who Must Appear to Challenge Subpoena, and who Must be Represented by an Attorney

A recent district court decision highlighted an additional procedural requirement in responding to a subpoena-related action, namely, that an employer cannot respond to an EEOC enforcement action without legal representation. In *EEOC v. Ayala AG Services*,³³¹ the EEOC sought enforcement of its administrative subpoena seeking information related to the investigation of two sexual harassment charges. The enforcement action went to hearing, at which a former employee of the company appeared to inform the court that the company had gone out of business.

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

E. Review of Recent Cases Involving Broad-Based Investigation by the EEOC³³²

1. Generally Applicable Standards in Subpoena Enforcement

In addition to highlighting the need for counsel in responding to a subpoena enforcement action, *EEOC v. Ayala Services*³³³ was also noteworthy for its overview of the standards generally applicable to an EEOC action for subpoena enforcement.

First, the court established that the subpoena was within the Commission's authority to issue, and that it was procedurally valid.³³⁴

The court then went on to assess the relevance of the information subpoenaed, asserting the broad relevancy standard discussed above and established in *Shell Oil*.³³⁵ The investigation in question involved two charges of sexual harassment discrimination and retaliation. Thus, the court deemed relevant the EEOC's administrative subpoena, which sought documents and information pertaining to the charging parties and their employment, relevant policies and training concerning sexual harassment, and information pertaining to potential comparators.

The court additionally noted the employer's failure to timely file a Petition to Revoke or Modify the subpoena, observing that its failure to challenge the subpoena within the prescribed five-day period constituted waiver.

Finally, in *Ayala*, the court noted the employer's failure to assert any argument that the subpoena was unduly burdensome. Accordingly, the subpoena was enforced in full.

2. Subpoenas Broad in Scope and the Resolution of Privilege Issues³³⁶

The EEOC's power to enforce even broad subpoenas was highlighted in another subpoena enforcement action involving an ADA investigation relating to a Physical Abilities Test.³³⁷ In this case, the district court was presented with a magistrate judge's Recommended Disposition, recommending that the subpoena be enforced in part. The question of enforcement was complicated by the fact that the court had recently presided over a related case filed by the EEOC against the same employer. In that case, the EEOC had asserted the employer engaged in unlawful retaliation by, among other things, implementing a physical abilities test in retaliation for protected activity. In the related case, the court determined that the physical abilities test was permissible.

The EEOC served an administrative subpoena on the employer after the resolution of the related case, while investigating a charge of discrimination by one of the class members in the earlier action. The charging party alleged that, after the resolution of the prior lawsuit, when applying for a job she was subjected to the physical abilities test that she believed had a disparate impact on female applicants. She alleged also that the test was administered to her in retaliation for her participation in the prior lawsuit.

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

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

333 *Ayala AG Services*, 2013 U.S. Dist. LEXIS 148431.

334 *Id.* at **7-9, citing 29 C.F.R. § 1601.12(a).

335 466 U.S. at 68-69.

336 *But see* discussion of *EEOC v. Royal Caribbean Cruises, Ltd.*, 2014 U.S. App. LEXIS 21228 (11th Cir. Nov. 6, 2014), in Section I.B.

337 *EEOC v. Wal-Mart Stores East, LP*, 2014 U.S. Dist. LEXIS 34738 (Mar. 17, 2014).

The broad subpoena sought, among other material, four categories of information: (1) lists identifying all individuals involved in the decision to implement the Physical Abilities Test, (2) the role of each person identified in making the decision, (3) copies of all documents relating to the decision, and (4) copies of all documents relating to whether the test should be administered to members of the prior class action.

The employer objected that the consent decree entered in the earlier case stripped the EEOC of its statutory jurisdiction over the charging party's claim of retaliation and gave it to the district court. The EEOC responded, and the magistrate agreed, that the court was not able to strip the Commission of the authority to investigate the charges. The company also argued, citing *EEOC v. Bashas', Inc.*,³³⁸ that the EEOC had an improper purpose in issuing the subpoena, namely, to circumvent the court's determination that the Physical Abilities Test was permissible. The magistrate similarly rejected this argument, finding that, unlike in *Bashas' Inc.*, the EEOC was not requesting information and documents for the purpose of funneling them to plaintiff's counsel in a related and ongoing class action. Rather, the Commission sought information and documents relevant to a newly filed charge and subsequent to the resolution of the related class action. The employer claimed the information and documents sought in the subpoena were subject to the attorney-client privilege or work product doctrine. However, at hearing before the magistrate judge, the company offered that some of the documents sought might not be protected by privilege. As a result, the magistrate recommended that an order of compliance be issued, and that the employer provide a privilege log detailing specific documents withheld on the basis of privilege.

The EEOC also argued it sought, by the administrative subpoena, to compel testimony in addition to information and documents. However, the EEOC left the "Testify Before:" box on its subpoena form unchecked. Thus, the magistrate refused to expand the scope of the subpoena to include testimony. Finally, the Commission maintained that it was entitled not only to existing documents but also to a compilation of the information requested. However, the subpoena's own definition of "documents" was limited to pre-existing documents and, therefore, the magistrate refused to extend enforcement to require the employer to create documents and compilations.

When the magistrate's recommendation reached the district judge, the employer again argued the EEOC violated the consent decree, under which the company was entitled to administer the Physical Abilities Test. The judge disagreed, noting that the issue included whether the employer had administered the Physical Abilities Test in a retaliatory manner. Thus, the court agreed with the magistrate judge that the consent decree did not prevent enforcement of the EEOC's subpoena.

The EEOC, meanwhile, asserted four objections to the magistrate's recommended order. First, it objected to the magistrate's determination that the company need not produce documents not already in existence. The court disagreed, but determined the issue was moot, as the EEOC had already served a second subpoena specifying that a request for "documents" was to include information "capable of being compiled into documentary form." Second, the Commission objected to the magistrate's recommendation that the company not be required to provide testimony in response to the subpoena. This issue was likewise rendered moot by a second administrative subpoena. Third, the EEOC objected to the magistrate's recommendation that the company produce a privilege log to the court in order to address specific issues of privilege, with the EEOC to file a motion to compel disputed entries on the log. The EEOC argued that "the resolution of privilege issues is part and parcel of the subpoena enforcement proceeding and no separate jurisdictional basis or motion should be required."³³⁹ The judge disagreed, noting that a motion to compel need not set forth the jurisdictional basis for the court's resolution of privilege dispute, but that procedure consistent with Federal Rule of Civil Procedure was appropriate. Finally, the EEOC objected to the magistrate's recommendation because it failed to set a date for the company's production of non-privileged materials. On this point, the judge agreed with the EEOC, implementing the magistrate's recommendation, with the addition of a date certain for the company's production.

3. EEOC Subpoenas and Electronically Stored Information (ESI)

A similarly complex decision was issued by the Western District of New York in *EEOC v. Sterling Jewelers Inc.*³⁴⁰ Sterling Jewelers was likewise premised upon a magistrate judge's recommendation. However, the issues in *Sterling* related to the employer's obligation to produce electronically stored information ("ESI") and other broad-based requests for documents. While the details of the subpoena enforcement action are discussed below, the upshot is that the employer was required not only to produce documents, but also to search and produce relevant ESI responsive to the EEOC's subpoena.

338 *EEOC v. Bashas', Inc.* 2009 U.S. Dist. LEXIS 97736 (D. Ariz. Sept. 30, 2009).

339 *Wal-Mart Stores East, LP*, 2014 U.S. Dist. LEXIS 34738, at *12.

340 *EEOC v. Sterling Jewelers Inc.*, 2013 U.S. Dist. LEXIS 149009 (W.D.N.Y. Oct. 16, 2013).

The case arose when an employee charged she was passed up for a promotion in favor of a younger, male employee. She also alleged she was fired in retaliation for complaining to her general manager that she believed she was the victim of age and sex discrimination. The employer's counseling report that formed the basis for her termination indicated the charging party's discussion of her pay with anyone other than her manager constituted a violation of the company's Code of Conduct.

In connection with its investigation, the EEOC issued a subpoena requesting: (1) the Code of Conduct and any other policies prohibiting employees from discussing pay; (2) discipline issued to other employees in enforcing such policies; and (3) documents explaining such discipline. The company responded that it had no such documents, except for the Code of Conduct, because it did not actually maintain a policy prohibiting employees from discussing their pay. In response to this assertion by the employer, the charging party produced to the EEOC over 100 declarations from current and former employees asserting they were prohibited from discussing pay.

In light of this evidence from the charging party, the EEOC issued a second subpoena, this time requesting: (1) documents and ESI reflecting contact and employment information for the individuals who signed the charging party's Counseling Report; (2) all versions of the company's Code of Conduct; (3) all documents and ESI explaining the Code of Conduct; (4) documents and ESI reflecting training on the Code of Conduct; (5) documents and ESI setting forth the company's disciplinary policies; (6) documents and ESI reflecting training on the disciplinary policies; (7) documents and ESI describing the company's confidentiality policies; (8) documents and ESI reflecting training on the confidentiality policies; (9) documents and ESI reflecting communications between the employer and its employees concerning employee compensation discussions; (10) documents and ESI reflecting employee discipline relating to employee discussion of compensation; (11) personnel files, including all ESI, for each employee disciplined for discussing compensation; (12) Charging Party's personnel file, including ESI; (13) documents and ESI reflecting contact and employment information for each employee disciplined for discussing compensation; (14) documents and ESI reflecting contact and employment information for each employee disciplined for violating the Code of Conduct; and (15) documents and ESI addressing how disciplinary actions are tracked or coded in any database or other system at the company. The company produced some, but not all, of the documents requested in the second subpoena.

Meanwhile, before it began its investigation into the charge, the EEOC had also filed an action against the employer alleging it maintained a system for making promotion and compensation decisions that was excessively subjective and through which the company permitted or encouraged managers to deny female employees promotions and increased compensation. In addition, at the time of the charge, a class arbitration was pending against the company alleging similar claims, including allegations it maintained a policy prohibiting employees from discussing their wages.

Before the magistrate, the EEOC argued that the company failed to produce documents and ESI responsive to subpoena requests 1, 2, 5, 7, and 12. The company responded that it had conducted a reasonable search and produced all relevant materials. The magistrate accepted this representation, but to resolve any ambiguity regarding ESI, he recommended the company be required to confirm that its search included ESI. If not, he recommended the company include in its response to those subpoena requests a search and production of responsive ESI.

With respect to the balance of the subpoena (items 3, 4, 6, 8-11, and 13-15), the company argued it sought the same information as the EEOC's earlier subpoena, sought information not relevant to the charge, was issued for an improper purpose (namely, to be used in the pending class litigation and arbitration actions), and that compliance would be unduly burdensome. With respect to the company's argument that the 2012 subpoena was duplicative of the EEOC's earlier subpoena, the magistrate disagreed, finding instead that the 2012 subpoena sought information to determine whether the company's earlier assertions in response to the 2010 subpoena were factually supported. The magistrate was more convinced by the company's relevance arguments, which centered on requests generally relating to the code of conduct and confidentiality policies, whether or not related to the discussion of pay. Accordingly, he recommended narrowing the scope of requests 3, 4, 6, 8, 14, and 15 to include only information concerning employee disclosures of compensation at the company.

The magistrate rejected the company's assertion that the EEOC was attempting to use the charge as a vehicle for gathering company-wide compensation-related information for its class action and the parallel arbitration by subpoena rather than proper discovery mechanisms in those actions. To the contrary, the magistrate found the information sought in the 2012 subpoena was "plainly relevant" to the applicable charge and, thus, the fact that it might also be relevant to issues in other pending litigation did not render the subpoena improper.

Finally, in support of its undue burden argument, the company asserted it employed approximately 57,000 individuals in retail sales positions nationwide. Because it did not code personnel records to identify whether an employee received any discipline related to discussions of compensation, it would have to manually review those personnel files in order to respond to the subpoena. Even accepting those allegations as true, the magistrate determined the company had not met its “difficult burden” of establishing compliance with the subpoena would threaten its normal business operations. Rather, he noted a business of the company’s size could accomplish the task using an outside vendor, and subpoena compliance would not even impact its operations. As part of its undue burden argument, the company also asserted that compliance with the subpoena could expose it to liability for violating employees’ privacy rights. The magistrate rejected this assertion out of hand, citing numerous other cases in which privacy arguments have been rejected in connection with administrative subpoena enforcement due to the EEOC’s obligation to keep private any information obtained by the EEOC. Accordingly, the magistrate recommended enforcement of the EEOC’s subpoena as narrowed to relate to discipline and policies germane to employee discussions of compensation. The district judge ordered the subpoena be enforced consistent with the magistrate’s recommendations, including broad-based ESI, if the employer had not, in fact, already searched and produced ESI responsive to the EEOC’s subpoena.

4. Limited Defenses Involving Native American Tribes

In another decision issued this year, *EEOC v. Forest County Potawatomi Community*,³⁴¹ a district court addressed the applicability of the EEOC’s jurisdiction under the Age Discrimination in Employment Act to enforce a subpoena against a Native American Tribe in its capacity as the proprietor of a casino. The subpoena at issue sought information relating to a charge of discrimination filed by an employee of the casino who was not a member of the Tribe. The casino contended, *inter alia*, that it was not subject to the ADEA and, therefore, the subpoena was invalid. As discussed below, despite numerous challenges by the employer arguing that it was not even subject to the EEOC’s jurisdiction, the subpoena was enforced against the Native American Tribe.

In first addressing the Tribe’s argument concerning applicability of the ADEA, the court applied rules of statutory interpretation for interpreting statutes in the context of Indian affairs. Under those rules, a statute of general applicability that is silent on whether it applies to Indian tribes is presumed to apply to them unless one of three exceptions applies: (1) the law touches on exclusive rights of self-governance in purely intramural matters; (2) the application of the law to the tribe would abrogate rights guaranteed by Indian treaties; or (3) there is proof by legislative history or some other means that Congress intended the statute not to apply to Indians on their reservations.³⁴² Preliminarily, the judge found that the ADEA is a law of general applicability based on its broad wording and few exceptions.

The court then turned to the Tribe’s sole argument concerning the exceptions to the rule of general applicability: that the ADEA touches on the exclusive rights of tribal self-governance in purely intramural matters. Purely intramural matters are matters limited to such things as “conditions of tribal membership, inheritance rules, and domestic relations.”³⁴³ The district court found that the ADEA, when applied to an employment relationship between a Tribe-operated casino and a non-Indian employee, does not touch on such matters. However, before moving on to the Tribe’s other arguments, the judge noted that the ADEA has been determined by other circuits not to apply to Indian tribes in certain circumstances. For instance, the Tenth Circuit ruled the ADEA was inapplicable where the tribe established the implication of Indian treaty rights to the issue.³⁴⁴ The Eighth Circuit determined the ADEA was not applicable to Indian tribes as related to a tribe-owned construction company’s employment relationship with a member of the tribe, as the relationship involved purely intramural matters.³⁴⁵ The Ninth Circuit likewise determined the ADEA was not applicable to the employment relationship between a tribe’s housing authority and a member of the tribe.³⁴⁶

The Tribe also argued that the EEOC was precluded from pursuing the subpoena by its prior statement, in a letter of dismissal of another charge, that it was closing its file because the Tribe “is exempt from Title VII and ADEA coverage.” In support of its argument that this statement prevented the EEOC’s subsequent attempt to investigate the later charge, the Tribe cited a case recognizing that an agency cannot change a definitive interpretation of a regulation without following the notice-and-comment procedures in the Administrative

341 *EEOC v. Forest County Potawatomi Community*, 2014 U.S. Dist. LEXIS 62353 (E.D. Wis. May 6, 2014).

342 *Forest County Potawatomi Community*, 2014 U.S. Dist. LEXIS 62353, at *3, citing *Donovan v. Coeur d’Alene Tribal Farm*, 751 F.2d 1113, 1116 (9th Cir. 1985).

343 *Id.*

344 2014 U.S. Dist. LEXIS 62353, *10-11, citing *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989).

345 *Id.* citing *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc.*, 986 F.2d 246 (8th Cir. 1993).

346 *Id.* citing *EEOC v. Karuk Tribe Housing Authority*, 260 F.3d 1071 (9th Cir. 2001).

Procedure Act. The court found this case inapposite, noting the EEOC had promulgated no regulation by its issuance of the earlier dismissal determination. Finally, the Tribe also suggested that sovereign immunity might protect it from the EEOC's subpoena. However, the Tribe also conceded that courts have uniformly held that an Indian tribe's sovereign immunity does not apply to claims brought by the United States. Thus, the judge ordered compliance with the subpoena as written.

F. Confidentiality

The confidentiality of information provided to the EEOC by an employer continues to be a source of concern to many employers. Although the courts generally have rejected confidentiality claims by employers,³⁴⁷ two recent decisions provide some limited support for employers when a compelling reasons for confidentiality are established.

In a recent subpoena enforcement action, one court continued to make minor inroads in setting some parameters dealing with the confidentiality of information provided to the EEOC. As discussed below, *EEOC v. Farmer's Pride, Inc.*³⁴⁸ dealt with the EEOC's requested reconsideration of an order that limited disclosure by the EEOC regarding information provided by the employer.

In a FY 2013 decision, *EEOC v. Farmer's Pride, Inc.*,³⁴⁹ a district court granted the employer's request that, if it be required to provide the EEOC with contact information for all employees at its facility, the court also issue a confidentiality order to protect employees.

The focus of the employer's initial challenge to enforcement of the subpoena was preventing the information disclosed by the employer from being provided by the EEOC to the charging party, the Friends of Farmworkers, and its attorneys, who Farmer's Pride alleged would use employee contact information for improper purposes. In support of this assertion, the employer alleged that Friends of Farmworkers, a non-profit organization with its roots in the American Civil Liberties Union, had, in the past, accessed similar employee contact information and used it to engage in "bullying, telephone solicitation, and an attorney hounding an employee at his house regarding court documents."³⁵⁰ The EEOC responded with its usual argument, that regulatory and internal protections are sufficient to protect confidential information provided to it. However, given Friends of Farmworkers' past misconduct, the court was not satisfied and issued a protective order.

In FY 2014, the EEOC applied to the court for reconsideration of its earlier order.³⁵¹ In support of its motion for reconsideration, the EEOC put forth three arguments: (1) the court failed to apply controlling Third Circuit law; (2) the court misapplied the "good cause" standard by examining why the Friends of Farmworkers sought the private information; and (3) the court relied on unsubstantiated assertions and inadmissible hearsay in finding that the Friends of Farmworkers would misuse employee contact information. The court rejected each of the EEOC's arguments in turn, affirming its earlier entry of a confidentiality order.

In a second decision, although not in the context of a subpoena enforcement action, a court also agreed to a confidentiality order regarding information produced to the EEOC by the employer. *EEOC v. Metro Special Police & Security Services, Inc.*³⁵² was an action by the EEOC against Metro Special Police under Title VII for sex discrimination and retaliation alleging the defendant's captain and lieutenant engaged in sexual harassment of subordinate security officers and retaliated against them for complaining to management. Pursuant to discovery in that case, the EEOC subpoenaed records from the Gaston County Sheriff's Office requesting documents in its possession relating to one of the supervisors alleged by the EEOC to have engaged in unlawful discrimination. The sheriff's office notified the EEOC that certain documents requested by the subpoena could, under North Carolina law, be produced only pursuant to court order. The sheriff's office also requested that the EEOC seek a protective order permitting documents produced to be designated confidential. In this context, the EEOC actually agreed, filing a motion with the court requesting an order enforcing its subpoena and also a protective order. The EEOC's motion was unopposed; thus, the court ordered compliance, and further ordered that the documents produced be designated confidential and not disclosed outside of the pending litigation.

347 See Barry Hartstein, et al., *Annual Report on EEOC Developments: FY 2012* at 26-27; *Annual Report on EEOC Developments: FY 2013*, at 35.

348 *EEOC v. Farmer's Pride, Inc.*, 2014 U.S. Dist. LEXIS 35793 (E.D. Pa. Mar. 18, 2014).

349 *EEOC v. Farmer's Pride, Inc.*, 2012 U.S. Dist. LEXIS 156484 (E.D. Pa. Oct. 31, 2012).

350 *Farmer's Pride, Inc.*, 2012 U.S. Dist. LEXIS 156484, at *23.

351 In addition, Friends of Farmworkers filed a Motion to Intervene, which the court denied upon determining the entity had neither standing nor a protectable interest supporting intervention as a matter of right, and failed to otherwise establish an interest in the litigation's outcome so as to support permissive intervention.

352 *EEOC v. Metro Special Police & Security Services, Inc.*, 2014 U.S. Dist. LEXIS 39775 (W.D.N.C. Mar. 21, 2014).

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Attacking Complaint Based on Lack of Specificity

Employers generally were unsuccessful in FY 2014 in challenging EEOC complaints based on lack of specificity under the heightened pleading standard set out in *Twombly* and *Iqbal*.³⁵³ In a retaliation case, the Eastern District of North Carolina denied a motion to dismiss, holding that the complaint stated facts sufficient to show the claimant reasonably believed she was being harassed based on her gender, and therefore had engaged in protected activity when she complained,³⁵⁴ and that she did not need to plead facts that would actually amount to a hostile work environment or disparate treatment to survive dismissal.³⁵⁵ The Northern District of Illinois held that the EEOC's complaint in an ADA case alleged conduct sufficiently pervasive or severe to state a hostile work environment claim by including allegations of derogatory epithets and mocking behavior.³⁵⁶

The federal district court in New Hampshire denied an employer's Rule 12(c) motion for judgment on the pleadings, finding allegations the claimant witnessed and became aware of sexual harassment of other employees was sufficient to state a claim for hostile work environment, and facts supporting a close personal friendship between the claimant and another employee who filed an EEOC charge based on alleged sexual harassment were sufficient to state a claim for third-party retaliation.³⁵⁷

In the EEOC's ongoing class challenge to United Parcel Service's (UPS) leave policies, a Chicago federal court denied UPS's motion to dismiss the EEOC's second amended complaint, finding the agency sufficiently alleged use of a prohibited qualification standard by alleging that UPS's leave policy amounted to a "100 percent healed" requirement.³⁵⁸

In a case perhaps reflecting more an unwillingness to change legal standards than lack of specificity in the complaint, the Southern District of Alabama granted an employer's motion to dismiss the EEOC's complaint alleging a grooming policy prohibiting dreadlocks was racially discriminatory, finding the complaint failed to establish a plausible claim for relief because it is well-established that Title VII prohibits discrimination based only on immutable characteristics, and a hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic.³⁵⁹

2. Key Issues in Class-Related Allegations

Unique issues arose in class-wide lawsuits brought by the EEOC in FY 2014. In a suit alleging sex discrimination against a nationwide class of employees, *EEOC v. Sterling Jewelers, Inc.*,³⁶⁰ the employer successfully moved for partial summary judgment on the grounds that the EEOC had failed to meet its burden to prove the agency conducted a pre-suit investigation on a nationwide basis, an administrative prerequisite to the EEOC filing suit. Because the EEOC could not establish a triable issue of fact as to whether its pre-suit investigation had a nationwide scope, the federal court for the Western District of New York granted summary judgment for the employer on the EEOC's nationwide pattern-or-practice claim, leaving only individual claims. The EEOC appealed to the Second Circuit, where briefing is currently underway.³⁶¹

353 See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 644 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

354 *EEOC v. Newport News Industrial Corp.*, 2014 U.S. Dist. LEXIS 28988, **6-7 (E.D.N.C. Mar. 5, 2014).

355 *Newport News Industrial Corp.*, 2014 U.S. Dist. LEXIS 28988, at **7-8.

356 *EEOC v. Mont Brook, Inc.*, 2014 U.S. Dist. LEXIS 70471, *3 (N.D. Ill. May 20, 2014).

357 *EEOC v. Fred Fuller Oil Co., Inc.*, 2014 U.S. Dist. LEXIS 12214, at **9-17 (D.N.H. Jan. 31, 2014).

358 *EEOC v. United Parcel Service, Inc.*, 2014 U.S. Dist. LEXIS 17187, at **4-6 (N.D. Ill. Feb. 11, 2014). The court had initially dismissed the EEOC's original complaint and denied leave to re-file, but reversed course on reconsideration and allowed the EEOC to enter the second amended complaint that was the subject of UPS's latest, unsuccessful challenge. See *EEOC v. United Parcel Service, Inc.*, 2013 U.S. Dist. LEXIS 4462 (N.D. Ill. Jan. 11, 2013) (overruling *EEOC v. United Parcel Service, Inc.*, 2012 U.S. Dist. LEXIS 92994, at *5 (N.D. Ill. July 3, 2012)).

359 *EEOC v. Catastrophe Mgt. Solutions*, 2014 U.S. Dist. LEXIS 50822, at *11 (S.D. Ala. Mar. 27, 2014).

360 *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 304 (Jan. 2, 2014) (Report, Recommendation and Order), adopted by *EEOC v. Sterling Jewelers, Inc.*, 2014 U.S. Dist. LEXIS 31524 (Mar. 10, 2014).

361 *EEOC v. Sterling Jewelers, Inc.*, Case No. 14-1782 (2d Cir.).

Courts continue to grapple with distinctions between the EEOC's authority to bring lawsuits on behalf of individual claimants under Section 706 and to file pattern-or-practice actions under Section 707.³⁶² In 2012, the Sixth Circuit, the only appellate court to address the issue, held in *Serrano v. Cintas Corp.* that the EEOC may bring a civil action on a pattern-or-practice theory under Section 706.³⁶³ This holding is significant because it provides the EEOC with two avenues for pursuit of claims under Section 706: (a) presenting circumstantial evidence under *McDonnell Douglas's*³⁶⁴ familiar burden-shifting analysis; or (b) meeting a heightened *prima facie* case standard to establish pattern-or-practice of discrimination under *International Brotherhood of Teamsters v. United States*.³⁶⁵ While under *McDonnell Douglas* the burden of proof at all times remains on the EEOC, under the *Teamsters* framework, once the EEOC establishes a pattern or practice of discrimination, the burden of proof shifts to the defendant on the question of individual liability. In addition, permitting a pattern-or-practice claim under Section 706 allows the EEOC potentially to recover compensatory and punitive damages, which are not available for pattern-or-practice claims under Section 707 of Title VII.

Without other circuit court authority, the federal district courts in FY 2014 have followed the Sixth Circuit's lead and allowed the EEOC to pursue pattern-or-practice cases under Section 706. This was the approach taken by the federal district court in Maryland,³⁶⁶ in a case involving an alleged pattern-or-practice of sex discrimination in hiring practices. Citing *Serrano*, the court denied the employer's motion to dismiss the EEOC's Section 706 claims and held that if the EEOC prevailed in establishing a pattern or practice of discrimination in Phase I of bifurcated proceedings, the EEOC would be permitted to use the *Teamsters* burden-shifting framework in Phase II trials to resolve claims on behalf of individuals.³⁶⁷

However, in the Maryland district court case, the court also denied the EEOC's motion to have punitive damages determined on a class-wide basis during Phase I. The court found that having the Phase I jury decide both eligibility for, and the amount of, punitive damages on a class-wide basis would potentially violate the employer's and the individual claimants' constitutional rights, as would having the Phase I jury decide only eligibility for punitive damages on a class-wide basis. Thus, the punitive damages determination would be reserved for the individual trials in Phase II.³⁶⁸

In another recent decision, in light of *Serrano*, the Southern District of Texas reversed an earlier ruling holding that pattern-or-practice claims must be brought under Section 707, not Section 706, and allowed the EEOC to proceed with the *Teamsters* method of proof in a Section 706 case.³⁶⁹

The *EEOC v. JBS USA, Inc.* case illustrates other unique pleadings issues that may arise when class-wide claims are brought under Section 706 and/or 707.³⁷⁰ In *JBS*, the EEOC brought a pattern-or-practice claim in federal court in Nebraska against a meatpacking company alleging failure to accommodate Muslim employees' requests for prayer breaks. The case was bifurcated, with Phase I to determine the EEOC's pattern-or-practice claim, and Phase II to determine individual claims. During Phase I of the case, the court found the employer had established its affirmative defense that providing the requested accommodations would present an undue hardship, and entered judgment in favor of the employer.³⁷¹ Because the ruling was not an appealable final judgment, the employer moved for certification of final judgment as to Phase I under Federal Rule of Civil Procedure 54(b), which the court granted over the EEOC's objection.³⁷² The court then found judicial economy served in allowing the EEOC to appeal the Phase I finding that the employer had established its undue hardship affirmative defense prior to commencing approximately 150 individual discrimination lawsuits where the employer would rely on the same evidence it used to establish its defense in Phase I.³⁷³

362 See 42 U.S.C. § 2000e-5.

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

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

365 431 U.S. 324 (1977).

366 *EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61425 (D. Md. Mar. 11, 2014).

367 *Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61425, at **3-4. However, the court left itself leeway to change course prior to the Phase II trials, stating, "[s]hould there be a change in the precedential climate prior to the commencement of Phase Two, the Court may reconsider this decision." *Id.* at *3.

368 *Id.*

369 *EEOC v. Bass Pro Outdoor, LLC*, 2014 U.S. Dist. LEXIS 103552 (S.D. Tex. July 30, 2014), *overruling EEOC v. Bass Pro Outdoor, LLC*, 2012 U.S. Dist. LEXIS 75597, at **29-30, 39-41 (S.D. Tex. May 31, 2012).

370 *EEOC v. JBS USA, LLC*, Case No. 10-cv-318 (D. Neb.).

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

372 *EEOC v. JBS USA, LLC*, 2014 U.S. Dist. LEXIS 9635 (D. Neb. Jan. 27, 2014).

373 *JBS USA, LLC*, 2014 U.S. Dist. LEXIS 9635, at **11-12.

The court subsequently granted the employer's motion to stay the proceeding based on the EEOC's Notice of Appeal to the Eighth Circuit, which was filed on March 27, 2014.³⁷⁴ The EEOC thereafter dropped its appeal of the summary judgment ruling in May 2014, electing to proceed with individual religious discrimination claims on behalf of various Somali Muslim workers, and the parties have continued to have numerous disputes regarding the merits of the cases.³⁷⁵

However, the Nebraska federal court rulings had no effect on parallel pattern-or-practice litigation the EEOC brought against the same employer in federal court in Colorado, containing similar factual allegations but arising out of the company's plant in Colorado, instead of Nebraska.³⁷⁶ These sister proceedings illustrate a scenario where the EEOC chose not to combine all class-wide claims against an employer into one lawsuit, instead requiring the employer to defend simultaneously on two fronts, with the potential for inconsistent outcomes.

3. Who is the Employer?

In FY 2014, employers had no success challenging whether the EEOC had sufficiently established a joint-employer relationship. The Sixth Circuit and district courts in Pennsylvania and Washington found the EEOC had introduced enough evidence to establish a joint-employer relationship to overcome motions for summary judgment in varying situations.

In the Sixth Circuit and in a federal district court in Washington state, the courts analyzed traditional joint-employer fact scenarios.³⁷⁷ In the Sixth Circuit, the EEOC argued that a general contractor and subcontractor jointly employed individuals hired to operate buck hoists at a construction site.³⁷⁸ Although the subcontractor was to supervise the employees, the subcontractor had minimal oversight, and the general contractor exercised more control over their work.³⁷⁹ Reasoning that entities are joint employers if they share or co-determine matters governing the essential terms and conditions of employment, the Sixth Circuit reversed the district court, holding the record supported a determination that the general contractor jointly employed the operators.³⁸⁰ The Washington federal district court denied two defendant orchard companies' motions for summary judgment wherein they asserted they were not the joint employer for Thai guest workers hired, housed, and paid by a defendant labor contractor.³⁸¹ Although the court applied the 12-factor test used for the employee-versus-independent contractor analysis, the court noted that the right to control the means and manner of the worker's performance is the primary factor to determine whether one is the employer of the worker.³⁸²

In Pennsylvania, the court evaluated a less common set of facts: whether an entity acting as a second entity's agent could be held liable under Title I of the ADA for conduct that occurred before the second entity became an employer under the statute.³⁸³ Pursuant to the ADA, an employer is a person who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person.³⁸⁴ In the Pennsylvania case, a management organization recruited and hired more than 300 employees for a healthcare facility.³⁸⁵ Applicants claimed they were required to undergo pre-employment physical examinations and were then denied employment based on actual or perceived disabilities.³⁸⁶ The management organization claimed it could not be held liable under Title I of the ADA because, at the time of the alleged conduct, the healthcare facility had yet to employ any individual, and therefore,

374 *EEOC v. JBS USA, LLC*, 2014 U.S. Dist. LEXIS 73238 (D. Neb. May 29, 2014).

375 See Case Docket, 8:10-cv-00318 (D. Neb.).

376 *EEOC v. JBS USA, LLC*, Case No. 10-cv-2103 (D. Colo.).

377 *EEOC v. Skanska USA Building, Inc.*, 2013 U.S. App. LEXIS 24806, at *2 (6th Cir. Dec. 10, 2013); *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 72866, at **11-12 (E.D. Wash. May 28, 2014).

378 2013 U.S. App. LEXIS 24806, at *9.

379 *Id.*, 2013 U.S. App. LEXIS 24806, **2-3. In finding the general contractor a joint employer, the court reasoned the general contractor had authority to remove the individuals from the site, directed the individuals' daily responsibilities and assignments, supervised the work performed, and handled hostile work environment complaints from the individuals.

380 2013 U.S. App. LEXIS 24806, at *9.

381 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 72866, at *17.

382 *Id.* at *13. The other factors the court evaluated included: (1) the skills required; (2) the source of the instrumentalities and tools; (3) the location of the work; (4) the duration of the relationship between the parties; (5) whether the hiring party has the right to assign additional projects to the hired party; (6) the extent of the hired party's discretion over when and how long to work; (7) the method of payment; (8) the hired party's role in hiring and paying assistants; (9) whether the work is part of the regular business of the hiring party; (10) whether the hiring party is in business; (11) the provision of the employee benefits; and (12) the tax treatment of the hired party.

383 *EEOC v. Grane Healthcare Co.*, 2014 U.S. Dist. LEXIS 28477 (W.D. Pa. Mar. 6, 2014).

384 42 U.S.C. §12111(S)(A).

385 *Grane Healthcare Co.*, 2014 U.S. Dist. LEXIS 28477, at *3.

386 *Id.* at *6.

did not meet the ADA's definition of "employer."³⁸⁷ The court rejected that position. It first opined that an agent independently satisfying the ADA's coverage criteria is amenable to suit by an individual formally employed by a different entity.³⁸⁸ Second, the court determined whether the EEOC had to independently establish the healthcare facility was an employer before the management organization could be held liable as an agent.³⁸⁹ The court held the statute does not require that an entity be an agent of a current employer in order to be a covered entity, and the management organization could be held liable for discriminatory acts allegedly committed in its capacity as an existing agent of a future employer.³⁹⁰ The court also denied, however, the EEOC's partial summary judgment motion against the healthcare facility. Stating the ADA's 15-employee coverage requirement must be strictly construed, the court concluded the facility did not meet the definition of employer when the alleged discriminatory conduct occurred and there were unresolved questions as to whether the management organization and the healthcare facility could be deemed a "single employer" during that time.³⁹¹

4. EEOC Motions—Challenges to Affirmative Defenses

The EEOC has continued to challenge defendants' affirmative defenses through motions to strike and/or for summary judgment. Under the Federal Rules, plaintiffs can move to strike affirmative defenses because they are redundant, immaterial, impertinent or scandalous.³⁹² Courts generally view such motions with disfavor, considering it a drastic remedy, and ordinarily deny such motions unless the matter under challenge has no relation to the controversy and may prejudice the other party.³⁹³

Despite this high hurdle, in FY 2014, federal district courts in Maryland and Indiana partially granted the EEOC's motions to strike several affirmative defenses.³⁹⁴ In Maryland, the court struck affirmative defenses for laches, the EEOC's failure to follow its own administrative procedures, and failure to identify class members, as the court had previously ruled upon these issues in the defendant's motion to dismiss.³⁹⁵ However, the court denied the EEOC's motion to dismiss the affirmative defenses of estoppel and waiver, pled because of the sexual harassment victim's failure to file criminal charges or retain evidence of any sexual assault, reasoning that whether the sexual assault occurred may bear on the outcome of the case.³⁹⁶ In Indiana, the court struck several affirmative defenses, holding they did not meet the pleading requirements of Rule 8, were nothing more than bare conclusory legal allegations, were redundant, were not proper affirmative defenses, and were essentially denials of liability or causation.³⁹⁷ When pleading affirmative defenses, defendants must comply with all pleading requirements from the Federal Rules, including setting forth a short and plain statement of the defense.³⁹⁸ The Indiana district court further instructed that affirmative defenses of "failure to state a claim" and a request for fees and costs are not considered proper affirmative defenses and should instead be brought by motion.³⁹⁹

In the *Global Horizons* case in Hawaii, the EEOC moved for summary judgment on 18 of 47 defenses against one defendant and 20 of 32 defenses against a second defendant.⁴⁰⁰ The court granted the EEOC's motion for summary judgment on 14 affirmative defenses against one defendant and 18 defenses against another defendant based largely on the impropriety of a matter as an affirmative defense, e.g., failure to state a claim; the matter not being applicable to the claims, e.g., the requirement to mitigate damages does not apply to claims seeking compensatory damages; or on the facts in evidence.⁴⁰¹ The district court also denied the defendant's motion for summary judgment regarding its laches affirmative defense, which was based on the five years that had elapsed between the start of the EEOC's investigation

387 *Id.* at *25.

388 *Id.* at *34. The management organization independently satisfied the ADA's coverage requirement because it met the ADA's numerosity requirement and directly controlled the applicants' access to employment opportunities with the healthcare facility.

389 *Id.* at *32.

390 *Id.* at *35.

391 *Id.* at *42.

392 Fed. R. Civ. P. 12(f).

393 *EEOC v. Spoa, LLC*, 2014 U.S. Dist. LEXIS 756, at **11-12 (D. Md. Jan. 3, 2014).

394 *Id.*, *EEOC v. SVT, LLC*, 2013 U.S. Dist. LEXIS 161989 (N.D. Ind. Nov. 14, 2013).

395 *Spoa, LLC*, 2014 U.S. Dist. LEXIS 756, at **13-16.

396 *Id.* at **12-13.

397 *SVT, LLC*, 2013 U.S. Dist. LEXIS 161989, at **3-12.

398 *Id.* at *2.

399 *Id.* at **3, 8.

400 *EEOC v. Global Horizons, et al*, 2014 U.S. Dist. LEXIS 26342, at *4 (D. Haw. Feb. 28, 2014); *EEOC v. Global Horizons, et al*, 2014 U.S. Dist. LEXIS 25932, at *48 (D. Haw. Feb. 28, 2014).

401 *Global Horizons, et al*, 2014 U.S. Dist. LEXIS 25932, at **25-48; *Global Horizons, et al*, 2014 U.S. Dist. LEXIS 26342, at **8-32.

and the filing of the action.⁴⁰² In doing so, the court opined it is well-established that the EEOC is not subject to any statute of limitations restriction on its ability to file suit, and the defendant introduced no evidence of inaction by the EEOC during that five-year period, whereas the EEOC introduced correspondence showing it was actively investigating the matter by investigating other entities involved in the case.⁴⁰³

5. Venue

In the Northern District of Texas, a defendant moved to transfer the case from the Dallas Division to the Fort Worth Division, where the defendant's business was located and the plaintiff resided.⁴⁰⁴ The court initially determined the claims could have been brought in the Fort Worth Division because the allegedly unlawful employment practice was committed in the State of Texas,⁴⁰⁵ but after reviewing the private and public factors, the court denied the defendant's motion for failure to satisfy the burden of showing that the Fort Worth Division would be clearly more convenient.⁴⁰⁶

6. Miscellaneous

Employers raised various other pleading issues during FY 2014 with varying degrees of success. The Northern District of Illinois denied an employer's motion to dismiss a complaint that went beyond the scope of the underlying administrative charge, finding that, unlike private plaintiffs, the EEOC is entitled to bring suit on allegations uncovered during the course of its investigation that are not contained in the administrative charge.⁴⁰⁷ The Eastern District of California denied an employer's motion to prevent the EEOC from relying on facts occurring after the date of the claimant's EEOC charge, finding the original charge sufficient to support EEOC action for any discrimination developed during a reasonable investigation of the charge, so long as the additional allegations of discrimination are included in the reasonable cause determination and subject to conciliation.⁴⁰⁸

However, where the EEOC charge and probable cause determination had no reasonable relation to an allegedly retaliatory police report by the employer against a former human resources manager nearly two years after she resigned from employment, the federal district court in Minnesota dismissed the EEOC's retaliation claim for failure to exhaust administrative remedies.⁴⁰⁹ The court also dismissed the EEOC's retaliatory hostile work environment and constructive discharge claims with respect to the human resources manager because the employer became aware of her protected activity only *after* she resigned, and, thus, could not have retaliated against her or intended to force her to quit.⁴¹⁰

The federal district court in Maryland allowed the plaintiff-intervenor and an unnamed class member to proceed under pseudonyms in the pleadings and court documents, provided they used their legal names in open court.⁴¹¹ In contrast to a typical sexual harassment case, the court found that the fact that the individuals were alleged victims of rape or attempted rape weighed in favor of allowing them to proceed under pseudonyms.⁴¹² Noting the enduring nature of docket filings in the internet age, the court found that requiring the individuals to use their legal names posed needless risk of mental harm.⁴¹³ The employer admitted to knowing the identity of the plaintiff-intervenor, and so would not suffer prejudice by allowing her to proceed anonymously.⁴¹⁴ As to the unnamed class member, the court partially granted the employer's motion for a more definite statement to require the EEOC to reveal her identity to the employer, in order for the employer to respond to the complaint allegations about her.⁴¹⁵

402 *Global Horizons, et al*, 2014 U.S. Dist. LEXIS 25932, at **22-23.

403 *Id.*

404 *EEOC v. The Fort Worth Center of Rehabilitation*, 2013 U.S. Dist. LEXIS 150538, at ** 4-5 (N.D. Tex. Oct. 18, 2013).

405 *The Fort Worth Center of Rehabilitation*, 2013 U.S. Dist. LEXIS 150538, at *5. Venue is proper and suit might be brought (1) in any judicial district in the state in which the unlawful employment practice is alleged to have been committed, (2) in the judicial district in which the employment records relevant to such practice are maintained and administered, (3) in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, or (4) if the respondent is not found within any such district, within the judicial district in which the respondent has his principal office. *Id.*

406 *Id.* at *11. The private factors considered include: access to sources of proof, availability of compulsory process to secure attendance of witnesses, cost of attendance of witnesses, and all other practical problems. *Id.* at **6-9. The public factors considered are administrative difficulties, local interest, familiarity with governing law, and avoidance of unnecessary conflict of laws. *Id.* at *10.

407 *EEOC v. Professional Freezing Services, Inc.*, 2013 U.S. Dist. LEXIS 172862 (N.D. Ill. Dec. 3, 2013).

408 *EEOC v. Farmers Ins. Co.*, 2014 U.S. Dist. LEXIS 74318, at **23-24 (E.D. Cal. May 30, 2014).

409 *EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **12-16 (D. Minn. Aug. 27, 2014).

410 *PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **9-12.

411 *EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145 (D. Md. Oct. 15, 2013).

412 *Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at **16-17.

413 *Id.* at **12-15.

414 *Id.* at **13-14.

415 *Id.* at **29-30.

Over the EEOC's objection, the Northern District of Ohio granted an employer's motion to join the employee's union as a defendant to the action, on the basis that the union played a role equal to its own in determining that the employee would be fired.⁴¹⁶

B. Laches Defenses

The EEOC is not required to complete its pre-suit investigation within a certain time period. However, dismissal may be an appropriate remedy when the EEOC's delay in bringing suit (1) is unreasonable and (2) results in undue prejudice to the employer's ability to defend against the lawsuit.⁴¹⁷ The party raising the laches defense bears the burden of proving both elements.⁴¹⁸

Determining whether a laches defense applies "demands a close evaluation of all the particular facts in a case."⁴¹⁹ "No particular period of delay is *per se* inexcusable or unreasonable."⁴²⁰ Consequently, "a claim is not easily disposed of at the motion to dismiss stage based on a defense of laches."⁴²¹

The court in *EEOC v. Global Horizons, Inc.*⁴²² applied these standards and denied a defendant's motion for summary judgment on the laches defense, reasoning that "the passage of five years does not by itself establish unreasonable delay."⁴²³ The court further found an unsupported, general assertion about the potential unavailability of prior employees who would have been key witnesses, is insufficient to demonstrate prejudice.⁴²⁴

Though the elements of a laches defense are not easy to prove, the defense should not be ignored. In *EEOC v. Propak Logistics*,⁴²⁵ nearly seven years passed between the charge filing date and the date the EEOC filed suit. The defendant moved to dismiss based on the laches defense. The court denied the motion without prejudice and ordered the parties to engage in limited discovery on the issue of whether the defendant experienced undue prejudice as a result of the EEOC's delay.⁴²⁶ The defendant filed a motion for summary judgment based on the laches defense after the discovery period ended. The court granted the defendant's summary judgment motion, finding the EEOC's delay was unreasonable and caused the defendant material prejudice.⁴²⁷ The court also granted the defendant's request for attorneys' fees.⁴²⁸

The laches defense may also be a useful tool to limit the number of participants in an EEOC-initiated class action. In *EEOC v. Evans Fruit Co.*,⁴²⁹ the EEOC alleged sex-based hostile environment claims on behalf of specific charging parties and a class of similarly situated female employees.⁴³⁰ The EEOC filed its First Amended Complaint on November 29, 2011, identifying three additional class members who had given statements to the EEOC.⁴³¹ A year later, when the case was less than four months from trial, neither party could locate the three late-added class members. Defendant claimed laches and asked the court to dismiss the three individuals from the class. The court granted the defendant's motion, finding it would be "inequitable and prejudicial" to the defendant to allow the individuals to remain as class members.⁴³²

Recent cases demonstrate a laches defense, though difficult to prove, may be dispositive of a case. Defendants should not hesitate to take on the burden of proof when opposing EEOC claims that began several years before the date the EEOC filed suit.

416 *EEOC v. Kyklos Bearing Int'l, LLC*, 2014 U.S. Dist. LEXIS 52259 (N.D. Ohio Apr. 3, 2014).

417 *EEOC v. Propak Logistics, Inc.*, 2013 U.S. Dist. LEXIS 43511, at *12 (W.D.N.C. Mar. 27, 2013), *aff'd*, *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145 (4th Cir. 2014); *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 25932, at *24 (D. Haw. Feb. 28, 2014) (setting forth elements).

418 *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 88560, at *17 (D. Haw. Jun. 30, 2014).

419 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 25932, at *24 (internal quotations omitted).

420 *EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at *25 (D. Md. Oct. 15, 2013).

421 *Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145, at *25.

422 *Id.* at **23-25.

423 *Id.* at *22.

424 *Id.* at **24-25.

425 *Propak Logistics*, 2013 U.S. LEXIS 43511, at **7-10.

426 *Id.* at **2-3.

427 *Id.* at *5.

428 *Propak Logistics*, 2013 U.S. LEXIS 43511, at *16.

429 *EEOC v. Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *4 (E.D. Wash. Nov. 27, 2012).

430 *Evans Fruit Co.*, 2012 U.S. Dist. LEXIS 169006, at *2.

431 *Id.* at *3.

432 *Id.* at *4.

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

In FY 2014, the EEOC continued its focus on litigating higher-impact class claims pursuant to Section 707, which allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in Section 706.⁴³³ Section 707 incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.⁴³⁴ The Fourth Circuit is currently entertaining an appeal involving this issue, which no other federal circuit court has yet directly addressed.⁴³⁵ In the past few years, most district courts have held that the 300-day period applies.⁴³⁶ However, a minority of district courts persists in holding that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day period.⁴³⁷

In *EEOC v. New Prime*, a district court in Missouri observed that a “few” district courts have applied the 300-day period to pattern-or-practice cases and then held that “the very nature” of pattern-or-practice cases attacking systemic discrimination “seems to preclude” use of the 300-day period.⁴³⁸ In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 district court case that held, “After careful consideration, this Court has concluded that the limitations period applicable to § 706 actions does not apply to § 707 cases, despite the language of § 707(e), which mandates adherence to the other procedural requirements of § 706.”⁴³⁹ The *Mitsubishi* court noted 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.⁴⁴⁰ 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.”⁴⁴¹ Of course, as described above, other courts have disagreed, finding that the statute’s plain language controls and there is no reason why the 300-day period cannot be calculated from the filing of the EEOC’s charge.⁴⁴² However, to the extent courts continue to cite *Mitsubishi*, such as the court in the recent *EEOC v. New Prime* case, the *Mitsubishi* case poses a continuing risk to employers since it leaves no temporal protection for stale claims so long as the EEOC can find evidence of discrimination outside the 300-day period. Thus, employers must still be prepared to persuasively argue the 300-day period *does* apply to pattern or practice claims.

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).⁴⁴³ Although by no means settled law, some courts have held, 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.⁴⁴⁴ This is helpful to employers because it shortens the time period during which the EEOC can reach back to draw in additional claimants.

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

434 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.

435 See *EEOC v. Freeman* No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013).

436 See *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).

437 *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).

438 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34.

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

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

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

442 *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).

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

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

In an effort to resurrect cases barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, and also the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.⁴⁴⁵ This argument was successful in *EEOC v. PMT Corp.*, where the district court held that the 300-day limit does not apply to pattern-or-practice cases where a “continuing violation” is alleged.⁴⁴⁶ To counter the EEOC’s reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on some district court decisions holding that the continuing violation doctrine does not apply to discrete acts of discrimination, such as terminations of employment.⁴⁴⁷ Moreover, some courts have held that even in the context of an “unlawful employment practice” claim such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the “300-day window.”⁴⁴⁸ In other words, where the EEOC seeks to enlarge the number of individuals entitled to recover, rather than the number of claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims would otherwise be outside the 300-day window based on the continuing violations doctrine and, before district courts at least, an even stronger argument that the statute of limitations set forth in Section 706 must be applied to Section 707 claims. Employers should soon receive additional clarity when the Fourth Circuit weighs in on this issue.⁴⁴⁹ Either way, employers can expect the EEOC to increase its reliance on equitable defenses, such as the continuing violation doctrine.

D. Investigation and Conciliation Obligations

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or “class” claims under Section 706, the EEOC is required to investigate and then attempt to eliminate any alleged unlawful employment practice by informal methods of conciliation.⁴⁵⁰ Thus, the EEOC must investigate and then engage in “conciliation” with an employer before filing a lawsuit. Only after “[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer.”⁴⁵¹ If the EEOC fails to conciliate in good faith prior to filing suit, the court may stay the proceedings to allow for conciliation or dismiss the case.⁴⁵²

Employers continue to challenge the sufficiency of the EEOC’s investigation and conciliation efforts with mixed results. Based on the Seventh Circuit’s decision in *Mach Mining* (as further discussed below), the EEOC has become more aggressive in responding to those challenges. Below is a discussion of cases from FY 2014 that address employer challenges to claimed failures by the EEOC to investigate and conciliate in good faith, the meaning of “good faith” conciliation, and the EEOC’s attacks against employer use of the EEOC’s failure to conciliate as an affirmative defense.

1. Challenging Failure to Conciliate in Litigation

Employers have regularly challenged the sufficiency of the EEOC’s conciliation efforts after the EEOC has actually filed suit. Specifically, employers have sought dismissal based on the EEOC’s purported failure to comply with its statutory conciliation obligations, alleging the EEOC’s pre-litigation conciliation efforts are deficient on both procedural and substantive grounds.

445 *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 within 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, *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).

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

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

448 *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).

449 *EEOC v. Freeman* No. 13-2365 (4th Cir.) (Notice of Appeal filed Nov. 6, 2013).

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

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

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

Employers have also recently argued that a failure to conciliate in good faith by the EEOC precludes a federal court from having subject matter jurisdiction to adjudicate a lawsuit. This “lack of subject matter jurisdiction” theory is not readily accepted by most courts. For example, in *EEOC v. Global Horizons, Inc.*, an employer tried to dismiss a national origin discrimination lawsuit, claiming the court did not have subject matter jurisdiction over the EEOC’s lawsuit because the EEOC had not satisfied its conciliation obligations.⁴⁵³ The court rejected the argument, holding the EEOC’s pre-suit requirements (*i.e.*, notice, investigation, reasonable-cause determination, and conciliation) are not subject matter jurisdiction requirements, but rather elements of the EEOC’s claim.⁴⁵⁴ It held that, where the EEOC has failed to satisfy its pre-suit requirements, the proper avenue for challenging this failure is a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted or a Rule 56 motion for summary judgment.⁴⁵⁵

Similarly, in *EEOC v. Pioneer Hotel*, an employer moved to dismiss the EEOC’s lawsuit pursuant to Rule 12(b)(1), arguing the court was without subject matter jurisdiction to “hear the present Title VII action because the EEOC failed to engage in a good faith attempt at conciliation pursuant to 42 U.S.C. § 2000e-5(b).”⁴⁵⁶ Like other courts, the district court rejected this argument,⁴⁵⁷ holding the conciliation requirement was not a jurisdictional prerequisite to the filing of a Commission suit.⁴⁵⁸ The court noted that before 2006, a finding of good faith conciliation was a “jurisdictional condition precedent to suit by the EEOC.”⁴⁵⁹ However, since the U.S. Supreme Court’s opinion in *Arbaugh v. Y&H Corp.*,⁴⁶⁰ evaluating several provisions of Title VII and holding them to be “claim elements” instead of jurisdictional requirements, most courts now hold the requirement to conciliate to be an element of the EEOC’s claim, not a jurisdictional requirement.

In 2014, courts continued to reject employer arguments that a failure to conciliate deprives them of subject matter jurisdiction. For example, in *EEOC v. Farmers Ins. Co.*, the district court rejected an employer’s effort to dismiss the litigation for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1).⁴⁶¹ The district court held that the preconditions to the EEOC filing a lawsuit “are not jurisdictional,” and therefore denied the employer’s motion to dismiss.⁴⁶²

Two other decisions address the conciliation process. In *EEOC v. BNSF Ry. Co.*, the magistrate judge granted the employer’s motion to compel production of EEOC conciliation materials because the EEOC did not raise a relevance objection in response to the employer’s underlying discovery requests.⁴⁶³ Because the EEOC did not object until it responded to the employer’s motion to compel, the court deemed any relevance objection waived.⁴⁶⁴

In *EEOC v. Bok Fin. Corp.*, an employer of two bank managers unsuccessfully tried to call EEOC personnel as witnesses in an apparent effort to criticize the Commission’s conciliation efforts.⁴⁶⁵ The EEOC filed a motion in limine to prevent these witnesses from testifying, which the district court granted on the grounds that the court had already “[d]etermined that the EEOC satisfied its pre-litigation requirements of investigation and conciliation.”⁴⁶⁶ Because the adequacy of the EEOC’s investigation and conciliation efforts is “non-justiciable as a matter of law,” per *Mach Mining* and other cases, the court excluded the testimony of the EEOC personnel under Federal Rule of Evidence 403 (allowing exclusion of even relevant evidence if probative value is substantially outweighed by unfair prejudice).

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

454 *Id.* at **24-26.

455 *Id.* at *28.

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

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

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

459 *Id.*

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

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

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

463 *EEOC v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 75891, at **2-3 (D. Kan. June 4, 2014).

464 *BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 75891, at *3.

465 *EEOC v. Bok Fin. Corp.*, 995 F. Supp. 2d 1251, 1252-53 (D.N.M. 2014).

466 *Bok Fin. Corp.*, 995 F. Supp. 2d at 1252.

2. The Meaning of “Good Faith Conciliation”

As discussed in prior Annual Reports, some courts require the EEOC to conciliate “in good faith” (with varying definitions of what that phrase actually requires), but others decline to second-guess the conciliation efforts of the Commission. Courts also take differing positions on the EEOC’s obligations in identifying and disclosing information about purported “aggrieved individuals” in conciliation before filing class lawsuits. The courts have not developed uniform standards for resolving these challenges.

The Second, Fifth, and Eleventh Circuit Courts of Appeals appear to require courts to evaluate “the reasonableness and responsiveness of the EEOC’s conduct under all the circumstances.”⁴⁶⁷ Based on this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.⁴⁶⁸

The Fourth and Sixth Circuits have adopted a standard more deferential to the EEOC.⁴⁶⁹ Under their standard, 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.”⁴⁷⁰ In *EEOC v. New Breed Logistics*, the Sixth Circuit denied the employer’s argument that the EEOC had failed to fulfill its obligation to investigate and conciliate where the EEOC added a retaliation claim in litigation on behalf of one of the plaintiffs that previously had not been investigated or conciliated.⁴⁷¹ The court reasoned that under the so-called “single filing rule,” the threshold question of whether the EEOC made “an attempt at conciliation” applied to claims like the retaliation claim in this case, where it could reasonably be expected to grow out of the investigation and conciliation efforts taken prior to the filing of the lawsuit.⁴⁷² Rather than examine the form and substance of the EEOC’s conciliation efforts, the court limited its inquiry to whether the retaliation claim was reasonably related to the original claims negotiated at conciliation.

In the Tenth Circuit, no clear standard has been adopted to define the meaning of “good faith” conciliation.⁴⁷³ In *EEOC v. Zia Co.*, the Tenth Circuit took the position that “a court should not examine the details of the offers and counteroffers between the parties, nor impose its [own] notions of what the agreement should provide.”⁴⁷⁴ However, in *EEOC v. Prudential Federal Savings & Loan Association*, it noted that conciliation involved two parties and the EEOC’s conciliation efforts would be acceptable, “so long as [the EEOC] makes a sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements.”⁴⁷⁵ The position taken in *Prudential* seems more akin to the “reasonableness and responsiveness” standard from the Second, Fifth, and Eleventh Circuits.

In *EEOC v. Mach Mining, LLC*, the Seventh Circuit became the first federal circuit court to foreclose the possibility of using the EEOC’s failure to conciliate as an affirmative defense, holding that the EEOC’s approach to conciliation during the administrative charge process is not judicially reviewable.⁴⁷⁶ In that case, the EEOC filed a lawsuit against Mach Mining in 2011, alleging discrimination against women since 2006, specifically in relation to hiring practices. Mach Mining asserted the affirmative defense that the EEOC did not conciliate in good faith before bringing suit against the company. The EEOC moved for partial summary judgment on this affirmative defense, arguing that, based on the Seventh Circuit’s decision in *EEOC v. Caterpillar, Inc.*,⁴⁷⁷ the conciliation process was not subject to judicial review. The district court denied the EEOC’s motion, relying on decisions from other circuits that allow an employer to challenge the EEOC’s conciliation efforts, and held that “the EEOC’s conciliation process is subject to at least some level of judicial review and that review would involve at least a cursory review of the parties’ conciliation.”⁴⁷⁸

467 The following states are encompassed by the Second, Fifth, and Eleventh Circuits: New York, Connecticut, Vermont (Second Circuit); Texas, Louisiana, Mississippi (Fifth Circuit); and Florida, Georgia, and Alabama (Eleventh Circuit).

468 *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).

469 The following states are encompassed by the Fourth and Sixth Circuits: Maryland, Virginia, West Virginia, North Carolina, South Carolina (Fourth Circuit); Michigan, Ohio, Kentucky, Tennessee (Sixth Circuit).

470 *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).

471 *EEOC v. New Breed Logistics*, 2013 U.S. Dist. LEXIS 40086, at *33 (W.D. Tenn. Mar. 22, 2013).

472 *New Breed Logistics*, 2013 U.S. Dist. LEXIS 40086, at *32.

473 The Tenth Circuit encompasses Oklahoma, Kansas, Utah, and Wyoming.

474 *EEOC v. Zia Co.*, 582 F.2d 527, 533 (10th Cir. 1978).

475 *EEOC v. Prudential Federal Savings & Loan Ass’n*, 763 F.2d 1166, 1169 (10th Cir. 1985).

476 *EEOC v. Mach Mining, LLC*, 738 F.3d 171, 182-183 (7th Cir. 2013).

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

478 See *EEOC v. Mach Mining, LLC*, 2013 U.S. Dist. LEXIS 10859 (S.D. Ill. Jan. 28, 2013).

The district court certified an interlocutory appeal of its order to the Seventh Circuit, which reversed. The court reasoned that Title VII's express statutory language makes clear that conciliation efforts are left solely to the EEOC's discretion and that the confidentiality provision governing the process, which provides for criminal penalties, conflicts with making conciliation efforts reviewable by courts. The court further found that there is no statutory standard for review of the conciliation process. The court distinguished the standard employed under the National Labor Relations Act (NLRA), which is frequently relied on by courts for guidance in evaluating failure-to-conciliate defenses, by pointing out that the NLRA contains "an explicit statutory command" to negotiate in "good faith."⁴⁷⁹ Title VII, the court reasoned, contains no such provision regarding conciliation. The court noted also "case-by-case adjudication of the sufficiency of the EEOC's conciliation efforts would require that courts be given some metric by which to analyze the parties' conduct," and since Congress had not done so, review of the defense had no "workable legal standard."⁴⁸⁰ Rejecting the arguments of Mach Mining and *amici* that, without judicial review, the EEOC would abandon or misuse conciliation, the court stated "there is no indication that Title VII's directive to conciliate was for the special benefit of employers or that they have a right to conciliation."⁴⁸¹ Finally, the court discussed at length its view that dismissal of a case for failure to conciliate offered little toward resolving employment discrimination litigation. Specifically, the "failure to conciliate" affirmative defense is based solely on insufficiency of process, and not the underlying facts or merits of the EEOC's claims. Indeed, the court opined that dismissal based on a procedural issue such as failure to conciliate is a drastic remedy that could "excuse the employer's (assumed) unlawful discrimination" and is contrary to the intent of Title VII.⁴⁸²

The Seventh Circuit's holding in *Mach Mining* that the EEOC's conciliation efforts are not subject to judicial review is contrary to all other circuit court decisions addressing the issue.⁴⁸³ As a result, Mach Mining's petition for *certiorari* to the U. S. Supreme Court was granted on June 30, 2014.⁴⁸⁴ The Supreme Court will hear arguments on the case during the October 2014 term and the case likely will be decided some time in 2015.⁴⁸⁵

As the courts await the Supreme Court's guidance on the issue, the impact of the Seventh Circuit's decision in *Mach Mining* on the decisions of the lower courts thus far has not been substantial. In *EEOC v. Bloomberg L.P.*, the EEOC sought reconsideration in January 2014 of an order, issued by the Southern District of New York in September 2013, finding that the EEOC had failed to satisfy its pre-litigation obligations, arguing that *Mach Mining* undermined the employer's failure-to-conciliate defense.⁴⁸⁶ The court denied the motion, holding the EEOC had failed to move for reconsideration within 14 days of the motions at issue and the EEOC had waived the argument. In so holding, the court found that, even if a timely motion had been made, it was not bound by *Mach Mining* and no basis existed for reconsideration of issue.⁴⁸⁷

In *EEOC v. Global Horizons, Inc.*, the District of Hawaii entirely disregarded the Seventh Circuit's decision in *Mach Mining* in finding that the EEOC complied with the good faith conciliation requirement.⁴⁸⁸ The court simply noted that the Ninth Circuit has not articulated a standard by which the EEOC's conciliation efforts should be evaluated and that district courts in the Ninth Circuit seem to have applied varying standards, before finding that, in any event, Global Horizons presented no evidence establishing that the EEOC acted in bad faith during the conciliation process.⁴⁸⁹

In a separate matter involving Global Horizons, Inc., however, the Eastern District of Washington cited the Seventh Circuit decision in *Mach Mining* in holding that the EEOC's pre-suit conciliation efforts are not subject to judicial review.⁴⁹⁰ In that case, the EEOC and Global Horizons filed cross motions for summary judgment on the issues of whether the EEOC satisfied its pre-suit investigation, reasonable cause,

479 *Mach Mining, LLC*, 738 F.3d at 176.

480 *Id.* at 178.

481 *Id.* at 180.

482 *Id.* at 184.

483 As set forth above, the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits have all held that the EEOC's conciliation efforts are subject to varying levels of judicial review.

484 See *Mach Mining, LLC v. EEOC*, 134 S.Ct. 2872 (2014) (Petition for Certiorari filed).

485 Mach Mining submitted its brief to the Supreme Court on September 4, 2014.

486 *EEOC v. Bloomberg L.P.*, 2014 U.S. Dist. LEXIS 18133, at **3-4 (S.D.N.Y. Jan. 23, 2014).

487 *Bloomberg L.P.*, 2014 U.S. Dist. LEXIS 18133, at **3-4.

488 *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 25932, at *33 (D. Haw. Feb. 28, 2014).

489 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 25932, at *33.

490 *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 72866, at *44 (E.D. Wash. May 28, 2014).

and conciliation obligations, and whether the court may review the EEOC's substantive efforts for each. The court found, prior to a ruling on liability, that court review of the EEOC's pre-suit conciliation efforts is limited to review of the complaint to ensure the EEOC's pleadings fulfill the statutory conciliation requirement.⁴⁹¹ If the EEOC's complaint alleges compliance, the court reasoned, that fact must be accepted as true.

In *EEOC v. Swissport Fueling*, the District of Arizona held, much like the Southern District of New York did in *Bloomberg*, that the Seventh Circuit's decision in *Mach Mining* did not warrant reconsideration of a prior order, and granted summary judgment as to 21 purported victims whom the EEOC failed to identify during the conciliation process.⁴⁹² The court reasoned that the Seventh Circuit's concern that courts would be called upon to evaluate the minutiae of conciliation efforts (including the sufficiency of particular settlement offers and/or the reasonableness of the EEOC's decisions to reject meeting offers, requests for information, or extensions of time) did not exist in that case, because the EEOC simply failed to identify the individuals for whom it sought highly individualized compensatory damages.⁴⁹³ Thus, the court held that a finding that the EEOC failed in good faith to conciliate by declining to disclose the names of claimants does not pose an undue burden on a court to analyze with specificity the EEOC's actions during the conciliation process.⁴⁹⁴

In *EEOC v. Bass Pro Outdoor World, LLC*, in a FY 2013 decision, the EEOC sought summary judgment on "an issue of law" under the Commission's theory that "[w]hether the EEOC attempted conciliation is judicially reviewable, but *how* the EEOC conducted conciliation is not."⁴⁹⁵ The Southern District of Texas flatly rejected the EEOC's argument, noting that the Fifth Circuit has regularly held that lower courts "'remain free' to scrutinize the EEOC's conciliation attempts."⁴⁹⁶ Moreover, the court admonished the EEOC for making this "unusual argument," particularly because the legislative history cited by the EEOC actually revealed that the final version of 42 U.S.C. § 2000e-2(f) intentionally omitted language that could have prevented courts from being able to review the conciliation process.⁴⁹⁷ As such, the court denied the EEOC's motion for summary judgment, and held conciliation is indeed reviewable by federal courts.

Thus, while the EEOC must provide some information to employers to satisfy its investigation and conciliation obligations prior to filing a lawsuit, the nature and amount of the information to be provided by the EEOC regarding any anticipated class continues to be a hotly contested issue.

The above decision should be contrasted with a FY 2014 decision in *Bass Pro*, in which the Southern District of Texas found that, although it was a "very close question," the EEOC was not required to identify specific identities of purported victims or the number of aggrieved individuals with regard to a Section 706 "class" claim during the conciliation process.⁴⁹⁸ The *Bass Pro* court in effect distinguished between requiring pre-litigation disclosure of alleged unlawful conduct and pre-litigation disclosure of specific identities and number of aggrieved individuals.⁴⁹⁹ It rejected the defendant's renewed motion for summary judgment, holding the EEOC was not required to disclose all those on whose behalf it sought relief, so long as the employer was aware of the nature of the alleged unlawful conduct.⁵⁰⁰ It reiterated that "courts will not review the sufficiency of the EEOC's pre-suit investigation" but that "courts will review whether an investigation occurred."⁵⁰¹

The above 2014 holding in *Bass Pro* is consistent with the Northern District of Oklahoma's November 2013 ruling in *EEOC v. Unit Drilling Co.*⁵⁰² As in *Bass Pro*, the *Unit Drilling* court held that the EEOC was not required to try to conciliate claims on behalf of unnamed potential class members before bringing the lawsuit where the employer was on notice that the EEOC was conducting a nationwide investigation.⁵⁰³ In *Unit Drilling*, the EEOC filed suit on behalf of an individual female plaintiff and other unnamed female applicants in

491 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 72866, at *44.

492 *EEOC v. Swissport Fueling*, 2014 U.S. Dist. LEXIS 17926, at **5-6 (D. Ariz. Jan. 9, 2014).

493 *Swissport Fueling*, 2014 U.S. Dist. LEXIS 17926, at **3-5.

494 *Id.* at *5.

495 *EEOC v. Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 142796, at **1-2 (S.D. Tex. Oct. 2, 2013). (Emphasis added).

496 *Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 142796, at *8.

497 *Id.* at *15.

498 *Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 103552, **76-82 (S.D. Tex. July 30, 2014). Please note that on Aug. 12, 2014, the defendant filed a motion for interlocutory appeal, which was granted on Nov. 17, 2014. *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014).

499 *Id.*

500 *Id.*

501 *Id.* at **76-77 (internal quotations omitted).

502 *EEOC v. Unit Drilling Co.*, 2013 U.S. Dist. LEXIS 156903, at **13-15 (N.D. Okla. Nov. 1, 2013).

503 *Unit Drilling Co.*, 2013 U.S. Dist. LEXIS 156903, at **13-15.

a failure-to-hire suit.⁵⁰⁴ The district court held that during the conciliation process, the EEOC had provided enough information to allow the company to perform its own investigation and estimate the number of female applicants—and perhaps even which applicants—who may have been subjected to discrimination.⁵⁰⁵ Thus, the EEOC was not required to identify all individuals involved in the nationwide investigation.⁵⁰⁶ The *Unit Drilling* court noted that “to satisfy the jurisdictional requirements of § 2000e-5(b), the EEOC need only make a ‘sufficient albeit limited effort to conciliate.’”⁵⁰⁷

Similarly, in *EEOC v. PMT Corp.*, the District of Minnesota held that the EEOC does not have a duty to identify allege victims at the conciliation phase in a pattern-or-practice case.⁵⁰⁸ The *PMT* court reasoned that “when the EEOC pursues a pattern or practice claim, it ‘does not stand in the employee’s shoes’ . . . [r]ather, the EEOC acts to ‘advance the public interest in preventing and remedying employment discrimination.’”⁵⁰⁹ The court found that the EEOC had met its duty to conciliate by specifically detailing the scope of the claim, and by identifying the time period at issue, the alleged perpetrator of the discrimination and the alleged discriminatory conduct without identifying the specific identities of the class members.⁵¹⁰ The *PMT* court’s assessment is like that of the District of Maryland in 2013 in *EEOC v. Spoa, LLC*, which held that the EEOC need not identify all class members since conciliation was on behalf of a class.⁵¹¹ The *Spoa* court found that the EEOC was diligent in investigating the named plaintiff’s charge and in bringing the lawsuit, and permitted the plaintiff and class members in question to appear anonymously in all filings, but the claimants did appear under their legal names in open court.⁵¹²

Finally, the Western District of Missouri has also held that the EEOC’s duty to investigate the claims of potential victims and disclose their identities in a pattern-or-practice case is limited. In *EEOC v. New Prime, Inc.*, the court held that the EEOC made the defendant aware that its policy regarding same-sex training was at issue upon receipt of the charge of discrimination.⁵¹³ The *New Prime* court further noted that the EEOC’s initial letters to the defendant put the defendant on notice that the EEOC was investigating on behalf of “similarly situated individuals” with regard to the same-sex training policy.⁵¹⁴ The court therefore found that the EEOC had satisfied its duty to conciliate and met the conditions precedent to filing suit, despite not having specifically identified the potential victims.⁵¹⁵

These decisions indicate that the EEOC’s duty to identify class members at the conciliation phase continues to be litigated. Employers cannot assume the Commission’s failure or refusal to identify the members of a class supporting a Section 706 claim will preclude those claims based on a failure to conciliate in good faith. Accordingly, employers should continue to request investigative findings from the EEOC, make reasonable and meaningful conciliation efforts regarding class allegations, and urge the Commission to meet its obligation to conciliate in good faith by soliciting estimates of the size and scope (temporally, geographically, or otherwise) of any purported class.

3. Traps for the Unwary—EEOC Attacks Based on the Good Faith Conciliation Defense

The EEOC has continued to argue against employers that plead a lack of good faith conciliation as an affirmative defense. In *EEOC v. Unit Drilling Co.*, the EEOC moved to strike four of the employer’s affirmative defenses (including defenses based on the defendant’s allegation that the EEOC failed to engage in good faith conciliation).⁵¹⁶ The Northern District of Oklahoma denied the EEOC’s motion, in part because motions to strike under Rule 12(f) are generally disfavored. More specifically, the district court denied the EEOC’s motion because it had already denied the defendant’s own motion to dismiss for the EEOC’s alleged lack of good-faith conciliation, and because the court determined striking defendant’s affirmative defenses would not materially alter or limit the parties’ discovery (and thus the EEOC would suffer no prejudice based on the denial). Although this case demonstrates that the EEOC’s attempts to strike an employer’s good faith conciliation affirmative defenses are not always successful, the EEOC’s strategic decision to attempt to do so in *Unit Drilling* serves to remind employers to ensure they have adequate factual support when asserting such defenses.

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at **13-14.

⁵⁰⁸ *EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **7-8 (D. Minn. Aug. 27, 2014).

⁵⁰⁹ *PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **7-8.

⁵¹⁰ *Id.*

⁵¹¹ *EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145 (D. Md. Oct. 15, 2013).

⁵¹² *Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145.

⁵¹³ *EEOC v. New Prime, Inc.*, 2014 U.S. Dist. LEXIS 112505, **17-22 (W.D. Mo. Aug. 14, 2014).

⁵¹⁴ *New Prime, Inc.*, 2014 U.S. Dist. LEXIS 112505, at **14-17.

⁵¹⁵ *Id.*

⁵¹⁶ *EEOC v. Unit Drilling Co.*, 2014 U.S. Dist. LEXIS 72449, at **3-4 (N.D. Okla. May 28, 2014).

E. Intervention

This section examines intervention by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether motions to intervene should be granted. This section also examines intervention-related issues decided by the courts during FY 2014, including adding pendent claims and one court's entry of a protective order to maintain confidentiality of the charging party-intervenor identities. For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Littler's *Annual Report on EEOC Developments—Fiscal Year 2013*.⁵¹⁷

1. EEOC Intervention in Private Litigation

As the primary federal agency charged with enforcing antidiscrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits. This may occur even in instances in which the EEOC has previously investigated and decided not to initiate litigation. Private discrimination class actions are especially vulnerable to EEOC intervention because, by their nature, they generally involve large numbers of employees, applicants, or former employees and alleged discriminatory policies or practices.

Section 706(f)(1) of Title VII essentially provides for “permissive intervention” by the EEOC in a private lawsuit at the court’s discretion, explaining that: “[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance.”⁵¹⁸ The same approach is followed in dealing with intervention in an ADA action.⁵¹⁹

Federal Rule of Civil Procedure 24(b), which addresses “permissive intervention,” provides in pertinent part:

Permissive Intervention. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact in common.

In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.⁵²⁰

In determining whether to exercise its discretion and permit intervention by the EEOC, the court looks to:

- whether the EEOC has certified that the action is of general importance; and
- whether the request is timely.⁵²¹

2. Charging Party’s Right to Intervene in EEOC Litigation

A charging party may intervene in a lawsuit to preserve his or her opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC and the charging party’s interests diverge.

Under 42 U.S.C. § 2000e-5(f)(1), the charging party may intervene in the EEOC’s Title VII or ADA lawsuit.⁵²² If the EEOC pursues a lawsuit under the ADEA or EPA, however, the charging party’s right to intervene or commence a lawsuit terminates.⁵²³ For example, in *EEOC v. SVT, LLC*,⁵²⁴ in the context of communications with potential claimants in a pattern or practice lawsuit, the court explained the differences

⁵¹⁷ Barry A. Hartstein, et. al., *Annual Report on EEOC Developments: Fiscal Year 2013*.

⁵¹⁸ 42 U.S.C. § 2000e-5(f)(1). 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. 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).

⁵¹⁹ 42 U.S.C. § 12117.

⁵²⁰ FED. R. CIV. P. 24(b) (as amended Dec. 1, 2007).

⁵²¹ See *Ramirez v. Cintas Corp.*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005) (Order Granting EEOC’s Motion for Leave to Intervene) citing *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int’l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975)); see also *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 1958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated “the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exists; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties.”

⁵²² Charging parties may not intervene in ADEA or EPA actions.

⁵²³ See 29 U.S.C. § 626(c)(1).

⁵²⁴ *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014).

between Title VII and the ADEA. Specifically, the court noted, the right of any person to bring suit under the ADEA is terminated when the suit is brought by the EEOC. This is unlike Title VII, which explicitly permits a charging party to intervene in an action brought by the EEOC against an employer. The court noted further the ADEA simply makes no mention of intervention.

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 or permissive. Most courts analyze a charging party's motion to intervene under Rule 24(a), unless pendent claims are involved and then those claims are analyzed under Rule 24(b), which, as discussed above, governs permissive intervention.⁵²⁵ Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit⁵²⁶ or the movant is a governmental entity other than the EEOC.⁵²⁷

Rule 24(a) provides:

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

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

In *EEOC v. Spoa, LLC*,⁵²⁸ the EEOC filed suit against the defendant employer, alleging that its owner had engaged in a pattern and practice of sexual harassment and sexual assault in violation of Title VII of the Civil Rights Act of 1964 and Title I of the Civil Rights Act of 1991. Specifically, the EEOC alleged the owner sexually harassed several waitresses and allegedly put a "date rape drug" in several waitresses' drinks to facilitate the owner's attempts at sexual assault. One of the waitresses, who was the subject of the alleged harassment and a charging party, moved to intervene as a matter of right. Granting the motion to intervene, the court noted that under Rule 24(a) of the Federal Rules of Civil Procedure, it must permit a party to intervene as plaintiff if the party "is given an unconditional right to intervene by federal statute." The court noted further that Title VII of the Civil Rights Act of 1964 provided that the EEOC could bring a civil action against a respondent and the person aggrieved would have the right to intervene in actions brought by the EEOC. Therefore, the court noted that so long as an aggrieved employee filed a timely motion to intervene in the EEOC's civil action, the charging party had an unqualified right to intervene. Given the unnamed plaintiff-intervenor in this case timely filed her motion, and the defendant-employer did not oppose the motion to intervene, the court granted the motion and permitted the unnamed intervenor to intervene as of right in the action.

In *EEOC v. Vamco Sheet Metals, Inc.*,⁵²⁹ the court also granted plaintiff-intervenors' motion to intervene in a Title VII lawsuit, underscoring the core principle of intervention as a matter of right and representing continuity of the basic approach. Four women who were allegedly laid off from a temporary construction project sooner than their similarly situated male peers by the defendant-employer filed charges alleging unlawful gender discrimination. After conducting an investigation, the EEOC filed suit against the defendant-employer alleging gender discrimination in violation of Title VII and Title I of the Civil Rights Act of 1991. The plaintiff-intervenors timely filed a motion to intervene, which the defendant-employer did not oppose. The court granted the motion to intervene as to the Title VII claim as a matter of right.⁵³⁰

While charging party motions to intervene are often granted when the EEOC takes the matter to litigation, such motions may be denied when the intervenor seeks to become involved in a subpoena enforcement action initiated by the EEOC during the investigation. In *EEOC v. Farmer's Pride, Inc.*,⁵³¹ after receiving a charge of gender discrimination and retaliation from a former employee, the EEOC began investigating the matter and issued a subpoena to the employer. The subpoena sought names and contact information of potential witnesses, as well as documents related to any sexual harassment complaints received by the employer at the same location since 2008. The employer

⁵²⁵ *EEOC v. WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (N.D. Cal. May 15, 2012).

⁵²⁶ *EEOC v. DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at **8-9 (M.D. Fla. Nov. 29, 2011).

⁵²⁷ *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)).

⁵²⁸ *EEOC v. Spoa, LLC*, 2013 U.S. Dist. LEXIS 148145 (D. Md. Oct. 15, 2013).

⁵²⁹ *EEOC v. Vamco Sheet Metals, Inc.*, 2014 U.S. Dist. LEXIS 77462 (D.N.Y. June 5, 2014).

⁵³⁰ The intervenors also moved to intervene with respect to the intervenor's state and local law discrimination claims, which the court granted. The intervenors further moved to intervene with respect to the labor claims under 29 U.S.C. § 207(r) and NYLL § 206-c, which the court denied.

⁵³¹ *EEOC v. Farmer's Pride, Inc.*, 2014 U.S. Dist. LEXIS 35793 (E.D. Pa. Mar. 18, 2014).

filed a petition to revoke the subpoena, which the EEOC denied. Ultimately, the EEOC filed an enforcement action in the district court. The court granted the application to enforce the subpoena, but further ordered that a confidentiality order be entered prohibiting the disclosure of any private contact information. The EEOC moved to reconsider the court's order. While the motion to reconsider was pending, the charging party moved to intervene in the enforcement action. Both the EEOC and the employer opposed the motion to intervene. The plaintiff-intervenor sought intervention under Rule 24(a)(2) and 24(b)(1)(B).

Under Rule 24(a)(2), the court denied the motion to intervene because the potential intervenor did not demonstrate that having a general interest in how the EEOC's investigation proceeded would establish a legal interest and right to intervene. Continuing, the court noted that even if the intervenor had established a legal interest in the EEOC's timely investigation of his claim, the disposition of the action enforcing the subpoena could not impair the intervenor's ability to protect his interest by other means. As the EEOC and the employer argued, the intervenor could request a right-to-sue letter at any time and pursue an action directly against the employer. Likewise, the court noted that the intervenor lacked any standing to dispute the subpoena enforcement action. In such an action, the only entities or individuals who had standing to dispute the subpoena were the recipient and target of the subpoena. Similarly, under Rule 24(b)(1)(B), the court denied the permissive intervention on the same general interest principles as under Rule 24(a)(2).

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b).

As stated above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who as a claim or defense that shares with the main action a common question of law or fact."⁵³² In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."⁵³³ This standard is commonly used for analyzing pendent claims.

In *EEOC v. JBS USA, LLC*,⁵³⁴ the defendant-employer, a meat-packing company, was sued by the EEOC regarding allegations the employer discriminated against Somali, Muslim, and African American employees. The EEOC alleged several pattern-or-practice claims based on purported discriminatory harassment, disparate treatment, denial of religious accommodation, retaliation, and discipline and discharge. The plaintiff-intervenors, more than 200 individuals, asserted multiple claims of discriminatory treatment because of race, national origin, religion, and retaliation—all under Title VII. After intervening, the plaintiff-intervenors filed a motion to amend their complaint and add claims regarding recent terminations and to plead new claims under the Family and Medical Leave Act. Noting the Federal Rules of Civil Procedure instruct courts to give leave to amend freely, the court granted plaintiff-intervenors' motion, identifying potential prejudice to the defendant as the most important factor to be considered when deciding whether leave to amend should be granted. In that respect, the court noted the defendant employer did not oppose the motion to amend, and had ample time to prepare its defenses to the additional factual allegations and claims.

In *EEOC v. Vamco Sheet Metals, Inc.*,⁵³⁵ (discussed *supra*), the court adopted the magistrate judge's report and recommendation, and while it granted the plaintiff-intervenor's motions to intervene with respect to the discrimination claims under Title VII, the New York Human Rights Law, and the New York City Human Rights Law, it declined to extend its supplemental jurisdiction to the intervenors' breastfeeding accommodation claims under Section 207(r) of the FLSA and Section 206-c of the New York Labor Law. Noting that Section 207(r) of the FLSA does not provide a private right of action—and consequently no right to intervene—the magistrate judge recommended denying the intervenor's request to join an FLSA claim for violation of Section 207(r). Likewise, the magistrate judge recommended not exercising supplemental jurisdiction over the intervenors' proposed claims under Section 206-c of the New York Labor Law. The magistrate judge noted that state law was unsettled as to whether Section 206-c permitted a private right of action. Consequently, the magistrate judge also recommended denying the motion to intervene as to the Section 206-c claim and the district court adopted the magistrate judge's recommendations.

⁵³² *DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at *8.

⁵³³ *Id.*

⁵³⁴ *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 150156 (D. Colo. Oct. 18, 2013).

⁵³⁵ *Vamco Sheet Metals, Inc.*, 2014 U.S. Dist. LEXIS 77462, at *2-3.

4. Protective Order to Maintain Confidentiality of Alleged Victims

During the past year, one court addressed issues surrounding entry of a protective order as it relates to identification of class members. In *EEOC v. Spoa, LLC*,⁵³⁶ the EEOC sued the defendant-employer, alleging its owner had engaged in a pattern and practice of sexual harassment and sexual assault. After the court permitted the plaintiff-intervenor to intervene and maintain her anonymity in the pleadings, motions, docket entries, and all written materials filed in the case, the EEOC sought entry of a protective order before it would provide the anonymous intervenor's name (and the name of another former employee) to the employer. The proposed protective order provided that all discovery materials containing the "true names" of the anonymous plaintiff-intervenor and the other former employee were to be designated as confidential documents and could be disclosed only to certain individuals. The proposed protective order provided that prior to disclosing confidential materials to individuals or entities within the employer's control, the employer must inform them of the protective order and obtain their written agreement to the order. The proposed protective order also provided that with respect to individuals or entities over whom the employer did not exercise control, the employer must inform them of the protective order, but was not obligated to obtain their written agreement to the order. The employer opposed the protective order, arguing it would place unfair burdens on its ability to verify or investigate the claims. The employer argued also the proposed protective order would expose it to liability if third parties did not abide by its parameters.

The court noted that a protective order should be issued if the party requesting it can demonstrate good cause. Given the instant case involved highly private, sensitive, and sexual assault-related information, the court held that "good cause" to issue a protective order existed. The court noted that, without the protective order, the court's prior order permitting the plaintiff-intervenor to remain anonymous in the pleadings, motions, docket entries, and all written materials filed in the case lacked meaning if the employer could disclose the plaintiff-intervenor's identity in some other way. Furthermore, the court noted that the employer would not be liable if a third party violated the order, and stated that it was more concerned that the identities of the intervenor and former employee would be shared publicly, such as on the Internet or with a news source. The court, therefore, held that good cause existed and entered the protective order, controlling the disclosure of identities outside of the litigation.

F. Class Discovery Issues in EEOC Litigation

As the EEOC increasingly eschews individual litigation for class actions, it is vital employers be aware of not only the tactics used by the EEOC to pursue these cases, but also which tools employers have to fight back against potentially expensive, overbroad, and time-consuming discovery. Close examination of the EEOC's tactics, especially the scope and timing thereof, can provide employers with important tools in handling these cases.

1. Bifurcation in EEOC Litigation

A common litigation tactic used by the EEOC in Section 707 cases is to seek bifurcated discovery, with discovery regarding individual damages (Phase II of the trial) coming after the liability phase of the trial (Phase I). As support for this strategy, the EEOC often argues that discovery on individual damages should come later in the litigation because such discovery is costly and time-consuming. This approach can also be beneficial for employers, who can move for summary judgment at the close of Phase I, thereby limiting their exposure and costs for Phase II, if not eliminating the need for Phase II entirely. On the other hand, employers may choose to oppose bifurcation and force the EEOC to identify aggrieved individuals before liability is determined.

An important legal development in 2014 was the continued expansion of the *Teamsters*⁵³⁷ bifurcation framework from Section 707 cases to Section 706 cases. In *EEOC v. Cintas Corp.*,⁵³⁸ on remand from the Sixth Circuit, the EEOC sought to bifurcate the action, with liability and punitive damages to be determined in Phase I, and a trial regarding individual damages to take place in Phase II.⁵³⁹ The employer opposed this plan, arguing the EEOC should be required in Phase I to identify the claimants on whose behalf the EEOC was pursuing claims and that discovery should take place as to those claimants before trial.⁵⁴⁰ On remand from the Sixth Circuit, the district court ordered the parties

⁵³⁶ *EEOC v. Spoa, LLC*, 2014 U.S. Dist. LEXIS 756 (D. Md. Jan. 3, 2014).

⁵³⁷ *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

⁵³⁸ *EEOC v. Cintas Corp.*, 2014 U.S. Dist. LEXIS 11294 (E.D. Mich. Jan. 30, 2014).

⁵³⁹ *Cintas Corp.*, 2014 U.S. Dist. LEXIS 11294, at *2.

⁵⁴⁰ *Id.* at *3.

to brief their respective positions, including (i) what Phase I of the bifurcated trial should involve; (ii) whether and when EEOC should have to identify claimants on whose behalf it seeks relief; (iii) what discovery is needed in Phase I; (iv) when punitive damages should be considered; and (v) whether additional experts should be permitted. The court has not yet issued a determination as to the EEOC's request for bifurcation.⁵⁴¹ Nevertheless, it is indicative of the EEOC's determination to expand the use of bifurcation in class actions.

Similarly, in *EEOC v. Performance Food Group, Inc.*,⁵⁴² the district court followed *Cintas* in denying the employer's motion to dismiss the Section 706 claim, holding that the EEOC was authorized to use the *Teamsters* framework in a Section 706 case.⁵⁴³ By separate order, the court bifurcated the case for trial, directing that, in Phase I, the EEOC would seek to establish its pattern-or-practice claim, and in Phase II, the court would determine claims made on behalf of individuals allegedly aggrieved by the application of the pattern or practice.⁵⁴⁴ As in *Cintas*, the EEOC sought in *Performance Food Group* to have punitive damages decided in Phase I, before any individual damages had been determined.⁵⁴⁵ The district court rejected the EEOC's proposed approach, finding that a determination of punitive damages on a class-wide basis would violate the employer's rights.⁵⁴⁶

2. Communication with Class

One issue that frequently arises in EEOC-led class actions is whether, and to what extent, an employer can communicate with members of the proposed class. In *EEOC v. SVT, LLC* (a failure-to-hire putative class action), an Indiana federal court rejected the EEOC's motion for a protective order to preclude the employer's *ex parte* communications with applicants who had not indicated they wanted to participate in lawsuit.⁵⁴⁷ Specifically, the EEOC sought to limit the employer's communication with the charging party and any other person for whom the EEOC sought relief, except those who had indicated to the EEOC that they did not wish to participate in the lawsuit.⁵⁴⁸ The court determined that, in Title VII cases, the EEOC does not have an inherent representative relationship to prospective class members, and so an employer could not be prohibited from engaging in *ex parte* discussions with those prospective class members.⁵⁴⁹ The court also rejected the EEOC's request that the court compel the employer to make certain representations to prospective class members during the *ex parte* communication, finding the EEOC had not shown any heightened need for such restraints, such as prior misconduct by the employer.⁵⁵⁰

Another issue in *SVT* was whether the EEOC could contact the employer's current and non-managerial employees. The employer requested the EEOC be required to inform it in advance of any former employee the EEOC intended to approach, so that the employer could raise any necessary objections.⁵⁵¹ The court approved the EEOC's request to contact former employees and denied the employer's request for prior disclosure.⁵⁵² With respect to current employees, the court granted the EEOC's request, provided the EEOC could not inquire into communication between employees and employer's counsel regarding the subject matter of the litigation.⁵⁵³

3. Scope of Discovery Regarding Identification of Class Members

Unlike in private civil suits, only the EEOC is a "party" in class actions brought by the EEOC. This is significant because the relationship of an individual to an action (*i.e.*, whether an individual is a party) can affect the type and amount of discovery an employer is entitled to with respect to that individual. The EEOC has shown some flexibility in agreeing to allow employers to depose individuals who wish to participate in the class, even where the number of individuals is greater than the maximum permitted by the Federal Rules of Civil Procedure. In *EEOC v. SVT, LLC*, for example, the EEOC did not object to the employer taking the deposition of any individual class member who indicated they

541 *Id.* at **3-4 (E.D. Mich. Jan. 30, 2014).

542 *EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61426 (D. Md. Mar. 11, 2014).

543 *Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61426, at **9-10.

544 *EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61425, at *2 (D. Md. Mar. 11, 2014).

545 *Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 61425, at **4-5.

546 *Id.* at **8-10.

547 *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014).

548 *SVT, LLC*, 2014 U.S. Dist. LEXIS 2391, at **3-4.

549 *Id.* at **17-18.

550 *Id.* at *21.

551 *Id.* at *26.

552 *Id.* at *27.

553 *Id.* at **30-31.

wished to participate in the class.⁵⁵⁴ Pursuant to the parties' agreement on depositions, the district court approved an increase in the number of depositions from 10 to 30 permitted under the Federal Rules of Civil Procedure.⁵⁵⁵ However, the court rejected the employer's request to serve written discovery on each represented class member because the class members were not parties to the action.⁵⁵⁶

G. Other Critical Issues in EEOC Pattern-or-Practice and Class-Type Cases

1. ESI: Electronic Discovery-Related Issues

Electronic discovery is an increasingly important issue, particularly in large-scale litigation such as class actions. Knowing what an employer's production obligations are, including its obligations to obtain data from non-parties, can help the employer push back against overbroad, costly, and burdensome information requests.

This year, a court addressed the right of a party to receive electronic discovery in a format that they can readily access and use. In *EEOC v. SVT*, the court concluded the EEOC was entitled to have the employer produce electronic data in the format specified by the EEOC.⁵⁵⁷ Notably, the employer had failed to seek a protective order, which may have affected the court's determination.⁵⁵⁸

Another issue that frequently arises with respect to e-discovery is who "controls" data and whether an employer can control data that is held by a non-party. Employers may deny having control over data that is stored by a third party—such as payroll data stored by a payroll company. However, lack of physical possession alone may not be enough for an employer to avoid production obligations. In *SVT*, the court held that the employer had "control" over electronic data even though the data was maintained by a non-party because the employer had the right to obtain a copy of the documents.⁵⁵⁹

Another significant issue that arises with e-discovery is the cost, and, more specifically, which party is responsible for paying the costs associated with the collection and production of electronic data. In a subsequent proceeding in the *SVT* case, an issue brought before the court was whether data outside of the control of the employer was not "reasonably accessible" because of undue burden and cost.⁵⁶⁰ There, the EEOC sought data that was not already available to the employer, and would have required the creation of custom reports by the non-party in order to be produced. The court found that data that was not already accessible to the employer was not reasonably accessible to the employer, and relieved the employer of the obligation to produce it.⁵⁶¹

2. Reliance on Experts in Class Cases

Expert testimony is of particular importance in disparate impact cases. This year, two key cases address the use of expert testimony in EEOC class actions.

In *EEOC v. Kaplan Higher Education Corp.*, the Sixth Circuit rejected the EEOC's attempt to introduce expert evidence regarding the potential disparate impact caused by the defendant's use of background checks in the hiring process. The EEOC relied on statistical data compiled by an expert in industrial and organizational psychology to prove its disparate impact claim.⁵⁶² The Sixth Circuit rejected the expert report, finding that it failed the *Daubert* test because (1) the sample was too small to be reliable, (2) the EEOC presented no evidence that the expert's theory/technique had been subject to peer review and publication, (3) the methodology lacked standards controlling the technique's operation since the expert admitted there was no particular standard used in the methodology, and (4) the EEOC failed to present evidence that the expert's methodology was generally accepted in the scientific community. The court further found the expert report to be deficient on the ground that the expert's sample applicant pool had a significantly different "fail rate" than the defendant's actual applicant pool. The court determined that, as a result, the expert's sample was not representative of the fail rates in the larger applicant pool from which the sample was drawn, and could not be used to demonstrate disparate impact.

⁵⁵⁴ *Id.* at *36.

⁵⁵⁵ *Id.* at *37.

⁵⁵⁶ *Id.* at *38.

⁵⁵⁷ *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 50114 (N.D. Ind. Apr. 10, 2014).

⁵⁵⁸ *SVT, LLC*, 2014 U.S. Dist. LEXIS 50114, at *14.

⁵⁵⁹ *Id.* at *11.

⁵⁶⁰ *EEOC v. SVT, LLC*, 2014 U.S. Dist. LEXIS 70848 (N.D. Ind. May 22, 2014).

⁵⁶¹ *SVT, LLC*, 2014 U.S. Dist. LEXIS 70848, at **11-12.

⁵⁶² *EEOC v. Kaplan Higher Educ. Corp.*, 2014 U.S. App. LEXIS 6490 (6th Cir. Apr. 9, 2014).

Other decisions have also given strength to employers' challenges to EEOC experts. For example, a Washington district court found that the testimony of the EEOC's proposed expert was both irrelevant to the action and unduly prejudicial to the defendant.⁵⁶³ Specifically, the expert's testimony as to industry anti-discrimination policies and the defendant's failure to adhere to those policies was both irrelevant to the question of whether the defendants discriminated against the claimants and unduly prejudicial to the defendants by allowing the jury to think the defendants were bad actors simply for failing to follow the industry standard.⁵⁶⁴

Not all decisions were wins for employers. In *Global Horizons*, the court concluded the EEOC could present its expert testimony if the defendant attempted to defend against punitive damages by arguing that it acted in good faith to comply with the law.⁵⁶⁵ Elsewhere, in Wisconsin, a federal court denied an employer's application to require an EEOC non-retained expert physician to disclose the specific medical records supporting the physician's opinion as to the claimant's medical condition and need for accommodation.⁵⁶⁶ The opinion is unlikely to carry much weight outside of Wisconsin, as the court's decision was based on the application of a local rule of the Federal Rules of Civil Procedure.

H. General Discovery by Employer

The EEOC tends to take an expansive view of its entitlement to discovery from the employer, while arguing that employer requests for discovery should be limited. Courts, however, have frequently taken the position that the EEOC has many of the same obligations as other plaintiffs' counsel in providing requested information. The primary dispute in these discovery battles continues to focus on the scope of the "deliberative process privilege," which the EEOC frequently asserts.

1. General Questions Seeking the Legal and Factual Basis for EEOC Claims

EEOC v. Duty,⁵⁶⁷ an ADA discrimination and retaliation case, illustrates the types of discovery requests an employer is permitted to pose to the EEOC regarding the basis for the agency's claims. The court found that employer interrogatories seeking a list from the EEOC of "every action" the employer took constituting discrimination were permissible and that the agency, after having responded to these requests, may not "subsequently ambush" the employer with additional examples of discrimination. The employer also properly sought identification of the sections of the ADA and regulations the EEOC contended the employer violated. The court rejected the EEOC's objection that the request sought a legal conclusion and held that the agency has a duty to inform the employer of the basis for the lawsuit. In the same vein, the court also allowed a request seeking facts that supported a demand for punitive damages. Moreover, rejecting the EEOC's objection based on the work-product doctrine, the court allowed requests seeking information regarding the employer's other employees who were interviewed, statements from those employees supporting any allegation, and information on non-expert testimony.

2. Depositions of EEOC Personnel

Courts have applied the deliberative process privilege in the context of depositions of EEOC personnel where the deposition intrudes upon the agency's decision-making process. While the privilege is applied to those matters relating to the EEOC's internal analysis and basis for legal conclusions, it does not apply to factual and administrative matters.

For example, in *EEOC v. BNSF Railway Co.*,⁵⁶⁸ a court deemed the following deposition questions to the EEOC investigator to be protected by the deliberative process privilege: why certain interviews did not occur, the contents and meaning of certain redacted sentences in the Charge file, and the EEOC's conclusions. Additionally, the court refused to compel the EEOC investigator to testify about how he arrived at certain conciliation demands and whether the EEOC would consider legal challenges to its investigation for purposes of conciliation, on the ground that such information is not relevant.

⁵⁶³ *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 65762 (E.D. Wash. May 9, 2014).

⁵⁶⁴ *SVT, LLC*, 2014 U.S. Dist. LEXIS 70848, at *9.

⁵⁶⁵ *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 65762 at *10.

⁵⁶⁶ *EEOC v. Aurora Health Care, Inc.*, 2013 U.S. Dist. LEXIS 164565 (E.D. Wis. Nov. 5, 2013).

⁵⁶⁷ *EEOC v. Duty*, 2014 U.S. Dist. LEXIS 78432 (D. Kan. June 10, 2014).

⁵⁶⁸ *EEOC v. BNSF Railway Co.*, 2014 U.S. Dist. LEXIS 53797 (D. Kan. Apr. 18, 2014).

In *EEOC v. Tepro Inc.*,⁵⁶⁹ the court held that an employer may not depose an EEOC official regarding the sufficiency of the investigation and conciliation processes that the official oversaw. The court relied on a Sixth Circuit decision—*EEOC v. Keco Industries*⁵⁷⁰—in holding that inquiring into the “form and substance” of the EEOC’s investigation and conciliation processes are not discoverable.

However, in *EEOC v. Roy Farms, Inc.*,⁵⁷¹ the court held that the deliberative process privilege did not apply to the employer’s request to depose an investigator on inaccuracies in the investigation file. The court made clear that the privilege did “not extend to purely factual material that does not reflect a government agency’s deliberative process.”

3. Discovery of EEOC-Related Documents

Courts often face employer requests for the EEOC’s investigative material, to which the EEOC routinely asserts the deliberative process privilege. The case *EEOC v. BNSF Railway Co.*⁵⁷² illustrates the application of this privilege to the EEOC’s investigative material. The court determined that the privilege applied to a host of document requests, including those seeking documents relating to the EEOC’s charge and investigatory process, and communications with the employee before the charge. In holding the privilege applied, the court relied on *EEOC v. JBS USA*,⁵⁷³ in which an employer’s attempt to discover internal EEOC emails relating to the investigation on the basis that those emails

relate to the “credibility” of the EEOC’s allegations was held to be a “back-door attempt to evaluate the adequacy of the EEOC investigation, a subject which is simply off limits.” Similarly, the *BNSF* court held that the employer’s desire to impeach the EEOC at trial using the investigation-related documents is an “inventive” attempt to impermissibly attack the adequacy of the EEOC’s investigation.

On partial review of the above decision,⁵⁷⁴ the court affirmed, but held that it did not suggest all information relating to the EEOC’s investigative process is irrelevant. The court noted that the employer improperly used a “broad brush” in opposing the deliberative process privilege, and that it did not argue how the privilege was inapplicable to its specific requests. Thus, the court found that a “particularized showing of relevance” could have borne a different result.

Courts have considered how the attorney-client privilege and the work-product doctrine apply to the EEOC’s investigative communications with employees. For example, in *EEOC v. Texas Roadhouse, Inc.*,⁵⁷⁵ a court distinguished between pre-litigation investigative communications with employees and post-litigation communications. The court held that the pre-litigation communications are discoverable and the post-litigation communications are not because they are protected under the attorney-client privilege and work-product doctrine.

Employers have also sought to discover the material related to the EEOC’s conciliation efforts. In *EEOC v. BNSF Railway Co.*,⁵⁷⁶ the court considered under what circumstances an employer could discover documents related to the EEOC’s conciliation efforts when that employer argues the EEOC did not conciliate in good faith, which is a condition precedent to prosecuting the action. The court analyzed each discovery request to determine whether the request was “relevant to the issue of conciliation generally without seeking to improperly dissect the details of the conciliation.” The court denied requests seeking information that examines the details of the offers and counter-offers between the parties, but granted those requests disclosing the identities of the individuals involved in the conciliation process on behalf of the EEOC because such identities could lead to admissible evidence on whether the EEOC conciliated in good faith.

4. Spoliation

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.

⁵⁶⁹ *EEOC v. Tepro, Inc.*, 2014 U.S. Dist. LEXIS 112590 (E.D. Tenn. Aug. 14, 2014).

⁵⁷⁰ *EEOC v. Keco Industries*, 748 F.2d 1097 (6th Cir. 1984).

⁵⁷¹ *EEOC v. Roy Farms, Inc.*, 2013 U.S. Dist. LEXIS 181872 (E.D. Wash. Dec. 31, 2013).

⁵⁷² *EEOC v. BNSF Railway Co.*, 2014 U.S. Dist. LEXIS 53797 (D. Kan. Apr. 18, 2014).

⁵⁷³ *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 156804 (D. Colo. Oct. 29, 2013).

⁵⁷⁴ *EEOC v. BNSF Railway Co.*, 2014 U.S. Dist. LEXIS 77133 (D. Kan. June 6, 2014).

⁵⁷⁵ *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125865 (D. Mass. Sept. 9, 2014).

⁵⁷⁶ *EEOC v. BNSF*, 2014 U.S. Dist. LEXIS 53797 (D. Kan. Apr. 18, 2014).

In *EEOC v. Womble Carlyle*,⁵⁷⁷ the employer sought sanctions because the charging party admitted to shredding documents on her job search efforts after the EEOC filed suit. The employer argued the court should sanction the EEOC and the employee by dismissing the demand for lost wages and benefits, or in the alternative, issue an adverse inference instruction to the jury. The court held the circumstances did not warrant striking the demand for back pay, but did evince a “sufficiently culpable mindset” of spoliation to warrant some lesser sanctions, including awarding reasonable attorneys’ fees incurred in conducting additional discovery on the employee’s mitigation of damages. It held also that the sanction of an adverse inference jury instruction should be left to the trial court.

However, in *EEOC v. Wedco*,⁵⁷⁸ the court denied both the employer’s and EEOC’s motions for spoliation sanctions. The employer sought sanctions because the intake officer of the state Fair Employment Practices Agency (who eventually transferred the case to the EEOC) shredded his handwritten intake notes. The court found no bad faith because the officer explained that he copied the relevant notes into the employee’s charge and that the notes were a first draft of the charge. Accordingly, the court denied sanctions because there were no facts indicating the officer acted with a culpable mind. The court denied also the EEOC’s sanctions based on the allegation that the employer had destroyed a noose displayed in the workplace to intimidate the employee. The court found that because the employee took photographs of the noose, there was no prejudice to the EEOC by the employer’s destruction of the item.

5. Third-Party Subpoenas

In *EEOC v. Randall Ford*,⁵⁷⁹ the court emphasized that the proper procedure to obtain documents from a non-party is a subpoena and not a release from the EEOC for the employee’s prior employment records. While the court found those records discoverable, it held that the court had no authority to compel the EEOC to execute a release directing a non-party—the employee’s former employer—to produce documents.

However, some courts have found the EEOC has standing to quash subpoenas from the employer to third parties, including to non-party employers of the charging party. As in *EEOC v. Unit Drilling*,⁵⁸⁰ courts generally find that the EEOC has standing to quash if the agency is seeking to preserve the charging party’s privacy rights. In this case, the court considered whether the EEOC has standing to quash a subpoena issued by the defendant-employer to non-party current and former employers and educational institutions attended by the employees. The defendant argued that the EEOC lacked standing to challenge the non-party subpoenas, and that the information was relevant to job qualifications, background, mitigation of damages, and damages sought by the plaintiffs. The court held that the EEOC had standing to seek to quash the subpoenas in order to protect the privacy rights of the employees it represents and that the subpoenas were overbroad and clearly made no attempt to seek only relevant information. Therefore, the court granted the motion to quash and advised the employer to tailor its subpoenas to the issues in the case.

In *EEOC v. Wedco*,⁵⁸¹ the court considered the employer’s subpoena to the charging party seeking his diaries and calendars, medical and psychological records, and any EEOC charge ever filed by him. The court found the EEOC had standing to challenge the subpoena both as the plaintiff and representative of the charging party. As for the diaries and calendars, balancing the employee’s privacy rights with the employer’s interest in obtaining potentially relevant information regarding his emotional and mental state, the court ordered the EEOC to submit any responsive documents for *in camera* review. As for the medical and psychological records, the court determined the employee had not waived the physician-patient privilege and, since he did not intend to rely on medical records to support his emotional distress claim, the court refused to compel him to produce his medical records. However, as for the EEOC charges filed, the court agreed with the employer that those documents relate to his state of mind, motive, credibility, and litigiousness, but it limited the request to five years preceding his employment with the defendant.

Courts are sensitive to the adverse effects claimants may suffer in their current employment when the defendant issues subpoenas to those current employers. For example, in *EEOC v. Texas Roadhouse Inc.*,⁵⁸² the court granted the EEOC’s motion to quash subpoenas the defendant issued to claimants’ six current and five former employers. The court noted that the subpoenas sought personnel files, which

⁵⁷⁷ *EEOC v. Womble Carlyle*, 2014 U.S. Dist. LEXIS 793 (M.D.N.C. Jan. 6, 2014); *EEOC v. Womble Carlyle*, 2014 U.S. Dist. LEXIS 58938 (M.D.N.C. Apr. 29, 2014).

⁵⁷⁸ *EEOC v. Wedco, Inc.*, 2014 U.S. Dist. LEXIS 130929 (D. Nev. Sept. 15, 2014).

⁵⁷⁹ *EEOC v. Randall Ford*, 2014 U.S. Dist. LEXIS 56596 (W.D. Ark. Apr. 23, 2014).

⁵⁸⁰ *EEOC v. Unit Drilling Co.*, 2014 U.S. Dist. LEXIS 3685 (N.D. Okla. Jan. 13, 2014).

⁵⁸¹ *EEOC v. Wedco, Inc.*, 2014 U.S. Dist. LEXIS 55783 (D. Nev. Apr. 22, 2014).

⁵⁸² *EEOC v. Texas Roadhouse, Inc.*, 2014 U.S. Dist. LEXIS 125869 (D. Mass. Sept. 9, 2014).

include private information, and that subpoenas directed at claimants' current employers concerning disputes with past employers can have a "direct negative effect" on the current employment raising "the specter of retaliation" and "should be used only as a last resort." The court, however, ordered the EEOC to provide the information sought in these subpoenas, including job titles, dates of employment, and wage and benefit information.

Similarly, in *EEOC v. Midwest Regional Medical Center*,⁵⁸³ the court considered whether the EEOC could quash an employer's subpoena for documents from the charging party's other employers and depose his scheduler at his current workplace. The court held that the subpoenas for the documents were overbroad and that the employer failed to show that documents sought from previous employers were relevant to whether the defendant-employer terminated the employee on account of disability. Also, the court disallowed a deposition of the current employer's scheduler because it could cause annoyance and embarrassment and the defendant had other means to discover the information sought through that deposition.

In *EEOC v. JBS USA*,⁵⁸⁴ the court addressed a defendant's ability to subpoena employment-related documents from charging party's subsequent employers. The court found that documents from interveners' subsequent employer were relevant and the proper subject of a third-party subpoena. Specifically, the court denied the EEOC's motion to quash to the extent it sought information regarding requests for, and complaints about, religious accommodation, workplace injury records, attendance records, employment applications, discipline and discharge documents and dates of employment.

I. General Discovery by EEOC/Intervenor

EEOC-initiated lawsuits continue to present unique challenges for employers. As the cases below demonstrate, the EEOC often asks for information employers deem burdensome and costly during the discovery phase of litigation.

1. Section 30(b)(6) Depositions

Section 30(b)(6) depositions often play a critical role in the discovery process, even in EEOC-initiated lawsuits. In 2013 and 2014, several district court opinions addressed motions concerning 30(b)(6) deposition designations and the reasonableness of the EEOC's 30(b)(6) deposition notice.

In *EEOC v. Celadon Trucking Services, Inc.*,⁵⁸⁵ the EEOC did not believe the defendant-employer's designated Rule 30(b)(6) deponent was knowledgeable and could provide sufficient information about the defendant's recruitment processes. In denying the EEOC's motion to compel a proper Rule 30(b)(6) deponent, the court determined that while Rule 30(b)(6) requires a business entity to prepare a deponent to adequately testify on matters known by the deponent and also on subjects that the entity should reasonably know, Rule 30(b)(6) does not promise a perfect deponent, just a knowledgeable one under the circumstances. In addition, the court noted that the EEOC did not identify a current employee of the defendant-employer who had greater knowledge than the designated deponent concerning the Rule 30(b)(6) topics. The court also found that in the days following the 30(b)(6) deposition, the EEOC took the depositions of at least four of the defendant's employees, who presumably could have helped fill in any gaps left open during the 30(b)(6) deposition.

In FY 2014, several courts had to address the issue of whether the EEOC could take a 30(b)(6) deposition of a defendant-employer's counsel. In *EEOC v. Unit Drilling Company*,⁵⁸⁶ the court had previously ruled that the EEOC was entitled to explore the factual basis of the assertions in the defendant-employer's response to a charge of discrimination and that the contents of the response were relevant and not privileged. Despite the defendant-employer's efforts to produce two 30(b)(6) deponents to testify about the response, the company still did not know how its counsel came to make the factual assertions in the response to the charge of discrimination. As a result, the EEOC believed the only person who could testify about the response was counsel for the defendant-employer who drafted the response.

Therefore, the court concluded that under the circumstances, the only means available to explore the basis for the response was to depose the defendant-employer's counsel. The court determined that since the credibility of the defendant-employer's explanation for its job hiring decisions would be a focus of the case, the material appeared critical to the EEOC's case. The court granted the EEOC's motion

⁵⁸³ *EEOC v. Midwest Regional Medical Ctr.*, 2014 U.S. Dist. LEXIS 59697 (W.D. Okla. Apr. 30, 2014), *reconsid. denied*, 2014 U.S. Dist. LEXIS 93056 (W.D. Okla. July 9, 2014).

⁵⁸⁴ *EEOC v. JBS USA, LLC*, 2014 U.S. Dist. LEXIS 1141356 (D. Colo. Sept. 29, 2014).

⁵⁸⁵ *EEOC v. Celadon Trucking Services, Inc.*, 2013 U.S. Dist. LEXIS 156845 (S.D. Ind. Nov. 1, 2013).

⁵⁸⁶ *EEOC v. Unit Drilling Company*, 2014 U.S. Dist. LEXIS 121901 (N.D. Okla. Sept. 2, 2014).

to depose the defendant-employer's counsel under the following conditions: (1) the deposition could not last more than three (3) hours, unless there was an improper interference with the questioning; (2) the questioning was limited to the factual basis for the defendant-employer's counsel's assertions in the response to the charge and who at the defendant-employer reviewed the response before it was served; and (3) the deposition had to be scheduled and completed as soon as possible.

In *EEOC v. Midwest Regional Medical Center*,⁵⁸⁷ the court held that the defendant-employer had to produce a Rule 30(b)(6) witness to discuss the factual information represented in the defendant-employer's position statement and related correspondence to the EEOC regarding the underlying charge of discrimination. The court also determined that if the designated witness was the defendant-employer's counsel, counsel was only required to testify as to the factual information represented in the position statement and related correspondence to the EEOC and not to counsel's legal theories concerning those facts.

The court held also that the defendant-employer was not required to produce a Rule 30(b)(6) witness to address the recommendation, authorization, and approval process of the plaintiff-intervenor's leave of absence and termination because the defendant had already produced witnesses to testify to such. In addition, the court held that the defendant-employer had to produce a Rule 30(b)(6) witness prepared to discuss document retention and destruction policies and procedures as it related to personnel records of former employees and as it related to emails, both locally and at defendant's corporate home office. The court found also that a deposition regarding the factual basis of defendant's affirmative defenses would be appropriate; however, in the interest of time, the court granted the EEOC 20 additional interrogatories to obtain the factual basis behind the defendant's affirmative defenses.

Decisions such as *Midwest Regional Medical Center* and *Unit Drilling Company* show that while courts are willing to allow the EEOC to depose an employer's counsel as a Rule 30(b)(6) deponent, such depositions are limited in scope and narrowly tailored.

2. EEOC Communications Ex Parte with Former or Current Employees

As discussed above, in class actions initiated by the EEOC, issues may arise concerning the EEOC's and the defendant-employer's ability to engage in *ex parte* communications. In *EEOC v. SVT, LLC*,⁵⁸⁸ the EEOC sought an order granting it permission to interview former employees and current, non-managerial employees outside the presence of defendant's counsel. The EEOC also sought a protective order to prevent the defendant-employer from having *ex parte* communications with employees contained within the scope of the defined class, where those people had not indicated whether they wanted to be represented by the EEOC in the matter.

The court held that the employer could engage in *ex parte* communications with potential class members who had not communicated to the EEOC that they wanted to be represented by the EEOC in the matter. The court held also that the EEOC could contact current and non-managerial employees of the defendant-employer, provided the EEOC could not inquire into communications between the employees and the employer's counsel regarding the subject matter of the litigation.

The court also distinguished Title VII claims from ADEA claims because the ADEA provides that the EEOC acts as *de facto* counsel for employees because the individual's right to bring an ADEA suit terminates when a suit is brought by the EEOC. In contrast, under Title VII, the right "to bring a private action does not terminate with an EEOC lawsuit, and, thus, the relationship between the EEOC and potential class members is not the same as in an ADEA case."⁵⁸⁹

3. Spoliation Issues

A recent case demonstrates the importance of preserving evidence when faced with EEO claims. In *EEOC v. SunTrust Bank*,⁵⁹⁰ the EEOC requested an adverse inference jury instruction based on the employer's alleged failure to preserve evidence, specifically, video surveillance footage critical to the EEOC's sexual harassment case. The employer admitted it had a duty to preserve evidence, reviewed the surveillance footage twice, did not provide the surveillance footage to the EEOC, and allowed the surveillance footage to be taped over in contravention of its own policies.

⁵⁸⁷ *EEOC v. Midwest Regional Medical Center, LLC*, 2014 U.S. Dist. 77015 (W.D. Okla. June 6, 2014).

⁵⁸⁸ *EEOC v. SVT, LLC d/b/a Ultra Foods*, 2014 U.S. Dist. LEXIS 2391 (N.D. Ind. Jan. 8, 2014).

⁵⁸⁹ *SVT*, 2014 U.S. Dist. LEXIS 2391, at **12-13.

⁵⁹⁰ *EEOC v. SunTrust Bank*, 2014 U.S. Dist. LEXIS 47703 (M.D. Fla. Apr. 7, 2014).

While the court denied the EEOC's request for an adverse inference jury charge, the court did grant the EEOC's alternative request that it be permitted to introduce evidence regarding the defendant's surveillance video program, policies regarding preservation of surveillance videos, and failure to preserve the video surveillance footage in question. The court noted that while the defendant's conduct came close to crossing into the realm of bad faith, at that juncture, the court was not persuaded that the defendant's actions breached the bad faith boundary. The court determined that it would reconsider its decision if the EEOC demonstrated bad faith at a later time.

The above case emphasizes the importance of employers maintaining and following record retention policies and procedures.

4. Financial Information

The EEOC often seeks during the discovery process the financial status of an employer when the agency is seeking punitive damages.⁵⁹¹ In *EEOC v. Braun Electric Company*,⁵⁹² the EEOC's discovery requests sought documents as to the employer's net worth. The employer argued the EEOC's requests were irrelevant, immaterial, not reasonably calculated to lead to the discovery of admissible evidence, and sought documents protected by privacy rights and privileges under California law and the work product doctrine.

The court determined the EEOC alleged facts that, if true, could give rise to an award of punitive damages. The court noted the defendant did not attempt to demonstrate why the facts set forth did not constitute a *prima facie* case upon which punitive damages could be awarded and that the EEOC did not seek information such as assets, liabilities, loan payments or debts. The court noted also that the right to privacy is not an absolute bar to discovery and may be subject to invasion.

In making its ruling, the court reaffirmed that a defendant's financial information is relevant where a plaintiff states a claim for punitive damages. The court stated that a party's interest in the confidentiality of financial information may be adequately addressed via a protective order.

Similarly, the court in *EEOC v. Midwest Regional Medical Center, LLC*⁵⁹³ determined that the employer was required to produce the financial information requested by the EEOC including financial statements showing gross profits, income tax returns and documents showing net worth because the plaintiff was seeking punitive damages.

In *EEOC v. Pioneer Hotel*,⁵⁹⁴ the district court in Nevada also determined that the employer's financial condition was relevant to the pursuit of punitive damages. In *Pioneer*, the EEOC asked the defendant to identify and produce all documents that reflected, described or related to the defendant's financial condition (including all assets and liabilities) for the period beginning January 1, 2006 to the present. In making its decision, the court stated that although only the defendant's current financial condition was relevant to the issue of punitive damages, some retrospective discovery was permitted to accurately assess the defendant's financial condition. The court also noted that generally, courts allow a party to discover information relating to a defendant's financial condition for the two or three most recent years. Finally, the court ruled that to the extent the defendant's financial records were not publicly reported or available, the production of the documents was subject to a protective order.

5. General Discovery Concerns

In *EEOC v. BNSF Railway Company*,⁵⁹⁵ the EEOC requested to inspect the defendant-employer's premises and have the defendant make its facility available to the EEOC's attorneys, agents and experts for the purpose of coordinating an on-site analysis. The EEOC had planned to ask substantive questions concerning the frequency and necessity of tasks being performed. The defendant-employer countered that the EEOC's request was beyond the scope of Federal Rule of Civil Procedure 34.

While the court agreed as a general proposition that an inspection of the workplace to help the EEOC's experts determine whether a claimed work function was "essential" could be proper, the court also determined that the EEOC was not entitled to use a Rule 34 inspection as an alternative to depositions or written discovery. Therefore, the court granted the EEOC's motion to perform a Rule 34 inspection under very specific restrictions.

⁵⁹¹ While various courts during the past fiscal year leaned in favor of the EEOC when seeking financial information based on a claim for punitive damages, the courts have been split in their treatment of this issue with some courts refusing to order defendants to disclose such information until the EEOC demonstrated potential entitlement to punitive damages. *See, e.g.*, Littler's 2013 Annual Report on EEOC Developments at 65.

⁵⁹² *EEOC v. Braun Electric Company*, 2014 U.S. Dist. LEXIS 9262 (E.D. Cal. Jan. 24, 2014).

⁵⁹³ *EEOC v. Midwest Regional Medical Center, LLC*, 2014 U.S. Dist. 77015 (W.D. Okla. June 6, 2014).

⁵⁹⁴ *EEOC v. Pioneer Hotel*, 2014 U.S. Dist. LEXIS 143894 (D. Nev. Oct. 9, 2014).

⁵⁹⁵ *EEOC v. BNSF Railway Company*, 2014 U.S. Dist. LEXIS 4936 (D. Kan. Jan. 15, 2014).

Two months later, the EEOC returned to the court to request an order requiring the employer to ensure the agency observed an employee performing the essential job functions that the defendant claimed the plaintiff-intervenor could not perform.⁵⁹⁶ In large part, the magistrate judge denied the EEOC's motion and concluded that many aspects of the EEOC's request went beyond the proper scope of Rule 34. The magistrate judge also determined that while Rule 34 permits the observation of machinery, work practices, or manufacturing operations on a party's premises, it is within the court's discretion to deny or limit an inspection if the discovery can be obtained through other means that are more convenient or less burdensome or if the burden of the inspection outweighs its likely benefit. The district court denied the EEOC's motion for review of the magistrate judge's order.

The court in *EEOC v. OhioHealth Corporation*⁵⁹⁷ also had to determine the appropriateness of the EEOC's discovery requests. In *OhioHealth*, the EEOC alleged the defendant discriminated against a former employee when it denied the employee's request for reassignment to a vacant day shift position for which she was qualified. The EEOC's discovery requests sought information and documents related to all day-shift positions that were, or became, vacant after the employee requested to be reassigned to a day-shift position. The defendant produced information and documents related to the positions for which the employee actually applied. The EEOC argued that information related to all vacant day-shift positions for which the employee met the educational requirements was relevant because the defendant had a duty to identify job vacancies as a reasonable accommodation. The court agreed that this information was likely to lead to the discovery of admissible evidence. The court noted that the defendant had a duty to locate a suitable position for the employee once she requested a transfer to a different position as an accommodation, and the EEOC would bear the burden of showing that a vacant position existed and that she was qualified for the position.

6. Miscellaneous

In *EEOC v. Global Horizons*,⁵⁹⁸ the court denied the EEOC's motion for an interlocutory appeal under 28 U.S.C. § 1292(b) of the court's discovery order granting the employer the ability to discover claimants' immigration documents. However, recognizing that it was unusual to permit discovery of immigration status in a civil lawsuit, the court granted the EEOC a limited stay of the court's order to permit the EEOC an opportunity to seek interlocutory relief from the Ninth Circuit.

The EEOC filed notice of interlocutory appeal to the Ninth Circuit on November 6, 2013. On December 6, 2013, the Ninth Circuit ordered the parties to brief the issue of whether the district court's order was immediately appealable under the collateral order doctrine. Subsequently, on August 1, 2014, the EEOC voluntarily dismissed its interlocutory appeal.

In *EEOC v. Parker Drilling Co.*,⁵⁹⁹ the employer sought an order compelling the production of three documents originally withheld by the EEOC under the "conciliation" privilege. Later, in a revised privilege log, the EEOC added the attorney-client and government deliberative process privileges as reasons for the agency's withholding the documents. The defendant-employer asserted that the conciliation privilege was inapplicable and that the EEOC waived the newly asserted privileges by failing to identify them in its initial privilege log. The court ordered the *in camera* submission of the documents, and upon review, found that two of the three documents were conciliation materials privileged from discovery under § 2000e-5(b) because they consisted of "proposals" and counter-proposals of compromise by the parties. The court held that the remaining documents did not contain such materials, and therefore were not material to which the § 2000e-5(b) conciliation privilege applied. The court also found that the EEOC waived the attorney-client and government deliberative process privileges by failing to raise the privileges when its discovery response was due. The court awarded the defendant-employer reasonable fees and costs associated with obtaining the materials because the court determined that the materials were unequivocally purely factual matters.

In *EEOC v. Performance Food Group*,⁶⁰⁰ the court was confronted with the EEOC's attempt to hold an employer to prior statements. During the administrative portion of the case, *Performance Food* took the position that two specific supervisors had ultimate hiring oversight of the division in questions. The court previously adopted this position when, during a prior subpoena enforcement proceeding, it cited

⁵⁹⁶ *EEOC v. Burlington Northern Santa Fe Railroad*, 2014 U.S. Dist. LEXIS 32408 (D. Kan. Mar. 13, 2014).

⁵⁹⁷ *EEOC v. OhioHealth*, 2014 U.S. Dist. LEXIS 148980 (S.D. Ohio Oct. 20, 2014).

⁵⁹⁸ *EEOC v. Global Horizons, Inc., d/b/a Global Horizons Manpower, Inc., et al.*, 2013 U.S. Dist. LEXIS 149713 (E.D. Wash. Oct. 3, 2013).

⁵⁹⁹ *EEOC v. Parker Drilling Co.*, 2014 U.S. Dist. LEXIS 151053 (D. Alaska Oct. 22, 2014).

⁶⁰⁰ *EEOC v. Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 143194 (D. Md. Oct. 8, 2014).

the ultimate hiring authority of the two supervisors as relevant to the underlying charge.⁶⁰¹ The court, however, declined to find that the employer was judicially estopped from changing its prior position during the subsequent litigation. The court found that *Performance Food* did not take the prior position for the purpose of gaining an unfair advantage in either the administrative phase or the subpoena enforcement action. The court did order that the EEOC be allowed an opportunity for discovery on the issue and noted that the prior statement and change of position could be admitted in the case.

J. Summary Judgment

There were fewer significant summary judgment wins for both the EEOC and employers in FY 2014 than in FY 2013. Neither side did significantly better than the other in terms of win or loss rates. Several noticeable themes, however, were evident. First, employers sought summary judgment, with mixed results, on the EEOC's ability to bring pattern-or-practice suits where the scope of the EEOC's investigation was not commensurate with the scope of its claims. Second, the EEOC continued its focus on disability accommodation claims, with multiple summary judgment opinions hinging on whether being physically present at the job site was an essential function of the job. Third, the EEOC's continued increased focus on pregnancy discrimination was apparent, with several cases this year serving to remind employers that the agency is not only increasing its pregnancy-related efforts in the ADA arena, but also with respect to Title VII claims. Finally, a hot-button issue from fiscal year 2013—summary judgment on the EEOC's failure to conciliate—continues to boil, with the Supreme Court granting the employer's petition for *certiorari* to review the Seventh Circuit's decision in *EEOC v. Mach Mining*.

1. Summary Judgment on the Scope of the EEOC's Investigation

Employers had some success this fiscal year seeking summary judgment in pattern-or-practice cases by arguing that the scope of the EEOC's complaint exceeded the scope of its investigation. The defendant-employer won summary judgment on this issue in *EEOC v. Sterling Jewelers Inc.*⁶⁰² and very narrowly lost a similar motion in *EEOC v. Bass Pro Outdoor World, LLC*⁶⁰³ addressing the related issue of whether the EEOC may bring a claim on behalf of individuals whose identities were not determined until after the EEOC's investigation. In the latter case, the defendant moved for interlocutory appeal. On November 17, 2015, the district court granted this motion.⁶⁰⁴

In *EEOC v. Sterling Jewelers Inc.*,⁶⁰⁵ the EEOC alleged that the employer engaged in a pattern and practice of discriminating against its female employees in promotion and compensation "throughout its stores nationwide."⁶⁰⁶ The employer moved for summary judgment on the EEOC's claims of nationwide discrimination, arguing that those claims should be dismissed because "there [was] no evidence that the EEOC conducted a nationwide investigation of its employment practices prior to commencing [the] action."⁶⁰⁷ Analogous to the posture it has taken with regard to court inquiries into its conciliation efforts, the EEOC argued that courts may not inquire into the sufficiency of its investigation.

The court granted summary judgment in favor of the employer, holding the EEOC failed to present sufficient evidence that it conducted a nationwide investigation before it filed this lawsuit.⁶⁰⁸ In so doing, the court noted that while courts will not review the sufficiency of the EEOC's pre-lawsuit investigation, they will review whether an investigation occurred and the scope of any investigation.⁶⁰⁹

The scope of the EEOC's investigation was also the central issue in *EEOC v. Bass Pro Outdoor World, LLC*,⁶¹⁰ in which the EEOC alleged the defendant unlawfully failed to hire Black and Hispanic applicants and engaged in unlawful retaliation against individuals who opposed its practices. The defendant filed a renewed motion for summary judgment, arguing in relevant part that the EEOC failed to adequately investigate its claims before filing suit.

601 *Performance Food Group, Inc.*, 2014 U.S. Dist. LEXIS 143194, at *5.

602 *EEOC v. Sterling Jewelers Inc.*, 3 F. Supp. 3d 57 (W.D.N.Y. 2014).

603 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 103552 (S.D. Tex. July 30, 2014).

604 *EEOC v. Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014).

605 *Sterling Jewelers Inc.*, 3 F. Supp. 3d at 57.

606 *Id.* at 62.

607 *Id.*

608 *Id.* at 69.

609 *Id.* at 63.

610 *Bass Pro Outdoor World, LLC*, 2014 U.S. Dist. LEXIS 103552.

The basis for the employer's argument was the EEOC's admission that some individuals on whose behalf it sought to bring a pattern-or-practice claim were not identified during the course of its investigation, and the court noted that there was discrepancy in the record as to whether *any* such individual had been identified by name during the EEOC's investigation. The court framed the issue as "whether the EEOC can bring a § 706 claim on behalf of individuals whose identities were not determined (or will not be determined) until after the EEOC completed its investigation."⁶¹¹ The EEOC argued that it can conduct an adequate investigation even where it does not know the specific identities of all those who were aggrieved. The defendant argued that if the Commission cannot identify the aggrieved individuals, then its investigation cannot be considered adequate.

The court found merit in both sides' arguments and considered the issue a "very close question."⁶¹² In the end, the court denied the defendant's motion because "the Court [was] not fully persuaded that the Commission is barred from bringing § 706 claims on behalf of unidentified victims."⁶¹³

The defendant filed a motion for interlocutory appeal on August 12, 2014, which was granted on November 17, 2014.

2. A Focus on Disability Accommodation and Telecommuting

Disability discrimination and accommodation cases also made their mark on the 2014 fiscal year landscape, as the EEOC continues to view disability accommodation as a top agenda item. Two cases of particular interest focused on the evolving issue of the circumstances under which an employee's physical presence at the employer's facilities may be considered an essential job function.

In *EEOC v. AT&T Corp.*,⁶¹⁴ the EEOC accused AT&T of failing to accommodate a former employee responsible for handling customer service calls and discharging her after she was diagnosed with Hepatitis C. The employer argued it had terminated the employee for excessive absences. Both parties sought summary judgment. The court denied both motions, finding several genuine issues of material fact in dispute, the most important of which from a trends perspective is whether regular attendance was an essential job function. Notably, the court suggested that whether regular attendance is an essential job function in any ADA case may never be appropriately determined at the summary judgment stage, stating: "[R]egular attendance is important in any job, and to settle this dispute as a matter of law under the ADA is beyond the reach of summary judgment."⁶¹⁵

The Sixth Circuit case *EEOC v. Ford Motor Company*⁶¹⁶ addressed the related questions as to whether physical presence at the office should be treated as an essential job function for an employee suffering from a debilitating disability, or whether a telecommuting arrangement could be a reasonable accommodation. The case involved a former employee who was discharged from her position as a "resale steel buyer," a position that required troubleshooting, interacting with suppliers, and group problem-solving with other members of her team, after asking if she could telecommute up to four days per week due to Irritable Bowel Syndrome. Based on the claimant's job functions, the defendant determined that telecommuting was not a reasonable accommodation and offered the alternative accommodations of a cubicle closer to a restroom or a transfer to another position better suited to telecommuting. The claimant refused these alternative accommodations and developed absenteeism and performance problems leading to her discharge. The EEOC alleged in relevant part that the defendant discriminated against the claimant on the basis of her disability by failing to grant her request to telecommute.⁶¹⁷ During fiscal year 2012, the district court granted summary judgment for the employer, finding that the claimant's proposed accommodation of working from home up to four days per week was not reasonable.⁶¹⁸

611 *Id.* at *66.

612 *Id.* at *81.

613 *Id.*

614 *EEOC v. AT&T Corp.*, 2013 U.S. Dist. LEXIS 164987 (D. Ind. Nov. 20, 2013).

615 *AT&T Corp.*, 2013 U.S. Dist. LEXIS 164987, at *11.

616 *EEOC v. Ford Motor Co.*, 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014), *reh'g granted*, *EEOC v. Ford Motor Co.*, No. 12-2484, 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

617 *Id.* The EEOC alleged also that the defendant retaliated against the claimant by giving her a poor performance review and ultimately terminating her employment for filing a Charge of Discrimination with the EEOC.

618 See *EEOC v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 128200, at *18 (E.D. Mich. Sept. 10, 2012). The district court granted summary judgment on the EEOC's retaliation claim on the grounds that the temporal proximity between the claimant's filing her charge and the alleged adverse actions was insufficient to create a genuine question of fact as to whether the employer's claim she was terminated for poor performance was pretextual. *Id.* at **20-21.

In an initial victory for the EEOC, the Sixth Circuit reversed the district court's grant of summary judgment to the employer, holding there were genuine issues of fact as to whether physical presence at the office was one of the claimant's essential job functions or whether telecommuting was a reasonable accommodation. The court repeatedly emphasized that recent improvements in telecommunications technology made it more difficult for employers to establish that physical presence in the office is an essential job function, even for positions that required teamwork and face-to-face interaction, stating:

[A]dvancing technology has diminished the necessity of in-person contact to facilitate group conversations. The world has changed since the foundational opinions regarding physical presence in the workplace were issued: teleconferencing technologies that most people could not have conceived of in the 1990s are now commonplace.⁶¹⁹

The court concluded that in light of these technological advances, whether physical presence in the office is an essential job function is a "highly fact specific question."⁶²⁰

This favorable outcome for the EEOC may prove to be short-lived, however, as the Sixth Circuit granted the defendant's petition for rehearing *en banc* on August 29, 2014.⁶²¹ Oral argument was held on December 3, 2014.

These cases are significant for employers because they demonstrate that as telecommunications technology continues to become more advanced, employers may have an increasingly difficult time arguing that an employee's physical presence in the workplace is an essential job function. Even for disabled employees whose job positions are such that employers would strongly prefer them to maintain a physical presence at the employer's facilities, and whose job positions may at first blush seem to require the employee's physical presence as a matter of common sense, employers will want to give careful consideration to requests that the employee be allowed to work from home as an accommodation.

3. Continued Focus on Pregnancy Discrimination

The EEOC continued its efforts to protect pregnant women from unlawful discrimination. The following two cases are noteworthy examples that demonstrate the difficulties employers may face when trying to establish that a pregnant job applicant was denied a position because her pregnancy rendered her unqualified, and the tough choices employers may face when presented with an employee with pregnancy-related medical restrictions who seeks to waive those restrictions and continue performing her job duties.

In *EEOC v. The WW Group, Inc.*,⁶²² the claimant expressed interest in applying to work for Weight Watchers as a group leader while she was pregnant. Weight Watchers maintained an unwritten policy that all applicants must be at their "goal weight" under the Weight Watchers program in order to be eligible for employment. The claimant was above her goal weight at the time she expressed interest in applying for work because she was in the fifth month of her pregnancy, and thus, she was told that she was not eligible for employment because she was not at her goal weight. The EEOC filed suit arguing that the company discriminated against the claimant on the basis of her sex by refusing to consider hiring her as a group leader because she was pregnant.

The employer moved for summary judgment, arguing that it was undisputed the claimant was not at goal weight when she sought employment, was therefore not qualified for the position, and there was no genuine issue of material fact that Weight Watchers would not have hired claimant for the position even in the absence of any discriminatory motive. The court denied the employer's motion, finding several genuine factual disputes, the most notable of which was whether the goal weight requirement was related to the claimant's ability to perform the job.⁶²³ The court noted that "[a] qualification requirement, although objective, that is totally unrelated to job performance is an insufficient basis on which to refuse to hire an individual."⁶²⁴ The court further emphasized that Weight Watchers had failed to adequately

619 2014 U.S. App. LEXIS 7502, at **19-20.

620 *Id.* at *17. The court also reversed summary judgment on the retaliation claim, holding that there was a genuine issue of fact as to whether the employer's explanation that it discharged the claimant for poor performance was pretextual, specifically because even though the claimant's performance deficiencies were an ongoing problem, they prompted a negative review only after the claimant filed her EEOC charge. *Id.* at *42.

621 2014 U.S. App. LEXIS 17252 (6th Cir. Aug. 29, 2014).

622 *EEOC v. The WW Group, Inc.*, 2013 U.S. Dist. LEXIS 169134 (D. Mich. Dec. 2, 2013).

623 *The WW Group, Inc.*, 2013 U.S. Dist. LEXIS 169134, at **25-26.

624 *Id.*

address the EEOC's argument that its applicant goal weight requirement cannot trump the provisions of Title VII, noting "[t]he fact that it has a policy that it claims permits it to discriminate against [the claimant] on the basis of her pregnancy-related weight gain does not relieve [the company] of its obligation to comply with the [Pregnancy Discrimination Act.]"⁶²⁵

In another of fiscal year 2014's more noteworthy pregnancy discrimination cases, *EEOC v. Greystar Management Services*,⁶²⁶ the claimant, a housekeeper at an apartment complex, informed her employer that she was concerned about working with chemicals while pregnant. At the employer's request, the claimant obtained and provided doctor's notes indicating that her exposure to chemicals had to be limited during her pregnancy even while wearing a mask and gloves. After providing these notes, however, the claimant expressed a willingness to resume at least most of her prior duties requiring use of chemicals. Nevertheless, the claimant's supervisors refused to allow the claimant to perform work that contradicted her doctor's instructions and told her she could only return to work if she obtained another letter from her doctor modifying her restrictions. The claimant was placed on unpaid leave and told that she was not terminated and could reapply to work with the defendant once her doctor cleared her to resume working with chemicals. Approximately five months after putting the claimant on leave, and after the claimant had already given birth, the defendant filled her position on the basis that it was claimant's responsibility to contact the company about returning and she had not done so.⁶²⁷

The EEOC filed suit alleging the defendant engaged in unlawful sex discrimination under Title VII by terminating the claimant after she became pregnant.⁶²⁸ The parties filed cross-motions for summary judgment. The central issue in the case was whether the defendant discriminated against the claimant by deferring to her doctor's pregnancy-based medical restrictions and refusing to allow the claimant to waive those restrictions.⁶²⁹

The court denied the defendant's motion for summary judgment because the comments of a former HR director suggested the defendant may have approached the claimant's medical restrictions differently because she was pregnant.⁶³⁰ The court denied the EEOC's motion for summary judgment because it found the defendant advanced undisputed legitimate, nondiscriminatory reasons for its action, including: it had no policy barring pregnant women from working; it did not initiate any issue of concern as to the claimant's pregnancy; and it requested a doctor's note only after the claimant sought an accommodation.⁶³¹

These cases are significant because they show that while the EEOC's heightened focus on discrimination against pregnant women under the Americans With Disabilities Act continues to draw headlines, the EEOC also remains focused on potential discrimination on the basis of pregnancy under Title VII.

4. U.S. Supreme Court to Decide Whether Conciliation Efforts are Subject To Judicial Review

In last year's Annual Report, we noted that in response to increasing demands from employers that the EEOC make a good-faith effort to conciliate their claims, the EEOC sought summary judgment in multiple cases, with varying results, arguing that conciliation efforts were not subject to judicial review.

As discussed more fully in Section VC of this Report, the Seventh Circuit issued a highly controversial decision at the beginning of fiscal year 2014 in *EEOC v. Mach Mining, LLC*,⁶³² when the Seventh Circuit reversed a district court decision denying the EEOC's motion for partial summary judgment on the defendant's affirmative defense that the EEOC did not conciliate in good faith prior to bringing suit against the company, and held that the EEOC's conciliation efforts are not subject to judicial review.⁶³³ The Seventh Circuit's holding is contrary to every other circuit court decision addressing the issue. As a result, Mach Mining's petition for *certiorari* to the U.S. Supreme Court was granted on June 30, 2014.⁶³⁴ The Court therefore appears poised to resolve this important issue that has divided federal appeals courts. Both parties have now filed their opening briefs, oral argument is set for January 13, 2015, and a decision is expected in the spring of 2015.

625 *Id.* at *38.

626 *EEOC v. Greystar Management Services*, 2013 U.S. Dist. LEXIS 177238 (D. Md. Dec. 18, 2013).

627 *Greystar Management Services*, 2013 U.S. Dist. LEXIS 177238, at *28.

628 *Id.* at *2.

629 *Id.* at *47.

630 *Id.* at *55.

631 *Id.* at *84.

632 *Mach Mining, LLC*, 738 F.3d 171 (7th Cir. 2013), *cert. granted*, No. 13-1019 (U.S. June 30, 2014).

633 738 F.3d at 182-183.

634 *See* 134 S.Ct. 2872 (2014).

K. Default Judgment

Ignoring a problem does not make it go away, particularly if that problem is an age discrimination lawsuit. On February 24, 2014, a district court in Hawaii denied a defendant healthcare facility owner's second attempt to set aside an award of default judgment, because she waited 18 months after the initial entry of judgment to contest the order.⁶³⁵ Moreover, the initial default judgment was granted for the defendants' similar failure to respond to the ADEA complaint in the first instance.⁶³⁶

In this case, the plaintiff sued her employer, a healthcare facility, claiming she was unlawfully terminated on account of her age. The healthcare facility's owner and primary manager reportedly made disparaging comments about the plaintiff's age (54) before firing her. Following an investigation, the EEOC named the healthcare facility as a defendant. Soon after filing an answer to the ADEA complaint, the business entity dissolved. Default judgment was entered against the facility on September 7, 2011.

Two months later, the EEOC filed an amended complaint and added the facility's owner as a defendant on the theory that she was the entity's "alter ego." The facility owner neither responded to any of the litigation notices nor appeared at the hearing on the EEOC's Motion for Default Judgment. As a result, default was entered against the facility owner on January 5, 2012.

A copy of the magistrate judge's findings and recommendations was returned as undeliverable; as a result, the court directed that a copy be sent to the address at which the defendant was successfully served with the complaint. Once again, the plaintiff failed to respond.

The magistrate determined that the facility owner was the alter ego of the facility itself with respect to the lawsuit, and was therefore liable for any violations of the ADEA in connection with the lawsuit. The court determined that the plaintiff's amount of back pay plus liquidated damages with interest amounted to \$193,236.88.

It was only a year and a half later that the defendant owner appeared for a Judgment Debtor Examination and filed a petition to set aside the default judgment. In denying her request, the magistrate noted that under Rule 60(c) of the Federal Rules of Civil Procedure, a motion to relieve a party from a final judgment "must be made within a reasonable time." In addition, such a motion made on account of a mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been discovered within a reasonable time to move for a new trial; or fraud, misrepresentation, or misconduct by the opposing party,⁶³⁷ must be made "no more than a year after the entry of the judgment[.]"⁶³⁸

The magistrate ruled that the request to set aside the entry of judgment was clearly outside the one-year limitation, and that "[w]hile what constitutes reasonable time depends upon the facts of the case rather than an arbitrary time period, setting aside judgments after such a lengthy delay requires a showing of 'extraordinary circumstances.'"⁶³⁹ In this case, the defendant failed to offer any evidence to support such a showing. Thus, to the extent the defendant premised her claims on excusable neglect to participate in the litigation, her request was barred by the one-year limitations period. To the extent her rationale for setting aside the default judgment was premised under some "other reason," she "failed to present extraordinary circumstances to overcome the unreasonable delay in presenting her request."⁶⁴⁰

A motion to set aside an entry of default for "good cause"⁶⁴¹ also failed this fiscal year. In *EEOC v. Titan Waste Services*,⁶⁴² the court granted the defense counsel's motion to withdraw, but ordered the defendant to obtain new counsel within 30 days, which it did not do. The plaintiff subsequently moved for default judgment. While this motion was pending, an attorney for the defendant filed a Notice of Appearance. The court ordered the defendant to file a motion for leave to file an untimely response with a memorandum in support, as well as a response to the original motion for default. These orders were ignored. Instead, the defendant filed a motion to set aside the default judgment four months after the counsel's appearance.

635 *EEOC v. Haw. Healthcare Professionals, Inc., et. al*, 2014 U.S. Dist. LEXIS 23193 (Feb. 24, 2014), adopted by *EEOC v. Haw. Healthcare Professionals, Inc. et al*, 2014 U.S. Dist. LEXIS 34219 (D. Haw. Mar. 17, 2014); *EEOC v. Frutoz-De Harne, et al.*, 2014 U.S. Dist. LEXIS 93088 (D. Haw. July 9, 2014).

636 *EEOC v. Haw. Healthcare Professionals, Inc.*, 2012 U.S. Dist. LEXIS 100844 (D. Haw. May 10, 2012), adopted by *EEOC v. Haw. Healthcare Professionals, Inc., et. al*, Civ. No. 10-00549 ACK-BMK (D. Haw. July 18, 2012).

637 *Haw. Healthcare Professionals, Inc., et. al*, 2014 U.S. Dist. LEXIS 23193, at *4, citing FED. R. CIV. P. (60)(b)(1-3).

638 *Id.* at * 5, citing FED. R. CIV. P. 60(c).

639 *Id.* at **5-6.

640 *Id.* at *7.

641 FED. R. CIV. P. 55(c).

642 *EEOC v. Titan Waste Services, Inc.*, 2014 U.S. Dist. LEXIS 30522 (N.D. Fla. Mar. 10, 2014).

In denying the motion to set aside the default, the court explained:

When a litigant has been given ample opportunity to comply with court orders but fails to effect any compliance, the result may be deemed willful. . . This is such a case. Defendant failed to comply with the Court's order to retain new counsel; did not timely respond to Plaintiff's Motion for Default Judgment; gave late notice of new counsel with no explanation; failed to comply with the Chief Magistrate Judge's Order to request leave to file an untimely response along with a proposed response to the Motion for Default Judgment; and ignored the Chief Magistrate Judge's Order to show cause why the Court should not enter a default judgment. Accordingly, the Court finds that Defendant has displayed a reckless and willful disregard for these judicial proceedings, and the Court need not make any additional findings in order to deny the relief requested.⁶⁴³

Judgment was ultimately entered in favor of the plaintiff for \$228,603.75.

L. Bankruptcy

A couple of decisions issued in FY 2014 indicate that neither a plaintiff's nor a defendant's bankruptcy filing can blunt the EEOC's efforts to pursue relief on the claimant's behalf.

In *EEOC v. Mid-West Regional Medical Center, LLC*,⁶⁴⁴ the plaintiff filed for voluntary bankruptcy six months after the EEOC filed an action on her behalf for disability discrimination under the ADA. Five months later, on July 2, 2014, the defendant company and the bankruptcy trustee filed a Joint Motion to Approve Compromise of Controversy and Settlement of Litigation. In essence, the company and bankruptcy trustee had agreed that—pending court approval—the company would pay the bankruptcy trustee \$15,000, and that all discrimination claims and causes of action would be discharged. The company argued that “the EEOC should be judicially estopped from pursuing damage claims on behalf”⁶⁴⁵ of the defendant because of the bankruptcy filing.

Evaluating the various factors of Tenth Circuit precedent,⁶⁴⁶ the court disagreed with the company's position, finding that the EEOC is not judicially estopped from pursuing damage claims on behalf of the plaintiff because, among other reasons, the plaintiff did not assert an inconsistent position with the bankruptcy court regarding the discrimination litigation, and that she did not act to mislead either court. Therefore, the court held that the EEOC was not judicially estopped from seeking damage claims on the plaintiff's behalf.⁶⁴⁷ Any damage amount awarded, however, would be offset by any agreed-upon settlement amount between the trustee and the company.

In *EEOC v. Lehi Roller Mills Co., Inc.*,⁶⁴⁸ the defendant in the action had filed for bankruptcy, and its counsel moved to withdraw. In response, the EEOC moved to amend the court's order permitting the counsel to withdraw. Specifically, the amendment sought to require the defendant to retain substitute counsel within 21 days of the order rather than 21 days after the bankruptcy stay is lifted. The court granted the EEOC's motion, finding that because the EEOC is an exempt governmental unit, it is not affected by the bankruptcy stay so long as the agency is “enforce[ing] . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.”⁶⁴⁹

In essence, because the EEOC in this case was seeking injunctive as well as monetary relief, it was not subject to the automatic bankruptcy stay. In the event the EEOC obtains monetary relief, however, the court held that the stay will apply.

643 *Titan Waste Services*, 2014 U.S. Dist. LEXIS 30522, at **4-5.

644 *EEOC v. Mid-West Regional Medical Center, LLC*, 2014 U.S. Dist. LEXIS 108899 (W.D. Okla. Aug. 7, 2014).

645 *Mid-West Regional Medical Center*, 2014 U.S. Dist. LEXIS 108899 at *7, citing Def. Mot. To Strike at 2.

646 *Eastman v. Union Pac. R.R Co.*, 493 F.3d 1151 (10th Cir. 2007) (Plaintiff was estopped from pursuing personal injury claims after failing to disclose the personal injury action during his bankruptcy proceedings. The appellate court discussed three factors that typically inform the decision whether to apply the doctrine of judicial estoppel in a particular case: “First a party's subsequent position must be clearly inconsistent with its former position. Next, a court should inquire whether the suspect party succeeded in persuading a court to accept that party's former position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled. Finally, the court should inquire whether the party seeking to assert an inconsistent position would gain an unfair advantage in the litigation if not estopped.” *Eastman*, 493 F.3d at 1156).

647 2014 U.S. Dist. LEXIS 108899, at *11.

648 *EEOC v. Lehi Roller Mills Co., Inc.*, 2013 U.S. Dist. LEXIS 155017 (D. Utah Oct. 28, 2013).

649 *Lehi Roller Mills Co.*, 2013 U.S. Dist. LEXIS 155017, at *3, citing 11 U.S.C. § 362(b)(4).

M. Trial

1. Trial Spotlight

The EEOC has made it clear in recent years that the ADA is a top enforcement priority. The Commission has also paid very close attention to harassment cases, especially harassment cases that could be expanded to include systemic or class-wide allegations. The EEOC tried cases in each of these focus areas during the 2014 fiscal year.

In *EEOC v. Beverage Distributors Co., LLC*,⁶⁵⁰ the EEOC alleged the defendant discriminated against the claimant when it withdrew its conditional offer of employment for a night warehouse loader position upon learning the claimant was legally blind. The parties tried the case to a jury. The jury (1) determined the defendant withdrew its conditional offer of employment because of the plaintiff's disability; (2) awarded \$132,347 in backpay; and (3) reduced the backpay award by \$102,803.75 because the claimant did not mitigate his damages.⁶⁵¹ The EEOC moved for judgment as a matter of law, alleging there was insufficient evidence for a jury to consider the defendant's failure-to-mitigate defense. The agency also asked the court to award prejudgment interest on the backpay award, reinstatement and/or front pay, a tax penalty offset, and injunctive relief.

The court granted the EEOC's motion concerning the failure-to-mitigate defense, reasoning the defendant did not establish a condition precedent to a failure-to-mitigate defense. That is, it failed to demonstrate there were suitable positions available, which the claimant could have discovered and for which the claimant was qualified.⁶⁵² The court found the employer's evidence regarding what jobs *existed* was insufficient to show either what jobs were actually *available*, or whether plaintiff was qualified for the available jobs.⁶⁵³ The court rejected the argument that a jury could infer some of the existing jobs would have been available during the relevant time period. Because there was insufficient evidence concerning the availability of jobs, the jury had no basis for its finding that the claimant had failed to mitigate his damages. The court reinstated the jury's back pay award of \$132,347.⁶⁵⁴

The court in *Beverage Distributors Co.* also granted the EEOC's requests for pre-judgment interest and a tax penalty offset on the backpay award.⁶⁵⁵ The court found pre-judgment interest is compensatory rather than punitive relief and was necessary to place the plaintiff in the position he would have been in "but for his wrongful termination."⁶⁵⁶ With regard to a tax penalty offset, which is intended to mitigate the tax consequences of the plaintiff being placed in higher tax bracket because of his backpay award, the court rejected the argument that tax offsets were inappropriate in single plaintiff cases and ordered a hearing to determine the tax consequences of the backpay award.⁶⁵⁷

On the issue of reinstatement, the court found the defendant had not demonstrated the claimant's current position was financially comparable to the position the claimant had sought with the defendant.⁶⁵⁸ There was also no evidence showing the defendant's relationship with the plaintiff was untenable. Accordingly, the court ordered reinstatement.⁶⁵⁹

The court in *Beverage Distributors Co.* also granted the EEOC's request for injunctive relief, permanently enjoining the defendant from further discrimination, and requiring the defendant to train employees, revise its policies, update its job postings, post certain notices, make periodic reports to the EEOC, and allow the EEOC to review its compliance efforts.⁶⁶⁰ The defendant argued that the EEOC waived its right to injunctive relief. The court rejected the argument. It was sufficient for the EEOC to state in the final pretrial order that it sought "reinstatement and front pay and other *equitable relief*."⁶⁶¹ Moreover, the court found injunctive relief was not limited to cases where there was a pattern or practice of discrimination.⁶⁶² The court further noted the testimony of defendant's witnesses "demonstrated a lack of sufficient knowledge about the ADA, its interactive process, and the requirement that reasonable accommodations be provided to employees."⁶⁶³

650 *EEOC v. Beverage Distributors Co., LLC*, 2013 U.S. Dist. LEXIS 172650 (D. Colo. Dec. 9, 2013).

651 *Beverage Distributors Co., LLC*, 2013 U.S. Dist. LEXIS 172650, at *2.

652 *Id.* at *7.

653 *Id.* at **10–11.

654 *Id.* at *20.

655 *Id.* at *24.

656 *Id.* at *21.

657 *Id.* at *29.

658 *Id.* at **26–27.

659 *Id.* at *28.

660 *Id.* at **30–31.

661 *Id.* at *30 (emphasis added).

662 *Id.* at *33.

663 *Id.* at *32.

2. Witnesses

Serious consequences may result from failure to adhere to court directives concerning designation of witnesses. In *EEOC v. JBS USA, LLC* (“*JBS I*”),⁶⁶⁴ the court granted the EEOC’s motion to strike 103 witnesses the defendant disclosed more than a year and a half after the deadline to supplement initial disclosures passed.⁶⁶⁵ The court bifurcated the religious discrimination case into two phases: Phase I, concerning pattern and practice of denial of religious accommodation, retaliation, and discipline and discharge; and Phase II, concerning pattern and practice of hostile work environment and individual damages. The court entered a scheduling order governing Phase I which included an October 20, 2011, deadline for parties to serve supplemental disclosures.⁶⁶⁶

Well over a year later, in February and March 2013, the defendant disclosed 103 witnesses, whom it characterized as rebuttal or impeachment witnesses.⁶⁶⁷ The court rejected the defendant’s argument that the scheduling order’s supplemental disclosure deadline did not require the parties to identify all *trial* witnesses, but rather was intended to merely formalize the bifurcation of litigation issues.⁶⁶⁸ The court cautioned that scheduling orders may not be “cavalierly disregarded . . . without peril,” and emphasized the defendant had an “extended period of time” to move to amend its witness list on a showing of good cause.⁶⁶⁹ The court further found the defendant’s designations did not indicate the witnesses were solely rebuttal or impeachment witnesses. And, in any event, the defendant had time to amend its witness list to include impeachment witnesses but did not do so.⁶⁷⁰

Also in *EEOC v. JBS*,⁶⁷¹ the EEOC moved to strike two other witnesses the defendant disclosed on the grounds the defendant’s disclosures were generic and prevented the EEOC from deciding whom to depose.⁶⁷² The court granted the motion to strike with regard to one witness who defendant identified only as a “Greeley Police Department Officer responding to plant on 9/5/08.”⁶⁷³ The court reasoned the disclosure failed to provide the EEOC with enough information to determine specifically whom it should depose.⁶⁷⁴

The defendant identified also two corporate witnesses by name, but added to the designation “or other corporate witness familiar with beef operations.”⁶⁷⁵ The court found that the disclosure provided enough information for the EEOC to take the named individuals’ deposition, but did not provide enough information to allow the plaintiff to depose another corporate witness in his place.⁶⁷⁶

3. Evidentiary Issues

Before cases reach a fact finder, the parties often must sort out evidentiary issues through the briefing of motions *in limine*. In *EEOC v. Suntrust Bank*,⁶⁷⁷ the defendant in a sexual harassment case sought to preclude the EEOC from relying on so-called “me too” evidence—evidence by non-party former employees regarding alleged harassment—at trial.⁶⁷⁸ The three intervenors alleged a single supervisor stared at their breasts, made inappropriate comments about their physiques, touched them inappropriately, and threatened to retaliate against them.⁶⁷⁹ At issue was the testimony of two non-parties who made similar allegations concerning the same supervisor.⁶⁸⁰ The court allowed the “me too” evidence, finding non-parties’ testimony concerning (1) alleged sexual harassment; (2) reporting the harassment; and (3) allegedly being retaliated against was relevant to the defendant’s motive, intent, or plan to discriminate and retaliate against victims of

664 *EEOC v. JBS USA, LLC* (“*JBS I*”), 2014 U.S. Dist. LEXIS 41276 (D. Colo. Mar. 25, 2014).

665 *JBS I*, 2014 U.S. Dist. LEXIS 41276, .at **10–11.

666 *Id.* at *10.

667 *Id.* at *11.

668 *Id.* at *12.

669 *Id.* at *15.

670 *Id.* at *22.

671 *EEOC v. JBS USA, LLC* (“*JBS II*”), 2014 U.S. Dist. LEXIS 127419 (D. Colo. Sept. 9, 2014).

672 *JBS II*, 2014 U.S. Dist. LEXIS 127419, at **30–31.

673 *Id.* at *30.

674 *Id.* at *41.

675 *Id.* at *40.

676 *Id.*

677 *EEOC v. Suntrust Bank*, 2014 U.S. Dist. LEXIS 62466 (M.D. Fla. May 6, 2014).

678 *Suntrust Bank*, 2014 U.S. Dist. LEXIS 62466, at *9.

679 *Id.* at **3–7.

680 *Id.* at **8–10.

discrimination. It was also relevant to the defendant's *Ellerth/Faragher* affirmative defense (which provides a defense against harassment claims if the employer reasonably acted to prevent and promptly correct harassing behavior and the employee unreasonably failed to take advantage of the defendant's preventative or corrective opportunities or otherwise avoid harm).⁶⁸¹

In a separate decision, the court in *EEOC v. Suntrust Bank* granted in part the EEOC's motion to exclude some of the defendant's exhibits.⁶⁸² The court excluded a summary of two witnesses' testimony prepared by the defendant's attorneys.⁶⁸³ The court declined to exclude an unauthenticated, handwritten note, but cautioned the defendant it would admit the note at trial only if the defendant laid a proper foundation.⁶⁸⁴ The court granted the EEOC's request to exclude a witness declaration that the defendant had not disclosed during the course of discovery.⁶⁸⁵

N. Remedies

1. Punitive Damages

Title VII allows an award of punitive damages when the plaintiff "demonstrates the defendant engaged in intentional discrimination with malice or with reckless indifference to the federally protected rights of an aggrieved individual."⁶⁸⁶ The Supreme Court has established a three-part framework for determining whether an award of punitive damages is proper under Title VII.⁶⁸⁷ First, the plaintiff must show that the employer acted with knowledge that its actions may have violated federal law.⁶⁸⁸ Second, the plaintiff must impute liability to the employer.⁶⁸⁹ 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."⁶⁹⁰

The court applied the punitive damages standards in *EEOC v. New Prime, Inc.*,⁶⁹¹ a case in which both parties moved for summary judgment on the issue of punitive damages. *New Prime, Inc.* concerned the defendant's "same-sex trainer policy" that, with a few exceptions, required all truck driver applicants to receive over-the-road training from an instructor and/or trainer of the same gender as the applicant.⁶⁹² The defendant claimed the policy provided privacy and safety for its drivers. Because there were fewer female trainers than male trainers, the policy resulted in a lengthy "female waiting list."⁶⁹³ The court denied the cross motion for summary judgment because defendant's general counsel testified he would violate a "civil" law to protect women.⁶⁹⁴ The court found this testimony sufficient to create a fact issue about the appropriateness of punitive damages, but insufficient to support summary judgment for the EEOC on the issue.⁶⁹⁵

2. Additional Remedies

In *EEOC v. Northern Star Hospitality*,⁶⁹⁶ the EEOC alleged the defendants (three related businesses that owned a restaurant) harassed a restaurant employee because of his race and retaliated against him by firing him after he complained about racially offensive pictures posted in the workplace.⁶⁹⁷ The court dismissed the hostile work environment claim, but permitted the retaliation claim to go to trial.⁶⁹⁸ The jury found the defendants had engaged in retaliatory termination and awarded the plaintiff \$15,000 in compensatory damages. After trial, the court considered the proper back pay award amount, whether the plaintiff was entitled to front pay, whether to grant the EEOC's motion for injunctive relief, and whether the defendants were entitled to relief from the damages award.⁶⁹⁹

681 *Id.* at **12-13.

682 *EEOC v. Suntrust Bank*, 2014 U.S. Dist. LEXIS 60017, at **8, 18 (M.D. Fla. Apr. 30, 2014).

683 *Suntrust Bank*, 2014 U.S. Dist. LEXIS 60017, at **9-10.

684 *Id.* at *13.

685 *Id.* at **17-18.

686 *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).

687 *U.S. Dry Cleaning Services Corp.*, 2014 U.S. Dist. LEXIS 75898, at *14 (citing *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 535 (1999)).

688 *Id.* (citing *Kolstad*, 527 U.S. at 535).

689 *Id.*

690 *Id.* (internal quotation omitted).

691 *EEOC v. New Prime, Inc.*, 2014 U.S. Dist. LEXIS 112505 (W.D. Mo. Aug. 14, 2014).

692 *New Prime, Inc.*, 2014 U.S. Dist. LEXIS 112505, at **4-5.

693 *Id.* at *5.

694 *Id.* at **29-30.

695 *Id.* at **29-30.

696 *EEOC v. Northern Star Hospitality*, 2014 U.S. Dist. LEXIS 10084 (W.D. Wis. Jan. 27, 2014).

697 *Northern Star Hospitality*, 2014 U.S. Dist. LEXIS 10084, at **1-2.

698 *Id.* at **2-3.

699 *Id.* at **5-6.

The defendants objected to the back pay award because it included a period of time during which the restaurant was closed for remodeling. The court rejected this argument, reasoning the defendants failed completely to bear their burden of proving they would not have employed the plaintiff during the remodeling period.⁷⁰⁰ The court awarded the claimant over \$39,000 in back pay, plus interest and a tax offset.⁷⁰¹ The court did not award front pay because the claimant did not proffer evidence showing how long he would have expected to have worked for the defendants had they not terminated his employment.⁷⁰²

The court also granted the EEOC's request for injunctive relief by (1) barring the defendants from discharging employees in retaliation for complaints about racially offensive postings in the workplace; (2) requiring the defendants to adopt policies that explicitly prohibit actions made unlawful under Title VII; (3) requiring the defendants to adopt an investigative process with regard to discrimination claims; and (4) requiring the defendants to provide annual training to managers.⁷⁰³

Injunctive relief may be available even where monetary relief is not. In *EEOC v. Grane Healthcare Co.*,⁷⁰⁴ the EEOC challenged an employer's practice of subjecting job applicants to pre-employment medical examinations and medical inquiries that the ADA prohibits.⁷⁰⁵ The defendant had actually hired the claimants on behalf of whom the EEOC sued, making those individuals ineligible for monetary relief. Nevertheless, the court granted the EEOC's motion for summary judgment and permanently enjoined the defendant from engaging in future pre-employment medical examinations.⁷⁰⁶

3. After-Acquired Evidence

An "after-acquired evidence" defense is appropriate if, after terminating an employee, an employer learns of wrongdoing that would have clearly formed legal grounds for termination. Successful application of this defense can bar not only reinstatement, but also front pay. The after-acquired evidence defense also limits a back pay award from the date of an unlawful discharge to the date the new information was discovered.

The defendant attempted to assert an after-acquired evidence defense in *EEOC v. U.S. Dry Cleaning Services Corporation*,⁷⁰⁷ a race-based failure-to-promote case. Shortly before trial, the defendant learned the claimant had failed to disclose an extensive criminal history on his employment application. The defendant filed a motion to amend its answer and affirmative defenses to add an after-acquired evidence affirmative defense.⁷⁰⁸

The EEOC asked the court to deny the motion as untimely. The court rejected the EEOC's argument, finding the defendant behaved reasonably by waiting until trial was imminent to spend time and resources on a criminal background check. The EEOC had "ample opportunity to interview [the plaintiff] and carefully explore his criminal background."⁷⁰⁹ Nevertheless, the court found that the after-acquired evidence defense would be futile because the case was solely about a failure to promote. The EEOC sought back pay for only a short period of time between the alleged discriminatory failure to promote and the claimant's subsequent promotion into the position in question. The defendant discovered the criminal record not only long after the promotion, but also long after it terminated claimant for other reasons. The termination was not at issue. Simply put, the "facts [did] not create 'extraordinary equitable circumstances' to permit [d]efendant to cut and paste an after-acquired evidence defense."⁷¹⁰

4. Duty to Mitigate

Plaintiffs have a duty to mitigate their lost wages by searching for comparable employment. This duty does not extend to a plaintiff's emotional damages.

⁷⁰⁰ *Id.* at *8.

⁷⁰¹ *Id.* at *10.

⁷⁰² *Id.* at *11.

⁷⁰³ *Id.* at *15.

⁷⁰⁴ *EEOC v. Grane Healthcare Co.*, 2014 U.S. Dist. LEXIS 91544 (W.D. Pa. July 7, 2014).

⁷⁰⁵ *Grane Healthcare Co.*, 2014 U.S. Dist. LEXIS 91544, at *2 (citing 42 U.S.C. § 12112(d)(2)(A)).

⁷⁰⁶ *Id.* at *10.

⁷⁰⁷ *EEOC v. U.S. Dry Cleaning Services Corporation*, 2014 U.S. Dist. LEXIS 111725 (S.D. Ind. Aug. 13, 2014).

⁷⁰⁸ *U.S. Dry Cleaning Services Corporation*, 2014 U.S. Dist. LEXIS 111725, at *1.

⁷⁰⁹ *Id.* at *2.

⁷¹⁰ *Id.* at *5.

In *EEOC v. Bloomberg L.P.*,⁷¹¹ the claimant alleged her former employer failed to promote her and constructively discharged her because of her sex and pregnancy.⁷¹² The court granted the defendant summary judgment on the constructive discharge claim, but denied summary judgment on the failure-to-promote claim.⁷¹³ The defendant later sought summary judgment on the plaintiff's claims for post-resignation back pay.⁷¹⁴

The court refused to adopt a rule that would categorically bar any plaintiff whose constructive discharge claim failed from receiving back pay based on an automatic failure-to-mitigate theory.⁷¹⁵ Instead, the court found that a plaintiff's duty to mitigate must be considered on a case-by-case basis.⁷¹⁶

In the case before the court, the claimant failed to mitigate her damages. The court reasoned "an employee's duty to mitigate will often require her to stay with her discriminatory employer."⁷¹⁷ In limited circumstances—such as where there are insurmountable obstacles to career advancement—it is unreasonable to expect a plaintiff to mitigate damages by continuing to work for her employer. The claimant in *Bloomberg L.P.* could not demonstrate such circumstances existed.⁷¹⁸ The court saw no evidence of permanent obstacles to the claimant's career advancement with the defendant. To the contrary, the evidence actually suggested the plaintiff's prospects for career progression improved while she was on maternity leave.⁷¹⁹

O. Settlement

As discussed elsewhere in this Report,⁷²⁰ the EEOC and employers entered into a number of significant settlements during FY 2014. Certain interesting issues did arise during the course of settlement. With respect to approving the parties' consent decrees, for example, a district court in California had to determine whether an agreement reached between the EEOC and the defendant at a formal settlement conference was enforceable.⁷²¹

In this case, the EEOC filed a lawsuit against the defendant employer, alleging it violated the ADA by terminating an employee and denying her a reasonable accommodation in violation of the ADA. The EEOC and the defendant employer reached an agreement during a settlement conference on the monetary amount and the key terms of the consent decree. Other terms of the settlement, however, remained unresolved, including: (1) successor liability, (2) designation and duties of an ADA coordinator, (3) inclusion of two non-admission clauses, and 4) the revision of defendant's policies and procedures concerning the ADA. The defendant moved to enforce the settlement agreement and argued the EEOC was impermissibly adding different and additional terms to the settlement agreement reached on the record between the parties. The EEOC, in contrast, argued there was no meeting of the minds of the material terms of the settlement agreement. The court ultimately granted the defendant's motion to enforce the settlement terms that were agreed upon, and made specific findings regarding the four main areas of dispute. In essence, the court asserted it had the authority in its discretion to provide the missing or disputed terms of the decree. Further, the court ordered the EEOC and the defendant to submit a revised consent decree consistent with the court's order.⁷²²

Courts also reminded parties not to get ahead of themselves during the settlement process. In one noteworthy case, the district court in Hawaii admonished the EEOC for failing to follow local rules in filing four consent decrees.⁷²³ In that case, the EEOC filed four consent decrees with the court without first filing an application, request, or motion, as required, with the proposed consent decrees. Counsel for the

711 *EEOC v. Bloomberg L.P.*, 2014 U.S. Dist. LEXIS 66441 (S.D.N.Y. Apr. 28, 2014).

712 *EEOC v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 841–851 (S.D.N.Y. 2013).

713 *Bloomberg L.P.*, 967 F. Supp. 2d at 851.

714 *Bloomberg L.P.*, 2014 U.S. Dist. LEXIS 66441, at *2.

715 *Id.* at *18.

716 *Id.* at *19.

717 *Id.* at *22.

718 *Id.* at **28-29.

719 *Id.* at **28-29.

720 See Section II.G, *Significant EEO Settlements and Jury Verdicts*, and Appendix A.

721 *Hosp. Housekeeping Sys. of Houston, Inc.*, 2013 U.S. Dist. LEXIS 155154 (E.D. Cal. Oct. 28, 2013), *adopted by* 2013 U.S. Dist. LEXIS 166718 (E.D. Cal. Nov. 21, 2013); *judicial decree and judgment entered*, 2014 U.S. Dist. LEXIS 7346 (E.D. Cal. Jan. 21, 2014).

722 The key provisions of the consent decree are as follows: (1) three year duration; (2) \$40,000 monetary payment to aggrieved individual; (3) the employer shall designate an ADA Coordinator to monitor compliance with the decree; (4) the employer will review and update policies and procedures; (5) the employer will post the consent decree; (6) the employer will provide training to all employees regarding their rights under the ADA; and (7) the ADA coordinator will make annual reports to the EEOC. *Hosp. Housekeeping Sys. of Houston, Inc.*, 2014 U.S. Dist. LEXIS 7321 (E.D. Cal. Jan. 21, 2014) (setting forth final terms of settlement).

723 *EEOC v. Global Horizons*, 2014 U.S. Dist. LEXIS 81099 (D. Haw. June 4, 2014) (order to show cause).

EEOC had been instructed to submit the decrees to the judge's email, as required under local rules, but instead filed them. The court noted that prior submissions of decrees were distinguishable where they were titled "[Proposed] Consent Decree" as opposed to "Consent Decree" or "Settlement Agreement/Consent Decree." Without the "[Proposed]" adjective, the court stated, the titles gave the misleading impression that the filings were court-approved.

The court rejected the EEOC counsels' arguments that they were not aware of the practice, because they were responsible for familiarizing themselves with the applicable rules. The court similarly denied the EEOC's requests for approval of the consent decrees and ordered counsel for the EEOC to show good cause why the court should not impose sanctions upon counsel for failing to file the applicable rules and instructions.⁷²⁴

The court ultimately determined that counsel disregarded the filing directions in order to announce at a press conference that the decrees had been filed, and decided the lead counsels were responsible for the violations of the court's rules and instructions and decided to file a disciplinary complaint against both. Additionally, the court decided that it would not consider the EEOC's request to approve the four decrees unless the EEOC held a press conference retracting its prior statements by submitting either (1) a declaration by an EEOC official describing the date, time, and place of the conference and a summary of the statements the EEOC made, or (2) a press release containing the same information.⁷²⁵

Courts have been equally stringent in enforcing consent decrees. On July 15, 2014, a magistrate judge recommended that a district court in Illinois sanction and hold an employer in contempt for alleged violations of a three-year consent decree entered into with the EEOC in 2011.⁷²⁶ As part of that decree entered into to resolve allegations of failure to accommodate employees who return from disability leave, the employer agreed to, among other steps, reform its ADA policies and practices, and refrain from discriminating on the basis of disability by failing to provide reasonable accommodations. The EEOC claimed that the employer unlawfully fired two employees, and another was allegedly forced to resign while on unpaid leave, all of whom could have worked with an accommodation. The magistrate recommended that in addition to paying \$82,000 in back pay to the three employees, the employer reimburse the EEOC for its reasonable fees and costs incurred in bringing the contempt motion. The magistrate also recommended that the consent decree be extended by one year.⁷²⁷ Although the employer vigorously challenged the magistrate's ruling, filing objections to the Report and Recommendations on August 12, 2014, an Illinois federal court judge ultimately upheld the magistrate's ruling and recommendation with respect to the contempt charge on December 2, 2014.⁷²⁸

P. Appeal

The litigation between the EEOC and Global Horizons, Inc., which is still pending in Hawaii ("*Global Horizons Litigation*"),⁷²⁹ has generated a wide variety of issues and corresponding entries from the court. In a June 30, 2014, entry,⁷³⁰ the court denied the defendant's motion for leave to file an interlocutory appeal of an order denying summary judgment based on the laches defense. The court found that the laches defense was not a pure question of law, and accordingly, did not present a proper issue for interlocutory appeal.⁷³¹

Q. Misconduct by EEOC

Courts will sanction the EEOC when either the agency itself, or the claimants on whose behalf the agency sues, violate court orders, the Federal Rules of Civil Procedure, or local rules, or otherwise engage in misconduct. For example, in *EEOC v. Womble Carlyle*,⁷³² the court granted defendant's motion for spoliation sanctions where the claimant discarded critical records relating to her job search efforts *after* defendant raised mitigation of damages as a defense.⁷³³

724 *Global Horizons*, 2014 U.S. Dist. LEXIS 81099, at **5-6.

725 *EEOC v. Global Horizons*, 2014 U.S. Dist. LEXIS 116116 (D. Haw. Aug. 20, 2014) (order finding cause to discipline EEOC's counsel).

726 *EEOC v. Supervalu*, 09-cv-5637 (N.D. Ill. July 15, 2014) (magistrate report and recommendation order filed).

727 Press Release, EEOC, *Court Recommends Supervalu/Jewel-Osco Be Held in Contempt for Violations of EEOC Consent Decree in Disability Case* (July 16, 2014), available at <http://www.eeoc.gov/eeoc/newsroom/release/7-16-14.cfm>.

728 *EEOC v. Supervalu*, 09-cv-5637 (N.D. Ill. Aug. 12, 2014) (Objections to Magistrate Judge's Report and Recommendations filed) (N.D. Ill. Dec. 2, 2014) (Order upholding magistrate's ruling and recommendation with respect to the EEOC's contempt charge).

729 *EEOC v. Global Horizons, Inc.*, Cause No. 11-00257 LEK (D. Haw.).

730 *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 88560, at **11, 17 (D. Haw. Jun. 30, 2014).

731 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 88560, at *11.

732 *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 U.S. Dist. LEXIS 38219, at **2, 12 (M.D.N.C. Mar. 24, 2014) (recommendation of magistrate judge), adopted, *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, 2014 U.S. Dist. LEXIS 58938, at *1 (M.D.N.C. Apr. 29, 2014).

733 *Womble Carlyle Sandridge & Rice, LLP*, 2014 U.S. Dist. LEXIS 38219, at *2.

As previously discussed,⁷³⁴ the court in the *Global Horizons Litigation* handled EEOC misconduct with non-monetary sanctions.⁷³⁵ In or around June 2014, a district court staff member asked the EEOC's counsel to email consent decrees and proposed orders to the court for review; specifically directed the EEOC not to file the decrees; and told the EEOC the court would file the decrees and signed orders after the court approved them.⁷³⁶ But the EEOC had already scheduled a press conference to discuss settlement, so it ignored the court's explicit instruction and filed the consent decrees. On June 4, 2014, the court ordered the EEOC to show cause why the court should not impose sanctions and explicitly refused to consider the consent decrees until after deciding the sanctions issue.⁷³⁷

After a hearing, the court found that EEOC's filing violated both a local rule concerning submission of proposed orders by email and as the court's oral instructions to EEOC's counsel.⁷³⁸ In its order, the court rejected the EEOC's argument that it was unaware of the applicable local rule, and admonished the EEOC for holding a press conference before the court finalized the consent decrees.⁷³⁹ The court also announced its intent to file a disciplinary complaint with the State Bar of California against each of the two EEOC lawyers involved in the improper filing.⁷⁴⁰ The court also ordered the EEOC to hold a press conference retracting statements made at the press conference about the improperly filed consent decrees, and conditioned its approval of the consent decrees on the EEOC's compliance with the court's directives.⁷⁴¹

R. Recovery of Attorneys' Fees by Employers

Title VII gives district courts the discretion to award reasonable attorneys' fees to a prevailing party. Although Title VII does not place different burdens on plaintiffs and defendants seeking an award of attorneys' fees, the U.S. Supreme Court applies a heightened standard to a prevailing defendant who seeks an award of attorneys' fees in a Title VII action.⁷⁴² Specifically, a prevailing defendant is eligible to receive an award of attorneys' fees only when the court finds that the plaintiff's action was "frivolous, unreasonable, or without foundation."⁷⁴³

In *EEOC v. Propak Logistics, Inc.*, the U.S. Court of Appeals for the Fourth Circuit affirmed an order requiring the EEOC to pay \$189,113.50 in attorneys' fees.⁷⁴⁴ The district court granted the employer's motion for summary judgment on the defense of laches because the EEOC took more than six-and-a-half years to investigate a charge of discrimination, and even then, could not identify key witnesses and documents needed to support its case. The district court found both the EEOC's delay in investigating and the EEOC's filing of a case after such a lengthy investigation to be unreasonable. The Fourth Circuit agreed, finding the EEOC's lawsuit "effectively was moot at its inception" because "the EEOC had failed to identify the class of victims who could be entitled to monetary relief, and injunctive relief was unavailable because [the employer] had closed its facilities."⁷⁴⁵

In *EEOC v. West Customer Management Group, LLC*,⁷⁴⁶ the district court adopted, in part, a magistrate's recommendation granting the defendant attorneys' fees and expenses based on the EEOC's continued litigation of a case after it became apparent the case was frivolous. The EEOC alleged the defendant discriminated against the claimant based on his national origin by not hiring him for a customer service position at a call center. The defendant argued it rejected the claimant not because of his national origin but because he had "an inability to communicate clearly, poor computer skills, and poor customer service skills."⁷⁴⁷ The district court denied the defendant's motion for summary judgment because of an ambiguous comment about the claimant's "heavy accent" and the EEOC's presentation of a small amount of comparator evidence.⁷⁴⁸ The parties battled over the comparator evidence at the motion *in limine* stage, and the EEOC ultimately proceeded to trial without offering any comparator evidence at all, relying almost exclusively on ambiguous comments about the claimant's accent.⁷⁴⁹

734 See Section V.O (Settlement) of this Report.

735 *EEOC v. Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 116116 (D. Haw. Aug. 20, 2014) (order finding cause to discipline EEOC's counsel).

736 *Global Horizons, Inc.*, 2014 U.S. Dist. LEXIS 81099, at **4-5.

737 *Id.* at **5-6.

738 *Global Horizons*, 2014 U.S. Dist. LEXIS 116116, at **6-7.

739 *Id.* at **9-11.

740 *Id.* at *10.

741 *Id.* at **10-11.

742 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014).

743 *Propak Logistics, Inc.*, 746 F.3d at 151 (quoting *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978)).

744 *Id.* at 150.

745 *Id.* at 151.

746 *EEOC v. West Customer Mgmt. Group, LLC*, 2014 U.S. Dist. LEXIS 125126, at *2 (N.D. Fla. Sept. 8, 2014) (partially adopting magistrate judge recommendation).

747 *EEOC v. West Customer Mgmt. Group, LLC*, 2014 U.S. Dist. LEXIS 125129, at *8 (N.D. Fla. July 28, 2014) (magistrate judge recommendation).

748 *West Customer Mgmt. Group, LLC*, 2014 U.S. Dist. LEXIS 125129, at **6-7.

749 *Id.* at *7.

In awarding fees, the magistrate judge emphasized that the EEOC Compliance Manual “expressly undermined the EEOC’s claim” by acknowledging that “[a]n employment decision based on foreign accent does not violate Title VII if an individual’s accent materially interferes with the ability to perform job duties.”⁷⁵⁰ The district court did not adopt the magistrate judge’s finding that the case was patently frivolous from the outset, but the court did affirm an award of attorneys’ fees and expenses incurred after the date of the final pretrial conference, “by which time the EEOC clearly would have known what evidence intended to present at trial.”⁷⁵¹

In *EEOC v. Peoplemark, Inc.*,⁷⁵² the U.S. Court of Appeals for the Sixth Circuit denied the EEOC’s petition for rehearing *en banc* of its 2013 a decision affirming an award of \$751,942.48 in fees and costs to an employer. In *Peoplemark*,⁷⁵³ the EEOC accused the employer of having a policy denying jobs to all applicants with criminal records. Discovery revealed the employer had no such policy, and had, in fact, placed numerous persons with felony records in jobs. But the EEOC moved forward with the litigation for months after this should have been clear, the court held, causing the defendant to incur significant additional fees and costs.

On the other hand, it should be noted that in *EEOC v. CRST Van Expedited*,⁷⁵⁴ the Eighth Circuit recently clarified the circumstances in which attorneys’ fees could be awarded when “(s)ome charges are frivolous; [and] others (even if not ultimately successful) have a reasonable basis,” explaining, “(L)itigation is messy, and courts must deal with this untidiness in awarding fees.” While the Eighth Circuit relied in part on the *Christiansburg* standard,⁷⁵⁵ the Eighth Circuit also relied on a recent Supreme Court decision, *Fox v. Vice*,⁷⁵⁶ which involved a “multiple-claim scenario,” and relied on the holding in *Fox* that a court may grant reasonable fees to the defendant [where the plaintiff asserts both frivolous and non-frivolous claims], but only for the costs that the defendant would not have incurred but for the frivolous claims.⁷⁵⁷ According to *Fox*, “(a) defendant need not show that every claim in a complaint is frivolous to qualify for fees,” but a defendant may not obtain compensation for work unrelated to a frivolous claim.⁷⁵⁸ The Eighth Circuit thus concluded that the fee award had to be reversed and remanded for further findings and needed to make “particularized findings of frivolousness, unreasonableness, or groundlessness as to each claim upon which it granted summary judgment on the merits to CRST.”⁷⁵⁹

Finally, courts also have awarded attorneys’ fees against the EEOC as sanctions for a claimant’s spoliation of evidence.⁷⁶⁰ In *EEOC v. Womble Carlyle Sandridge & Rice, LLP*, the court granted a defendant’s motion for spoliation sanctions where the defendant raised a defense of mitigation of damages and the claimant discarded critical records relating to her job-search efforts.⁷⁶¹ The court also rejected the EEOC’s argument that an award of \$29,651.00 in expenses, including attorneys’ fees, was excessive, in part because the defendant prevailed on the substantive issue of whether the claimant engaged in culpable spoliation.⁷⁶²

750 *Id.* at *11 (quoting EEOC Compliance Manual).

751 *West Customer Mgmt. Group, LLC*, 2014 U.S. Dist. LEXIS 125126, at **2-3.

752 *EEOC v. Peoplemark, Inc.*, 2014 U.S. App. LEXIS 4881, at **1-2 (6th Cir. Mar. 10, 2014).

753 *See EEOC v. Peoplemark, Inc.*, 732 F.3d 584 (6th Cir. 2013).

754 *EEOC v. CRST Van Expedited, Inc.*, No. 13-3159 (8th Cir. Dec. 22, 2014).

755 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)

756 131 S. Ct. 2205 (2011).

757 *Id.* at 2211.

758 *Id.*

759 The Eighth Circuit also determined that certain ruling by the district court could not be considered in any fee award: (1) the appeals court concluded that the district court improperly determined the case involved a “pattern or practice” claim and no fees could be awarded based on that finding; and (2) the claims that were dismissed “based on the EEOC’s failure to satisfy its pre-suit obligations” (*i.e.* failure to conciliate the claims of certain individuals prior to bringing suit) could not be considered in the fee award because the dismissal could not be viewed as a decision “on the merits” of the claims.

760 *Womble Carlyle Sandridge & Rice, LLP*, 2014 U.S. Dist. LEXIS 38219, at **2, 12.

761 *Id.* at *2.

762 *Id.*

APPENDIX A—EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS¹

Select EEOC Settlements in FY 2014

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|-------------------|---|--|--|---|
| \$2.4 million | Race and National Origin Discrimination | According to the EEOC, a labor contractor at four Hawaii farms engaged in a pattern or practice of harassing, discriminating, or retaliating against approximately 500 Thai farmworkers based on national origin and race; the EEOC named the farm operations as joint employers with the contractor. The lion's share of the settlement (\$1.6 million) will be submitted by one of the four farms to a settlement fund. The remaining three farms will pay \$425,000, \$275,000, and \$100,000. All amounts will be distributed by the EEOC. Under the terms of the consent decree, the employer will hire an EEOC-approved monitor to ensure the company's compliance with the settlement terms. The company will establish and implement an internal complaint procedure, and conduct training on EEO laws. The decree will remain in effect for three years. | U.S.D.C. of Hawaii | 9/5/2014 |
| \$2.1 million | Sex Discrimination, Harassment, and Retaliation | According to the EEOC, a former lot manager, under the direction of the general manager, subjected a class of men to egregious forms of sexual harassment, including shocking sexual comments, frequent sexual solicitations, and regular physical contact. The agency alleged the company retaliated against male employees who objected to the sexually hostile work environment. The settlement will affect 55 men. In addition to monetary relief, the consent decree will require the employer to maintain anti-discrimination policies and practices, evaluate their managers on their compliance with anti-discrimination laws, hire a monitor to oversee efforts to provide a harassment-free workplace, conduct employee and management training, and report instances of other discrimination or harassment complaints to the EEOC while the decree is in effect. | U.S.D.C. of New Mexico | 4/1/2014 |
| \$1.45 million | Sex Discrimination and Harassment | According to the EEOC, the company maintained a sexually hostile work environment toward female mortgage bankers at one facility by tolerating sexually charged behavior and comments from supervisory staff and participating mortgage bankers. The EEOC also alleged female mortgage bankers who did not embrace and participate in certain activities were ostracized and suffered economic consequences by being deprived of lucrative sales calls, training opportunities, and other employment benefits. Under the terms of the consent decree, the employer must pay a total of \$1,450,000: \$979,389 as compensatory and punitive damages and \$470,611 as back wages to the 16 women affected. Among other equitable relief measures, the employer must provide the EEOC with all written or oral complaints of sexual harassment or discrimination made to the employer's human resources or employee relations departments, and any corrective action taken in response to the complaints. | U.S.D.C. for the Southern District of Ohio | 2/3/2014 |
| \$1.4 million | Age Discrimination | According to the EEOC, the agency resolved four systemic ADEA investigations, alleging the employers did not permit volunteer firefighters to accrue points for performing certain duties once they reached the age of 55-60. The points translate into greater retirement benefits. Under the terms of the conciliation agreements, the employer restored the points not awarded due to age, thereby resulting in increased monthly benefits at retirement, and lump sum retroactive awards of monetary benefits for current retirees and family members of deceased retirees. The employers were also required to change their policies to make them ADEA-compliant. | * 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 29 of the EEOC 2014 Annual Report. |

¹ Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2014. 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 \$200,000 to plaintiffs and more than \$175,000 to defendants.

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|-------------------|---|--|--|---|
| \$1.35 million | Disability Discrimination | According to the EEOC, an employer's fixed-leave policy failed to consider leave as reasonable accommodation. Per the EEOC, since the policy merely tracked requirements of the FMLA, employee leaves were limited to a maximum of 12 weeks. The employer's policy meant that employees who were not eligible for FMLA leave were fired after being absent for a short time, and many more were fired once they were out more than 12 weeks. Under the terms of the consent decree, the employer must revise its leave policy, provide mandatory EEO training, and maintain records of all reports, complaints, or allegations that it failed to provide a leave of absence, and/or time off as a reasonable accommodation to a person with a disability and/or that the employer failed to engage in the interactive process with a person with a disability who requests time off and/or a leave of absence as a reasonable accommodation to her or his disability, and will comply with EEOC's record-keeping regulations. The decree will be in effect for four years. | U.S.D.C. of New Jersey | 6/30/2014 |
| \$1.3 million | Race Discrimination | According to the EEOC, the company engaged in a pattern or practice of race discrimination against African-American job applicants by refusing to hire them for front-of-house positions at two Baltimore, Maryland locations. The resulting consent decree will be in effect for two years. Under the terms of the decree, within 30 days the employer is required to submit \$1.3 million into a Qualified Settlement Fund to be established and administered by the EEOC. Of this amount, 50% shall constitute back pay with interest and the remaining 50% shall constitute statutory damages payable to eligible claimants who applied or were employed at any time during the period January 1, 1998 until January 1, 2010. The employer will be responsible for paying the settlement fund claims administrator's fees incurred in the course of carrying out its duties in an amount not to exceed \$150,000. The employer will also be required to designate a Decree Compliance Monitor to monitor and ensure its compliance with the terms of the consent decree. For two years the employer will also establish hiring goals and improved recruiting efforts to diversify its workforce, and strengthen its EEO training and compliance methods. | U.S.D.C. of Maryland | 9/12/2014 |
| \$1.2 million | Race and National Origin Discrimination and Retaliation | According to the EEOC, Thai farm workers were subject to national origin and race discrimination, harassment and retaliation. The EEOC lawsuit included claims against six separate farms. Settlements involving four other farms were reached in September 2014. The consent decree involving this particular farm will remain in effect for two years, and requires the company to insert specific anti-discrimination language into its contracts with farm labor contractors. The company must also institute EEO training and internal complaint procedures. | U.S.D.C. of Hawaii | 11/18/2013 |
| \$1 million | Sex and National Origin Discrimination | According to the EEOC, following a systemic investigation of a restaurant chain, the agency found that it failed to hire front-of-the-house staff on the basis of their sex and national origin. The conciliation agreement provided for a payment of \$1 million to the class members. In addition, the employer agreed to train all human resources and management personnel on EEO laws, and will make efforts to recruit women and Hispanic employees. | * 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 pages 29-30 of the EEOC 2014 Annual Report. |
| \$920,000 | Race, Color, Sex, National Origin, and Age Discrimination | According to the EEOC, this settlement resolved six discrimination charges filed between 2007 and 2009 alleging a staffing firm engaged in a pattern and practice of classifying and failing to refer job applicants in San Diego based on their race, color, sex, national origin, age, or disability. In addition to the \$920,000 in monetary relief, the employer is required to conduct annual EEO and diversity training to all employees at its San Diego location, with an emphasis on non-discriminatory referral and hiring procedures. The employer must also hire an independent EEO consultant to assist with the revision of the company's EEO policies and complaint procedures. | U.S.D.C. for the Southern District of California (San Diego Local Office) | 10/22/2013 |

| SETTLEMENT AMOUNT | CLAIM | DESCRIPTION | COURT | EEOC PRESS RELEASE |
|-------------------|--|---|--|---|
| \$900,000 | Age Discrimination and Retaliation | According to the EEOC, the company discriminated against seven former management employees and a class of 108 former employees by firing workers over the age of 40 during a "reduction in force." The EEOC alleged the company fired older employees because of their age and retaliated against certain employees who opposed orders to discriminate against older workers. The resulting consent decree will be in force for three years, and require the employer to conduct management training and create employment policies addressing age discrimination and retaliation. On a semi-annual basis during the three-year consent decree period, the employer will be required to provide the EEOC with a list of all complaints of discrimination or retaliation made against the employer. With respect to the monetary portion of the settlement, \$445,500 will be apportioned in varying amounts to the seven named plaintiffs and another employee who was terminated on account of age; the remaining \$454,500 will be placed in a settlement fund for potential claimants. | U.S.D.C. for the Northern District of Illinois | 9/22/2014 |
| \$650,000 | Race Discrimination | According to the EEOC, a company failed to hire a class of individuals on account of their race (African American) or national origin (Hispanic). The EEOC and the company reached a negotiated settlement, whereby the employer will pay \$650,000 to the class, and will hire 75 African American and Hispanic workers over the next five years. | * 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 29 of the EEOC 2014 Annual Report. |
| \$650,000 | Race, National Origin, and Sex (Male) Discrimination | According to the EEOC, an employer's background screening policy resulted in unlawful discrimination based on race (African American), national origin (Hispanic) and sex (male). This EEOC investigation resulted in a conciliation agreement whereby the employer will agree to establish a class back pay fund of \$650,000 for aggrieved individuals, as well as reform its criminal history screening process to conform to the EEOC's Enforcement Guidance. The agreement provides for an external monitor and training in criminal history screening. | * 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 30 of the EEOC 2014 Annual Report. |
| \$575,000 | Age Discrimination | According to the EEOC, the company engaged in a pattern or practice of age discrimination against approximately 200 applicants 40 and over at six of its restaurants in five Pennsylvania cities and one Ohio city. The EEOC also alleged the company failed to keep required records. The resulting consent decree will be in force for 3.5 years, and require the employer to pay \$115,000 per month for five months, for a total of \$575,000 in monetary relief, into a Qualified Settlement Fund account, which will be managed by a claims administrator. Under the terms of the decree, the employer must pay all of the administrator's expenses incurred in the course of carrying out its duties under the decree, up to a maximum of \$15,000. The employer must also establish recruiting and hiring goals, and institute other anti-discrimination measures, including EEO training. | U.S.D.C. for the Western District of Pennsylvania | 12/9/2013 |
| \$530,000 | Sex Discrimination | According to the EEOC, a company employing drivers allegedly had a practice of not hiring women for driving positions because of their sex. In addition to paying \$530,000, the employer will adopt an EEO policy prohibiting gender discrimination, and train all human resources personnel on gender-based discrimination. | * 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 30 of the EEOC 2014 Annual Report. |
| \$500,000 | Disability Discrimination | According to the EEOC, two separate employers (a hospital and an insurance company) each agreed to pay \$500,000 to employees who were allegedly discriminated on the basis of disability, and modify their leave policies to provide accommodations to employees with disabilities. | * 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 30 of the EEOC 2014 Annual Report. |

Select EEOC Jury Awards or Judgments in FY 2014²

| JURY OR JUDGMENT AMOUNT | CLAIM | DESCRIPTION | CASE CITATION | EEOC PRESS RELEASE |
|-------------------------|--|---|--|--------------------|
| \$1.6 million | Disability Discrimination and Harassment | The EEOC alleged 32 intellectually disabled workers were discriminated against and harassed on the basis of disability. In 2013, a jury awarded the claimants \$240 million, which was later reduced to \$1.6 million to comply with statutory caps. On appeal, the U.S. Court of Appeals for the Eighth Circuit affirmed the jury's verdict on liability. | <i>EEOC v. Hill Country Farms, Inc.</i> , 2014 U.S. App. LEXIS 8650 (8th Cir. May 5, 2014) | None available |
| \$751,942 | Race Discrimination | The EEOC accused the employer of having a policy denying jobs to all applicants with criminal records. Discovery revealed the employer had no such policy, and had, in fact, placed numerous persons with felony records in jobs. The EEOC moved forward with the litigation for months afterward, causing the defendant to incur significant additional fees and costs. The district court ultimately awarded the employer its fees and costs, which the Sixth Circuit affirmed in 2013. In March 2014, the Sixth Circuit denied the EEOC's petition for rehearing <i>en banc</i> , thereby upholding the fee award. | <i>EEOC v. Peoplemark, Inc.</i> , 2014 U.S. App. LEXIS 4881 (6th Cir. Mar. 10, 2014). | None available |
| \$499,000 | Sexual Harassment and Retaliation | The EEOC alleged a company's former CEO and several management-level employees made lewd sexual comments and acted inappropriately towards women, and that complaints to human resources were not adequately addressed. The jury awarded a former executive assistant \$250,000 in punitive damages based on the claim that she was sexually harassed by her supervisor, and \$82,000 and \$167,000 to two other employees for lost wages and benefits as a result of allegedly having been fired for reporting and opposing the harassment and hostile work environment. | <i>EEOC v. EmCare</i> , Civil Action No. 3:11-CV-02017-P) (N.D. Tex) | <u>10/27/2014</u> |
| \$243,000 | Race Harassment | Truck drivers were allegedly subjected to racial harassment and derogatory slurs by the company's general manager and several Caucasian employees. A jury found in favor of the employees. The district court ruled the EEOC should recover \$50,000 in compensatory and punitive damages on behalf of one plaintiff, and that another should recover \$193,509 in compensatory and punitive damages, back pay, and pre-judgment interest. The Fourth Circuit, in an unpublished opinion, upheld the damages award. | <i>EEOC v. A.C. Widenhouse</i> , 13-1389 (4th Cir. 2014, June 24, 2014) | <u>6/25/2014</u> |
| \$228,000 | Race Harassment and Discrimination | Default judgment was entered against a company for conduct of one of its managers. The EEOC alleged the manager in question subjected its only African-American driver to discriminatory treatment, including assigning white drivers more favorable routes, and requiring him to perform degrading and unsafe work assignments. The employee was also allegedly subjected to racial harassment and derogatory insults, and ultimately terminating his employment. | <i>EEOC v. Titan Waste Services, Inc.</i> Case No. 3:10-cv-00379 (N.D. Fla.) | <u>3/14/2014</u> |
| \$189,114 | Race Discrimination | The Fourth Circuit affirmed the district court's decision ordering the EEOC to pay attorneys' fees to the prevailing defendant employer after the district court awarded summary judgment to the employer on its laches defense. The appellate court decided that due to the 6.5-year delay in initiating the lawsuit, and the fact that the lawsuit was moot when filed, the EEOC should pay attorneys' fees. | <i>EEOC v. Propak Logistics, Inc.</i> , Case No. 13-CV-1687 (4th Cir. 2014) | None available |

² Fees and costs awarded to defendants are shaded.

APPENDIX B—FY 2014 EEOC AMICUS AND APPELLANT ACTIVITY³

FY 2014—Appellate Cases Where the EEOC Filed an Amicus Brief

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|-----------------------------------|--|------------|-----------|--|---|
| <i>Chandler v. City of Lawton</i> | U.S. Dist. Ct., W.D. Okla. No. 131082 | 12/23/2013 | ADEA, ADA | Charge Processing; Limitations Parties Reached Settlement | <p>Background: Defendant moved to dismiss the plaintiff's claims under the ADEA and ADA because the claims were not filed within 180 days. The plaintiff had filed his charge of discrimination 285 days after the date of the last discriminatory act against him. At the time he filed his charge, the Oklahoma Human Rights Commission, the state FEPA, had been abolished by the Oklahoma legislature and the Oklahoma Office of Attorney General assumed the responsibility of employment discrimination complaints. The Office of Attorney General did not enter into a worksharing agreement with the EEOC and was not designated as a FEPA. As a result, Oklahoma is a jurisdiction having no FEP agency and a charge is only timely filed within 180 days from the date of the alleged violation.</p> <p>Issue EEOC Addressed as Amicus: The EEOC's amicus brief addressed the proper limitations period for filing charges of employment discrimination in Oklahoma.</p> <p>EEOC's Amicus Brief: The EEOC contends that the plaintiff had 300 days in which to file a charge of discrimination as long as proceedings are timely initially instituted with a state agency, regardless of whether the agency is designated a FEPA by the EEOC. Here, the EEOC contends that its agreement with the Office of Attorney General satisfies the requirement regarding how proceedings are initially instituted with the state agency since the agencies agreed to send each other copies of all charges of discrimination received within 10 calendar days of receipt. Therefore, the EEOC believes the Oklahoma statute meets the requirements of the relevant statutory provisions to be considered a "deferral state" entitled to the 300-day charge filing period.</p> <p>Court's Decision: The plaintiff and defendant reached a settlement agreement that resolved this lawsuit, and the appeal was withdrawn.</p> |

³ The information included in Appendix B, including the "FY 2014 Appellate Cases Where the EEOC Filed an Amicus Brief" and "FY 2014—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.

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|--|--|------------|-----------|---|---|
| <i>Chavez v. Credit Nation Auto Sales, LLC</i> | U.S. Dist. Ct., N.D. Ga. No. 13-312 | 2/14/2014 | Title VII | Charge Processing, Limitations, Sex Pro Employer | <p>Background: The plaintiff filed a one-count complaint alleging the defendant deprived her of equal employment opportunities as an employee because of her sex. The defendant moved for summary judgment arguing (1) plaintiff failed to exhaust her administrative remedies prior to initiating the lawsuit; and (2) plaintiff failed to establish the defendant violated Title VII.</p> <p>Issue EEOC Addressed as Amicus: Whether equitable tolling excuses an aggrieved individual's failure to file a timely charge when the plaintiff attempted to file a charge within the limitations period but the EEOC investigators responsible for charge processing refused to accept the charge.</p> <p>EEOC's Amicus Brief: The EEOC contends it mistakenly refused to accept an otherwise timely charge proffered by the plaintiff and, as a result, the plaintiff could not satisfy this condition precedent to filing suit. As a result, the EEOC argues the limitations for the charge-filing requirement should be equitably tolled, both as a matter of fairness to the plaintiff and as a means of securing enforcement of the law. The EEOC contends that when the plaintiff attempted to file a charge, the investigator informed the plaintiff that she could not file a charge because, as a transgender woman, she was "not protected against discrimination on the basis of sex" under Title VII. The plaintiff made a second attempt to file a charge with the EEOC but an investigator again refused to take the charge based on lack of coverage. When the plaintiff was finally able to file a charge, the EEOC dismissed the charge as untimely. The EEOC later reopened its investigation and later issued a dismissal on the merits.</p> <p>Court's Decision: The court noted that it is undisputed that the plaintiff failed to submit a valid EEOC charge within the 180-day period. The court held that the statute of limitations period should be equitably tolled because the EEOC misled the plaintiff about the nature of her rights under Title VII. The record demonstrated that plaintiff attempted to exhaust her administrative remedies in a timely manner but was misled about her rights under Title VII by the EEOC's misinformation that a transsexual could not bring an actionable sex discrimination claim. However, the court granted the defendant's motion for summary judgment finding that no reasonable juror could conclude that the plaintiff's failure to conform to gender stereotypes motivated the defendant's decision to terminate her employment.</p> |

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|-----------------------------|--|------------|-----------|--|---|
| <i>Browning Ferris NLRB</i> | National Labor Relations Board No. 3C-RC-109684 | 6/15/2014 | Title VII | Joint-Employer Standard for Liability Pending | <p>Background: Browning-Ferris Industries (BFI) operates a recycling facility and its employees generally work outside the facility. Leadpoint provides subcontracted employees to BFI, and they generally work inside the facility. A written agreement between Leadpoint and BFI states that Leadpoint is the sole employer of the subcontracted employees. The Board's current joint employer standard is as follows: "To determine whether two separate entities should be considered joint employers, the Board analyzes whether alleged joint employers share the ability to control or co-determine essential terms and conditions of employment. Essential terms and conditions of employment are those involving such matters as hiring, firing, discipline, supervision, and direction of employees. However, the putative joint employers' control over these employment matters must be direct and immediate. The authority to make routine directions of where to do a job, rather than the manner in which to perform the work, is insufficient to support a joint employer finding." Applying that standard, the regional director held that BFI and Leadpoint are not joint employers. He determined that Leadpoint sets the pay scale; is the sole provider of benefits; has sole authority to control recruitment, hiring, counseling, discipline, and termination, etc. The regional director opined that "[t]o the extent that any BFI employee instructed a Leadpoint employee, the instruction was merely routine in nature and insufficient to warrant a finding that BFI jointly controls Leadpoint employees' daily work."</p> <p>Issue EEOC is Addressing as Amicus: (1) Under the Board's current joint-employer standard, is the employer the sole employer of the petitioned-for employees? (2) Should the Board adhere to its existing joint-employer standard or adopt a new standard? What considerations should influence the Board's decision in this regard? (3) If the Board adopts a new standard for determining joint-employer status, what should that standard be? If it involves the application of a multifactor test, what factors should be examined? What should be the basis or rationale for such a standard? The real issue is whether the Board considers Leadpoint to be the sole employer of the subcontracted employees or whether it considers Leadpoint and BFI to be joint employers.</p> <p>EEOC's Amicus Brief: The EEOC urges the Board to adopt the same joint-employer standard the EEOC uses. The EEOC's Compliance Manual states: "The term 'joint employer' refers to two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer." The EEOC considers the <i>Darden</i> factors,⁴ such as who hires and fires, who assigns</p> |

4 *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992).

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|---|--|------------------|------------------|--------------------------------|--|
| | | | | | <p>work, who controls daily activities, who furnishes equipment, where the work is performed, who pays the worker, who provides employee benefits, how the worker is treated for tax purposes, and whether the worker and the putative employer believe that they are creating an employer-employee relationship. The EEOC's joint employer definition is flexible and more accurately reflects congressional intent than the Board's definition.</p> <p>Court's Decision: This case is still pending before the National Labor Relations Board.</p> |
| <p><i>Grant v. United Cerebral Palsy of NYC, Inc.</i></p> | <p>U.S. Court of Appeals, 2d Circuit No. 14-1223</p> | <p>7/16/2014</p> | <p>Title VII</p> | <p>Retaliation Pending</p> | <p>Background: Plaintiff claims she was retaliated against after she filed a charge with the EEOC alleging sex discrimination. The district court granted summary judgment for the defendant, reasoning the plaintiff could not establish that at the time she made either her internal complaint or her first formal charge of discrimination, she reasonably believed the defendant violated Title VII.</p> <p>Issues on Appeal: Did the district court err in granting summary judgment for the defendant?</p> <p>Issue EEOC is Addressing as Amicus: Did the district court err in relying on the opposition clause standard to conclude that the plaintiff cannot establish that she engaged in protected activity under Title VII?</p> <p>EEOC's Amicus Brief: The EEOC contends the district court should have applied the participation clause of Title VII. The EEOC also argues that under the participation clause, the statute requires only that an individual engage in an identified protected activity, and does not condition protection for participation on any other criteria. The statute accords protection under the participation clause for filing a charge of discrimination "regardless of the validity or reasonableness of the charge." The statute does not qualify that protection by requiring that the charge must have been meritorious, or that the charging party must have reasonably believed that a Title VII violation occurred. In sum, the EEOC argues that the participation clause should be interpreted broadly to protect Title VII charge filers from retaliation for filing a charge with the Commission, without regard for whether the allegations in the charge are later deemed valid or reasonable.</p> <p>Court's Decision: The case is currently pending with the court.</p> |

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|---|---|------------|-----------|------------------------|---|
| <i>Boyer-Liberto v. Fontainebleau Corp.</i> | U.S. Court of Appeals, 4th Circuit No. 13-1473 | 7/8/2014 | Title VII | Retaliation Pending | <p>Background: Plaintiff claimed the defendant unlawfully retaliated against her in violation of Title VII when it terminated her following her reports of racial discrimination. Specifically, the plaintiff complained about two racial epithets that occurred at the work place. A panel of justices for the Fourth Circuit initially upheld the district court's decision, ruling that the plaintiff could not establish that she reasonably believed she suffered from a severe and pervasive hostile work environment. The Fourth Circuit subsequently vacated this judgment, and ordered an <i>en banc</i> hearing.</p> <p>Issues on Appeal: Did the plaintiff reasonably believe she suffered from a hostile work environment when she made a complaint to her employer regarding two racial epithets?</p> <p>Issue EEOC is Addressing as Amicus: Did the Fourth Circuit panel incorrectly rule that the plaintiff had no reasonable belief that she suffered from an actionable hostile work environment?</p> <p>EEOC's Amicus Brief: The EEOC argued that even if only two incidents of racial epithets over the course of two days was not by itself a hostile work environment under Title VII, the conduct itself was severe enough for the plaintiff to complain to her employer. The EEOC contends that such activity should be protected under Title VII, as employees should be encouraged to report severe and offensive behavior, even if it has not yet risen to the level of an actionable hostile work environment claim.</p> <p>Court's Decision: The case is currently pending with the court.</p> |

| CASE NAME | COURT AND CASE NUMBER | DATE FILED | STATUTES | BASIS/ISSUE/ RESULT | COMMENTARY |
|-------------------------------------|---|------------|-----------|------------------------|--|
| <i>Demasters v. Carilion Clinic</i> | U.S. Court of Appeals, 4th Circuit No. 13-2278 | 2/25/2014 | Title VII | Retaliation Pending | <p>Background: The district court granted the defendant's motion to dismiss, holding that the plaintiff's activity was not protected under the participation clause of Title VII because it involved the assistance of an employee's internal complaint. The district court also held that as an Employee Assistance Program ("EAP") consultant, the plaintiff was merely performing his job when assisting an employee with discrimination complaints and therefore fell under the "manager rule" exception.</p> <p>Issue EEOC is Addressing as Amicus: (1) Does an employer violate the opposition clause of Title VII's anti-retaliation provision when it fires an EAP consultant because he counsels a co-worker to complain to his employer about sexual harassment and then objects to the employer's response; (2) Does an employer violate the participation clause of Title VII's anti-retaliation provision when it fires an EAP consultant because of his participation in an employer's internal investigation and complaint procedures?</p> <p>EEOC's Amicus Brief: The EEOC argues that under controlling Supreme Court precedent, the plaintiff's statements to HR constituted protected opposition to unlawful discrimination. The district court improperly held that the plaintiff's handling of an employee's complaint did not constitute opposition conduct under the "manager rule" exception because he was merely doing his job as an EAP counselor. The EEOC argues the rule has no application here, first because the plaintiff's conduct was viewed by his employer as adverse to the company's interests, and second because the manager rule, developed in FLSA cases, is inapplicable to Title VII retaliation cases. The EEOC also contends that the plaintiff's assistance to the employee and criticisms of the employer's handling of his case also constituted participation in proceedings under Title VII. Proceedings under Title VII include employers' internal investigations and the plaintiff's efforts to help the employee instigate an investigation are properly viewed as participation conduct. The EEOC argues the plain language of the statute states that employees are protected when they participate in any proceeding under the statute and internal investigations are necessarily "under" the statute given the strong incentives for employers to create internal procedures for dealing with harassment complaints to limit their liability for supervisory harassment. Thus, the EEOC contends the district court erred in holding that the plaintiff's actions did not constitute participation under Title VII because the employee had not yet filed a charge or lawsuit.</p> <p>Court's Decision: Oral argument has been set for January 29, 2015.</p> |

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| <i>Walker v. Mod-U-Kraf Home, LLC</i> | U.S. Court of Appeals, 4th Circuit No. 14-1038 | 5/19/2014 | Title VII | Sex Harassment Vacated and Remanded Pro-Employer Summary Judgment on Hostile Environment Claim; Affirmed Pro-Employer Summary Judgment on Retaliation Claim | <p>Background: The employer is a company that builds homes and commercial projects. The plaintiff began working as a trim painter in June 2007. She was laid off from work in 2009 but returned to the same position in May 2010. She claims she was harassed verbally by several coworkers. She complained and her supervisor allegedly told her to "ignore it" and said he would speak to the alleged harasser. She was moved to another position so she would not have any contact with the alleged harasser. However, the situation worsened, especially after she began dating a male coworker. Due to the harassment, the plaintiff saw her doctor, who ordered her to take two weeks of medical leave. When she called the employer to inform it about the leave, she claimed that within 20 minutes she was terminated for "misconduct." She filed an EEOC charge, obtained a Notice of Right to Sue, and filed suit claiming sexual harassment. The district court granted the employer summary judgment because the actions complained of did not meet the "severe or pervasive" conduct per Fourth Circuit precedent; other comments were one-time incidents that did not meet the standard for a hostile work environment in <i>Harris v. Forklift Systems, Inc.</i>, 510 U.S. 17, 21 (1993); there was no disparity in power between the harasser and plaintiff as in other Fourth Circuit cases; the hostile work environment was not "hellish."</p> <p>Issue EEOC is Addressing as Amicus: Whether the district court erred in holding that the plaintiff did not adduce sufficient evidence of severe or pervasive harassment to survive summary judgment, and in overly relying on various immaterial factors in its analysis?</p> <p>EEOC's Amicus Brief: The EEOC argued that the district court erred in treating the most egregious cases and facts as establishing a baseline for actionable harassment. The correct standard is set by the Supreme Court, <i>severe or pervasive</i>. Also, a power disparity has never been held by the Fourth Circuit to be a prerequisite for demonstrating coworker harassment, and this court has never held that an actionable hostile work environment must be "hellish." The district court failed to view the evidence in light of the totality of the circumstances, per <i>Harris</i>.</p> <p>Court's Decision: The Fourth Circuit vacated the judgment of the district court granting summary judgment to Mod-U-Kraf Homes on the plaintiff's hostile work environment claim and remanded for further proceedings, and affirmed the district court's grant of summary judgment to Mod-U-Kraf Homes on the plaintiff's retaliation claim. The court recognized that harassment need not involve touching or be "physically threatening" in order to be actionable. "That there are also arguments that suggest that this conduct may not be sufficiently severe or pervasive does not mean that a reasonable jury could not conclude otherwise. At bottom, the facts presented in the record are simply too close to that line for summary judgment to be appropriate." <i>Walker v. Mod-U-Kraf Home, LLC</i>, No. 14-1038 (4th Cir. Dec. 23, 2014), <i>slip op.</i> at 16.</p> |

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| <i>Thibodeaux-Woody v. Houston Community College</i> | U.S. Court of Appeals, 5th Circuit No. 13-20738 | 4/8/2014 | EPA, Title VII | Sex Discrimination Mixed outcome: Affirmed Pro-Employer Summary Judgment on the Retaliation Claim; Reversed and Remanded EPA Claim | <p>Background: Plaintiff alleged a violation of the Equal Pay Act and Title VII alleging that a male employee in the same position received a higher salary. The district court granted summary judgment for the defendant, holding the defendant established its affirmative defense that factors “other than sex” determined the salaries at issue.</p> <p>Issues on Appeal: Did the district court err in granting summary judgment to defendant?</p> <p>Issue EEOC Addressed as Amicus: Did the district court apply the proper summary judgment standard in evaluating the employer’s affirmative defense?</p> <p>EEOC’s Amicus Brief: The court improperly granted summary judgment to defendant because it failed to establish its affirmative defense as a matter of law. Specifically, the EEOC argued that the district court erred when holding that the defendant established that the only reason for the differences in salaries was because the male employee chose to negotiate his compensation. Unlike the <i>McDonnell Douglas</i> framework used for Title VII claims, under which the plaintiff always bears the burden of proof, it is not enough for the employer asserting an EPA affirmative defense simply to offer evidence of a legitimate reason. Instead, the EEOC argued, the employer must offer sufficient evidence to prove the EPA defense as a matter of law, <i>i.e.</i>, that no reasonable jury could reach a contrary conclusion.</p> <p>Court’s Decision: On November 14, 2014, the court, in an unpublished opinion, affirmed in part, reversed in part and remanded the case. The court affirmed the district court’s grant of summary judgment in favor of the employer on the retaliation claim, finding the claimant did not establish a causal link between her complaints about the salary disparity and the employer’s failure to increase her pay. The court, however, revived her Equal Pay Act claim, reasoning “[i]f negotiation is not available to persons of both sexes, it cannot be a legitimate, nondiscriminatory reason for a pay differential.”</p> |

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| <i>Travers v. Verizon Wireless</i> | U.S. Court of Appeals, 6th Circuit No. 13-6527 | 3/3/2014 | ADA | Disability Pro Employer | <p>Background: The charging party began working for the employer in May 2008. She realized she had a heart condition in March 2010. The employer was aware of her heart condition because she wore her heart monitor to work and she told supervisors and managers about it. The charging party took leave in March, April, May and June, and was terminated in June. The district court granted summary judgment to the employer because (1) there was insufficient evidence that the charging party had an actual disability; (2) the charging party failed to show that the employer "regarded her as unable to do her job or as being substantially limited in performing the tasks of a senior account representative;" and (3) the charging party failed to prove pretext as the employer held an honest belief in its proffered reason.</p> <p>Issues on Appeal: (1) Whether the district court abused its discretion in ruling on whether the charging party was actually disabled where the employer had waived the issue for purposes of summary judgment and the court gave the charging party no notice it would address the issue; (2) whether the record evidence of the charging party's disability was sufficient to withstand summary judgment on the question of coverage under the ADA; (3) whether the district court incorrectly analyzed whether the employer regarded the charging party as disabled by applying inconsistent pre-ADA Amendments law; and (4) whether the charging party's evidence contradicting the employer's asserted reason for her termination is sufficient to create a fact question as to pretext.</p> <p>Issue EEOC Addressed as Amicus: Did the district court apply the correct standard in determining whether the claimant was disabled?</p> <p>EEOC's Amicus Brief: The EEOC argued (1) the court committed reversible error when the charging party was without notice that her actual disability status would be considered on summary judgment and was prejudiced because of it. (2) The charging party showed enough evidence to demonstrate she had a disability under the ADA. The ADA is in favor of "broad coverage of individuals" and the charging party showed that her heart condition is a physical impairment that substantially limited the operation of her heart and circulatory system. (3) The EEOC also asserted that the district court applied the incorrect standard as to whether the employer regarded the charging party as disabled. Congress amended the ADA to clarify that a plaintiff need not show that her employer regarded her as being substantially limited in some major life activity, yet the court still applied the wrong standard. (4) Finally, the charging party proved pretext through her testimony and documentary evidence. She challenged the truthfulness of the employer's explanation, and the honest belief rule does not apply when this occurs. The EEOC requested the court to reverse the district court's grant of summary judgment and remand the matter for trial.</p> |

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| | | | | | <p>Court's Decision: Judgment was affirmed in an unpublished opinion dated September 8, 2014. On November 13, the plaintiff's motion for a rehearing <i>en banc</i> was denied.</p> |
| <p><i>Huri v. Office of the Chief Judge of the Circuit Court of Cook County, et al.</i></p> | <p>U.S. Court of Appeals, 7th Circuit No. 12-2217</p> | <p>5/7/2014</p> | <p>Title VII</p> | <p>Charge Processing, Retaliation Pending</p> | <p>Background: The charging party is a Muslim who wore a hijab covering her hair during work. The charging party alleged that from 2002 to 2010 she was treated in a hostile manner due to her religious faith. She complained but alleged no one corrected any of the hostile behavior. In fact, she claimed the behavior worsened. The charging party filed a claim alleging that she was discriminated against based on her religion, national origin, and that she was retaliated against for engaging in protected activity. After she retained counsel, she filed another charge alleging additional acts of discrimination, harassment and retaliation. She then filed suit claiming hostile work environment, religious and national origin harassment, and retaliation. The district court dismissed the hostile work environment claim because the charging party did not include this claim in any of the charges she filed with the EEOC. The court also dismissed the retaliation claim because she did not allege "harassment severe enough to cause a significant change in her employment status."</p> <p>Issue EEOC is Addressing as Amicus: (1) Did the district court err in dismissing the charging party's hostile work environment claim for failure to exhaust administrative remedies where the charging party complied with the EEOC's regulation requiring that her charge "describe generally" the alleged discriminatory practices? (2) Did the district court err in dismissing the charging party's retaliation claim for failure to state a claim?</p> <p>EEOC's Amicus Brief: The EEOC argues that the charging party's hostile work environment claim was properly brought, as her charges contained enough detail to meet the "general description" standard set out in EEOC's regulations. Importantly, the EEOC noted that the district court failed to cite Title VII, EEOC regulations or case law to support or explain its conclusion that an EEOC charge must contain a heightened level of detail. Also, the EEOC claims that the charging party's retaliation claim should not have been dismissed. First, the district court erred in requiring more than that set out by the Supreme Court in <i>Burlington Northern & Santa Fe Railway Co. v. White</i>, 548 U.S. 53 (2006). Actionable retaliation is not limited to employer conduct that results in a <i>significant</i> change in the charging party's employment status, as the district court required. Also, the Seventh Circuit held this year that the "materially adverse" showing "is lower than that required for a discrimination claim." <i>Chaib v. Indiana</i>, 744 F.3d 974, 986-87 (7th Cir. 2014). The EEOC contends that due to the district court applying incorrect standards throughout its decision, the court should reverse the district court's judgment and remand this case for further proceedings.</p> <p>Court's Decision: The case is currently pending with the court.</p> |

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| <i>Whitaker v. Milwaukee County, Wisconsin</i> | U.S. Court of Appeals, 7th Circuit No. 13-3735 | 2/18/2014 | ADA | Charge Processing Pro Employer | <p>Background: The charging party began working for the county in 2001. Another entity took over the county's welfare department in 2008, but the charging party was still a county employee for most purposes. She was approved for intermittent FMLA leave in June 2010 and for continuous FMLA leave in August 2010. Her leave was exhausted on October 18, she asked for more leave until December 28, but the employer agreed to extend her leave to Friday, November 5, stating that if she did not return the employer would "begin the process for medical separation." The charging party filed a charge with the EEOC stating that she would be terminated because she was unable to return to work by November 8 due to medical reasons. She received a right-to-sue letter and she sued the county and the state alleging discriminatory discharge and failure to accommodate her by granting her additional leave. The district court dismissed the state on immunity grounds and granted the county summary judgment. The court dismissed the claimant's failure to accommodate claims because they were beyond the scope of her EEOC charge. Finally, the district court rejected the charging party's joint-employer argument and decided that the county was no longer acting as her employer and had no role in her termination.</p> <p>Issue EEOC is Addressing as Amicus: Whether the respondents had failed to accommodate the charging party reasonably when they refused to extend her leave. In other words, did the district court err in ruling that the charging party's failure-to-accommodate claim was beyond the scope of her charge?</p> <p>EEOC's Amicus Brief: The EEOC argues that the charging party's claim that her employer failed to reasonably accommodate her when it denied her request for extended medical leave is within the scope of her charge. The standard is that a claim can be raised in court (although it was not in the charge) if it is "reasonably related to one of the EEOC charges and can be expected to develop from an investigation into the charges actually raised." The EEOC claimed that the charging party's failure to accommodate claim satisfies that test because any EEOC investigation of her charge would need to address whether it would have been reasonable to accommodate her by extending her leave. The claims are implicating the same individuals and based on the same facts.</p> <p>Court's Decision: On November 25, 2014, the Seventh Circuit affirmed the district court's decision. The court found that although the county was the claimant's official employer, the Wisconsin Department of Health Services was the entity that denied her leave request and ultimately terminated her employment. Thus, the county had no part in the decision-making process. In addition, the court held that the claimant's accommodation claims were outside the scope of her EEOC charge.</p> |

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| <i>State of Arizona; Aguilar v. Asarco, LLC</i> | U.S. Court of Appeals, 9th Circuit No. 11-17484 | 1/21/2014 | Title VII | Harassment, Sex Pro Employee | <p>Background: The plaintiffs, the Arizona FEPA and the individual employee, brought claims against the defendant for sexual harassment, constructive discharge, and retaliation. The jury returned a verdict in favor of the plaintiff solely on the sexual harassment claim. The jury awarded the plaintiff employee no compensatory damages, \$1 in nominal damages, and \$868,750 in punitive damages. The district court later reduced the punitive damages award to \$300,000—the statutory maximum. The plaintiff employee sought \$350,902.75 in attorneys’ fees, which was granted in its entirety. The appellate court panel vacated the district court’s award of punitive damages as constitutionally excessive in light of the fact that the ratio of punitive to compensatory damages was 300,000 to 1. The panel held that the highest punitive award supportable was \$125,000 in order for there to be a “reasonable relationship” between compensatory and punitive damages. The panel ordered that on remand, the district court could order a new trial unless the plaintiff accepted a remittitur to \$125,000. Plaintiffs filed a petition for a rehearing <i>en banc</i>.</p> <p>Issue EEOC is Addressing as Amicus: The EEOC filed an amicus brief in support of plaintiffs’ petition for rehearing <i>en banc</i>. The issue the EEOC is addressing is whether a court must conduct a due process analysis to an award of punitive damages that falls within Title VII’s statutory caps.</p> <p>EEOC’s Amicus Brief: The EEOC argues the statutory cap set forth in Title VII defines the upper limit of a punitive damages award and no additional scrutiny under the due process clause is warranted. The EEOC argues the panel’s remittitur of punitive damages to \$125,000 was arbitrary and not warranted in light of the statutory cap. Since Congress has already regulated punitive damages award by statute, the EEOC contends the only limit on the amount of punitive damages a jury may award is the size of the company found liable for discrimination.</p> <p>Court’s Decision: The appellate court granted plaintiffs’ request that the case be reheard <i>en banc</i>. Oral argument was held on June 18, 2014. On December 10, 2014, the full Ninth Circuit upheld the initial damages award. The court reasoned that punitive damages conferred under 42 U.S.C. § 1981a, which imposes a \$300,000 cap on compensatory and punitive damages, comport with due process because the statute’s provisions meet the constitutional concerns underlying <i>BMW of N. Am., Inc. v. Gore</i>, 517 U.S. 559 (1996). The court also held that it was not an abuse of discretion for the lower court to admit evidence of sexually explicit graffiti, or award attorneys’ fees to the plaintiff. <i>State of Arizona v. ASARCO LLC</i>, No 11-17484 (9th Cir. Dec. 10, 2014) (<i>en banc</i>), <i>slip op.</i> at 21.</p> |

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| <p><i>Scavetta v. Dillon Companies</i></p> | <p>U.S. Court of Appeals, 10th Circuit No. 13-1311</p> | <p>01/13/2014 7/24/2014</p> | <p>ADA</p> | <p>Disability Pro Employer</p> | <p>Background: The plaintiff raised claims for, among other things, failure to provide reasonable accommodations under the ADA and retaliation for engaging in a protected activity under the ADA. The plaintiff presented evidence that she had been diagnosed with rheumatoid arthritis and, as a result, could not give immunizations in her position as a pharmacist. The jury found in favor of the defendant on both of these claims. The plaintiff claimed that the trial court erred in refusing to instruct the jury that major life activities included the operation of the immune system and the operation of the musculoskeletal system.</p> <p>Issue EEOC Addressed as Amicus: The EEOC filed two amicus briefs in this case. The first amicus brief addressed the following two issues: (1) did the district court err in refusing to instruct the jury that the term “major life activity” includes major bodily functions; and (2) did the district court err by instructing the jury that it should find for the defendant if the company made good-faith efforts to identify a reasonable accommodation. The EEOC filed a second amicus brief in support of the Appellant’s Petition for Rehearing <i>en banc</i> which addressed the following issues: (1) whether the panel ignored the expansion of coverage set forth in the ADAAA, and (2) whether the panel erred in its decision regarding the jury instruction.</p> <p>EEOC’s Amicus Brief: The ADAAA was in effect at the time the defendant terminated the plaintiff. Under the ADAAA, the term “major life activities” includes “the operation of a major bodily function,” such as the cardiovascular system or the immune system. The EEOC contends that the plaintiff offered evidence that her rheumatoid arthritis alters the functioning of her immune and musculoskeletal systems; therefore, the court should have instructed the jury the definition of major life activity included operation of a major bodily function.</p> <p>The EEOC also contended the district court erred in instructing the jury to enter a verdict in favor of the defendant if it found that the company “made a good faith effort in consultation with [the plaintiff] to identify and make a reasonable accommodation that would provide her with an equally effective opportunity workplace.” The EEOC argued this was an error because there is no “good-faith” effort defense to liability under the ADA.</p> <p>Court’s Decision: The appellate court affirmed the jury verdict in favor of the defendant. Specifically, the appellate court held the district court did not abuse its discretion in using a jury instruction that did not define major life activity to include operation of a major bodily function. Although the parties agree that “the operation of a major bodily function” is considered a “major life activity” under the ADA, the parties disagree whether there was evidence that the plaintiff’s major bodily functions were substantially limited. The court held that rheumatoid arthritis will not necessarily substantially limit a major life activity</p> |

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| | | | | | in all cases. Because there was no specific evidence presented at trial that rheumatoid arthritis limited the operations of the plaintiff's major bodily functions, the appellate court held that the district court correctly declined to reference major bodily functions in its instructions. Although the EEOC raised the issue of the "good-faith" instruction in its amicus brief, the appellate court did not address this question, presumably because the plaintiff did not raise this issue on appeal. Further, the appellate court denied the appellant's petition for rehearing or rehearing <i>en banc</i> . |

FY 2014—Appellate Cases Where the EEOC Filed as the Appellant

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| <i>EEOC v. Sterling Jewelers, Inc.</i> | U.S. Court of Appeals, 2d Circuit No. 14-782 | 09/03/2014 | Title VII | Charge Processing Pending | <p>Background: The district court dismissed the EEOC's enforcement action for failing to investigate the nationwide allegations prior to filing its lawsuit. The EEOC had raised a company-wide pattern-or-practice of gender-based discrimination in pay and/or promotion claim. The district court held that the EEOC failed to present evidence that it had investigated a nationwide class during the investigation phase of the lawsuit.</p> <p>Issues on Appeal: Whether the district court erred in dismissing the EEOC's enforcement action holding the EEOC failed to investigate claims of nationwide discrimination.</p> <p>EEOC's Position on Appeal: The EEOC argues that the scope and extent of its investigation is not reviewable by the court. The EEOC further argues that it did investigate nationwide claims as evidenced by its administrative file. Therefore, the EEOC contends the district court erred in dismissing this lawsuit for failing to investigate a nationwide class prior to filing suit.</p> <p>Court's Decision: The appeal is not yet fully briefed.</p> |

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| <i>EEOC v. Allstate Insurance Co.</i> | U.S. Court of Appeals, 3d Circuit No. 14-2700 | 8/12/2014 | ADA, ADEA, Title VII | Retaliation Pending | <p>Background: The EEOC filed a complaint alleging the defendant violated the anti-retaliation provisions of Title VII, the ADEA, and the ADA by requiring its employee agents to release all their claims under those statutes in order to continue selling insurance for the company. In 2003, the EEOC and the defendant filed cross motions for summary judgment, and in March 2004, the district court granted the EEOC's motion for summary judgment as to liability, ruling that the challenged program violated the anti-retaliation provisions. In December 2005, relying on new case authority, the defendant filed a second motion for summary judgment, and the district court granted that motion in June 2007. The EEOC appealed, and the Third Circuit reversed and remanded the decision. In April 2013, the EEOC and the defendant filed cross motions for summary judgment. In March 2014, the district court denied the EEOC's motion and granted the defendant's.</p> <p>Issues on Appeal: Whether the district court erred in ruling that the defendant's policy requiring its employee agents to release all their claims in order to continue working was not retaliatory per se.</p> <p>EEOC's Position on Appeal: In ruling the defendant's release requirement was lawful, the district court relied on the rule that employers may lawfully seek releases from terminated employees in exchange for enhanced severance benefits. The EEOC contends, however, that this general rule does not authorize the agreement at issue as the employees' relationship with the employer was not terminated and they received no "severance" benefit. The EEOC also maintains that those who refused to sign the agreements participated in protected opposition activity.</p> <p>Court's Decision: This appeal is currently pending with the court. Oral argument is scheduled for January 15, 2015.</p> |

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| <i>EEOC v. Freeman</i> | U.S. Court of Appeals, 4th Circuit No. 13-2365 | 1/29/2014 | Title VII | Race, Sex Pending | <p>Background: The EEOC filed suit alleging Freeman’s use of credit and criminal checks to make hiring decisions constituted race and sex discrimination. The district court granted Freeman’s partial motion to dismiss, limiting the EEOC’s suit to acts within 300 days of the charge, which alleged the credit checks were discriminatory. The district court later granted Freeman’s motion for partial summary judgment, limiting the criminal checks allegations to acts within 300 days of the EEOC’s formal notice to Freeman of its expanded investigation. Finally, the district court granted Freeman’s motion to exclude EEOC’s expert reports as unreliable and/or untimely and granted summary judgment in its favor, holding the EEOC failed to establish a <i>prima facie</i> case without those reports and failed to identify the “specific employment practice” under challenge.</p> <p>Issues on Appeal: (1) Whether the district court erred in concluding the EEOC failed to identify the “particular employment practice” under challenge; (2) Whether the district court abused its discretion in finding the EEOC’s supplemental expert reports untimely and in excluding them as a discovery sanction; (3) Whether the court abused its discretion in excluding the expert reports as unreliable and erred in holding EEOC failed to establish a <i>prima facie</i> case of disparate impact discrimination; and (4) Whether the court erred in limiting the EEOC’s credit claim to acts within 300 days of the charge and the criminal claim to acts within 300 days of the EEOC’s formal notice of expansion of its credit investigation.</p> <p>EEOC’s Position on Appeal: The EEOC contends the district court made a threshold error in holding it failed to identify the “specific employment practice” at issue. Contrary to the court’s conclusion, Title VII does not require disparate impact plaintiffs to break down a credit or criminal check policy by each individual sub-factor or by “job category.” Rather, 42 U.S.C. §2000e-2(k) (1) requires only that plaintiffs identify the “particular employment practice” within an employer’s decisionmaking process that causes the disparate impact. The EEOC argues it complied with this requirement by isolating two elements of Freeman’s multi-step hiring process for challenge: credit checks and criminal checks. The EEOC also contends that the district court abused its discretion in excluding as untimely the supplemental reports of EEOC’s experts as they constituted admissible “supplements” under Rule 26. Additionally, the EEOC argues the district court’s exclusion of the supplements as unreliable under <i>Daubert</i>⁵ was an abuse of discretion, as the attacks on the EEOC’s expert go to the weight of the evidence, not to its admissibility. Lastly, the EEOC argues the district court failed to properly apply the continuing violations theory in applying the statute of limitations.</p> <p>Court’s Decision: Oral argument was heard on Oct. 29, 2014. This appeal is currently pending with the court.</p> |

5 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

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| <i>EEOC v. Ford Motor Co.</i> | U.S. Court of Appeals, 6th Circuit No. 12-2484 | 7/18/2014 | ADA | Disability Discrimination, Reasonable Accommodation Pending | <p>Background: The charging party was terminated from her position as a resale steel buyer after she asked to telecommute several days per week in an attempt to control the symptoms of irritable bowel syndrome (IBS). The EEOC argues that Ford discriminated against the plaintiff on the basis of her disability and retaliated against her for filing a charge with the EEOC. The district court granted summary judgment in favor of Ford. A three judge panel for the Sixth Circuit overturned the district court's summary judgment decision, holding there were material facts in dispute over whether Ford provided a reasonable accommodation. The court, however, subsequently vacated this decision and order a re-hearing <i>en banc</i>.</p> <p>Issues on Appeal: Whether the district court erred in holding that a telecommuting arrangement was not a reasonable accommodation?</p> <p>EEOC's Position on Appeal: The EEOC contends that the charging party is qualified for the resale buyer position, and a telecommuting arrangement would be a reasonable accommodation. Ford argues that a telecommuting arrangement is generally not a reasonable accommodation for resale buyers because they must interact on a regular basis with other team members and access information that is unavailable during non-"core" business hours. The EEOC contends, however, that there exists a material dispute in fact over how often such face-to-face interaction is required for the charging party's particular position. The EEOC also contends Ford's alternative accommodations to move the charging party's cubicle closer to the restroom would be ineffective due to the severity of the disability. Additionally, the EEOC contends that moving the charging party to a position better suited for telecommuting is also not a reasonable accommodation. Lastly, the EEOC contends there is a material issue of fact regarding the retaliation claim, as the charging party was terminated soon after filing her EEOC charge.</p> <p>Court's Decision: This appeal is currently pending with the court.</p> |
| <i>EEOC v. Global Horizons, Inc.</i> | U.S. Court of Appeals, 9th Circuit No. 1336058 | 2/28/2014 | Title VII | National Origin, Race EEOC voluntarily dismissed its appeal | <p>Background: The EEOC brought a lawsuit against a number of companies alleging they had subjected a newly immigrated class of Thai workers to a pattern or practice of disparate treatment and a hostile work environment based on their national origin and race. During discovery, the district court ordered the EEOC to disclose the immigration status of the claimants, subject to a protective order. Specifically, the district court held that the defendants were entitled to immigration information to assess credibility and to support potential defenses.</p> <p>Issues on Appeal: (1) Is the district court's order to disclose information related to immigration status immediately appealable pursuant to the collateral order doctrine; and (2) did the district court err by ordering disclosure of information related to the claimants' immigration status?</p> <p>EEOC's Position on Appeal: The EEOC argues that disclosing this information would require the EEOC to violate federal confidentiality provisions and the information is irrelevant. Further, the EEOC contends disclosure of this information will have a chilling effect on this litigation and future employment discrimination litigation. The EEOC notes that Title VII protections apply regardless of citizenship status.</p> <p>Court's Decision: The EEOC voluntarily dismissed its appeal on August 4, 2014.</p> |

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| <i>EEOC v. The Geo Group, Inc.</i> | U.S. Court of Appeals, 9th Circuit No. 13-16292 | 3/7/2014 | Title VII | Charge Processing, Harassment, Limitations, Retaliation, Sex Pending | <p>Background: The EEOC and the Arizona FEPA filed a lawsuit against the defendant on behalf of multiple aggrieved women alleging sexual harassment and retaliation. During the investigation period of the charge, the EEOC identified only six of the allegedly aggrieved women. The EEOC then attempted to conciliate on behalf of 20 women, even though these women were unknown. The EEOC identified the women during the course of litigation by sending letters to employees seeking claimants. The district court dismissed all of the aggrieved women that the EEOC failed to identify during the investigation of the charge for failing to exhaust administrative remedies. The district court later dismissed two additional women because their claims occurred more than 300 days prior to the date the EEOC issued its reasonable cause finding.</p> <p>Issues on Appeal: (1) Whether the district court abused its discretion in dismissing aggrieved women whom the EEOC failed to satisfy administrative prerequisites and only learned of the women in litigation; (2) whether the district court properly held the “filing period” for the charge for the non-charge-filing woman was 300 days from the date the EEOC advised the defendant of the expanded allegations in the charge.</p> <p>EEOC’s Position on Appeal: The EEOC argues the district court erred in holding that it was required to exhaust administrative remedies on behalf of each aggrieved individual in a Section 706 case. Specifically, the EEOC contends it was not required to identify, investigate, and conciliate the claims of each claimant during the administrative process. The EEOC argues also that the relevant statutory period for all aggrieved women is 300 days from the date the original charge of discrimination was filed—not 300 days from the date the EEOC provided notice to the employer of the expanded allegations.</p> <p>Court’s Decision: This appeal is currently pending with the court.</p> |

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| <i>EEOC v. Exel Inc.</i> | U.S. Court of Appeals, 11th Circuit No. 14-110007 | 7/16/2014 | Title VII | Sex Pending | <p>Background: The jury returned a verdict in favor of the EEOC and an intervenor, finding that the employer discriminated against the charging party based on her sex in denying her a promotion. The EEOC sought injunctive relief, back pay, compensatory damages, and punitive damages. The jury awarded back pay, compensatory damages, and \$475,000 in punitive damages. Due to Title VII's statutory limits, the court reduced the punitive damages to \$275,000. The employer filed a renewed motion for judgment as a matter of law or, alternative, for a new trial, arguing that the evidence did not support the jury's verdict as to liability or punitive damages. The district court granted the motion with respect to the punitive damages award and vacated the entire \$275,000 award.</p> <p>Issues on Appeal: Whether the court should correct its judicial precedent regarding punitive damages under 42 U.S.C. § 1981a, and reinstate the jury's verdict?</p> <p>EEOC's Position on Appeal: The EEOC argues the court's current standard for imputing liability for punitive damages under 42 U.S.C. § 1981a conflicts with Supreme Court precedent and the Eleventh Circuit's own 2013 Pattern Jury Instructions. The standard for this court is that liability for punitive damages may be imposed only when the discriminating employee was sufficiently "high up the corporate hierarchy" or when "higher management countenanced or approved" the conduct. Supreme Court precedent (in <i>Kolstad v. American Dental Association</i>) states that liability for punitive damage depends upon whether the discriminator acted in a "managerial capacity" and the employee does not need to be the employer's top management. The EEOC claims that when the Supreme Court standard is applied to the facts of this case, the court should reinstate the \$275,000 punitive damages award because the evidence supports the jury's determination that the general manager acted in a "managerial capacity" when he denied the charging party a promotion because of her sex.</p> <p>Court's Decision: This case has been tentatively calendared for the week of February 2, 2015.</p> |

FY 2014—Select Decided Appellate Cases in Which the EEOC was a Party

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| <i>EEOC v. Kohl's Department Stores, Inc.</i> | U.S. Court of Appeals, 1st Circuit No. 14-1268 | 5/12/2014 | ADA | Disability Discrimination Pro Employer | <p>Background: The charging party claimed discrimination and constructive discharge after the defendant's failure to accommodate her disability. The district court granted summary judgment for the defendant, holding the failure-to-accommodate claim could not survive because the charging party failed to engage in the interactive process and was therefore responsible for its breakdown. The district court also ruled that because summary judgment was appropriate on the failure-to-accommodate claim, summary judgment must follow on the constructive discharge claim.</p> <p>Issues on Appeal: Did the district court err in granting summary judgment for defendants when it held that the charging party failed to engage in the interactive process?</p> <p>EEOC's Position on Appeal: The EEOC contends the district court discounted the role the defendant's managers played in the interactive process' breakdown. The district court instead mistakenly focused its attention on the "last act" in the interactive process, namely the charging party's visible frustration at her managers' recalcitrance. The EEOC argues the charging party's frustration was insufficient to show she was responsible for the interactive process breakdown. For the same reasons, the EEOC argues also that the district court erred in granting summary judgment on the constructive discharge claim as the charging party had to choose between continuing to work an "erratic" schedule and serious risks to her health.</p> <p>Court's Decision: In a 2-1 panel ruling, the First Circuit affirmed the lower court's grant of summary judgment in the employer's favor. The court found the employee's unwillingness to participate in the interactive process "is the reason why the record lacks facts regarding what reasonable accommodations Kohl's might have offered" had the employee participated. The appellate court concluded the employer "acted in good faith when it initiated an interactive process and displayed its willingness to cooperate with [the employee], not once but twice, to no effect." <i>EEOC v. Kohl's Department Stores, Inc.</i>, No. 14-1268 (1st Cir. Dec. 19, 2014).</p> |

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| <i>EEOC v. New York Port Authority</i> | U.S. Court of Appeals, 2d Circuit | 9/29/2014 | EPA | 2014 U.S. Dist. LEXIS 18533 Pro Employer | <p>Background: The EEOC filed suit against the Port Authority of New York and New Jersey ("Port Authority"), asserting that the Port Authority paid its female nonsupervisory attorneys at a lesser rate than their male counterparts for "equal work" in violation of the Equal Pay Act. The district court granted the Port Authority's motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).</p> <p>Issues on Appeal: Did the district court err in dismissing the EEOC's complaint for failing to plead how the particulars of each position at issue was "equal work" between male and female employees?</p> <p>EEOC's Position on Appeal: To support its claim that the attorneys performed "equal work," the EEOC pled broad facts concerning the attorneys' jobs (such as that the attorneys all have "the same professional degree," work "under time pressures and deadlines," and utilize both "analytical" and "legal" skills) that are generalizable to virtually all practicing attorneys. The EEOC did not, however, plead any facts particular to the attorneys' actual job duties. Instead, the EEOC proceeded under a theory that, at the Port Authority, "an attorney is an attorney is an attorney" — that is, that the dozens of nonsupervisory attorneys working at the Port Authority during the relevant period (in practice areas ranging from Contracts to Maritime and Aviation, and from Labor Relations to Workers' Compensation) were all doing equal work — and that, as a result, it was not required to detail similarities between the attorneys' job duties (or other factual matter as to the content of the attorneys' jobs) to state a plausible EPA claim.</p> <p>Court's Decision: The court concluded that the EEOC's failure to allege any facts concerning the attorneys' actual job duties deprives the district court of any basis from which to draw a reasonable inference that the attorneys performed "equal work," the touchstone of an EPA claim. Accordingly, the complaint failed to state a plausible claim for relief.</p> |
| <i>EEOC v. Baltimore County</i> | U.S. Court of Appeals, 4th Circuit | 3/31/2014 | ADEA | 2014 U.S. App. LEXIS 5902 Pro EEOC | <p>Background: The EEOC sued Baltimore County under the ADEA, claiming the county discriminated against an individual and a class of similarly situated employees age 40 or older by requiring them to pay higher pension contributions than those paid by younger employees for the same pension benefits, based on their ages at hire. The district court initially awarded summary judgment in favor of Baltimore County, but the Fourth Circuit vacated and remanded the decision. On remand, the lower court held that the pension plan violated the ADEA.</p> <p>Issues on Appeal: Whether an employee retirement benefit plan maintained by Baltimore County, Maryland unlawfully discriminated against older county employees based on their age?</p> <p>Court's Decision: The facts demonstrate that the "County's plan mandated different contribution rates that escalated explicitly in accordance with employees' ages at the time of their enrollment in the plan." The court held that the county's plan violated the ADEA, because the plan's employee contribution rates were determined by age. The court also held that the ADEA's "safe harbor provision" applicable to early retirement benefit plans does not shield the county from liability for the alleged age discrimination. The court affirmed the district court's award of summary judgment on the issue of liability, and remanded the case for consideration of damages.</p> |

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| <i>EEOC v. Propak Logistics, Inc.</i> | U.S. Court of Appeals, 4th Circuit | 3/25/2014 | Title VII | 2014 U.S. App. LEXIS 25454 Pro Employer | <p>Background: Former employee brought a Title VII suit claiming he was terminated because he was non-Hispanic. The employee ultimately obtained a right-to-sue letter from the EEOC, filed a complaint in the U.S. district court, and eventually settled with the employer. The EEOC, however, notified the employer that it would continue its own investigation into the employer's alleged discrimination. Years later, the EEOC filed a Title VII suit against the employer on behalf of non-Hispanic employees. The district court dismissed the complaint based on laches and ordered the EEOC to pay the employer's reasonable attorneys' fees.</p> <p>Issues on Appeal: Whether the district court abused its discretion in ordering the EEOC to pay attorneys' fees to a prevailing defendant employer after the court awarded summary judgment to the employer in an action brought by the EEOC.</p> <p>Court's Decision: The appeals court affirmed the district court. The facts demonstrate that the EEOC waited more than 6.5 years after the charge of discrimination was filed to initiate the lawsuit. Due to the delay, many witnesses became unavailable and certain employer records were destroyed due to employees who had since left the company.</p> <p>In a Title VII action, a prevailing defendant is eligible to receive such an award only when the court finds that the plaintiff's action was "frivolous, unreasonable, or without foundation."</p> <p>The court determined that the district court correctly awarded the defendant attorneys' fees because the EEOC's lawsuit was moot when it was filed, <i>i.e.</i>, the EEOC failed to identify the class of victims who could be entitled to monetary relief and injunctive relief was unavailable; and the company no longer operated any facilities in North Carolina, an allegedly discriminatory plant.</p> |

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| <i>EEOC v. A.C. Widenhouse, Inc.</i> | U.S. Court of Appeals, 4th Circuit | 06/24/2014 | Title VII and §1981 retaliation | Unpublished Pro EEOC | <p>Background: In a race discrimination case, the district court instructed the jury to find the defendant employer liable for retaliatory discharge and retaliation if race discrimination was the “motivating factor” in his termination. The jury found the defendant liable, and the district court issued its judgment. Afterwards, the U.S. Supreme Court issued its decision in <i>University of Texas Southwestern Medical Center v. Nassar</i>, 133 S. Ct. 2517, 2534 (2013), holding that “a plaintiff making a retaliation claim under [Title VII] must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer” and not only a motivating factor.</p> <p>Issues on Appeal: Whether the district court made evidentiary and instructional errors such that the employer is entitled to a new trial on appellees’ claims of racially hostile work environment, racially discriminatory discharge and retaliatory discharge?</p> <p>Court’s Decision: The court affirmed the district court and the employer is not entitled to a new trial. At the district court level, the EEOC brought suit on behalf of two employees alleging a racially hostile work environment, and one of their employees intervened in the suit claiming racial harassment, racially discriminatory discharge and retaliatory discharge.</p> <p>The district court instructed the jury: (1) to find the employer liable if it found that retaliation for the intervening employee’s protected activity of reporting racial discrimination was a motivating factor in his termination, and (2) to determine whether the employer would be liable for punitive damages if it were found to be liable for the substantive counts of the complaints. The jury found the employer liable for each count and awarded compensatory and punitive damages to plaintiffs and back pay with interest to the intervening employee. Additionally, the court granted attorneys’ fees. The employer appealed due to <i>Nassar</i>, holding that “a plaintiff making a retaliation claim under [Title VII] must establish that his or her protected activity was a but-for cause of the alleged adverse action by the employer.”</p> <p>The court determined that even though the district court plainly erred in giving the motivating-factor instruction, that error did not affect any substantial rights because the employer cannot show that it was prejudiced at all. The court also found no error with respect to the punitive damages instruction given to the jury in the liability phase of trial, because the district court followed correct procedure outlined in prior case law.</p> <p>With respect to the district court disallowing testimony and examination, the court did not consider this argument because the employer failed to object at the district court level.</p> <p>Finally, the court determined that the district court’s fee award was not an abuse of discretion because of the supporting billing, affidavits and other documentation supported the fee award.</p> |

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| <i>EEOC v. Exxon Mobil Corp.</i> | U.S. Court of Appeals, 5th Circuit | 3/25/2014 | ADEA | 2014 U.S. App. LEXIS 5488 Pro Employer | <p>Background: The EEOC appealed the district court’s award of summary judgment in favor of Defendant Exxon Mobil Inc. The EEOC challenged Exxon’s mandatory retirement policy requiring its corporate pilots to retire at age sixty as a violation of the ADEA. In response, Exxon asserted an affirmative defense—that the requirement was a bona fide occupational qualification (BFOQ), relying on a comparable rule utilized by the Federal Aviation Administration (FAA) for commercial pilots. The district court granted summary judgment to Exxon based on this defense. The EEOC appealed, and the Fifth Circuit reversed and remanded the case for additional discovery and a decision addressing the full BFOQ analysis. On remand, the district court allowed additional discovery but again granted summary judgment to Exxon. The EEOC then appealed this judgment.</p> <p>Issues on Appeal: Whether the district court erred in granting summary judgment for the defendant based on its BFOQ defense?</p> <p>EEOC’s Position on Appeal: The EEOC argued that genuine issues of material fact remain that preclude summary judgment based on the incongruity between the commercial pilots subject to the FAA regulation and Exxon’s pilots. The EEOC asserted that the piloting duties, planes, and operations of an Exxon pilot are materially different from that of a commercial pilot to which the FAA regulations apply.</p> <p>Court’s Decision: The court upheld the district court’s summary judgment ruling for defendants, reasoning commercial pilots and Exxon pilots were substantially congruent for purposes of establishing a BFOQ defense.</p> |

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| <i>EEOC v. LHC Group, Inc.</i> | U.S. Court of Appeals, 5th Circuit No. 13-60703 | 2/26/2014 | ADA | Disability Pro EEOC | <p>Background: The EEOC appeals from the district court's order granting the employer summary judgment, alleging the employer discriminated against the charging party on the basis of her disability by failing to reasonably accommodate her and by firing her. The charging party was a registered nurse who was promoted to team leader in March 2009 and branch manager in May 2009. The charging party had a seizure at work on May 26, 2009 and claimed that she was discriminated against, and ultimately terminated, due to her epilepsy. The district court ruled that the EEOC failed to establish a <i>prima facie</i> case of disability discrimination because it failed to show that the charging party was qualified to be a team leader or field nurse. The district court also ruled that, even if the EEOC had established a <i>prima facie</i> case, the employer articulated legitimate reasons for terminating the charging party and the EEOC failed to offer sufficient evidence of pretext. Finally, the district court dismissed the EEOC's claims that the employer violated the ADA by failing to provide the charging party a reasonable accommodation.</p> <p>Issues on Appeal: (1) Did the EEOC offer sufficient evidence that the charging party was qualified to be a team leader, that the employer's post-seizure criticisms of her performance were pretextual, and that the employer fired her because of her epilepsy? (2) Did the EEOC offer sufficient evidence that after the charging party's epileptic seizure the employer rejected her request for computer assistance, a reasonable accommodation? (3) Assuming <i>arguendo</i> that the charging party was not qualified to be a team leader, even with a reasonable accommodation, did the EEOC offer sufficient evidence that the charging party was qualified to resume her field nurse duties and that the employer failed to accommodate her by returning her to her former position?</p> <p>EEOC's Position on Appeal: The EEOC argues there is evidence (statements) linking the charging party's termination to her epilepsy. The employer's justification for termination was pretextual because the charging party's performance declined only after her seizure. Finally, the employer failed to engage in an interactive process, so the district court erred in dismissing the EEOC's claim that the employer failed to accommodate the charging party by reassigning her to her former field nurse position. The EEOC asks the appellate court to reverse the district court's judgment and remand the case for further proceedings.</p> <p>Court's Decision: On December 11, 2014, the Fifth Circuit issued a decision reversing in part, finding there is a genuine dispute of material fact as to whether the employer's reason for firing the employee was motivated by her disability. The appellate court clarified that a claimant setting forth an ADA claim need not always prove that he or she was replaced by a non-disabled individual. To establish a nexus, it is sufficient to show simply that "[the employee] was subject to an adverse employment decision on account of his disability." In addition, the Fifth Circuit panel held that because the ADA uses the "motivating factor" analysis, the EEOC's alleged failure to rebut the employer's performance-based reasons for termination was not fatal to the claim. "[A]n employee who fails to demonstrate pretext can still survive summary judgment by showing that an employment decision was 'based on a mixture of legitimate and illegitimate motives . . . [and that] the illegitimate motive was a motivating factor in the decision.'" <i>EEOC v. LHC Group, Inc.</i>, No. 13-60703 (5th Cir. Dec. 11, 2014).</p> |

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| <i>EEOC v. Kaplan Higher Educ. Corp.</i> | U.S. Court of Appeals, 6th Circuit | 4/09/2014 | Title VII | 2014 U.S. App. LEXIS 6490 Pro Employer | <p>Background: The EEOC sued the defendant for using the same type of background check that the EEOC itself uses. Specifically, both the EEOC and the defendant run credit checks on certain applicants. The EEOC sued the defendant alleging the use of credit checks caused it to screen out more African-American applicants than Caucasian applicants, creating a disparate impact. Proof of disparate impact is usually statistical proof in the form of expert testimony. The district court excluded the EEOC's expert testimony on the grounds that it was unreliable. The expert engaged in a process called "race rating," which was used to determine the race of the applicant by visual means by reviewing the drivers' license photograph.</p> <p>Issue on Appeal: Whether the district court abused its discretion when it excluded the EEOC's expert testimony?</p> <p>EEOC's Position on Appeal: Among other arguments, the EEOC claimed the district court erred in rejecting photographs as a source of race identification; federal courts have recognized that race may be observed by visual means; and that the district court erred when it rejected evidence of consistency between photo race identifications and other race identification data.</p> <p>Court's Decision: The appellate court affirmed the district court's decision excluding the EEOC's expert.</p> |
| <i>EEOC v. Skanska United States Bldg.</i> | U.S. Court of Appeals, 6th Circuit | 12/10/2013 | Title VII | 2013 U.S. App. LEXIS 24806 Pro EEOC | <p>Background: Skanska USA Building, Inc. was the general contractor for a construction company. A Skanska subcontractor hired the charging party to operate a temporary elevator at the site. The charging party contended he was subjected to harassment based on his race. The EEOC sued Skanska, alleging racial discrimination and retaliation in violation of Title VII. The EEOC contended that although the contractor did not employ the charging party directly, it acted as his joint employer. The district court found no joint employer status and granted summary judgment in favor of the contractor.</p> <p>Issues on Appeal: Whether the district court erred in finding the defendant was not a joint employer to be liable under Title VII.</p> <p>EEOC's Position on Appeal: The EEOC argued that Skanska was a joint employer because it had the ability to direct the charging party's work, selected his supervisors, set his hours and daily assignments, and supervised his performance. The EEOC also argued that Skanska was aware of the charging party's complaints over discrimination, but did nothing in response.</p> <p>Court's Decision: The court reversed the district court's decision, holding that Skanska was a joint employer subject to liability under Title VII.</p> |

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| <i>EEOC v. Mach Mining, LLC</i> | U.S. Court of Appeals, 7th Circuit | 12/20/2013 | Title VII | 2013 U.S. App. LEXIS 25454 Pro EEOC <i>Petition for Certiorari granted on June 30, 2014 (Docket No. 13-1019)</i> | <p>Background: In the underlying matter, the EEOC filed a lawsuit against defendant, claiming that it had discriminated against women since 2006 by “never hir[ing] a single female for a mining related position” and because the defendant “did not even have a women’s bathroom on its mining premises.” When defendant asserted the affirmative defense that the EEOC did not conciliate in good faith, the EEOC moved for summary judgment and argued that based on <i>EEOC v. Caterpillar, Inc.</i>, 409 F.3d 831 (7th Cir. 2005), the EEOC’s conciliation process was not subject to any judicial review. The district court rejected the EEOC’s argument, held that <i>Caterpillar</i> did not prevent judicial review of the conciliation process, and opined that while circuits are split, “at least some level of judicial review” exists for the EEOC’s conciliation process. The Seventh Circuit granted the EEOC’s petition for interlocutory appeal of the district court’s order denying the EEOC’s motion for partial summary judgment. Specifically, the EEOC argued the district court erred in holding that its conciliation efforts were subject to judicial review.</p> <p>Issues on Appeal: (1) Whether a court can review the EEOC’s conciliation efforts; and (2) If a court can review the EEOC’s conciliation efforts, whether the reviewing court should apply a deferential or heightened scrutiny of review.</p> <p>Court’s Decision: In reversing the district court’s denial of summary judgment, the Seventh Circuit held that the “language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit.”</p> <p>In its ruling, the court of appeals focused on five considerations.</p> <p>First, the court reviewed the statutory language of Title VII, which does not suggest that the EEOC’s approach to conciliation is reviewable. The court noted the express statutory language made clear that conciliation efforts are left solely to the EEOC’s discretion, and that the confidentiality provision governing the process, which provides for criminal penalties, conflicts with making that information reviewable by courts.</p> <p>Second, the court determined there is no statutory standard for review of the conciliation process, noting that other courts “applying a failure to conciliate defense have varied widely in what evidence they consider and what actions they require of the EEOC.”</p> <p>As a third basis, the appeals court asserted that judicial review of conciliation undermines the process, as it opens the door to employers focusing on building a record of the EEOC’s failure to conciliate to prepare a defense, as opposed to participating in the conciliation process.</p> <p>Fourth, the Seventh Circuit relied on its own precedent to demonstrate its “consistent skepticism toward employers’ efforts to change the focus from their own conduct to the agency’s pre-suit actions.”</p> <p>Fifth and finally, the Seventh Circuit acknowledged that it was “the first circuit to reject explicitly the implied defense of failure to conciliate,” and further acknowledged that it was proceeding “as if we are creating a circuit split.”</p> <p>The Seventh Circuit opined that dismissal based on a procedural issue such as failure to conciliate is a drastic remedy that could “excuse the employer’s (assumed) unlawful discrimination” and is contrary to the intent of Title VII.</p> <p>The U.S. Supreme Court has granted Mach Mining’s petition for <i>certiorari</i>, and will decide this case during its 2014-2015 term.</p> |

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| <i>EEOC v. CRST Van Expedited</i> | U.S. Court of Appeals, 8th Circuit No. 13-3159 | 10/1/2013 | Title VII | Propriety of Fee Award Pro EEOC | <p>Background: In this seven-year litigation battle, the lower court awarded attorneys' fees to the employer (for the second time), the most recent award totaling \$4,694,442.14. In the underlying lawsuit, the EEOC alleged that the lead plaintiff and "other similarly situated female employees" were subjected to harassment and the employer failed to take prompt corrective action to address their concerns. The court warned the EEOC: "[i]f during the course of discovery CRST discover[ed] evidence that shed[] doubt on the EEOC's representations to the court, CRST [could] file an appropriate motion." <i>EEOC v. CRST Van Expedited</i>, Case No. 1:07-cv-00095, Docket #400 (Aug. 1, 2013).</p> <p>On February 8, 2013, CRST and the EEOC filed a joint "Motion for Entry of Order of Dismissal." The dismissal was based on the Eighth Circuit decision affirming, with minor exception, the dismissal of virtually all claims, except those on behalf of two individuals, and the claims of one individual were withdrawn. The EEOC and CRST ultimately agreed to resolve the one remaining claim of the original charging party for \$50,000.</p> <p>CRST thereafter sought an award of fees, which was granted by the court, which led to the notice of appeal, briefing and argument before the Eighth Circuit, which was held on September 11, 2014.</p> <p>Issues on Appeal: The focus of the recent appeal is solely on the fee award.</p> <p>EEOC's Position on Appeal: The EEOC argued that the employer was not the prevailing party because the claims of at least one individual survived, and there was a settlement payment by the employer. The employer argued that the EEOC acted in bad faith by trying to use the threat of pattern-or-practice litigation to force the employer into settlement or otherwise face litigation, including over 150 depositions and other costly discovery potentially involving millions of dollars.</p> <p>Court's Decision: The Eighth Circuit reversed and remanded the \$4.7 award of attorneys' fees levied against the EEOC. The court concluded that the employer was "not entitled to an award of attorneys' fees for (1) claims that the district court dismissed based on the EEOC's failure to satisfy its pre-suit obligations and (2) the purported pattern-or-practice claim. On remand, the district court must individually assess each of the claims for which it granted summary judgment to CRST on the merits and explain why it deems a particular claim to be frivolous, unreasonable, or groundless." <i>EEOC v. CRST Van Expedited, Inc.</i>, No. 13-3159 (8th Cir. Dec. 22, 2015).</p> |
| <i>EEOC v. Hill Country Farms</i> | U.S. Court of Appeals, 8th Circuit | 5/05/2014 | ADA | 2014 U.S. App. LEXIS 8650 Pro EEOC | <p>Background: The district court granted partial summary judgment for the EEOC. During the trial, the defendant moved to vacate the district court's partial summary judgment, arguing the order was void because an allegedly indispensable third party had not been joined as a defendant. Following a hearing, the district court denied the motion. Eventually, a jury found the defendant liable for the remaining ADA violations and awarded damages. The defendant subsequently appealed.</p> <p>Issue on Appeal: Whether the district court erred in granting partial summary judgment without joinder of a third party.</p> <p>EEOC's Position on Appeal: The EEOC argued that partial summary judgment was proper as it was undisputed that defendant paid disabled employees at less than minimum wage.</p> <p>Court's Decision: The appellate court upheld the district court's partial summary judgment order for the EEOC.</p> |

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| <i>EEOC v. Abercrombie and Fitch Stores</i> | U.S. Court of Appeals, 10th Circuit | 10/01/2013 | Title VII | 2013 U.S. App. LEXIS 20028 Pro Employer <i>Petition for Certiorari granted on October 2, 2014 (Docket No. 14-86)</i> | <p>Background: The EEOC filed a lawsuit against the defendant alleging that it failed to accommodate a Muslim employee's religious beliefs. Specifically, the employee wore a headscarf during the interview process, but did not state her religion during the interview, nor did she say she was wearing her headscarf due to her religion. The company decided not to hire the employee, even though she was a good candidate.</p> <p>After the parties filed cross motions for summary judgment, the court found the EEOC established a <i>prima facie</i> case and denied summary judgment to the defendant. At trial on the issue of damages, the jury awarded the EEOC compensatory damages. The defendant appealed.</p> <p>Court's Decision: The Tenth Circuit reversed the district court's grant of summary judgment to the EEOC, reversed the denial of summary judgment to the defendant, and remanded with instructions to vacate. The defendant argued that the claimant did not establish the notice required for a <i>prima facie</i> case, because the employee never told the defendant she wore the headscarf for religious reasons. The Tenth Circuit found that the EEOC could not make a <i>prima facie</i> case because there was no genuine dispute that no one involved in the hiring process had "particularized, actual knowledge" that the employee wore the headscarf due to religious beliefs and that she needed an accommodation.</p> <p>The U.S. Supreme Court has granted the EEOC's petition for <i>certiorari</i>, and will decide this case during its 2014-2015 term.</p> |

| CASE NAME | COURT | DATE OF COURT DECISION | STATUTES | CITATION AND RESULT | COMMENTARY |
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| <i>EEOC v. Royal Caribbean Cruise Lines, Ltd</i> | U.S. Court of Appeals, 11th Circuit No. 13-13519 | 11/6/2014 | ADA, Title VII (Subpoena Enforcement) | 2014 U.S. App. LEXIS 21228 Pro Employer | <p>Background: The employer refused to renew an employee's employment contract after he was diagnosed with HIV and AIDS although he had been declared fit for duty by his physician. The employee filed a charge and the EEOC filed an application for subpoena enforcement following the employer's refusal to produce documents and information concerning its foreign national applicants or employees who were refused employment because of their medical conditions. The magistrate judge issued a report recommending denial of the EEOC's application. The district court adopted the magistrate's report and EEOC filed an appeal.</p> <p>Issues on Appeal: (1) Whether the district court improperly denied the EEOC's petition for subpoena enforcement as seeking irrelevant and overbroad information because it included requests for data that could uncover other possible violations and potential victims of discrimination on the same basis as that alleged in the filed charge; and (2) whether the district court improperly decided that compliance with the subpoena would be unduly burdensome.</p> <p>EEOC's Position on Appeal: The EEOC argued that its subpoena should be enforced as its expanded investigation was a lawful exercise of its authority and the material sought was relevant. The EEOC has broad investigative authority and it was used in this matter to determine whether other potential victims and statutory violations exist. Further, the EEOC asserts that compliance with the subpoena would not pose an undue burden on the \$1 billion global corporation with over 50,000 employees, especially since it did not present any evidence at the district court that production of the subpoenaed data would threaten or disrupt its business operations. The EEOC argued the court should vacate the district court's order and direct the court to enforce the subpoena in its entirety. The EEOC asked the court to reverse the district court's ruling that the employee's failure to accommodate claim was beyond the scope of her charge.</p> <p>Court's Decision: On November 6, 2014, the 11th Circuit affirmed the district court's decision. The court held that the EEOC's subpoena power must be relevant to the individual charge under investigation. According to the court, "Because [the employer] has admitted that the reason that it refused to renew [the plaintiff's] contract is his medical condition, whether it refused to renew other employee's contracts for the same reason is irrelevant to his charge." While statistical and comparative data may be relevant in certain circumstances, the onus is on the EEOC to show the requested information is relevant to the individual claimant's charge of discrimination. It is not enough that the information may be relevant "to issues that may be contested when and if future charges are brought by others."</p> |

APPENDIX C—SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC FILED IN FY 2014⁶

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
|-------------|-------|---|--|---|---|
| 10/30/2013 | TX | USDC Southern District of Texas 4:13mc2573 Nancy F. Atlas Court Granted Application to Enforce Subpoena | Rosenberg Health and Rehabilitation Center | Systemic Investigation | Application to show cause why the administrative subpoena should not be enforced in an EEOC investigation of claims of race, national origin and retaliation brought by three individuals who were discharged or resigned. On July 29, 2013, the EEOC served three subpoenas seeking copies of applications for employment for every nursing or nursing assistant applicant during a five-month period in 2012. On August 5, 2013, the employer served a Petition to Revoke or Modify Subpoenas. On September 30, 2013, the EEOC denied the petition and ordered compliance with the subpoena. On October 30, 2013, the EEOC filed an Application for an Order to Show Cause, and on November 11, 2013, the court issued an Order to Show Cause. On November 20, 2013, the employer responded claiming the subpoenas for employment applications were overly burdensome and not relevant to the discharged claimants' allegations. On December 2, 2013, the court granted the application to enforce the subpoena, requiring the employer to produce the requested employment applications with contact information and social security numbers redacted under protective order. The court concluded that if the EEOC could show a pattern of discrimination from the documents produced, the employer would have to disclose applicants' contact information. |
| 11/7/2013 | AZ | USDC Arizona—Phoenix 2:13mc89 Neil V Wake Court Granted the Application for an Order to Show Cause; Employer did not Respond; Contempt Hearing Scheduled | Pentagon Technologies | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in an EEOC investigation of an individual's charges of sex and gender discrimination. On August 9, 2013, the EEOC issued two subpoenas seeking: 1) documents related to employer's transfer, reassignment, and discharge policies; 2) description of employer's practices to record/investigate conduct related to sex; 3) records of complaints of inappropriate conduct related to sex; 4) information regarding the charging party's discharge; 5) information about the individual(s) who replaced the charging party; 6) personnel records for charging party and replacement; 7) employee list; 8) job description for Protocol Auditor position; 9) documents relating to how the employer determines salary for Protocol Auditor; 10) salary range for Protocol Auditor; and 11) identifying information for individuals who held Protocol Auditor position. The employer did not respond to either subpoena, and on November 7, 2013, the EEOC submitted an Application for an Order to Show Cause. The employer did not respond and did not appear at a February 14, 2014 show cause hearing. On February 21, 2014, the court granted the Application for an Order to Show Cause and ordered employer to provide all documents responsive to the subpoenas. The employer did not respond to the court's order. On September 9, 2014, the EEOC filed an Application to Show Cause why the employer should not be held in civil contempt. On September 30, 2014, the court set a hearing date of December 9, 2014 on the matter. |

⁶ The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2014. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to issuance of a court opinion.

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 11/19/2013 | OK | USDC Western District of Oklahoma 5:13cv1229 David L. Russell Parties Agreed to a Protective Order to Control the use and Dissemination of the Confidential Information Sought | The Referral Center | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in investigation of individual claims of race discrimination and retaliation. On May 17, 2012, the EEOC issued a subpoena seeking medical and treatment records for patients to whom the claimant provided medications. The employer objected, which the EEOC viewed as a Petition to Modify or Revoke the subpoena arguing that compliance would violate federal laws including HIPAA. The EEOC proposed the parties agree that a protective order be entered by the court, but the employer maintained its objections. On January 13, 2014, the parties appeared for a hearing on the subpoena application and agreed to a protective order to control the use and dissemination of the confidential information sought. |
| 12/2/2013 | IL | USDC Northern District of Illinois 1:13cv8608 John J. Tharp, Jr. Order for Compliance Issued | Corporate Executive Board Company | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced against a third party vendor, arising from the EEOC's investigation of allegations of race discrimination in pre-employment testing. The charge was initially filed by an individual claiming discrimination in his discharge based on age and race, as well as racial discrimination in the application process. On January 24, 2013, the EEOC issued a subpoena to a third party vendor seeking information about the employer's pre-employment psychological assessment program (the vendor administers a first set of tests, the employer a second; the vendor maintains data from both sets of tests). The vendor's counsel agreed over the phone with EEOC investigators to provide the information, but failed to provide the information. The vendor did not file a Petition to Revoke or Modify the subpoena. On December 2, 2013, the EEOC filed an Application for an Order to Show Cause. On December 17, 2013, the vendor's counsel telephoned the EEOC and claimed the vendor lacked portions of the information requested. Following meet and confer efforts, the vendor did not provide the information requested. On April 3, 2014, the EEOC filed a Motion for an Order to Show Cause, and on April 9, 2014, the court granted the EEOC's Motion. Following a hearing on May 28, 2014, the court ordered employer to produce the information requested concerning the pre-employment assessments. On June 18, 2014, the employer produced sufficient information to satisfy the EEOC. On August 26, 2014, the court issued an order terminating the matter. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 12/6/2013 | CO | USDC Colorado 1:13cv3294 William J. Martinez Order for Compliance Issued, as well as Protective Order for Confidential Information | Dish Network LLC | Individual Charging Parties | Application to show cause why the administrative subpoena should not be enforced arising from an investigation of individual claims of disability and age discrimination in the employer's online application process. The process was required to apply for a customer service representative position, and allowed only a "yes" or "no" answer as to availability to work evenings, weekends and holidays. The applicant alleges he was unable to explain his answer or request an accommodation. The employer provided a position statement and responded to two requests for information. The EEOC sent a third request for information asking for details about the online application, a description of information and record storage systems, nationwide information about the applicant pool, and an employee list. On June 28, 2012, the EEOC issued two subpoenas seeking all documentation relating to any research reports compiled by the employer before/during/after adopting the online assessment; details of the administration of the test, and its use in the hiring process; information regarding maintenance/storage of test information; job description for Customer Service Position; and contact information for all applicants. On May 3, 2013, the EEOC served a second subpoena seeking additional information regarding the online assessment test. The employer filed an untimely petition to revoke the first subpoena, did not file a petition in response to the second subpoena, and refused to comply with both. On December 6, 2013, the EEOC filed an Application for an Order to Show Cause. On December 11, 2013, the court granted the Application. Following a March 4, 2014 hearing, the employer responded, contesting only the production of the names and contact information for individuals who completed the pre-employment assessment, were hired, and were current employees. After consideration of supplemental briefing, on March 17, 2014, the court ordered the employer to comply with the disputed item. Instead of providing all applicants' contact information, the employer was required to provide contact information for applicants who completed the process, were hired, and were current employees. Subsequently the employer filed an emergency motion to stay and modify the court's order, arguing the EEOC expanded its request by asking for contact information for former employees. The court denied the motion to stay, but on May 20, 2014, granted a protective order to protect confidential information that would be provided. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 2/17/2014 | CA | USDC Northern District of California 3:14mc80064 Edward M. Chen EEOC Withdrew Application for an Order to Show Cause after Employer Voluntarily Complied with Subpoena | Bally Total Fitness Corporation | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in the investigation of an individual claim of disability discrimination. The employer responded to the EEOC's request for information, but did not include all requested information. On July 29, 2013, the EEOC issued a subpoena seeking: 1) the personnel file of employees charged with discriminatory conduct; 2) all job applications, resumes, assessments, etc., for job applicants for the position sought by charging party; 3) all EEO information, including disability status, for each applicant; 4) identifying information for all individuals hired for the position; 5) work schedules; 6) pay records; and 7) contact information including home addresses for all employees at the location regardless of position. On August 26, 2013, the employer provided some requested information but objected to providing hiring records beyond job applications, work schedules, payroll records, or employee contact information. On February 18, 2014, the EEOC submitted an Application for an Order to Show Cause, which the employer opposed. On March 31, 2014, the EEOC withdrew its application stating that the employer complied with the subpoena to the EEOC's satisfaction. |
| 3/5/2014 | TX | USDC Southern District of Texas 4:14mc577 Kenneth M. Hoyt EEOC Withdrew Application for an Order to Show Cause after Employer Voluntarily Complied with Subpoena | Aber Fence and Supply Company Inc. | Systemic Investigation | Application to show cause why the administrative subpoena should not be enforced arising from an investigation of national origin discrimination. On October 30, 2013, the EEOC served a subpoena seeking the identification of all employees working in the state of Utah in 2012 and 2013; documents pertaining to the US DOL's investigation of wages paid; documents related to the charging party's separation of work; and documents responsive to the charge. On March 5, 2014, the EEOC filed an application for an Order to Show Cause. On April 7, 2014 the EEOC filed a notice that the employer had complied with the subpoena making the hearing no longer necessary. |
| 3/31/2014 | MD | USDC Maryland 1:14cv986 James K. Bredar Application to Show Cause Dismissed after Employer Voluntarily Complied with Subpoena | National Floors Direct | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced arising from an investigation of disability discrimination under the ADA. On February 27, 2012, the EEOC issued a subpoena seeking production of: 1) the address of the facility where charging party worked; 2) the employer's legal name; 3) number of employees between August 1, 2009 and July 31, 2010; 4) employer's organizational chart; 5) description of employer's principal product; 6) description of employer's corporate status; 7) description of organizational and management structure; 8) an employee handbook; 9) policies related to discrimination/discipline; 10) description of personnel file storage; 11) personnel files for three employees; 12) job descriptions for sales manager positions; 13) identity of all non-management and management employees; 14) response to the complaint; 15) identity of employees paid by commission. The court vacated the hearing as the EEOC received the documents it had requested, and the application to show cause was subsequently dismissed. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 4/30/2014 | CO | USDC Colorado 1:14mc73 Boyd N. Boland (Magistrate) Pending | Dillon Companies d/b/a King Soopers | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in an investigation of an individual claim of disability discrimination, denial of a reasonable accommodation, and retaliation. On April 11, 2012, the Colorado Civil Rights Division found no probable cause in the retaliation claim, but probable cause in the discharge and reasonable accommodation denial claims. The CCRD subsequently filed a motion to withdraw the notice of hearing and formal complaint and dismiss the case with prejudice. In November 2013, the employer was contacted by an EEOC investigator requesting an on-site visit and interviews. Discussions regarding interview dates were ongoing. On April 30, 2014, the Application to Show Cause was filed. The employer filed a response June 30, 2014. No further action has been taken in this case. |
| 5/8/2014 | NM | USDC New Mexico 1:14mc26 Judith C. Herrera Order for Compliance Issued | Albuquerque Country Club | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced for an investigation into individual claims of hostile work environment and gender discrimination. On July 31, 2013, the EEOC issued a subpoena seeking: 1) any documentation regarding charging party's complaints of harassment; 2) a list of all employees at a location between January 1, 2009 and July 31, 2013 including: name, gender, SSN, date of hire, position held, date of termination, last known contact information; and 3) employee personnel file. The employer filed a petition to revoke or modify the subpoena claiming that the information was not relevant to the EEOC's investigation. The EEOC denied the petition. The employer did not comply with the subpoena by failing to furnish a list of all employees during a multi-year span including contact information, nor provide a copy of a specific personnel file. The court ordered the employer to show cause, and granted the EEOC partial relief. In a June 19, 2014 memorandum opinion, the court ordered the employer to provide documentation regarding the individual's complaint of harassment, a modified version of the employee list requested, and the requested personnel file of the alleged harasser. |
| 5/9/2014 | VA | USDC Western District of Virginia 3:14mc14 Glen E. Conrad EEOC Filed a Notice of Withdrawal of Its Application for Order to Show Cause; Court Dismissed Without Prejudice | Karlise In Home Care, Inc. | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced arising out of an individual's charges of religious and national origin discrimination. On August 20, 2013, the EEOC served a subpoena seeking: 1) a copy of the employer's policies and procedures relating to harassment/discrimination; 2) identification of all employees, including name, date of hire/termination, and contact information; 3) the charging party's personnel file; 4) a position statement in response to charge; and 5) a complete response to other documents requested. Following a September 3, 2014 Order to the employer to show cause, the EEOC filed a notice of withdrawal of its application on October 7, 2014, stating it elected not to pursue enforcement. The court ordered the matter dismissed without prejudice October 7, 2014. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 5/19/2014 | CO | USDC Colorado 1:14mc92 Kristen L. Mix (Magistrate) Pending | Centura Health | Systemic Investigation | Application to show cause why the administrative subpoena should not be enforced in investigation of charges brought by three former employees and one current employee alleging disability discrimination. Three charges specifically cited failure to provide, or denial of, reasonable accommodations. Two charges alleged age discrimination, one alleged sex discrimination, and three alleged discrimination based on their discharge. On November 8, 2012, the EEOC served a subpoena seeking the name, SSN, date of birth, position held, reason for termination, discharge documents, and last known contact information for all employees terminated from four medical centers/hospitals. One hour before the response to the subpoena was due on November 26, 2012, the employer's counsel called the investigator to discuss the subpoena's scope. The information was never produced, and the EEOC filed an Application for Order to Show Cause on May 19, 2014. The court granted the application on July 8, 2014, and the employer filed a response July 30, 2014, arguing the subpoena was never received by the employer. The subpoena had been addressed to a temporary employee who was no longer at the company and was signed for by a non-employee. The employer filed a supplemental brief, and the EEOC filed a motion to strike. The court did not strike the supplemental memorandum, but did allow the EEOC to file a response. On October 23, 2014, the court denied the EEOC's motion, citing their failure to comply with their Compliance Manual regarding the service of a subpoena. The court stated the EEOC may serve an amended, correct subpoena. |
| 5/29/2014 | NM | USDC New Mexico 1:14mc30 William P. Johnson Pending | Able Services Db Able Building Maintenance | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in the investigation of an individual national origin charge. The individual alleged he was discharged for not speaking English. The employer provided a position statement but did not produce any documents in response to the request for information. On February 6, 2014, the EEOC issued a subpoena seeking in spreadsheet format information for all employees whose employment ended between September 2009 and January 2014, including name, contact information, job title, job duties, race, ability to speak English, date of employment separation, name of individual who authorized separation, reason for separation, and all job vacancies in New Mexico. The employer did not subsequently communicate with the EEOC or comply with the subpoena. The EEOC filed the Application for an Order to Show Cause on May 29, 2014. No further action has been taken in this case. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 6/2/2014 | FL | USDC Middle District of Florida—Tampa Bay 8:14cv1301 Mary S. Scriven Thomas B. McCoun III (Magistrate) Order for Compliance Issued | Kb Staffing LLC | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced arising out of an individual's disability discrimination charge. The individual alleged discrimination based upon a pre-offer health questionnaire required for consideration for employment. The employer refused to produce the requested documents, which included applicant flow data, completed healthcare questionnaires, and the identity of all referred and rejected applicants with reasons for their rejection. On December 23, 2013, the EEOC issued a subpoena seeking a copy of health questionnaires for all applications for the three years preceding the charge and health questionnaires for all current employees. The employer filed a petition to revoke the subpoena, which was denied. On June 2, 2014, the EEOC filed the application. The case was reassigned as miscellaneous under number 8:14mc0041 on June 11, 2014. In response to the application, the employer argued that it had settled the individual claim on which the EEOC based its investigation, thereby divesting the EEOC of jurisdiction. In reply, the EEOC argued that the agency may investigate "policies and practices" based on an individual charge. The magistrate judge recommended the employer be ordered to comply with the subpoena, and on September 16, 2014, the court adopted the recommendation. |
| 6/18/2014 | CA | USDC Northern District of California 3:14mc80185 Edward M. Chen EEOC Withdrew its Application after Employer Complied with the Subpoena | 99 Cents Only Stores LLC | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in an investigation of an individual's charges of national origin, race, and sex discrimination. The EEOC issued a subpoena on February 7, 2014. The subpoena requested 1) correct legal name of the business and its legal status; 2) organizational chart; 3) written position statements; 4) copies of all policies relating to the charges; 5) charging party's personnel file; 6) District Manager's personnel file; 7) policies regarding to sex-based and national origin-based harassment; 8) whether charging party complained internally, and if yes, information about the complaint; 8) whether there have been other similar internal complaints; 9) whether other complaints of harassment have been received regarding the alleged harasser; 10) an employee list; 11) any personnel actions against the charging party; 12) payroll records; and 13) employees who were hired, reinstated or rehired in the Store Manager position at a location during the relevant period. The employer did not respond to the request for information or subpoena. On July 3, 2014, the parties filed a joint statement requesting a continuance, which the court granted. On August 11, 2014, the EEOC withdrew its application stating the employer had complied with the subpoena. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 7/15/2014 | TX | USDC Southern District of Texas 4:14mc1698 Vanessa D Gilmore Order for Compliance Issued | GE Oil & Gas Inc. | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced arising from individual charges of age and race discrimination. The EEOC set a due date for January 28, 2013 for the position statement, and a series of discussions and changes in personnel on both sides followed. Following a January 3, 2014 information request that went unanswered, on May 7, 2014, the EEOC served a subpoena requesting: 1) a copy of the employer's disciplinary policy; 2) a list of all employees supervised by the employee alleged to act discriminatorily; 3) all employees terminated for a similar reason as the charging party between August 1, 2012 and December 31, 2012; 4) copy of the charging party's personnel file; and 5) information on the alleged discriminatory employee's job duties and conduct. The employer did not attend the show cause hearing, and on September 29, 2014, the court ordered the employer to comply with the subpoena. On November 13, 2014 the EEOC filed for civil contempt as the employer still had not complied nor contacted the EEOC. |
| 8/15/2014 | MD | USDC Maryland 1:14cv2612 George Levi Russell, III Pending | Maritime Autowash Inc. | Systemic Investigation | Application to show cause why the administrative subpoena should not be enforced in the investigation of class-wide, national origin-based discrimination and retaliation claims. The initial charging party's allegations included longer work hours, shorter breaks, lack of proper equipment, additional duties, and payment of less in wages. The EEOC requested a list of all employees from January 1, 2012 to the present including personal and position-related information, as well as personnel files, wage records, and hours worked for all employees who held the same positions as the charging party. The employer responded to the initial request for information, but narrowed the scope to 2013, did not provide an employee list with complete information, and objected to providing certain information. On July 12, 2014, the EEOC served a subpoena requesting information not provided. The employer filed a petition to revoke the second subpoena on the basis of improper service. The EEOC denied the petition, and the employer requested the determination package and copy of the final determination, but had not received it as of their response filing. On August 15, 2014, the EEOC filed an Application to Show Cause. On November 5, 2014, the employer responded, arguing the issue of improper service and that 12 of the 13 charges were filed by undocumented workers who lack standing under Title VII. On November 17, 2014, the EEOC replied, arguing proper service, that the employer failed to timely file its notice to revoke, and that the information sought was relevant to a properly filed charge of discrimination. The court has not yet ruled. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 8/21/2014 | IL | USDC Northern District of Illinois 1:14-cv-6450 James B. Zagel Daniel G. Martin (Magistrate) Court Denied Without Prejudice all Motions Regarding Discovery and Further Investigations | Alexian Brothers Health System | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced arising from an individual charge of disability discrimination. The individual alleges the employer required employees to return from leaves of absence only if they could return to full duty, and refused to provide reasonable accommodations. The EEOC issued a subpoena on September 20, 2013. The requested documents included: 1) employer's leave of absence, reasonable accommodation, and return-to-work policies; 2) criteria used to determine employee readiness to return to work after medical leave; 3) requests to return to work since January 1, 2010; 4) an electronic database identifying employees who requested a leave of absence with their personal information and information about their request; 5) whether employees returned to work after the leave and whether the return included restrictions; 6) employees who were terminated after using medical leave; 7) process for determining whether to provide reasonable accommodations; 8) organizational charts; and 9) an electronic database identifying all open, available, or advertised positions from January 1, 2010 to the present and descriptions of those positions. On September 27, 2013, the employer filed a petition to revoke or modify the subpoena, which the EEOC denied nine months later on June 30, 2014. The employer then complied in part, but maintained objections to requests for return to work accommodations, an electronic database identifying individuals who requested a medical leave of absence. On August 21, 2014, the EEOC applied for an Order to Show Cause, and on September 8, 2014, the employer requested oral argument to address, in part, that the EEOC's subpoena sought to extend its jurisdiction to the FMLA. The court held oral argument on September 24, 2014, denying without prejudice all motions regarding discovery and further investigations. |
| 8/25/2014 | WI | USDC Eastern District of Wisconsin 2:14-mc-52 Lynn Adelman Pending | Union Pacific Railroad Co. | Individual Charging Parties, But EEOC Sought "Pattern and Practice" Evidence | Application to show cause why the administrative subpoena should not be enforced arising from the investigation of two individuals' charges of violations due to race discrimination and retaliation. During the course of the EEOC's investigation, the charging parties requested and obtained right-to-sue letters and filed claims in federal court on which judgment was entered against them. On May 15, 2014, the EEOC served a subpoena seeking "pattern and practice" evidence related to the individual claims under investigation prior to the issuance of the right-to-sue letter. The employer filed a timely petition to revoke or modify the subpoena, which the EEOC denied. On August 25, 2014, the EEOC filed an application to enforce the subpoena. The employer opposed the application in a September 15, 2014 motion to dismiss the application. Therein, the employer argued that the charging parties had not claimed disparate impact or a pattern or practice of discrimination and that the EEOC had divested itself of the investigation by issuing a right-to-sue letter. The court has not yet ruled on the application. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 9/8/2014 | TX | USDC Southern District of Texas 4:14-mc-2092 Nancy F. Atlas Order for Compliance Issued | Houston Foods Inc. dba Burger King | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced regarding an investigation into charges of race discrimination, harassment, and retaliation. The charging party claimed Hispanic managers harassed African American employees and subjected them to less favorable terms and conditions of employment. On June 5, 2014, the EEOC issued a subpoena seeking: 1) organizational chart; 2) personnel file of the charging party; 3) an employee list for the charging party's location from January 2013 to present; 4) policies regarding scheduling, hours assignments, days off, and promotion to management; 5) employee handbook; 6) information about the location's managers; 7) documents regarding the charging party's internal complaints; 8) time sheets for January 1, 2013 to February 1, 2013; and 9) anti-harassment or employee complaint mechanism procedures. The employer failed to respond to the subpoena. On August 27, 2014, the EEOC filed an application to enforce the subpoena. The employer failed to attend the hearing on the application, and on November 4, 2014, the court ordered enforcement of the subpoena. |
| 9/22/2014 | CA | USDC Northern District of California 5:14-mc-80266 Beth Labson Freeman Paul Singh Grewal (Magistrate) Pending | D'Arrigo Bros. Co of California | Individual Charging Parties | Application to show cause why the administrative subpoena should not be enforced arising out of two individuals' charges of sex discrimination. Following an investigation that commenced in early 2011, on May 5, 2014, the EEOC issued a subpoena seeking: 1) a list of all individuals in the charging party's classification and department who were disciplined for a safety/work practice violation from January 1, 2010 to December 31, 2011; 2) individuals in the same classification and department who were suspended or demoted for the same violation as the charging party during the same period; 3) individuals in the same classification and department who were laid off in the same period; 4) individuals who were demoted and then rehired the next season during the same period; 5) the personnel and discipline record of the alleged harasser; 6) list of all individuals supervised by the alleged harasser between January 1, 2010 and December 31, 2011; 7) a list of all individuals in the charging party's department during the relevant time; 8) copy of the employer's progressive discipline, suspension, demotion, hiring, rehiring, and layoff policies from both when the charging party was employed and current copies, as well as an explanation as to how employees are made aware of the policies. After meet and confer efforts, the employer provided written objections to the subpoenas. The employer failed to submit a Petition to Revoke. On September 22, 2014, the EEOC filed an application for an order enforcing the subpoena. The EEOC argued that the employer waived its right to object to the subpoena, that the information sought was relevant, and that compliance was not burdensome. The employer opposed the application, arguing that a Petition to Modify or Revoke a subpoena is permissive, that the employer had put the EEOC on notice of its objections, and that the subpoenas sought irrelevant and burdensome information. On October 28, 2014, the employer filed a motion to quash the subpoenas (on the same grounds as its opposition), which the EEOC opposed. The parties stipulated that the EEOC's application and employer's motion to quash would be heard concurrently on December 2, 2014. |

| FILING DATE | STATE | COURT NAME/ CASE NUMBER/ JUDGE/RESULT | DEFENDANT(S) | INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION | COMMENTARY |
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| 9/30/2014 | TN | USDC Western District of Tennessee 2:14-cv-2765 John T. Fowlkes, Jr. Diane K. Vescovo (Magistrate) Pending | Sears Holdings Corporation | Individual Charging Party | Application to show cause why the administrative subpoena should not be enforced in an investigation of an individual charge of race discrimination. The individual alleged his salary was reduced when he was placed on light duty, but two other Caucasian workers did not have a salary reduction when placed on light duty. On December 31, 2013, the EEOC served a subpoena seeking: 1) all policies relating to the issues raised in the charges including reasonable accommodation and light duty policies; 2) copy of the charging party's request for reasonable accommodation/light duty for the period January 1, 2012 to present; 3) the employer's response to the request; 4) personnel and payroll actions for the charging party related to job assignment during the same period; 5) copies of the comparators' requests for reasonable accommodation/light duty from October 28, 2011 to the present as well as the employer's responses; 6) personnel and payroll actions for the comparators related to job assignments for the same period; 7) lists of employees placed on light duty from October 28, 2011 to the present; 8) list of individuals who made the decision to reduce the charging party's pay and change his job assignment; and 9) list of individuals who made the decision to place comparators on light duty. The employer submitted the individual's personnel file on January 28, 2014 and stated the remaining information would be produced no later than January 31, 2014. No additional information was provided. On September 30, 2014, the EEOC filed an application to show cause. The hearing on this application has not yet taken place. |

APPENDIX D—FY 2014 SELECT EEOC-RELATED DISPOSITIVE DECISIONS BY CLAIM TYPE(S)⁷

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
|---|-----------------------------|--|--|---|---|---|
| Age Discrimination Disability Discrimination | Lehi Roller Mills Co., Inc. | U.S.D.C. for the District of Utah, Central Division No. 2:08-cv-00591 | 2014 U.S. Dist. LEXIS 60869 (D. Utah, May 1, 2014) | 1) Defendant's Motion for Summary Judgment 2) Defendant's Motion to Dismiss Second Claim of Plaintiff-Intervenor's Complaint in Intervention, or in the Alternative, for Partial Summary Judgment Motion on that Claim | 1) Is the defendant entitled to summary judgment on the EEOC's claims based on the ADEA and Title I of the ADA for suspending and terminating the plaintiff-intervenor's employment? 2) Is the defendant entitled to summary judgment on the EEOC's claim based on the ADA for improper medical inquiry re: the plaintiff-intervenor's diabetes during his employment? | The court denied the employer's motion for summary judgment on the EEOC's and the plaintiff-intervenor's claims for age discrimination, disability discrimination, and improper medical inquiry. First, the court found direct evidence of age discrimination because of alleged statements by the president of the company that referenced the plaintiff-intervenor's age and that occurred in temporal proximity to his termination. Further, the EEOC did not have to show the plaintiff-intervenor was replaced by someone younger, since he presented direct evidence of age discrimination. Second, the court found the plaintiff-intervenor was not required to present someone who replaced him without a disability to prove disability discrimination and also found that the replacement did not have diabetes. Finally, the plaintiff-intervenor exhausted his administrative remedies on the improper medical inquiry claim since the EEOC investigated and offered conciliation to the employer on the claim. |

⁷ The summary contained in Appendix D reviews select reported court opinions ruling on dispositive motions in litigation where the EEOC is a party. For purposes of this appendix, opinions are organized by claim type(s).

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
|---|------------------|---|---|---|---|--|
| Age Discrimination | Baltimore County | U.S. Court of Appeals for the 4th Circuit 13-1106 | 2014 U.S. App. LEXIS 5902 (4th Cir. Mar. 31, 2014) | Employer's interlocutory Appeal of the District Court's Decision to Grant Summary Judgment to The EEOC on The Issue of the Employer's Liability with Respect to Whether its Retirement Plan Violated the ADEA | Whether the EEOC was entitled to summary judgment on its claim that the employer's retirement plan violated the ADEA? | <p>The Fourth Circuit held that the district court properly granted summary judgment to the EEOC in a dispute over a county employee retirement benefit plan because the plan violated the ADEA by determining employee contribution rates based on age rather than by any permissible factor pursuant to 29 U.S.C. § 623(f)(1).</p> <p>More specifically, the employer's retirement plan required that employees contribute to the plan a certain fixed percentage of their annual salaries over the course of their employment. Employee contribution rates were based on the number of years an employee would contribute to the plan before being eligible to retire at age 65; the older an employee was at the time of enrollment, the higher the contribution rate for that employee because the employee's contributions would earn interest for fewer years than the younger employees' contributions.</p> <p>The court affirmed summary judgment for the EEOC because the disparate rates were not motivated by either the time value of money or other funding considerations, and thus, the plan treated older employees at the time of enrollment less favorably than younger employees "because of" their age.</p> |
| Disability Discrimination Discriminatory Discharge Failure to Accommodate | AT&T Corp. | U.S.D.C. for the Southern District of Indiana, Indianapolis Division No. 1:12-cv-00402 | 2013 U.S. Dist. LEXIS 164987 (D. Ind. Nov. 20, 2013) | 1) EEOC's Motion for Partial Summary Judgment 2) Defendant's Motion for Summary Judgment | Whether there are any disputed issues of material fact in a failure-to-accommodate case? | <p>The EEOC accused the employer of failing to accommodate the claimant after she was diagnosed with Hepatitis C and for discharging her for a disability. The employer stated it terminated her for poor attendance. The court denied summary judgment to both the EEOC and the employer, finding at least three genuine issues of material fact. The court found the following material facts in dispute: (1) whether regular attendance was an essential function of the claimant's employment; (2) whether the claimant put the employer on notice that she was seeking job accommodations; and (3) the length of the leave requested by the claimant.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
|---------------------------|----------------|--|---|---|---|--|
| Disability Discrimination | Ford Motor Co. | U.S. Court of Appeals for the 6th Circuit 12-2484 | 2014 U.S. App. LEXIS 7502 (6th Cir. Apr. 22, 2014) | The EEOC's Appeal of the District Court's Order Granting the Employer's Motion for Summary Judgment | Whether the employer was entitled to summary judgment on the EEOC's claims of failure to accommodate the claimant's disability and retaliation? | <p>The claimant was a "resale buyer," a position involving troubleshooting, interacting with suppliers, and group problem solving with other members of her team. When the claimant developed Irritable Bowel Syndrome, she requested an accommodation to telecommute. Based on the claimant's job functions, the employer determined that telecommuting was not a reasonable accommodation and offered alternative accommodations of a cubicle closer to a restroom or a transfer to another position better suited to telecommuting. The claimant refused the alternative accommodations, and later developed issues related to work performance and absenteeism. The claimant filed an EEOC charge of discrimination, and shortly thereafter, she was placed on a Performance Improvement Plan and terminated.</p> <p>On the failure to accommodate claim, a panel of the Sixth Circuit reversed the trial court, and held that there were genuine issues of material fact on whether the claimant remained "qualified" for the position and whether telecommuting was a reasonable accommodation. The court held there was sufficient evidence to suggest that the claimant remained qualified for her position if the employer eliminated the requirement that she be physically present at the office. The court further held that the employer had the burden of showing that the claimant's physical presence was an essential job function or that telecommuting created an undue hardship. The court held that this was a "highly fact specific question" and that telecommuting was not necessarily antithetical to the claimant's position.</p> <p>The Sixth Circuit panel also reversed the trial court on the retaliation claim, holding that there was a fact issue on pretext because the evidence suggested that the claimant's performance failings did not actually motivate the employer's decision to discipline her and terminate her employment.</p> <p>Specifically, although the claimant's performance deficiencies were ongoing problems, they prompted a negative review only after the claimant filed her EEOC charge.</p> <p>On August 29, 2014, a majority of the judges voted for rehearing of this case <i>en banc</i>.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Disability Discrimination. | Grane Healthcare Co. and Ebensburg Care Center, LLC d/b/a Cabria Care Center | U.S.D.C. for the Western District of Pennsylvania Civil Action No. 3:10-250 | 2014 U.S. Dist. LEXIS 28477 (W.D. Pa. Mar. 6, 2014) | 1) EEOC's Motion for Partial Summary Judgment 2) Defendants' Motion for Summary Judgment as to all Claims | 1) Whether the EEOC was entitled to summary judgment on its claim that the defendants violated the ADA? 2) Whether the defendants were entitled to summary judgment on the EEOC's claim that they violated the ADA? | <p>The court granted in part and denied in part the EEOC's motion for partial summary judgment for violations of the ADA. The court denied the defendant's motion.</p> <p>First, the court held that Grane Healthcare, which purchased the company implementing the medical exams, was an "employer" or "joint employer" during the relevant time period. Because Grane Healthcare met the ADA's covered entity requirements, the EEOC was entitled to summary judgment, an order enjoining Grane Healthcare from violating the ADA's prohibitions against pre-offer medical examinations, and damages.</p> <p>The court then denied, in part, the EEOC's motion for partial summary judgment because there were disputed factual issues as to whether the defendants constituted a single employer during the hiring process. For this reason, the court also denied the defendants' motion for summary judgment.</p> |
| Disability Discrimination Retaliation | Product Fabricators, Inc. and M&M Manufacturing, Inc. | U.S. Court of Appeals for the Eighth Circuit Nos. 13-2102 and 13-2103. | 2014 U.S. App. LEXIS 15690 (8th Cir. Aug. 15, 2014), <i>petition for reh'g en banc denied</i> , 2014 U.S. App. LEXIS 21054 (8th Cir. Nov. 3, 2014) | Defendant's Motion for Summary Judgment | Whether the defendant discriminated and/or retaliated against a former employee in violation of the ADA when it discharged the employee for poor performance on the same day that it had the employee sign a statement about questions the EEOC had asked him during an investigation that occurred a year earlier? | <p>In February 2008, employee Adam Breaux was interviewed in connection with an EEOC investigation into whether the company had discriminated against a former employee named Dennis Anderson on the basis of disability. After the EEOC interviewed Breaux and other employees, one of the company owners, Mark Murphy, asked the employees who were interviewed whether the EEOC interviewer mentioned any specific employees by name during their interviews. Breaux told Murphy that the EEOC had asked him specifically about Anderson.</p> <p>In September 2008, Breux injured his shoulder at work, and in August 2009, he told his supervisor he might need shoulder surgery.</p> <p>On August 31, 2009, the EEOC filed suit against the employer as a result of the Anderson investigation. Two days later, on September 1, 2009, Murphy asked Breaux to sign a statement acknowledging that the EEOC interviewer specifically mentioned Anderson when interviewing Breaux. Later that same day, the company fired Breaux for poor performance.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| | | | | | | <p>The EEOC and Breaux (collectively "plaintiffs") sued the employer, asserting claims of disability discrimination based on Breaux's right shoulder injury and retaliation based on (1) Breaux's alleged request for a reasonable accommodation in the form of time off for surgery and recovery, and (2) Breaux's participation in the EEOC's Anderson investigation. The district court granted the employer's motion for summary judgment on these claims and plaintiffs appealed.</p> <p>The Eighth Circuit affirmed. The court first considered plaintiffs' ADA discrimination claim holding that plaintiffs could not establish the causation element of their <i>prima facie</i> case because Breaux did not schedule his surgery or request time off for surgery prior for his termination and because the employer accommodated his disability for a year by placing him in a supervisor position that met his physical limitations.</p> <p>The court affirmed on the failure to accommodate count because the evidence did not establish that Breaux ever made an accommodation request.</p> <p>The court next considered plaintiffs' claims that the employer retaliated against Breaux for (1) requesting the reasonable accommodation of time off for surgery, and (2) participating in the EEOC's investigation into whether the employer discriminated against Anderson. The court rejected the first retaliation claim on the ground that there was no evidence that Breaux ever requested time off for surgery. With regard to plaintiffs' claim that the employer terminated Breaux in retaliation for participating in the EEOC's Anderson investigation, the court held that the plaintiffs' failed to create a genuine factual issue regarding whether there was a causal connection between Breaux's participation in the Anderson investigation and his termination over a year later.</p> <p>The court also found, on the disability discrimination and retaliation claims, that even if the plaintiffs could establish a <i>prima facie</i> case, there was no evidence that the employer's stated rationale for discharging Breaux (poor performance) was pretextual.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Disability Discrimination | Womble Carlyle Sandridge & Rice, LLP | U.S.D.C. for the Middle District of North Carolina Case No. 1:13-cv-46 | 2014 U.S. Dist. LEXIS 86953 (M.D.N.C. June 26, 2014) | Defendant's Motion for Summary Judgment | Whether the defendant is entitled to summary judgment against the plaintiff-intervenor's claim of disability discrimination? | The court granted the defendant's motion for summary judgment. The plaintiff-intervenor filed a lawsuit against her former employer, alleging she was terminated because of her disability in violation of the Americans with Disabilities Act. The complainant worked as an office services assistant. Her job duties included some heavy lifting. After returning to work from her breast cancer treatment, the complainant had a lifting restriction. The court concluded the complainant's work restriction prevented her from performing the essential functions of her job with or without reasonable accommodation. The court rejected the EEOC's argument that providing a helper for the complainant is a reasonable accommodation. Thus, the court held that the complainant was not a qualified individual under the ADA because she could not lift more than 20 pounds, which was an essential function of her job, and the EEOC had not identified any reasonable accommodation that would allow her to perform that essential job function. |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| National Origin Discrimination Joint Employment Hostile Work Environment Constructive Discharge Retaliation | Global Horizons, Inc., d/b/a Global Horizons Manpower, Inc.; Green Acre Farms, Inc., Valley Fruit Orchards, LLC | U.S.D.C. for the Eastern District of Washington No. 11-3045-EFS | 2014 U.S. Dist. LEXIS 72866 (E.D. Wash. Mar. 28, 2014) | 1) Defendants' Motion for Summary Judgment; 2) EEOC's Amended Motion for Partial Summary Judgment | 1) Were the defendants employers of the claimants as defined by Title VII? 2) Whether the defendants mistreated or discriminated against any claimant on the basis of race or national origin or retaliated against any claimant in violation of Title VII? 3) Did the EEOC fail to satisfy its Title VII investigation and conciliation requirements before filing the lawsuit? | The court granted in part (no Title VII liability), denied in part (genuine disputes of material fact as to joint employer and Title VII pre-lawsuit conciliation requirement is not substantively judicially reviewable), and denied as moot in part (Title VII pre-lawsuit investigation and reasonable-cause determination requirements) the defendants' motion for summary judgment. The court granted in part (conciliation) and denied as moot in part (investigation) the EEOC's motion for partial summary judgment. The court used 11 factors besides the right to control to determine that a genuine dispute of material fact existed as to whether the defendants employed the claimants as joint employers with the farm labor contractor. Regarding the claimants' hostile work environment claim, the court found no evidence of either physical conduct or verbal discussions that were either objectively or subjectively hostile, and based on race or national origin. Further, the court found no evidence that working conditions were so intolerable such that a reasonable person would be forced to leave, ruling against the constructive discharge claim. The court further found that the EEOC's claim of retaliation was untimely. Finally, the court agreed with the Seventh Circuit that the EEOC's pre-lawsuit conciliation efforts are not reviewable. |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Pregnancy Discrimination | Bloomberg L.P. | S.D.N.Y. 07 Civ. 8383 (LAP) | 2014 U.S. Dist. LEXIS 66441 (S.D.N.Y. Apr. 28, 2014) | Employer's Motion for Summary Judgment on the EEOC's claim for Post-Resignation Back Pay | Whether the employer was entitled to summary judgment on the EEOC's claims of post-resignation back pay? | <p>The claimant resigned from her position with the employer and claimed constructive discharge.</p> <p>Given the court had previously granted the employer's summary judgment motion with respect to the constructive discharge claim, the court found there was no issue of material fact with respect to whether the claimant failed to mitigate her damages by voluntarily resigning from her employment. Drawing all inferences in favor of the claimant, the court found that no reasonable jury could conclude that the claimant faced circumstances that absolved her of her duty to mitigate damages by continuing to work for the employer. Thus, the court granted the employer's motion for summary judgment on the EEOC's claims of post-resignation back pay.</p> |

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| Pregnancy Discrimination | Greystar Management Services | U.S.D.C. for the District of Maryland No. ELH-11-2789 | 2013 U.S. Dist. LEXIS 177238 (D. Md. Dec. 18, 2013) | 1) EEOC's Motion for Partial Summary Judgment 2) Defendant's Motion for Summary Judgment | 1) Whether a former HR director's comments precluded summary judgment for the defendant? 2) Whether the employer's efforts to accommodate the claimant's restrictions precluded summary judgment for the EEOC? | The court denied the parties' cross motions for summary judgment. The claimant worked as a housekeeper. After she informed her employer she was pregnant and became concerned with working with chemicals, the employer advised her to obtain a doctor's note. The notes indicated that her exposure to chemicals had to be limited during her pregnancy even while wearing a mask and gloves. Because the job of a housekeeper required that the claimant spend the majority of her time around chemicals, the employer put her on an unpaid leave of absence. After the employee was placed on the leave of absence, the employer continued to attempt to communicate with the doctor to fully understand the claimant's restrictions. After the claimant failed to communicate that she wanted to return to work, the employer assumed she voluntarily resigned. The central issue in the case was whether the employer discriminated against the claimant by adhering to her doctor's notes and refusing to allow the claimant to waive her medical restrictions. The court denied the employer's motion for summary judgment because of the comments of a former HR director involved with the claimant's situation who may have suggested that the employer approached the plaintiff's medical restrictions differently because she was pregnant. The court denied the claimant's motion for summary judgment because it found that the employer had advanced undisputed legitimate, nondiscriminatory reasons for its action: the employer had no policy barring pregnant women from working, it did not initiate any issue of concern as to the claimant's pregnancy, and it requested a doctor's note only after the claimant sought an accommodation. The record also reflected the employer's concerted efforts to accommodate the claimant pending clarification of her doctor's requirements and to determine her medical restrictions. |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Pregnancy Discrimination | The WW Group, Inc., d/b/a Weight Watchers | U.S.D.C. for the District of Michigan, Southern Division No. 12-11124 | 2013 U.S. Dist. LEXIS 169134 (D. Mich. Dec. 2, 2013) | Employer's Motion for Summary Judgment | Whether the employer was entitled to summary judgment on the EEOC's claim of pregnancy discrimination? | <p>The claimant applied to work for Weight Watchers as a group leader while she was pregnant. The company maintained a policy that all applicants be at their "goal weight" under the Weight Watchers program in order to be eligible for employment. The claimant was above her goal weight at the time she applied for work because she was in the fifth month of her pregnancy, and, thus, she was told she was not eligible for employment. The EEOC sued.</p> <p>The employer moved for summary judgment on the basis that the claimant was unqualified for the position at the time of application because she was above her goal weight. The court denied the employer's motion because there were genuine issues of material facts as to: (1) whether the claimant was within her goal weight range when she sought employment; (2) whether the claimant was qualified for the position; (3) whether the employer would have refused to hire the claimant notwithstanding her pregnancy; and (4) whether the applicant goal weight policy as applied to the claimant was a <i>bona fide</i> occupational qualification.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Race Discrimination and Retaliation | Bass Pro Outdoor World, LLC and Tracker Marine, LLC | U.S.D.C. for the Southern District of Texas Case No. 4:11-CV-3425 | 2014 U.S. Dist. LEXIS 36207 (S.D. Tex. July 30, 2014) | Employer's Renewed Motion for Summary Judgment | Whether the EEOC can bring a § 706 "class" claim on behalf of individuals whose identities were not determined (or will not be determined) until after the EEOC completed its investigation (i.e., on behalf of individuals who were not specifically identified during the EEOC's investigation)? | <p>The EEOC alleged the employer engaged in a pattern or practice of unlawfully failing to hire African American and Hispanic applicants and engaging in unlawful retaliation against individuals who opposed the employer's practices. The employer filed a renewed motion for summary judgment on the grounds that: (1) the court was mistaken in concluding in a prior order that the EEOC had not acted in bad faith in the course of conciliating its § 706 claims; (2) regardless of how the EEOC conducted itself during the first conciliation period, it exhibited bad faith during a recent stay; and (3) the EEOC failed to adequately investigate its claims before filing suit.</p> <p>In ruling on the defendant's motion, the court summarily rejected the first two arguments pertaining to the EEOC's alleged bad faith during the conciliation process. The bulk of the court's order addressed the employer's third argument: that the EEOC failed to adequately investigate its claims before filing suit. The basis for the company's argument was the EEOC's admission that some individuals on whose behalf it sought to bring a § 706 claim were not identified during the course of its investigation, and the court noted that there was discrepancy in the record as to whether any individual on whose behalf the EEOC sought to bring its § 706 claim had been identified by name during the EEOC's investigation. The court therefore framed the issue as "whether the EEOC can bring a § 706 claim on behalf of individuals whose identities were not determined (or will not be determined) until after the EEOC completed its investigation." The EEOC argued that it can conduct an adequate investigation even where it does not know the specific identities of all those who were aggrieved. The employer argued that if the Commission cannot identify the aggrieved individuals, then its investigation cannot be considered adequate.</p> <p>Although the court considered it a close question, the court denied the employer's motion because "the Court [was] not fully persuaded that the Commission is barred from bringing § 706 claims on behalf of unidentified victims." On Aug. 12, 2014, the defendant filed a motion for interlocutory appeal, which was granted on Nov. 17, 2014. <i>EEOC v. Bass Pro Outdoor World, LLC</i>, 2014 U.S. Dist. LEXIS 161053 (S.D. Tex. Nov. 17, 2014).</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Race Discrimination | U.S. Dry Cleaning Services Corp. d/b/a Tuchman Cleaners | U.S.D.C. for the Southern District of Indiana 1:12-cv-1376-JMS-TAB | 2014 U.S. Dist. LEXIS 75898 (S.D. Ind. June 4, 2014) | Defendant's Motion for Summary Judgment on the EEOC's Claim for Punitive Damages | Whether the employer was entitled to summary judgment on the EEOC's claim for punitive damages? | <p>The claimant was a presser for the employer, a dry cleaning company. The claimant applied for an assistant manager position. When the claimant was denied the promotion, his direct supervisor told him he did not receive the position because her superiors did not believe he was the right face for the store. When asked what she meant, the claimant's supervisor allegedly told him, "What do you think I mean by face for this store? Your skin color is not the right [sic] for this store, for this community."</p> <p>The court denied the employer's motion for summary judgment with respect to the EEOC's claim for punitive damages because (1) the EEOC established the employer acted with knowledge that its actions may have violated federal law because the employee who made the comment that the claimant's skin color was not the right fit for the store was aware of Title VII and the employer's anti-discrimination policy; (2) the EEOC established the employee who made the comment was a managerial employee, thus imputing liability to the employer; and (3) while the employer had an anti-discrimination policy, the employer did not establish it engaged in good faith efforts to comply with Title VII because there was no evidence that its managers had been trained on the anti-discrimination policy or on Title VII. Thus, the employer could not establish that it should not be held vicariously liable for the discriminatory actions of its managerial agents under the framework outlined in <i>Kolstad v. American Dental Ass'n</i>, 139 F.3d 958 (D.C. Cir. 1998).</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Sex Discrimination | Sterling Jewelers Inc. | U.S.D.C. for the Western District of New York No. 08-CV-00706(A)(M) | 2014 U.S. Dist. LEXIS 304 (W.D.N.Y. Jan. 2, 2014) | Defendant's Motion for Partial Summary Judgment | Whether there is a triable issue of fact as to the scope of the EEOC investigation of the defendant's employment practices prior to commencing the action? | <p>The court granted in part and denied in part the defendant's motion for partial summary judgment. The defendant moved for summary judgment, arguing that since "there is no evidence that the EEOC conducted a nationwide investigation of its employment practices prior to commencing this action, its claims of nationwide discrimination must be dismissed." <i>EEOC v. Sterling Jewelers Inc.</i>, 2014 U.S. Dist. LEXIS 304, at *6 (W.D.N.Y. Jan. 2, 2014). The defendant also requested in its motion that the court reconsider the applicable statute of limitations on the EEOC's pattern-or-practice claim.</p> <p>As to the EEOC's investigation, the EEOC, which bears the burden of proving it satisfied all conditions precedent to maintaining this action, failed to present sufficient evidence that it conducted a nationwide investigation before it filed this lawsuit. The court recommended that the EEOC's claim of a nationwide pattern or practice of employment discrimination be dismissed with prejudice. As to the statute of limitations issue, the court recommended the defendant's request for reconsideration of the issue be denied since there are no compelling reasons to do so, "such as an intervening change of controlling law, the availability of new evidence or the need to correct a clear error or prevent manifest injustice." <i>Id.</i> at *29.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
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| Sexual Harassment | Braun Electric Company | U.S.D.C. for the Eastern District of California 12-CV-01592 | 2014 U.S. Dist. LEXIS 46428 (E.D. Cal. Apr. 2, 2014) | Defendant's Motion for Summary Judgment | Whether the employer was entitled to summary adjudication on the EEOC's claim of sexual harassment with respect to the claims of another charging party Rios, who was named by the EEOC as a party in interest in its lawsuit on behalf of charging party Schmidt? | <p>The case was brought by the EEOC on behalf of the charging party, Schmidt, and on behalf of all other similarly situated individuals. During the pendency of the case, another individual, Rios, was identified by the EEOC as a party in interest. The employer moved for adjudication of Rios's claims.</p> <p>The court held that the EEOC could litigate Rios's claims where the EEOC investigated charging party Schmidt's charge of harassment, discovered the same harassment may have happened to other employees who had contact with the same supervisor at the same facility (including Rios), made a reasonable cause determination, and offered a conciliation agreement that provided for relief for employees in a class who were similarly harassed by the same supervisor at the same facility. Therefore, the court denied the employer's motion for summary adjudication with respect to Rios's claims.</p> |

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| Sexual Harassment | Braun Electric Company | U.S.D.C. for the Eastern District of California 12-CV-01592 | 2014 U.S. Dist. LEXIS 39476 (E.D. Cal. Mar. 24, 2014) | Defendant's Motion for Summary Judgment | Whether the employer was entitled to summary judgment on the EEOC's claim of sexual harassment with respect to the claims made by the initial claimant Schmidt and/or another claimant Rios, identified by the EEOC as a party in interest? | <p>The EEOC brought this case on behalf of the claimant, Schmidt, and on behalf of all other similarly situated individuals. During the case, the EEOC identified another individual, Rios, as a party in interest. The employer moved for summary judgment with respect to the claims of both Schmidt and Rios.</p> <p>With respect to Schmidt, the court denied summary judgment because there was a genuine issue of material fact as to whether the employer knew or should have known the harasser's harassment went beyond what Schmidt complained about to human resources because of the harasser's past harassment and Schmidt's complaints to lower-level managers about the harasser's conduct. There was also a genuine issue of material fact because the employer failed to show that it took remedial measures that were reasonably calculated to end the harassment in response to the formal complaints made against the harasser. Therefore, the employer could not establish the <i>Faragher / Ellerth</i> defense.</p> <p>With respect to Rios, the court ordered the parties to submit additional briefing as to the status of Rios as a party to the case because the EEOC had never sought leave to amend the complaint to add Rios as a party and it was unclear to the court whether the EEOC sought to add Rios as a second claimant or if Rios was simply a purported member of the class of similarly situated individuals who were adversely affected by the employer's alleged unlawful conduct.</p> |

| CLAIM TYPE(S) | DEFENDANT(S) | COURT AND CASE NO. | CITATION | MOTION | GENERAL ISSUES | COMMENTARY |
|------------------------------|-------------------------------|---|--|---|--|--|
| Title VII— Laches Defense | Global Horizons, Inc., et al. | U.S.D.C. for the District of Hawaii No. 11-00257 | 2014 U.S. Lexis 25932 (D. Haw. Feb. 28, 2014) | 1) Global Horizon's Motion for Summary Judgment on its Laches Affirmative Defense 2) The EEOC's Motion for Partial Summary Judgment on Global Horizon's Affirmative Defenses | 1) Whether the EEOC's complaint should be dismissed because of the affirmative defense of the doctrine of laches? 2) Whether genuine issues of material facts exist as to some of the Defendant's affirmative defenses? | The Court denied the defendant's motion for summary judgment and partially granted and partially denied the EEOC's motion for summary judgment. In order to establish the doctrine of laches, the defendant had to prove that (1) the EEOC's five-year delay was unreasonable and unexcused; and (2) the defendant suffered prejudice as a result of the delay. The court noted that the EEOC is not subject to any statute of limitations restrictions on its ability to file suit in federal court. The court further found no genuine issue of material fact as to the reasonableness of the five-year delay between the start of the investigation and the filing of the original complaint. The EEOC had introduced uncontroverted evidence that during this time period, it had been investigating other entities involved in the same matter. The court found that the defendant suffered no prejudice. As to the EEOC's motion for summary judgment, the court partially granted the motion, eliminating the defendant's affirmative defenses of failure to state a claim, failure to conciliate in good faith, failure to conduct an adequate investigation, lack of subject matter jurisdiction, laches, lack of standing, beyond the scope of the EEOC investigation, lack of proximate cause, beyond the scope of employment, additional defenses, bad faith, fraud, misrepresentation, other wrongful conduct, contributory negligence, waiver, estoppel, unclean hands, and lack of intent. The court denied the EEOC's motion for the affirmative defenses of statute of limitations and non-liability for nonemployees. |

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|--------------------------------------|--|---|---|---|--|--|
| Title VII— Affirmative Defense | Maui Pineapple Company, Ltd., et al. | U.S.D.C. for the District of Hawaii No. 11-00257 | 2014 U.S. Dist. Lexis 26342 (D. Haw. Feb. 28, 2014) | Two EEOC Motions for Partial Summary Judgment on the Defendant's Affirmative Defenses | Whether genuine issues of material fact exist as to some of the defendant's affirmative defenses? | The court partially granted and partially denied the EEOC's motions regarding the defendant's affirmative defenses. In partially granting the motions, the court eliminated the following affirmative defenses: lack of investigation of charges, lack of good- faith conciliation, failure to exhaust administrative remedies, exclusivity of the workers' compensation statute, preemption by the Labor Management Relations Act, failure to state a claim, failure to state a claim that supports damages, lack of subject matter jurisdiction, failure to mitigate damages, doctrine of laches, unknown discrimination, adverse action taken regardless of protected status, after- acquired evidence doctrine, waiver, estoppel, unclean hands, outside the scope of the charges or investigation, standing, improper joinder, lack of proximate cause, intervening or superseding cause, preexisting injuries, and immigration status. The court denied summary judgment on statute of limitations and untimely charges. |

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