THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2021

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

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

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ABOUT OUR EEO & DIVERSITY PRACTICE GROUP

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

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

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

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INTRODUCTION

This **Annual Report on EEOC Developments—Fiscal Year 2021** (hereafter "Report"), our eleventh annual publication, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year. The Report does not merely summarize case law and litigation statistics, but also analyzes the EEOC's successes, setbacks, changes, and strategies. By focusing on key developments and anticipated trends, the Report provides employers with a roadmap to where the EEOC is headed in the year to come.

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

Part One provides an overview of EEOC and employer diversity initiatives and the challenges that arise in their implementation. Employers, federal agencies, and the courts have long recognized the importance of fostering a diverse and inclusive work environment, but what does that entail, and what are the pitfalls? This section discusses the history of efforts to make workforces more representative, the intersection between diversity, equity and inclusion (DEI) programs and employment laws, and lawful steps employers can take to achieve their DEI goals.

Part Two outlines EEOC charge activity, litigation and settlements in FY 2021, focusing on the types and location of lawsuits filed by the Commission. More details on noteworthy consent decrees, conciliation agreements, judgments and jury verdicts are summarized in Appendix A to this Report. A discussion of cases in which the EEOC filed an amicus or appellate brief can be found in Appendix B.

Part Three focuses on the current composition of the EEOC, its regulatory activities, and other agency priorities and initiatives. This chapter includes a discussion of potential changes to the Commission in the coming months, how the EEOC's guidance and policies have evolved in the face of COVID-19, and where the agency's priorities lie.

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 in pursuit of its goal to combat systemic discrimination. Appendix C to this Report supplements this section in summarizing subpoena enforcement actions filed by the EEOC during FY 2021.

Part Five of the Report focuses on FY 2021 litigation in which the EEOC was a party. This discussion is broken down into numerous topic areas, including: (1) pleading deficiencies raised by employers and the EEOC; (2) statutes of limitations cases involving both pattern-or-practice and other types of claims; (3) intervention and consolidation of claims with private counsel representing charging parties; (4) class issues in EEOC litigation; (5) other critical issues in EEOC litigation, including protective orders, ESI and experts; (6) general discovery issues in litigation between the parties; (7) favorable and unfavorable summary judgment rulings, which also are summarized in greater detail in Appendix D; (8) default judgments against employers; (9) trial-related issues and those tied to remedies and settlements; and (10) circumstances in which courts have awarded attorneys' fees to prevailing parties.

Appendices A-D are useful resources that should be read in tandem with the Report. **Appendix A** includes summaries of significant EEOC consent decrees, conciliation agreements, judgments, and jury verdicts. **Appendix B** highlights appellate cases where the EEOC has filed an amicus or appellant brief and decided appellate cases in FY 2021. **Appendix C** includes information on select subpoena enforcement actions filed by the EEOC in FY 2021. **Appendix D** highlights notable summary judgment decisions by claim type.

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

I. EEO & DIVERSITY EFFORTS—AN OVERVIEW OF DIVERSITY INITIATIVES AND CHALLENGES THAT NEED TO BE ADDRESSED

In this opening chapter, based on a renewed focus on Diversity, Equity and Inclusion (DEI) initiatives by various companies in the wake of the "Black Lives Matter" movement and related developments, Co-Chairs of Littler's EEO & Diversity Practice, Barry Hartstein and Alyesha Asghar Dotson, provide an overview of both the legal and practical issues to be considered in any DEI initiative.

Systemic discrimination will remain front and center by the Equal Employment Opportunity Commission (EEOC) during the coming year. In issuing the *Fiscal Year 2021 Agency Financial Report*,[1] EEOC Chair Charlotte A. Burrows underscored, "It is important to maintain our capacity as we rebuild the economy to confront the urgent issue of systemic discrimination and work toward an America where all have a fair chance to work, provide for their families, and contribute to our economy."

It clearly is in an employer's best interests to take proactive steps in strengthening its diversity efforts, rather than being faced with a systemic investigation and/or related lawsuit filed by the EEOC. As most readers are aware, based on the resolution of EEOC investigations and/or lawsuits involving systemic claims, aside from monetary relief, a central focus is injunctive relief in which the agency frequently mandates policy revisions, required training, affirmative recruitment, outreach and hiring efforts, retention of outside monitors, posting requirements and ongoing reporting requirements to the agency.

The resurgence of the "Black Lives Matter" movement in the wake of the killing of George Floyd and other members of historically marginalized communities also has set in motion a renewed focus on diversity efforts by corporate America, and by companies across the globe. This has included some companies announcing "targets" and "commitments to specific actions" involving minority hiring.[2] While commendable, employers need to take care to avoid claims of "reverse discrimination" and/or other legal risks when implementing and/or strengthening a company's Diversity, Equity & Inclusion efforts. These DEI efforts also need to consider the "Me Too" movement and broad-based legislation involving pay equity.[3]

This opening chapter briefly reviews the legal landscape in developing hiring goals and updating employment practices as part of any DEI initiative.

A. The EEOC Perspective

In its Fiscal Year 2021 Agency Financial Report, EEOC Chair Burrows further explained the EEOC's approach to systemic discrimination and related investigations and lawsuits as follows:

> Addressing systemic discrimination—where a discriminatory pattern, practice, or policy has a broad impact on an industry, company, or geographic area—is central to the mission of the EEOC. Systemic discrimination creates barriers to opportunity that causes widespread harm to workers, workplaces, and the economy. Without systemic enforcement, many discriminatory systems and structures would persist—leading to more harm to individuals subject to such discriminatory practices and potentially more individuals filing charges of discrimination against their employers. A robust systemic program allows the EEOC to make change on a national, regional, or industry level while helping substantial numbers of employees at once.
>
> In fiscal year 2021, the Commission renewed its attention to tackling systemic employment discrimination in all forms and on all bases, including unlawful harassment. The EEOC has numerous tools to combat systemic discrimination and harassment, including outreach and education, technical assistance, and enforcement, and uses all of them to achieve change on a broad scale. As a result, the Commission's systemic enforcement program produced significant results with more than 342 systemic investigations resolved on the merits and more than $24.4 million in monetary benefits obtained. In addition to providing monetary relief to charging parties and other aggrieved individuals, these

1 *See* EEOC, Press Release, *EEOC Issues Yearly Financial Report* (Nov. 16, 2021)

2 *See* Geri Stengel, *Black Lives Matter Protests Moves Corporate D & I Initiatives Center Stage*, Forbes (June 17, 2020). *See also* Marin Wolf and Kim Bhasin, *Wells Fargo, Delta Join a Nascent Push into Racial Hiring Quotas*, Bloomberg Law (Sept. 1, 2020). As indicated in the Bloomberg article, the initial genesis actually was in the 60s and stemmed from affirmative action efforts by federal contractors to ensure equal employment opportunity.

3 Perhaps the most far-reaching legislation is the recently amended Illinois Equal Pay Act in which Illinois employers will need to begin auditing and potentially modifying their compensation practices immediately to obtain an "equal pay registration certificate," which will be required to be submitted to the Illinois Department of Labor between March 24, 2022 and March 24, 2024. *See* Barry Hartstein, Jennifer Jones, and Paul Newendyke, *Illinois Equal Pay Certificate Requirements Amended*, Littler ASAP (Aug. 24, 2021).

resolutions included targeted equitable relief designed to change employment practices, prevent future discrimination, and bring respondents into compliance with the law. The EEOC secured targeted equitable relief in 100% of successful systemic conciliations.

When efforts to combat systemic discrimination through voluntary compliance fail, litigation may be necessary to remedy and prevent future discrimination. In fiscal year 2021, the EEOC resolved 26 systemic suits, obtaining a total of approximately $22.7 million for 1,671 individuals and significant equitable relief.[4]

The EEOC is not alone in its impetus to combat systemic discrimination. On day one of his presidency, Joe Biden handed the Department of Labor its guiding directive: to help build back the economy in a more inclusive, diverse, and equitable way.[5] Jenny Yang, director of U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), explained how the Department is working alongside some of the largest corporations in the U.S. to address diversity training and hiring. She also shared concerns about the software programs companies are using to find—and weed out—potential job candidates.

Importantly, the EEOC, OFCCP, and the U.S. Department of Justice (DOJ) underscored this combined resolve to focus on DEI when, by a vote of 3-2 in November 2020, the EEOC voted to approve entering into a revised Memorandum of Understanding (MOU) with the OFCCP and the DOJ.[6] The MOU promotes interagency coordination in the enforcement of equal employment opportunity (EEO) laws, maximizing efficiency and eliminating duplication and inconsistency among the three agencies.

Like prior years, Littler's *Annual Report on EEOC Developments* reviews the EEOC's authority to conduct broad-based investigation, related subpoena enforcement actions, large-scale EEOC settlements and litigation filed by the agency. However, this opening chapter addresses the equal employment and DEI efforts from a different perspective—focusing on DEI initiatives to highlight steps that employers lawfully can consider to help minimize and/or reduce the risks of discrimination charges and related litigation.

B. Voluntary Diversity/Affirmative Action Efforts—Review of Legal Principles

1. Setting the Stage for DEI - Title VII of the Civil Rights Act of 1964

Any discussion of potential hiring goals or other employment decisions involving members of historically marginalized communities[7] or women requires a brief review of applicable law. The starting point for any analysis is Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex (including sexual orientation and gender identity) or national origin. However, Section 703(j) in Title VII prohibits preferential treatment based on an individual's protected status and expressly provides as follows:

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, state, section, or other area, or in the available work force in any community, state, section, or other area.

Employers would therefore do well to think through the complexity of legal compliance parameters on any DEI initiative, including pay equity reviews, and other seemingly benign well-intended efforts, before implementing the same.

4 EEOC, *Fiscal Year 2021 Agency Financial Report*, p. 19.
5 *See* Nicole Goodkind, *The Department of Labor wants to partner with companies on diversity goals*, Fortune (July 16, 2021).
6 *See* EEOC, Press Release, *EEOC Approves MOU Promoting Interagency Coordination* (Nov. 2, 2020).
7 Recent DEI literature suggests that the term "minorities" suggests victimhood or deficit. Utah Division of Multicultural Affairs, *Building Equity & Inclusion Through the Power of Language*; *See also* AP Stylebook, *race-related coverage*. "The word is sometimes used as a blanket term for people from underrepresented groups including Black and African Americans, Latinx and Hispanics, Asian Americans, Pacific Islanders, Native Americans and refugees. People of color will comprise a majority of the nation's population in a little more than a generation by 2044." *Id.* Instead, recommended practice is to use language that empowers, *e.g.* "People with disabilities" vs "the disabled", "historically resilient" or "historically underrepresented" or "racially minoritized" (as termed by Dr. Tamara Stevenson of Westminster College). *See also* Mita Mallick, *These 4 phrases are sabotaging your DEI efforts*, FastCompany (Aug.11, 2021). Thus, for the purposes of this paper, the authors will use the empowering term "members of historically marginalized communities" except where the term "minorities" appears in a direct quote.

Although traditional Title VII consideration may be par for the course as employers contemplate hiring, firing, promotion, demotion, and other employment risks, a rising trend of internal complaints, viral stories, agency charges, and lawsuits alleging "reverse discrimination" is complicating this area. Without thoughtful counsel and consideration, an employer intent on making DEI progress may feel hemmed in by its legal compliance obligations.

2. Affirmative Action Permitted in Limited Context Involving Affirmative Action Plans, Such as by Government Contractors

On July 2, 1964, the Civil Rights Act of 1964 became law. Shortly thereafter, on September 24, 1965, President Johnson issued Executive Order 11246, which charged the secretary of labor with responsibility for ensuring equal opportunity for members of historically marginalized communities involved in any federal contractors' recruitment, hire, training and other employment practice.8 Executive Order 11246 essentially set forth the requirement that federal contractors not discriminate in employment and "take affirmative action to ensure equal opportunity based on race, color, religion, and national origin."[9] At the time, the federal government also established the OFCCP in the U.S. Department of Labor to administer the order.[10]

Based on express terms of the executive order, which has continued in effect to date, federal contractors and subcontractors with 50 or more employees that have entered into a contract of $50,000 or more with the federal government are required to prepare a written affirmative action plan for each "establishment," which includes setting up goals and timetables for each job group in which historically marginalized communities and/or women are underutilized in the applicable recruiting area.[11]

Affirmative action plans and their legality have a long history, and the first major case to address voluntary affirmative action programs by a federal contractor was the U.S. Supreme Court decision in *United Steelworkers of America v. Weber*.[12] In that case, the company implemented an affirmative action-based training program to increase the number of the company's Black or African-American[13] skilled craft workers. At issue was a collectively bargained plan by an employer and a union that reserved for Black employees 50% of the openings in a training program until the percentage of Black craft workers in the plan was "commensurate with the percentage of Blacks in the local labor force." Weber, who was white, and passed over for the program by a less-senior Black candidate, filed a class action in federal court challenging the program essentially alleging that he was a victim of reverse discrimination.

The sole questions before the Court was whether Title VII "forbids" a private employer and union from voluntarily agreeing to such a program. In upholding the affirmative action plan, the Court looked at the legislative history in which Congress' "primary concern in enacting the prohibition against racial discrimination in Title VII was the plight of Blacks or African-Americans in this country" and thus rejected the plaintiff's claims and concluded that the express terms of the statute were intended to cause "employers and unions to self-examine and to self-evaluate their employment practices and endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." The Court focused on the express language in Title VII dealing with preferences and pointed out Section 703(j), as referenced above, could have provided that Title VII "would not require or permit" any employer to grant any voluntary race-conscious affirmative action, but limited the provision to the term "require." The Court thus concluded that voluntary affirmative action efforts may be permissible.

The Court limited the scope of the decision permitting a voluntary affirmative action effort to the following:

- The focus was a private-sector employer;
- The action was taken "to eliminate conspicuous racial imbalance in traditionally segregated job categories";

8 *See* U.S. Department of Labor, Office of Federal Contract Compliance Programs, *History of Executive Order 11246*,
9 *Id.*
10 *Id.*
11 *See* David Goldstein, *Littler on Government Contractors & Equal Employment Opportunity Obligations*, for a comprehensive review of an employer's affirmative action obligations.
12 *See United Steelworkers of America v. Weber*, 99 S. Ct. 2721, 443 U.S. 193 (1979).
13 According to recent DEI literature and the AP Style Manual, one may use the capitalized term "Black" as an "adjective in a racial, ethnic or cultural sense: Black people, Black culture, Black literature, Black studies, Black colleges." AP Stylebook, *race-related coverage*. Use of the capitalized Black recognizes that language has evolved, along with the common understanding that especially in the United States, the term reflects a shared identity and culture rather than a skin color alone. *Id.* Also use Black in racial, ethnic and cultural differences outside the U.S. to avoid equating a person with a skin color. *Id.* African American is also acceptable for those in the United States. However, the terms "Black" and "African American" are not necessarily interchangeable. *Id.* Americans of Caribbean heritage, for example, generally refer to themselves as Caribbean American, and may therefore more accurately be identified by referencing members of the Black diaspora. As such, follow an individual's preference if known, or use the alternative by way of "Black or African American" where unknown as the authors do in this paper.

- The action was viewed as temporary and would be required to "end as soon as the percentage of Black skilled craftworkers in the Gramercy plant approximate the percentage of Blacks in the local labor force"; and
- The plan "does not unnecessarily trammel the interests of the white employees" because the plan "does not require the discharge of white workers and their replacement with new Black hires."

While the *Weber* decision involved a hiring selection decision, the same principles were applied by the Supreme Court to an employer's promotion decision in *Johnson v Transportation Agency, Santa Clara County*.[14] The *Johnson* decision focused on gender-based preferences. In that case, the employer passed over a male employee, Paul Johnson, and promoted a female employee to a road dispatcher job. At the time, the employer had in effect a voluntary affirmative action plan, which was adopted because "mere prohibition of discriminatory practices is not enough to remedy the effect of past practices and to permit attainment of an equitable representation of minorities, women and handicapped persons." The plan included express language that "in making promotions to positions within a traditionally segregated job classification in which women have been significantly underrepresented, the Agency is authorized to consider as one factor the sex of a qualified candidate."

In *Johnson*, the female candidate and Johnson were two of nine candidates initially deemed qualified for the job, and following interviews by a two-person board, seven of the applicants were certified as eligible for selection. Johnson was tied for second based on the interview score, with the female employee ranked next. Following a second interview by three supervisors, the decision was made to promote the female candidate. The lawsuit followed and Johnson alleged that he was denied promotion based on his sex in violation of Title VII.

The district court initially ruled in favor of Johnson, finding that he was more qualified for the dispatcher position *and that sex was the "determining factor,"* and following the criteria in *Steelworkers v. Weber*, the employer's plan did not pass muster because it was not described as a "temporary" plan. The Ninth Circuit reversed, finding that the absence of an express provision was not dispositive. Following appeal, the U.S. Supreme Court upheld the promotion decision based on the principles set forth in the *Weber* decision.

- The Court determined that consideration of sex of the applicants for the position was justified based on the "manifest imbalance" that reflected the underrepresentation of women in "traditionally segregated job categories," and the promotion of the female employee based on the affirmative action plan was "designed to eliminate Agency work imbalances in traditionally segregated job categories.
- The Court also concluded that the affirmative action plan did not "unnecessarily trammel" the rights of male employees or create an absolute bar to their advancement. The plan expressly provided for "goals," which "should not be construed as 'quotas' that must be met," and the plan merely authorized consideration of affirmative action when evaluating qualified candidates. In this situation, taken into account that any of the seven candidates were authorized to be promoted, there was "no legitimate, firmly rooted expectation of the part of petitioner," and he retained his employment "at the same salary and with the same seniority, and remained eligible for other promotions."
- Finally, the Court viewed the plan as "temporary" in nature, consistent with *Weber*, because employer's plan was "intended to attain a balanced workforce, not to maintain one." Further, there were ongoing challenges in increasing representation of minorities and women and the employer had taken "a moderate, gradual approach to eliminating the imbalance in the workforce, one which establishes realistic guidance for employment decisions."

Despite the passage of years since the *Weber* and *Johnson* decisions, the U.S. Supreme Court to date has focused only on remedial-based affirmative action. The Court has not yet addressed whether a private-sector employer can engage in affirmative action for a non-remedial purpose, such as a desire to achieve or maintain diversity in the workplace.[15] The Court was last presented with this issue in *Taxman v. Board of Education*,[16] in which the Third Circuit held that an affirmative action plan aimed at

14 *See Johnson v. Transp. Agency*, 107 S. Ct. 1442, 480 U.S. 616 (1987).

15 In recent years, the focus on affirmative action programs has been limited to a university setting. As an example, the issue of a compelling interest in diversity for university admissions, subject to restrictions, was upheld by the Supreme Court in Fisher v Univ. of Texas, 136 S. Ct. 2198 (2016), but that decision (and similar decisions involving public education/universities) involved constitutional principles, and these principles have not been applied to private-sector employers in addressing employment decisions. As many readers are aware, on January 24, 2022, the U.S. Supreme Court agreed to take up two cases, which have been consolidated for oral argument in the 2022-2023 term, in which the same petitioners, Students for Fair Admissions, have challenged the consideration of race in college admissions. *See Students for Fair Admissions v. President and Fellows of Harvard*, No. 19-2005 (1st Cir. Nov. 12, 2020), *cert. granted*, (U.S. Jan. 24, 2022) (No. 20-1199) and *Students for Fair Admissions v. University of NC, et al.*, No. 1:14CV954 (M.D.N.C. Oct. 18, 2021), *cert. granted*, (U.S. Jan. 24, 2022) (No. 21-707).

16 1 F. 3d 1547 (3d Cir. 1996), *cert. granted*, 117 S. Ct. 2506 (1997) (No. 96-679).

promoting diversity, rather than remedying discrimination, was unlawful under Title VII,[17] but the *Taxman* case was settled before the Supreme Court addressed the issue.

3. General Concerns of "Reverse Discrimination" Based on Preferential Treatment in Hiring and Related Practices

Any voluntary diversity efforts implemented by an employer face tension with Title VII of the Civil Rights Act, which expressly provides that it is illegal for an employer to make employment decisions "because of" an individual's race, color, religion, sex or national origin.

The seminal "reverse discrimination" case is the U.S. Supreme Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*,[18] which involved a factual pattern in which an employer fired two white employees and retained one Black employee who committed the same misconduct as the white employees. Based on this differential treatment, the U.S. Supreme Court reaffirmed that the standards of Title VII apply regardless of whether the person belongs to a majority group or is a member of a historically marginalized community.[19]

A review of applicable decisions demonstrates that merely engaging in outreach efforts to members of historically marginalized communities is completely within the bounds of applicable law. On the other hand, preferential treatment toward members of historically marginalized communities violates Title VII.

17 The *Taxman* decision dealt with an employee layoff, and the employer had to choose between two equally qualified teachers, one of whom was white and the other being Black or African-American, and the School Board's president stated that the Board made the decision to retain the minority employee because "it was sending a very clear message that we feel our staff should be culturally diverse" and there is "a district advantage to students…so that they are more aware, more tolerant, more accepting, more understanding of all people of all background." Based on the authority of *Weber* and *Johnson*, they saw no legal support to the goal of promoting racial diversity, and the decision "unnecessarily trammel[s] the interests of the [nonminority] employees," citing the *Weber* decision.

18 427 U.S. 273, 280 (1976).

19 There exists a significant disagreement among courts about how to analyze the factor of reverse discrimination. The Sixth, Seventh, Eighth, Tenth, and D.C. Circuits require a reverse discrimination plaintiff to show "background circumstances that demonstrate that a particular employer has reason or inclination to discriminate invidiously against [majority groups] … or evidence that there is something 'fishy' about the facts at hand." *Gore v. Indiana Univ.,* 416 F.3d 590, 592 (7th Cir. 2005); *see Leadbetter v. Gilley,* 385 F.3d 683, 690 (6th Cir.2004); *Hammer v. Ashcroft,* 383 F.3d 722, 724 (8th Cir. 2004); *Stover v. Martinez,* 382 F.3d 1064, 1076 (10th Cir. 2004); *Russell v. Principi,* 257 F.3d 815, 818 (D.C. Cir. 2001); *Lanphear v. Prokop,* 703 F.2d 1311, 1315 (D.C. Cir. 1983). These courts require this enhanced showing because they argue that a reverse discrimination plaintiff "who otherwise makes out a *prima facie* case is not entitled to an inference of discrimination, because the proof scheme set out in *McDonnell*, is premised upon this country's history of racial discrimination against minority groups, particularly Blacks." *Stock v. Universal Foods Corp.,* 1994 WL 10682, at *3, n. 2 (4th Cir. 1994). On the other side, the Third, Fifth, and Eleventh Circuits hold that the *McDonnell Douglas* framework applies in both ordinary discrimination and reverse discrimination cases. *See Bass v. Board of County Commissioners,* 256 F.3d 1095, 1103-1104 (11th Cir. 2001); *Byers v. Dallas Morning News,* 209 F.3d 419, 426 (5th Cir. 2000); *Iadimarco v. Runyon,* 190 F.3d 151 (3rd Cir. 1999); *Wilson v. Bailey,* 934 F.2d 301, 304 (11th Cir.1991). The Fourth Circuit has not taken a position officially on this issue. *See Weeks v. Union Camp Corp.,* 2000 WL 727771, at *6 n. 13 (4th Cir. June 7, 2000) (acknowledging that "[w]e have not taken a position on this issue"); *Stock,* 1994 WL 10682, at *3, n. 2 (4th Cir. 1994) (finding that "[w]e do not have to resolve this issue here"); *Lucas v. Dole,* 835 F.2d 532, 534 (4th Cir. 1987) ("we expressly decline to decide at this time whether a higher burden applies."). In the absence of an official position by the Fourth Circuit, an intra-circuit split has formed among the district courts. *Compare Moore v. Rural Health Services, Inc.,* 2007 WL 666796, at *9 n. 9 (D.S.C. Feb. 27, 2007) (applying the standard *McDonnell Douglas* test) and *Stock v. Universal Foods Corp.,* 817 F. Supp. 1300, 1305-06 (D. Md. Mar. 31, 1993) (same) *with Adams v. High Purity Sys., Inc.,* 2009 WL 2391939 (E.D. Va. July 2, 2009) (imposing an enhanced showing of background circumstances that support the argument that the defendant is the unusual employer that discriminates against majority groups); *McNaught v. Virginia Comm. College System,* 933 F. Supp. 2d 804 (E.D. Va. Mar. 20, 2013); *Gilbert v. Penn–Wheeling Closure Corp.,* 917 F. Supp. 1119, 1126 (N.D. W. Va. Mar. 13, 1996).

Examples of Lawful Minority Outreach:

- White males employed by the Department of Energy claimed that the Agency's Affirmative Action and Diversity Plans and Accomplishment Reports reflected a "sub-culture" of reverse discrimination because the plan focused on "ensuring diversity in the applicant pool for positions at the agency." The court rejected the plaintiffs' reliance on the plan to support their reverse discrimination claims in part because "policies here were of the type that expand the pool of persons under consideration, which is permitted, as long as it is not followed by an explicit policy of preferring the minority candidates in the group."[20]
- A claim of reverse discrimination failed where plaintiff alleged an "aggressive effort…to recruit minorities and females as candidates." The court provided policy reasons that support an inclusive policy that targets the recruiting of women and members of historically marginalized communities: An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that members of historically marginalized communities and women are not discriminatorily excluded from employment. This not only allows employers to obtain the best possible employees, but it is an excellent way to help avoid lawsuits. The only harm to white men is that they must compete against a large pool of qualified applicants. This, of course, is not an appropriate objection, and does not state a cognizable harm.[21]

Examples of Unlawful Preferential Treatment Toward Members of Historically Marginalized Communities

- A white male plaintiff proved a *prima facie* case of reverse race discrimination where plaintiff's allegations were based on his employer's supposed desire, and its use of an affirmative action plan, to hire more members of historically marginalized communities, and he alleged that his termination was directly attributable to this desire. The court noted that the plaintiff had provided proof that his superiors were "catching hell" for not hiring minority employees, and that one of his supervisors had received a $2,000 bonus for meeting minority hiring goals after terminating the plaintiff's employment and replacing him with a Black employee.[22]
- The District Court for the Southern District of Indiana denied the employer's motion for summary judgment in a reverse *g*ender discrimination case. The plaintiff alleged that the employer's human resources department ignored rankings generated by interviewers and selected a lower-ranked female job candidate over the plaintiff. The employer asserted that there were legitimate, non-discriminatory reasons for not hiring the plaintiff, that there was no evidence of pretext, and that the plaintiff would not have been hired "but for" the alleged discrimination. The court disagreed, explaining that because the employer's human resources department completely ignored the interviewers' rankings when making their hiring decision, they were not entitled to rely on those same rankings in putting forth their defense to discrimination charges.[23]

A 2018 lawsuit against a technology company illustrates how these complaints may arise.[24] In the purported class action lawsuit, the "First Amended Class Action Complaint," filed on April 18, 2018, alleged in relevant part:

> Throughout the Class Periods, and in violation of California law, [Company] employees who expressed views deviating from the majority view at [the Company] on political subjects raised in the workplace and relevant to [the Company's] employment policies and its business, such as "diversity" hiring policies, "bias sensitivity," or "social justice," were/are singled out, mistreated, and systematically punished and/or terminated from [the Company], in violation of their legal rights.

The lawsuit was settled in May 2020 after the lawsuit was moved to arbitration.

In another lawsuit against the same employer,[25] the plaintiff's Complaint included similar allegations based on a recruiter alleging that he had been pressured into avoiding hiring "non-diverse candidates." Shortly after the lawsuit was filed, the allegations of the Complaint were described in the press as follows:

20 *Mlynczak v. Bodman*, 442 F.3d 1050, 1058 (7th Cir. 2006).
21 *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997).
22 No. 1:95CV333, 1997 WL 271709 (N.D. Miss. May 15, 1997).
23 *White v. Alcoa*, No. 3:04-CV-78, 2006 WL 769753, at *3 (S.D. Ind. Mar. 27, 2006).
24 *See* Case No. 18 CV 321529, Santa Clara County, State of California, initially filed in January 2018, in which the "First Amended Class Action Complaint," was filed on April 18, 2018.
25 *See* Case No. 18-cv-0042, Santa Clara County, State of California (Filed: Jan. 31, 2018).

> A former . . . employee has sued [the Company] for allegedly pressuring recruiters to only look for female, Black, and Hispanic or Latinx applicants. [Plaintiff] — who spent nine years working at [the Company]— filed a discrimination suit in January [2018]. [Plaintiff] claims that [the Company] implemented "clear and irrefutable policies" meant to exclude white and Asian men in an attempt to increase the company's overall diversity. He also claims that [the Company] retaliated against him for opposing these policies, eventually firing him in November 2017.
>
> [Plaintiff]'s lawsuit targets [the Company] and 25 unnamed . . . employees who allegedly enforced discriminatory hiring rules, quoting a number of emails and other documents. It claims that for several quarters, the [defendant employer] would only hire people from historically underrepresented groups for technical positions. In one hiring round, the team was allegedly instructed to cancel all software engineering interviews with non-diverse applicants below a certain experience level, and to "purge entirely any applications by non-diverse employees from the hiring pipeline." California labor law prohibits refusing to hire employees based on characteristics like race or gender.
>
> [The Company] allegedly "purged" non-diverse employee applications.
>
> [Plaintiff] alleges that several employees complained to [the Company] about the company's hiring policies, but were either ignored, transferred, or demoted. The lawsuit says that some employees from marginalized groups were uncomfortable with a program called "Project Mirror," where they would be specifically assigned to interview candidates of their own race or gender. One person allegedly "complained that managers were speaking about Blacks like they were objects."
>
> [The Company] told *The Wall Street Journal* that "we have a clear policy to hire candidates based on their merit, not their identity. … At the same time, we unapologetically try to find a diverse pool of qualified candidates for open roles, as this helps us hire the best people, improve our culture, and build better products." However, the *Journal* cites anonymous sources that corroborate some of [Plaintiff]'s claims.26

The court docket indicates that on March 23, 2018, the court entered an order granting a joint stipulation to stay the action in favor of arbitration.[27]

The above discussion demonstrates that an employer can never eliminate legal risk based on any DEI efforts, but being informed of the legal parameters in any communications regarding an employer's DEI initiatives may limit an employer's risks.

C. Legal Issues in Implementing a Successful DEI Program

Employers can use specific diversity initiatives to encourage and foster a diverse workforce. In contrast to AAPs, a diversity plan is voluntarily designed by employers to promote various types of diversity in the workplace (*e.g.*, diversity in race, gender, ability, background, experience, thought, etc.) and often to address diversity and inclusion in other aspects of the workplace. Diversity goals can be legally permissible if properly formulated. However, employment initiatives that amount to quotas or otherwise require or strongly encourage employment decisions to be based on a protected category have been deemed to violate Title VII.[28]

For years, "quota systems" have been deemed unlawful under anti-discrimination laws because they demand or strongly encourage that hiring or promotion *decisions* are made based (in whole or in part) on one's membership in a protected category.[29] However, aspirational goals carefully crafted and implemented to ensure ultimate decisions are not made based on protected categories in reaching the targets and goals, are generally lawful.[30] Targets and goals relating to the increase of the recruiting pool or pipeline, rather than specific hiring decisions from the pool, are more likely to withstand legal scrutiny because they seek to expand the pool of qualified applicants rather than influence or encourage a hiring manager to make a particular decision based on a protected category.[31] Additionally, diversity efforts should use a definition of diversity based on evidence that individuals are indeed underrepresented in the workforce relative to the applicable comparator population of qualified workers.[32]

26 *See* Adi Robertson, *… Recruiter Sues [Company] for Allegedly Refusing to Hire White and Asian Men*, The Verge (Mar. 2, 2018).
27 *See* https://unicourt.com/case/ca-sm-arne-wilberg-vs-google-inc-et-al-381108. The current status and/or outcome of the arbitration is not public.
28 *See, e.g. Hill v. Ross*, 183 F.3d 586, 589 (7th Cir. 1999).
29 *See id.*
30 *Id.*
31 *Id.*
32 *See Dean v. City of Shreveport* 438 F.3d 448,456 (5th Cir. 2006).

However, even aspirational hiring and promotion goals may become evidence of discrimination in employment litigation. Specifically, failure to achieve those goals may be introduced as evidence of bias.[33] In an unfortunate turn of events, managers setting the goals could find those goals used by plaintiffs' attorneys to establish the reasonableness of decisions that fail to meet the expectations reflected in the goals. Plaintiffs would be expected to contend that a non-discriminating employer would have achieved the goals, because it would serve no purpose to set unattainable goals. Although managers might truthfully testify those goals were set with the intent that managers would stretch to achieve them, and failing to do so is not evidence of discrimination, a judge could conclude it is for a jury to determine if that characterization is credible. The employer then would be in the awkward position of minimizing the value of its hiring/promotion goals as a benchmark against which it should be compared.

The Fifth Circuit addressed this issue in a 2006 decision involving an employer with nationwide operations based on the employer establishing a "Balanced Workforce Initiative" (BFW) that was intended to ensure that "all racial and gender groups were proportionally represented at all levels of the company."[34] The employer established numerical targets annually, based upon government labor force data, and published the actual and desired racial and gender composition for each office. Throughout the time the employer had the BWF in place, the company produced reports listing the actual and desired racial and gender compositions of each office.[35] These reports indicated to the company that Black or African-American employees were over-represented and whites were under-represented at the company's Houston office in comparison to the local population.[36] Several white plaintiffs filed suit after they were denied promotions or pay increases.[37]

The Fifth Circuit held, "the existence of the BWF program is sufficient to constitute direct evidence of a form or practice of discrimination."[38] The court further held that because the employer was a federal contractor, the BWF did not satisfy the requirements of an AAP. Therefore, the court held that existence of the BWF program was enough to constitute direct evidence of a form or practice of discrimination.[39] The court found evidence of discrimination because the employer "candidly identified explicit racial goals for each job and grade level" and managers were evaluated on how well they complied with the BFW's objectives.[40]

On the other hand, more aspirational, non-quota-based diversity plans or policies do not give rise to the same level of risk. In a subsequent 2011 decision, the Fifth Circuit ruled in favor of the employer based on a lawsuit filed by a white female employee, who filed a claim of race discrimination alleging that her termination was based on a false investigation of complaints made against her, in order that defendant could terminate her as part of its diversity initiative.[41] In support of this claim, the plaintiff pointed to defendant's diversity policy, which stated that the company values diversity and considers it an important and necessary tool that will enable the company to maintain a competitive edge, and that defendant is committed to maintaining a workforce that reflects the diversity of the community.[42] The Fifth Circuit held that the district court properly dismissed her claims on summary judgment, finding no evidence that the decision to terminate her was based on the diversity initiative or influenced by racial animus.[43]

In summary, in implementing diversity initiatives, employers may include aspirational goals and objectives, but should avoid specific quotas and hiring / promotion benchmarks that could be cited to support claims of discrimination. A recent court ruling, as illustrated below, is a stark reminder that care must continue to be exercised in implanting diversity initiatives.

33 Courts have held that "evidence that an employer has failed to live up to an affirmative-action plan is relevant to the question of discriminatory intent. . ." *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 472 (8th Cir. 1984); *Humphries v. Pulaski Cty. Special Sch. Dist.*, 580 F.3d 688, 694 (8th Cir. 2009) ("[A]n affirmative action plan may be direct evidence of discrimination if the challenged employment action resulted from the employer acting in connection with that plan.").
34 *See* 347 F.3d 130, 133 (5th Cir. 2003).
35 *Id.*
36 *Id.*
37 *See id.*
38 *Id.* at 137.
39 *Id.*
40 *See id.*
41 *See Bissett v. Beau Rivage Resorts, Inc.*, 442 Fed. Appx. 148, 152 (5th Cir. 2011).
42 *See id.*
43 *See id.*

$10 Million "Reverse" Race & Gender Discrimination Verdict Gives DE&I Programs a Halloween Fright[44]

For the past several years, companies have been focused on creating and executing meaningful diversity, equity and inclusion (DE&I) programs to address the multi-faceted challenges—and opportunities—of diversifying their workforces. In so doing, however, some employers have opted for strategies that could be categorized as overly robust in attempting to achieve their goals. On the practical eve of Halloween, and in what may be viewed as a truly scary setback for many companies that are implementing their own DE&I initiatives, this week, a jury delivered a stunning $10 million verdict to the plaintiff in D*uvall v. Novant Health, Inc.*, Civil Action No. 3:19-cv-00624 (W.D.N.C. Oct. 26, 2021), when they found the plaintiff's race (white) and sex (male) were motivating factors when the employer terminated his employment.

In this case, the jury found that plaintiff's termination was part of an overall promotional tactic aimed at increasing diversity within the upper echelons of the employer's leadership ranks, as he was just one of at least five other highly evaluated, white male, executive peers who were also replaced by underrepresented minorities (URMs) and females in the same general timeframe.

Background

The employer hired the plaintiff in August 2013 as its Senior Vice President for Marketing and Communications. The plaintiff was hired by the employer's Executive Vice President and Chief Consumer Officer (EVP), and the plaintiff reported to that individual during his employment. Throughout the plaintiff's tenure, he received positive performance reviews and the EVP had never criticized the plaintiff's work.

In 2016, the employer's Diversity & Inclusion (D&I) officer presented its board with a five-year strategic D&I plan to embed diversity organization within its leadership ranks by 2019; that plan was approved by the health system's board. Notably, the employer's D&I plan included (1) the use of a diversity "lens" in its decision-making; and, (2) the implementation of a long-term incentive (LTI) plan for senior leadership members who could demonstrate they improved D&I in various areas between 2017-2019. In fact, 50% of the LTI plan was specifically dependent on senior leaders' ability "to meet their underrepresented minority hiring targets."

In 2017, the health system also received a less-than-favorable scorecard from an independent diversity organization that highlighted several opportunities for enhancing D&I. In 2018, the employer formed a Diversity and Inclusion Executive Council (DIEC), in which it discussed the scorecard and its efforts to improve in those areas. To accelerate the implementation of its D&I initiative in response to its scorecard rating, the employer also purportedly set diversity hiring "targets", which included hiring within their senior leadership levels. This confluence of events, according to the plaintiff, was at the root of his employer's actions in deciding to swiftly replace him and other white male senior leaders with URMs and females. The plaintiff's job was terminated on July 30, 2018, and he was replaced by two women – one Black and one white.

The Case and the Verdict

On November 18, 2019, the plaintiff filed a lawsuit in the United States District Court for the Western District of North Carolina alleging that he had been wrongfully terminated and that his termination had been motivated by his race and sex in violation of Title VII of the Civil Rights Act of 1964. The court denied the parties' cross motions for summary judgment and the matter was set for trial on the plaintiff's claims. In the plaintiff's trial brief, he asserted that he could prove discrimination using a "mixed motive" approach and that circumstantial evidence could be used to demonstrate that his race and gender were motivating factors in the employer's decision to remove him.[45] The plaintiff's evidence at trial focused on the employer's diversity "targets"; its use of metrics to measure its progress towards meeting those targets; an array of terminations of white male senior leaders within the relevant time period; and the replacements of those employees with URMs and females.

44 *See* Cindy-Ann Thomas and Brandon R. Mita, *$10 Million 'Reverse' Race & Gender Discrimination Verdict Gives DE & I Programs a Halloween Fright*, Littler ASAP (Oct. 28, 2021).

45 Unlike some federal circuits, the Fourth Circuit has not adopted a heightened standard of proof for "reverse" discrimination claims.

The centerpiece of the plaintiff's evidence at trial included a document with the employer's "nine-box" performance ratings from 2017 for all senior leaders. The plaintiff was able to demonstrate that by 2019, every white male on the document had been terminated and every woman and minority on that same document had been promoted. The plaintiff also presented evidence that the employer's diversity statistics from 2016-2019 showed a 5.9% decrease in white employees at or above the Vice President level as well as contemporaneous increases in the numbers of women and underrepresented minorities. What's more is that when a recruitment firm contacted the health system to enquire about plaintiff's employability following his termination, the EVP specifically indicated that his performance was not the reason for his termination. This unfortunate assortment of facts was apparently enough to convince a jury that the health system was motivated by the plaintiff's race and gender when it terminated him and awarded the plaintiff with $10 million in punitive damages.

Trick or Treat – Employer Takeaways

This decision has significant implications for those employers whose own DE&I programs may be viewed as "aggressive" with respect to how they are being communicated and implemented, and as they react and respond to diversity scorecards as well as broad social movements calling for change in the composition of their workforces. Accordingly, while the ultimate foundation for and goals of such initiatives remain relevant, meritorious, and indeed necessary, companies looking to avoid a similarly chilling blow to their own efforts should seize the opportunity to take a closer look at their DE&I programs - in light of this rather ghoulish verdict.

D. Policies and Practices Aimed to Encourage Recruitment of Members of Historically Marginalized Communities Generally

Diversity initiatives that seek to increase the representation of members of historically marginalized communities among applicants or candidates are generally permissible under Title VII. For example, recruiting applicants from an array of colleges (including colleges with high proportions of URM students), publicizing job vacancies more broadly (including in media focused on URM populations), mentoring programs, and other practices discussed in this paper, if implemented in a neutral way, can legitimately improve diversity and be more inclusive and pose far less risk of litigation. Courts have also approved efforts to increase the size of the applicant or candidate pool to include members of historically marginalized communities, so long as such practice does not require that a candidate be hired/promoted because of race. ("[I]t proves the opposite of discriminatory intent since the stated reason for the change was to increase diversity in the applicant pool.").[46]

In addition, the EEOC has endorsed recruiting efforts that encourage diverse applicants to apply for positions.[47] On April 28, 2006, the EEOC published an informal discussion letter in response to an inquiry regarding whether Title VII prohibits job advertisements for college or university faculty positions, which state that women and minorities are "encouraged"—or in some cases, "especially encouraged"—to apply.[48] The EEOC sanctioned these methods, while distinguishing them from preferential hiring. "Because members of groups that have been historically underrepresented in a particular profession may be deterred from applying unless they are encouraged to do so, such advertisements help employers attain greater diversity among their applicants."[49]

Therefore, diversity initiatives that focus on achieving a diverse candidate pool, rather than setting rigid standards for the hiring a certain number of candidates from historically marginalized communities, may avoid legal pitfalls discussed within this paper.

However, hiring managers and/or recruiters should not be given recruitment incentives linked to quantitative diversity and inclusion goals or hiring of diverse employees. If the incentive is paid only if diverse candidates are hired, hiring managers and recruiters may be tempted to increase the chances of obtaining bonus incentives by advancing only (or mostly) diverse candidates,

46 *See, e.g., Brown v. Del. River Port Auth.*, 10 F. Supp. 3d 556, 566 (D.N.J. 2014)

47 EEOC, *EEOC Informal Discussion Letter Regarding Title VII/Advertising/Affirmative Action/ Diversity* (Apr. 28, 2006) ("[I]f the employer's existing recruitment methods consistently result in an applicant pool that does not reflect the relevant qualified labor force, the employer can adopt alternative strategies to attract a more diverse pool.").

48 *Id.*

49 *Id.*

which may be ruled in violation of Title VII. In effect, the recruiter, under such incentive payment system, becomes a decision maker for many candidates.

E. Practical Issues in Implementing a Successful DEI Program

The remaining portion of this chapter includes practical guidance for DEI programs in the form of outlines and "do's and don'ts", as well as additional guidance from external sources, including guidance from the EEOC and OFCCP.[50]

1. Recruitment

- Focus on diversifying your candidate pools.
- Develop a plan for diversifying the applicant pool and train recruiters on how to effectively implement it. Among the essential tools in your talent acquisition teams' toolbelt are the appropriate ways in which they can and cannot preview social media data and other personal information to engage in DEI initiatives, including the development of diverse slates.
- Remember to expand—not contract—recruitment pipelines by partnering with socio-economically and racially diverse educational institutions and job fairs.
- Utilize diverse talent (employees) and affinity groups to assist with recruiting.

Guardrails

- Exclude no one from the candidate pool based on any protected characteristic.
- Always make hiring decisions based solely upon business-related criteria.
- Train your recruiters to understand the parameters of legally compliant diversity efforts in recruitment and hiring.

2. Hiring

- If you are comfortable with the risk described above, set aspirational hiring goals (not quotas) based on a realistic analysis of the talent in the relevant market.
- Goals are aspirational and flexible, which allows for individual hiring decisions to still be based upon each individual candidate's qualifications. Quotas are mandatory and rigid and create risk of violations.
- Utilize diverse hiring panels or groups to increase diverse perspectives in the decision-making stage.
- Invest in unconscious/implicit bias training and specifically train managers on where unconscious bias can present itself in the interview process.51
- Consider diversity of *experience* (including experience with historically marginalized communities and underserved populations) but train/remind decision makers that it is impermissible to consider the candidate's race, ethnicity and/or gender or other protected categories in hiring—or, indeed, any employment decisions.

Guardrails

- Require that each discrete hiring decision be made based upon candidate qualifications and not on numerical goals.
- Keep in mind employee perception that can surround numerical goals and make sure that message around goals is constant, consistent and top-down.
- Use hiring panels or groups to create an added layer of accountability for decision-making.
- Create standardized interview questions to ensure that all candidates are given an equal opportunity to highlight their skills.

50 *See* EEOC, *Best Practices of Private Sector Employers*; *See also* U.S. Department of Labor, Office of Federal Contract Compliance Program, *Best Practices for Fostering Diversity & Inclusion*. Even though it was published in 1998, the Best Practices of Private Sector Employers report serves as a valuable yardstick for employers to gauge the effectiveness and acceptability of various DE&I voluntary initiatives under the law.

51 In September 2020, former-President Trump passed an executive order banning the use of certain workplace diversity training programs. *See* Executive Order 13950 (Sept. 2020). Under the executive order, agencies in violation could also be declared ineligible for future government contracts. EO 13950, therefore, created potential risk associated with unconscious / implicit bias training. President Biden has since revoked the executive order. *See* *Executive Order 13985 of January 20, 2021: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, 86 Fed. Reg. 7009 (Jan. 25, 2021). The order not only rescinded the diversity training restrictions but also required all agencies to prioritize and create opportunities for communities that have been historically underserved.

- Upon sufficiently training its interviewers, an employer may consider creating candidate evaluation forms and have each interviewer complete the forms for every candidate before review and discussion by the panel or group. Decision makers should clearly articulate and document their reasons as to why a hiring choice was made, particularly if two potential hires are essentially comparable. Note that if implemented inconsistently, or without enough training, such evaluation forms could serve as problematic evidence in future litigation.
- Strike out personal characteristics from resumes at the initial review stages to remove the applicant's identifying characteristics (*e.g.*, name, address, school name, and/or address) that might trigger unconscious bias among recruiters and interviewers.
- Remember that diversity differs from inclusion. Efforts to recruit diverse talent must be met with efforts to retain and grow diverse talent and reduce attrition among employees.

3. Accountability

Leader Competency

- Do not incentivize managers to make hiring decisions based on protected traits.
- Do not create a system that rewards managers for hiring/ promoting members of historically marginalized communities over other individuals.
- Measure effort qualitatively by whether effort/activity requires active or passive engagement (*e.g.*, attending a luncheon versus serving on a committee that promotes cultural competency).
- Also consider quantified effort (measure investment hours). But, remember to tie any incentives to substantive efforts. For example, taking on a leadership role in an affinity group, participating as a mentor in a formalized mentorship program, or substantive efforts towards recruitment expansion.
- Require leaders to report efforts to develop talent.

Guardrails

- Do not require managers to set aside positions for diverse candidates.
- Do not tie compensation or bonuses to diverse hiring or promotion decisions.

4. Retention

- Tools such as affinity groups open to all employees, sponsorship/mentorship programs, policy and practice updates (to, for *e.g.*, employee handbooks to make them more inclusive, or to succession planning efforts) can make a significant positive impact on diversity retention by creating a space for members of historically marginalized communities to come together and build connections.
- Focus on creating a culture of inclusion.
- Assign executive sponsors for affinity groups to serve as a conduit between affinity groups and the C-suite, to become accidental advocates, and to avoid loss of focus for such groups.

Guardrails

- To avoid reverse discrimination claims, messaging matters.

5. Self-Evaluation of Effort

- Conduct a climate assessment that includes focus groups or conduct regular neutrally facilitated focus groups (aka courageous conversations) to gauge employee satisfaction with the company's diversity efforts.

- After discussion with counsel to understand the risks associated with this practice, consider conducting a **privileged** demographic, pipeline, or pay equity analysis to better understand the life cycle of employees within the organization, and track progress.[52]
- Multinational employers that are intent on collecting personnel information with the aim of conducting such a self-evaluation should pay careful heed to the high risk posed by various jurisdictions' complex data privacy laws.
- Multinational employers that intend to analyze data and self-evaluate should also ensure that their analysis is not ethnocentric. Instead, employers should account for the varying international definitions of diversity as well as the laws of various nations that may make U.S.-centric DEI initiatives inadvisable or illegal.

For specific guidance on recruitment recommended practices from the EEOC and OFCCP, see below.

Do's and Don'ts of Diversity Recruitment

DO NOT:

- Use a quota system or set goals so specific as to constitute a quota.
- Set aside a certain number of positions, memberships, training opportunities or leadership positions for diverse candidates.
- Select candidates for hire, or employees for promotion/projects based on their protected characteristics or in a manner such that their protected status is the deciding or motivating factor.
- Promote diversity so it conflicts with established policies.

DO:

- Screen applicants consistently and apply the same standards to all applicants.
- Draft a mission statement and goals that are aspirational in nature, and narrowly tailor the initiative to work toward the stated goals.
- Communicate the mission and goals of the program to employees with an emphasis on diversity of thought and experience, inclusion, and varying perspectives rather than strict demographic diversity.
- Follow existing policies regarding hiring and advancement or modify existing policies to align with the goals of the diversity initiative if necessary.
- Allow all employees to participate in company-recognized affinity groups.[53]
- Be cautious in communicating to employees regarding the progress of the initiative toward its stated goals so employees do not feel that any group is being provided with favored status.

6. EEOC and OFCCP Guidance

The EEOC suggests the below *"Splendid"*[54] approach to address diversity in recruitment, outlined below.

- STUDY—Since one cannot solve problems that one doesn't know exists, know the law, the standards that define one's obligations, and the various barriers to EEO and diversity. Assistance can be obtained from the EEOC, professional consultants, associations or groups, etc.
- PLAN—Know one's own circumstances (workforce and demographics—locally, nationally, and globally). Define one's problem(s); propose solutions; and develop strategies for achieving them.
- LEAD—Senior, middle, and lower management must champion the cause of diversity as a business imperative and provide leadership for successful attainment of the vision of a diverse workforce at all levels of management.

52 There are many risks with using self-identification surveys, and the authors of this paper recommend that employers work closely with counsel to construct, launch, and conduct any DEI demographic or substantive analysis. To the extent an employer nevertheless chooses to collect self-identification data beyond that which it is required by government regulations, the company should implement robust data sharing guideline and train competent gatekeepers to manage the same.

53 If an employer plans to implement Affinity groups, it will need to use a charter and guidelines. Otherwise, it risks groups' operating at cross purposes with the company. It also risks the creation of groups that could be considered counter to the company's diversity, equity, and inclusion efforts.

54 EEOC, *Best Practices of Private Sector Employers*. Although this report was issued by the EEOC in 1998, the report provides excellent illustrations of "best practices" for improving equal employment opportunities in the workplace, as identified by the EEOC.

- ENCOURAGE—Companies should encourage the attainment of diversity by all managers, supervisors, and employees, and structure their business practices and reward systems to reinforce those corporate objectives. Link pay and performance not only for technical competencies, but also for how employees interact, support and respect each other.
- NOTICE—Take notice of the impact of your practices, after monitoring and assessing company progress. Self-analysis is a key part of this process. Ensure that a corrective strategy does not cause or result in unfairness.
- DISCUSSION—Communicate and reinforce the message that diversity is a business asset and a key element of business success in a national and global market.
- INCLUSION—Bring everyone into this process, including white men. Help them understand that EEO initiatives are *g*ood for the company and, thus, good for everyone in the company. Include them in the analysis, planning, and implementation.
- DEDICATION—Stay persistent in your quest. Long-term gains from these practices may cost in the short term. Invest the needed human and capital resources.

The OFCCP provides the below list of effective employee engagement practices and recruitment strategies[55] used by companies with active diversity and inclusion programs:

- CEO Leadership through Correspondence and Video—These company-wide videos and newsletters set the tone for employees, managers, and leaders throughout the company. They include a statement affirming the company's commitment to non-discrimination and equal opportunity practices from corporate leaders. Clearly communicating diversity and inclusion goals helps eliminate impediments in the employment processes and encourages proactive recruitment.
- Outreach Efforts—Federal contractors can establish relationships with historically Black colleges and universities (HBCUs) through their career centers (or career services) and obtain points of contact through whom the company can provide listings of available employment opportunities and internships. Federal contractors can identify and select HBCUs with academic programs that specifically relate to company products and services to establish internships and create a talent pipeline.
- Network Within—Federal contractors can survey[56] their current workforce for referrals of qualified recent graduates of HBCUs. An employee referral reward program can be created to strengthen this practice. These alumni can provide a gauge of the current priorities and needs of the HBCUs and will also be a great source for mentors when HBCU students are brought on board.
- Employee Resource Groups—Employee resource *g*roups (ERGs) or affinity groups offer employees an opportunity to network, address shared issues and concerns, and receive support from similarly situated individuals. Federal contractors should encourage the creation of forum groups, *e.g.*, Black/African American, Hispanic, Asian America Pacific Islander (AAPI), and conduct meetings with each group to discuss recruitment, outreach, mentoring, diversity, inclusion, and development programs.
- Internships—Creating an internship program is a valuable practice when it comes to attracting and developing future employees. Whether it be a summer internship, or an internship developed on a quarterly or semester schedule, such programs ensure that your company has a constant pipeline of trained employees. Providing scholarships or stipends to students at HBCUs and offering internship opportunities with housing assistance are also excellent opportunities.
- Mentoring Programs—A mentoring program is a great way to help a new employee intimately learn about your company, while encouraging them to pursue recurring internships while completing their degree.

55 U.S. Department of Labor, Office of Federal Contract Compliance Program, *Best Practices for Fostering Diversity & Inclusion*.

56 Other than such limited circumstances, the authors of this paper recommend employers refrain from surveys of DEI demographics or substantive information because of the legal risks they create. Raw data collected in response to surveys or on the HRIS system can be discovered in future litigation. Such data can also be leaked to the public by employees. The problem with raw data – other than being potentially negative evidence that can be used against the company – is that it is confusing. It is subject to misinterpretation by opposing counsel and the public because they might consider the company's diverse representation to be below par without understanding how it stacks up to the actual demographics of diverse individuals within the relevant job codes in the relevant area. Moreover, regardless of how well an employer controls the data, employees who release their protected characteristics are likely to believe that subsequent adverse employment actions were influenced by that information. The burden will then be on the employer to demonstrate the contrary, which – of course – involves expense and possible litigation. For additional information regarding the risks of diversity statistics, we also refer you to the following Littler podcast: Cindy-Ann L. Thomas, *Questioning the Diversity Questionnaire*, Littler Podcast (May 11, 2021).

- Apprenticeship Programs—Federal contractors' connections with HBCUs are instrumental in providing real work experience to apprenticeship program participants and other career readiness programs including individuals with disabilities and veterans.
- Career Fairs—A career fair is another resource that attracts talented candidates. Many colleges and universities have annual and semi-annual career fairs. These fairs often prepare students by disclosing available jobs and qualifications. Federal contractors can attend on-campus job fairs at HBCUs and work with college career services departments. Such participation could include providing suggestions on interview preparation, guidance on developing a resume, and advice on career paths. Companies could also bring their best interns and young alumni to discuss the work they are doing and highlight their responsibilities.
- Social Media—Today's college students are extremely social media savvy. In order to attract top talent, contractors must meet them where they are. Contractors may find that directing their social media recruiting efforts to such sites as Facebook, Instagram, and LinkedIn will garner great options.
- Campus Information Visits—Campus information visits can be used to link HBCU students with high-quality career programs offered by federal contractors. By offering on-campus workshops and events, contractors can connect with an HBCU's pool of talented students to achieve recruiting goals. Even something as simple as an information table in a high-traffic area of the campus will allow contractors to network with students interested in the career fields offered by the company. Federal contractors should consider including HBCUs as a part of their recruitment strategies and target the population by attending open houses, connecting with alumni associations, and attending functions as they occur on the campus and in the communities.
- HBCU Alumni Associations—Many HBCUs are represented in almost every large city throughout their alumni association. These *g*roups are invaluable as they maintain a direct line of communication to their respective HBCUs. Federal contractors can identify alumni of HBCUs and meet with them to discuss diversity, and recruitment, and to share ideas. HBCU alumni at the company can also identify other diverse candidates, share key information about their HBCU, provide points of contact, and serve as ambassadors to engage their community to tell them about the company.
- Establishing Relationships—Make a point of contact at the various internal departments at the HBCUs (for example, many universities have veterans' programs and programs for individuals with disabilities). Work with these contacts to create a pilot internship program. Formalize the relationship so that it doesn't disappear when individuals move on to new positions. Federal contractors can contact and form relationships with specific HBCU academic departments. Both entities should discuss the company's needs and identify how HBCU graduates can help meet such needs. Build partnerships with HBCU organizations focused on equitable recruitment, such as HBCU 20x20.[57]
- Connect with National Organizations—Partner with national Black foundations, faith-based institutions, and conferences. By establishing a partnership, you can provide significant value to your diversity outreach effort. Federal contractors can establish and maintain liaisons with organizations and professional groups such as the National Society of Black Engineers (NSBE) to help minority employees from HBCUs find employment and succeed in the workplace. Federal contractors can contact the National Black Law Students Association (NBLSA) for targeted recruitment of law students nationwide. Examples of potential partner organizations include the National Association for Equal Opportunity in Higher Education (NAFEO); National Historically Black Colleges & Universities Foundation, National Society of Black Engineers, and National Black Law Students Association.

57 "The World's Largest Network for HBCU Job *S*eekers," *https://hbcu20x20.com/*

The OFCCP also provides what it considers to be the best practices and requirements for diversity hiring by federal contractors:

Best Practices and Requirements	
Best Practices	Requirements
Form diverse instructional staff search committees.	Base hiring decisions on job-related knowledge, skills, and abilities.
Use objective selection tools to ensure a more uniform assessment of applicants.	Ensure the selection process is free from bias through: • Review of job applications and other pre- employment forms to ensure information requested is job related; • Evaluation of selection methods that have an adverse impact to ensure that they are job related and consistent with business necessity; and • Training in EEO for management and supervisory staff.
Ensure recruitment sources are available to all members of management involved in the recruiting, screening, selection, and promotion processes.	
Create mentoring partnerships within and outside your organization.	
Recruit from a variety of recruitment sources.	
Use techniques to improve recruitment and increase the flow of minority and female applicants.	
• Place help wanted advertisements, when appropriate, in local minority news media and women's interest media; • Disseminate information on job opportunities to organizations representing minorities and women and employment development agencies when job opportunities occur; • Encourage all employees to refer qualified applicants; • Actively recruit at secondary schools, junior colleges, colleges and universities with predominantly minority or female enrollments; • Create EEO apprenticeship programs; and/or • Request employment agencies to refer qualified minorities and women.	• Include the phrase, for example, "Equal Opportunity/ Affirmative Action Employer" in all printed employment advertisements.
Create diversity inclusion programs.	
Ensure that all employees are given equal opportunity for promotion by:	
• Posting promotion opportunities; • Creating and engaging with employee resource groups; • Offering career counseling to assist employees in identifying promotion opportunities, training and educational programs, and opportunities for job rotation or transfer; and/or	• Evaluating job requirements for promotion.

F. Conclusion

DEI is a business necessity for employers today because of its bearing on unity in the workplace, legal compliance, branding, business opportunities, recruitment, and retention. From local businesses to international conglomerates, companies are tackling the difficult questions surrounding developing and implementing a best-in-class DEI program. Cutting-edge initiatives include analyzing important diversity metrics, and avoiding the legal issues posed by existing laws.

The above discussion is intended to be a springboard for ongoing discussion in implementing and/or strengthening an employer's DEI initiatives. Any such discussion should include a broad range of issues including diversity metrics, EEO, pay equity, workplace privacy, labor management relations, government contractor obligations, where applicable, and international employment issues for global operations, to name a few. Employers also will need to closely monitor legislative developments at both the state and federal level (and internationally, as applicable) in this rapidly emerging area of the law.[58]

58 *See e.g.*, Barry Hartstein, Jennifer Jones and Paul Newendyke, *Illinois Equal Pay Certificate Requirements Amended*, Littler Insight (Aug. 24, 2021). Between March 24, 2022 and March 23, 2024, Illinois employers will need to "submit an application to obtain an equal pay registration certificate" and certify "that the average compensation for its female and minority employees is not consistently below the average compensation…for its male and non-minority employees within each of the major job categories . . . taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, or other mitigating factors." Recent amendments added "education or training, job location, [and] use of a collective bargaining agreement."

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

In what seems to be the new practice going forward, the EEOC issued two separate reports providing financial and performance metrics for FY 2021.[59] On November 16, 2021, the Commission published its Agency Financial Report (FY 2021 AFR).[60] On March 28, 2022, the EEOC issued its FY 2021 Annual Performance Report (FY 2021 APR).[61] According to the EEOC's records, the Commission received 61,331 private-sector charges during this past fiscal year.[62] This figure represents a 9.07% decrease from the number of charges filed in FY 2020. The EEOC reports that of these filings, 3,631 charges alleged discrimination related to COVID-19.[63] The Commission also states that in FY 2021, it initiated three Commissioner charges in which the charges alleged several issues, including (1) failure to hire based on disability; (2) constructive discharge based on disability; (3) discharge based on disability; and (4) failure to accommodate disability.[64]

As shown by the following chart, the number of charges filed in FY 2021 continues to represent a downward trend in the number of overall private-sector charges filed with the Commission.

Fiscal Year	Number of Charges	% Increase/Decrease
2007	82,792	--
2008	95,402	+15.23%
2009	93,277	-2.23%
2010	99,922	+7.12%
2011	99,947	+0.03%
2012	99,412	-0.54%
2013	93,727	-5.72%
2014	88,778	-5.28%
2015	89,385	+1.01%
2016	91,503	+2.37%
2017	84,254	-7.92%
2018	76,418	-9.30%
2019	72,675	-4.90%
2020	67,448	-7.19%
2021	61,331	-9.07%

In addition, the EEOC indicates the merit factor rate of these charges increased from 17.4% to 19.2% from FY 2020 to FY 2021.[65] The agency further highlighted the percentage of post-investigation charge resolutions in which the EEOC was able to obtain some form of targeted, equitable relief.[66] The EEOC reported that out of 834 resolutions, 781(93.6%) included targeted, equitable relief.[67] With the EEOC's goal for FY 2022 increasing to 86-88%[68] of resolutions containing targeted, equitable relief, it is very likely that the EEOC will continue its strenuous efforts to pursue these remedies for any charges where the EEOC finds merit and seeks a resolution.[69] Comparatively, Fair Employment Practices Agencies (FEPAs) reported 5,085 merit resolutions, but in contrast to the

59 Prior to FY 2019, the EEOC issued one Performance and Accountability Report (PAR) in late fall.
60 EEOC, Fiscal Year 2021 Agency Financial Report, *available at* https://www.eeoc.gov/sites/default/files/2021-11/2021-AFR.pdf
61 EEOC, Fiscal Year 2021 Annual Performance Report, *available at* https://www.eeoc.gov/2021-annual-performance-report-apr.
62 FY 2021 APR, p. 28.
63 *Id.*
64 FY 2021 APR, p. 59. Moreover, the agency also reported that it initiated 43 directed investigations, which primarily targeted issues of age discrimination in advertising, hiring, promotion, discharge, terms and conditions of employment, waivers and benefits. *Id.*
65 *Id.* The EEOC has defined "Merit Resolutions" as charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations. *See* https://www.eeoc.gov/eeoc/statistics/enforcement/definitions.cfm.
66 FY 2021 APR, p. 15. Targeted, equitable relief is defined as "any non-monetary and non-generic relief (other than the posting of notices in the workplace about the case and its resolution), which explicitly addresses the discriminatory employment practices at issue in the case and either provides remedies to the aggrieved individuals or prevents similar violations in the future. Such relief may include customized training for supervisors and employees, development of policies and practices to deter future discrimination, and external monitoring of employer actions, as appropriate." *Id.*
67 *Id.*
68 For FY 2021, the performance measure was 85%-87%. *See* FY 2011 APR, p. 15.
69 *See* FY 2021 AFR, p. 14.

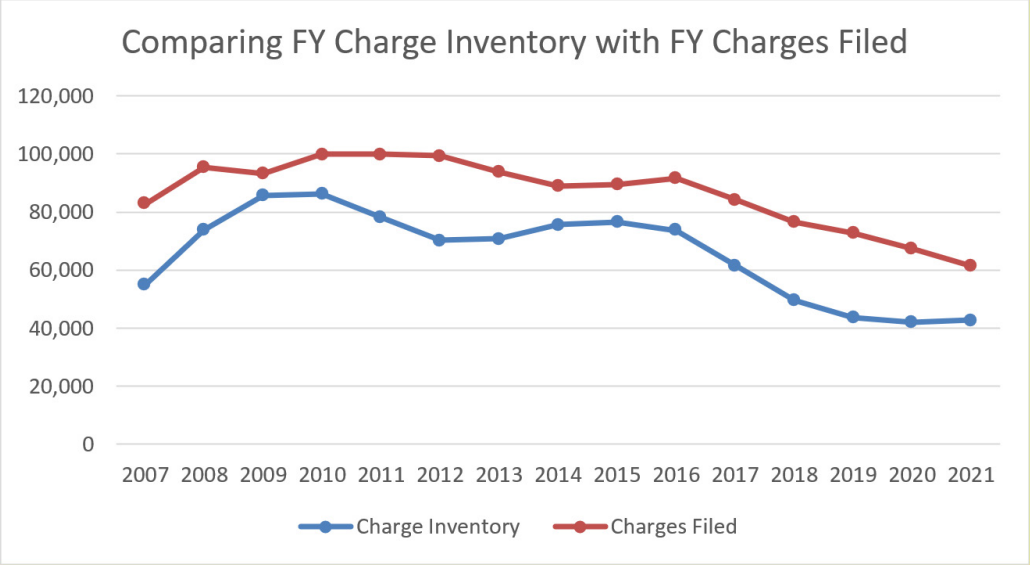
EEOC, only 20.9% or 1,064 of those resolutions involved targeted, equitable relief.[70] This represents only a 0.2% increase in FEPA merit resolutions over FY 2020.

The agency reports in its FY 2021 AFR that it secured over $484 million for victims of discrimination in the private sector and local governments.[71] In contrast, however, that number inexplicably rose to "more than $485 million" in the EEOC's FY 2021 APR.[72] In both documents, the underlying figures comprising these totals are the same: (1) "approximately $350.7 million for 11,067 victims of employment discrimination in the private sector and state and local government workplaces through mediation, conciliation, and settlements"; (2) "nearly $34 million for 1,920 individuals as a direct result of litigation resolutions"; and (3) "more than $100 million for 2,169 federal employees and applicants."[73] Nevertheless, these figures represent a significant drop from the prior fiscal year, during which the EEOC reportedly secured a total of $535.4 million in monetary recovery, $333.2 of which was obtained through mediation, conciliation, and settlements, and $106 million through litigation.[74]

With respect to the backlog of charges, after a five-year streak of decreasing charge inventory, the EEOC saw a slight uptick in FY 2021. According to the FY 2021 AFR, at the end of the fiscal year there were 42,811 pending charges, a 2% increase over the prior year's backlog.

Fiscal Year	Charge Inventory	% Increase/Decrease
2007	54,970	--
2008	73,951	+34.53%
2009	85,768	+15.98%
2010	86,338	+0.66%
2011	78,136	-9.50%
2012	70,312	-10.01%
2013	70,781	+0.67%
2014	75,658	+6.89
2015	76,408	+0.99%
2016	73,559	-3.73%
2017	61,621	-16.23%
2018	49,607	-19.50%
2019	43,580	-12.15%
2020	41,951	-3.74%
2021	42,811	+2.0%

70 *Id.*
71 FY 2021 AFR, p.10.
72 FY 2021 APR, pp. 4, 32.
73 *Compare* FY 2020 AFR, p. 10 and FY 2021 APR, p. 32.
74 EEOC, Fiscal Year 2020 Annual Performance Report, *available at* https://www.eeoc.gov/fiscal-year-2020-annual-performance-report.



According to the Commission, managing its charge inventory included fielding more than 383,500 calls from the public through the agency's contact center. The EEOC also reportedly handled over 52,000 emails, which represents an increase of nearly 40% over the prior fiscal year.[75] With that said, the agency has taken steps to address the increased demand for public contact and the increasing charge backlog by hiring more than 450 employees for positions in FY 2021.[76] The majority of the 450 new hires are front-line staff (*i.e.*, investigators, investigative support assistants, mediators, and attorneys), who will "better position the agency to provide quality service to the public and ensure timely and appropriate resolution of discrimination charges."[77]

The Commission touted a number of outreach efforts conducted in the past fiscal year. Specifically, the EEOC avers it conducted "more than 2,325 outreach events and providing more than 254,830 individuals nationwide with information about employment discrimination and their rights and responsibilities."[78] Such efforts included:

- Addressing the intersection of COVID-19 and federal employment discrimination laws, including conducting 313 outreach events related to COVID-19.
- Holding the Commission's first-ever, all virtual public hearing by videoconference to explore the workplace civil rights implications of the COVID-19 pandemic.
- Conducting listening sessions, trainings, and meetings on the rights of LGBTQ+ individuals to be free from employment discrimination, including hosting 186 outreach events related to LGBTQ+ matters.[79]

With respect to staffing, the EEOC had 1,927 FTEs at the end of FY 2021, representing a slight (.62%) decrease in headcount.[80] Given the EEOC's aforementioned hiring efforts with respect to increasing the number of predominantly front-line staff by 450 individuals, it appears that the agency has proactively taken steps to avoid the "Great Resignation,"[81] as experienced throughout many areas of the private sector. Indeed, according to the U.S. Bureau of Labor Statistics, the EEOC's .62% decrease in headcount for FY 2021 was better than the federal government as a whole (0.9%) at that time.[82]

75 FY 2021 AFR, p. 11.
76 Id at p. 18; *See also* FY 2021 APR, p. 27.
77 FY 2021 APR, p. 27.
78 FY 2021 AFR, p. 11
79 *Id.*
80 *Id.*, p. 29.
81 Kim Parker and Juliana Menasce Horowitz, *Majority of workers who quit a job in 2021 cite low pay, no opportunities for advancement, feeling disrespected*, Pew Research Center (Mar. 9, 2022); Ian Cook, *Who Is Driving the Great Resignation?*, Harv. Bus. Rev. (Sept. 15, 2021).
82 U.S. Bureau of Labor Statistics, Table 4. Quits levels and rates by industry and region, seasonally adjusted, *available at* https://www.bls.gov/news.release/jolts.t04.htm (last visited Apr. 2, 2022).

Fiscal Year	Number of FTEs at End of FY	Number of FTE Increase/Decrease	Percentage Increase/Decrease
2007	2,158	---	---
2008	2,176	18	0.83%
2009	2,192	16	0.74%
2010	2,385	193	8.80%
2011	2,505	120	5.03%
2012	2,346	-159	-6.35%
2013	2,147	-199	-8.48%
2014	2,098	-49	-2.28%
2015	2,191	93	4.43%
2016	2,202	11	0.50%
2017	2,082	-120	-5.45%
2018	1,968	-114	-5.48%
2019	2,061	93	4.73%
2020	1,939	-122	-5.92%
2021	1,927	-12	-.62%

Finally, since 2020, the EEOC data modernization team has been developing an Agency Record Center (ARC), an end-to-end charge management solution for the agency's private-sector processes and corresponding FEPA partner processes. The finalized ARC system was deployed on January 18, 2022 to 145 EEOC and FEPA offices. EEOC and FEPA personnel are reportedly undergoing training in preparation for full implementation and use of ARC's charge management system, which the EEOC states has 20 app modules.[83] According to the Office of Inspector General's Semiannual Report to Congress concerning an audit of the EEOC from April 1, 2021 to September 30, 2021, ARC will assist the agency by: (1) "transform[ing] the way the EEOC serves the public by making its charge, complaint, and appeal processes transparent and providing information to its constituents online and on demand"; (2) "streamlin[ing] processes to improve customer service for constituents, including individuals, state and local partners, federal agencies, businesses, and other organizations"; and (3) "improv[ing] productivity by providing agency employees secure access to the tools, data, and documents they require."[84]

B. Systemic Investigations and Litigation

Although most EEOC lawsuits were filed on behalf of individual charging parties, the Commission has continued to demonstrate interest in initiating systemic investigations and litigation. Discrimination is considered "systemic" if it involves a discriminatory pattern, practice or policy that has a broad impact on an industry, company or geographic area. The Commission maintains in its FY 2021 AFR that addressing systemic discrimination "is central to the mission of the EEOC."[85] In FY 2021, the EEOC filed the same number of systemic lawsuits (13) as it did in FY 2020, but given the slightly higher number of lawsuits filed in FY 2021 compared to FY 2020 (116 merits suits versus 93),[86] those lawsuits represented a smaller percentage of overall lawsuits (11.2% of the total in FY 2021 versus 14% in FY 2020).

Year	Merits Case Filings	Systemic Filings	Percentage
2009	281	19	6.8%
2010	250	20	8%
2011	261	23	8.8%
2012	122	10	8.2%
2013	131	21	16%
2014	133	17	12.8%

83 FY 2021 APR, p. 25.

84 U.S. Office of Inspector General's Semiannual Report to the U.S. Congress, *available at* https://oig.eeoc.gov/sites/default/files/semiannuals/FINAL%20DRAFT%20SEMIANNUAL%20REPORT%20%28002%29.pdf (last visited Apr. 2, 2022); *See also* FY 2021 AFR, p. 2.

85 FY 2021 AFR, p. 19.

86 FY 2021 AFR, p. 10. Littler also kept track of EEOC case filings during the course of the fiscal year, but our records indicate the EEOC filed a total of 117 lawsuits.

2015	142	16	11.3%
2016	86	18	20.9%
2017	184	30	16.3%
2018	199	37	18.6%
2019	144	17	11.8%
2020	93	13	14%
2021	116	13	11.2%

Within its 2018-2022 Strategic Plan, the Commission states under "Strategic Objective I" (combat employment discrimination through strategic law enforcement) that one of the Commission's four key strategies includes "us[ing] administrative means and litigation to identify and attack discriminatory policies and other instances of systemic discrimination."[87] To that end, on January 8, 2021, the EEOC launched a new webpage dedicated to systemic enforcement.[88] The stated purpose of the page is "to provide transparency about how the Commission approaches systemic discrimination enforcement efforts."[89] The page describes how the EEOC "determined that systemic enforcement is effective, explains how the EEOC determines what is systemic discrimination, and details the process of initiating and conducting a systemic case."[90]

In its FY 2021 AFR, the EEOC notes that it "renew[s] its attention to tackling systemic employment discrimination in all forms and on all bases, including unlawful harassment."[91] The Commission's systemic enforcement program efforts in FY 2021 resulted in "342 systemic investigations resolved on the merits and more than $24.4 million in monetary benefits obtained."[92]

Fiscal Year	Systemic Lawsuits Filed	Monetary Recovery
2012	12	$36.2 million
2013	21	$40 million
2014	17	$13 million
2015	16	$33.5 million
2016	18	$20.5 million
2017	30	$38.4 million
2018	37	$30 million
2019	17	$22.8 million
2020	13	$69.9 million
2021	13	$24.4 million

As noted, just as in FY 2020, the agency filed the same number of new systemic cases in FY 2021—13 new filings.[93] These systemic suits involved the following types of alleged systemic discrimination: ADA policy claims; hiring claims based on sex; harassment based on sex and pregnancy; race and national origin-based discharge; and age-based layoffs.[94]

At the end of FY 2021, the EEOC had 180 cases on its active district court docket, of which 38 (21.1%) were non-systemic, multiple victim cases and 29 (16.3%) involved challenges to systemic discrimination. Meanwhile, the EEOC had resolved 138 merits lawsuits at the federal district court level, and as a result, recovered approximately $34 million on behalf of 1,920 individuals. These figures represent a fairly sizeable drop off from the agency's FY 2020 numbers with the EEOC closing out 165 merit lawsuits with favorable resolutions, totaling $106 million to be spread across 25,925 individuals. The EEOC states that it "achieved a favorable result" in approximately 96% of all district court resolutions.[95]

87 EEOC, Strategic Plan for Fiscal Years 2018-2022, *available at* https://www.eeoc.gov/eeoc/plan/strategic_plan_18-22.cfm#objective1 (last visited Feb. 6, 2020).
88 EEOC, Press Release, *EEOC Unveils New Webpage Concerning Systemic Enforcement* (Jan. 8, 2021). The page can be found here: https://www.eeoc.gov/systemic-enforcement-eeoc.
89 *Id.*
90 *Id.*
91 FY 2021 AFR, p. 19.
92 *Id.*
93 FY 2021 APR, p. 32.
94 *Id.* at p. 33.
95 *Id.* at p. 32.

Fiscal Year	Number of Total Pending Litigation Cases	Number of Pending Systemic Cases	% of Systemic Cases in Litigation
2012	309	62	20.0%
2013	231	54	23.4%
2014	228	57	25.0%
2015	218	48	22.0%
2016	165	47	28.5%
2017	242	60	24.8%
2018	302	71	23.5%
2019	275	59	21.5%
2020	201	59	29.3%
2021	180	29	16.0%

C. EEOC Litigation Statistics – Type of Lawsuit, Location, and Claims

The EEOC filed 116 "merits" lawsuits in FY 2021 of which 74 suits were filed on behalf of individuals—29 of these "multiple victim lawsuits" were non-systemic class suits (typically involving fewer than 20 individuals) and, as noted, 13 were systemic cases.[96]

Year	Individual Cases	"Multiple Victim" Cases (including systemic cases)	Percentage of Multiple Victim Lawsuits	Total Number of EEOC "Merits"[97] Lawsuits
2005	244	139	36%	381
2006	234	137	36%	371
2007	221	115	34%	336
2008	179	111	38%	270
2009	170	111	39.5%	281
2010	159	92	38%	250
2011	177	84	32%	261
2012	86	36	29%	122
2013	89	42	24%	131
2014	105	28	22%	133
2015	100	42	30%	142
2016	55	31	36%	86
2017	124	60	33%	184
2018	117	82	41%	199
2019	100	44	31%	144
2020	68	25	27%	93
2021	74	42	21.1%	116

In past years, the EEOC filed scores of lawsuits the end of the fiscal year. FY 2020 saw a departure from that trend with the number of lawsuits filed between August 1 and September 30 down 20% from the year prior. This year, however, the EEOC returned to its usual trend when it filed 57 of the 116 merits lawsuits in the last two months of the 2021 fiscal year.

In addition to providing the top states where the EEOC filed lawsuits for FY 2021, the chart below maps out the state trends since 2016 and the number of cases filed in those states.[98]

96 *Id.*

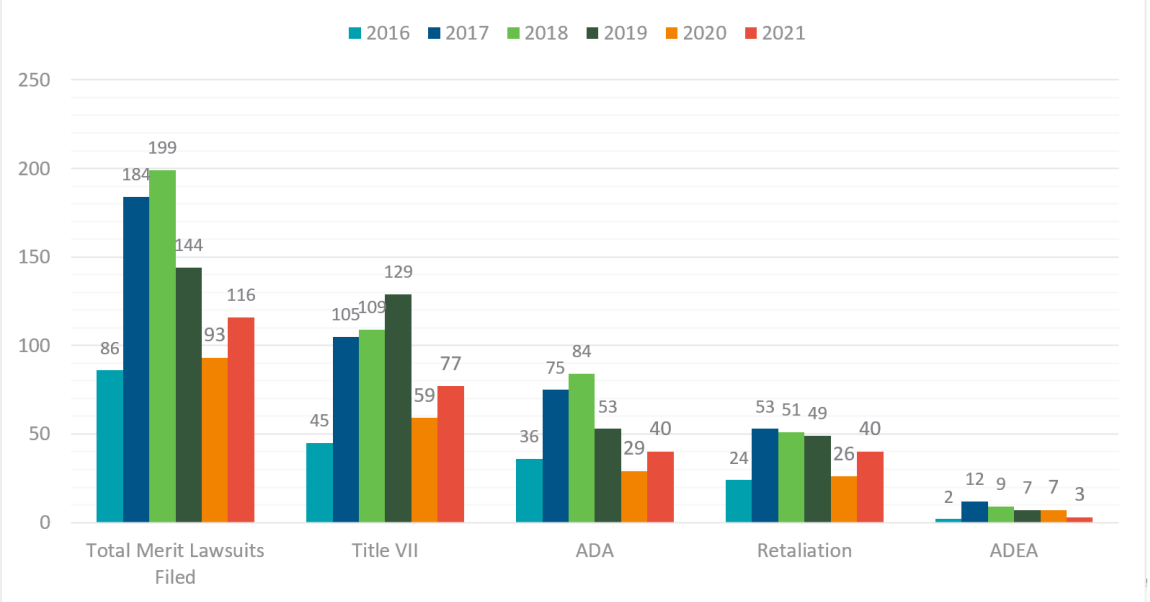
97 *See id.* The EEOC has defined "merits" suits as direct lawsuits or interventions involving alleged violations of the substantive provisions of the statutes enforced by the EEOC as well as enforcement of administrative settlements.

98 Littler monitored the EEOC's court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not currently make publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis.

	2016	2017	2018	2019	2020	2021
1	N. Carolina (11)	California (20)	California (19)	Florida (13)	Texas (11)	Texas (14)
2	Maryland (9)	Maryland (16)	Texas (14)	N. Carolina (11)	Florida (9)	Florida (10)
3	Texas (8)	Texas (16)	Maryland (13)	Texas (10)	California (8)	Illinois (7)
4	Colorado (7)	Illinois (13)	Georgia (13)	Maryland (9)	New York (7)	Georgia (6)
5	California (6)	Georgia (10)	N. Carolina (11)	New York (9)	Georgia (6)	Alabama (6)
6	Illinois (6)	Florida (9)	New York (10)	Georgia (7)	Michigan (6)	Colorado (6)
7	Florida (4)	New York (8)	Florida (9)	Michigan (7)	Arkansas (5)	California (5)
8	Mississippi (4)	Tennessee (7)	Michigan (9)	California (6)	Maryland (5)	New York (5)
9	Nevada (4)	Louisiana 6	Alabama (7)	Minnesota (6)	Ohio (4)	Pennsylvania (5)
10	Alabama (3)	Michigan (6)	Illinois (7)	Louisiana (5)	-	Maryland (5)
11	Arizona (3)	Mississippi (6)	Pennsylvania (7)	Pennsylvania (5)	-	Mississippi (4)
12	Michigan (3)	-	Tennessee (7)	Washington (5)	-	N. Carolina (4)
13	New York (3)	-	Washington (7)	Alabama (4)	-	-
14	-	-	Wisconsin (7)	Colorado (4)	-	-
15	-	-	-	Oklahoma (4)	-	-

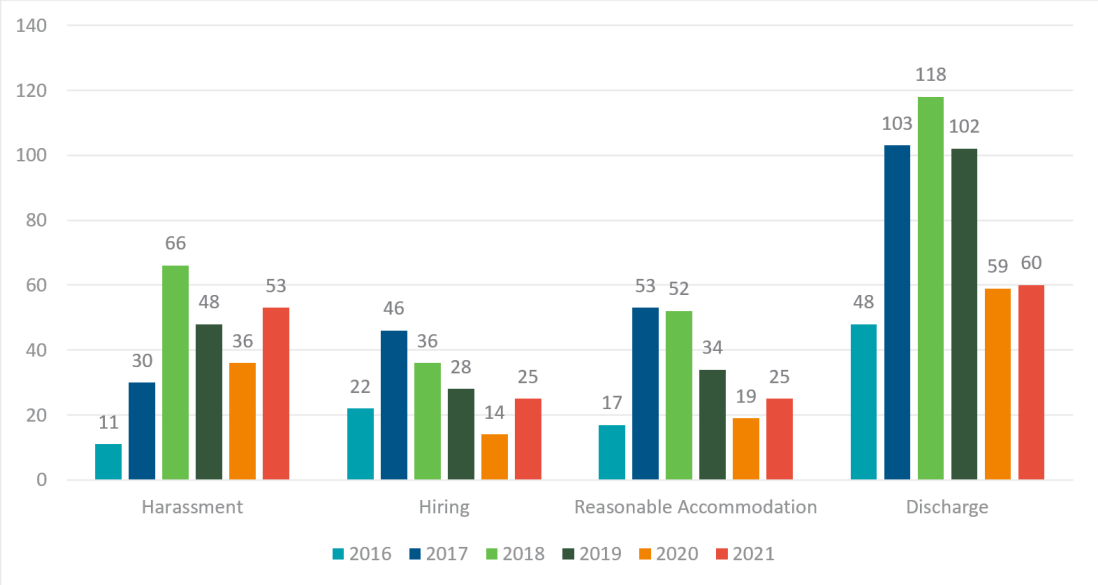
Based on these trends, the states in which the Commission appears to have consistently litigated most heavily include California, Florida, Maryland, New York, and Texas.

The 116 "merits" lawsuits filed in FY 2021 alleged a wide range of bases, including discrimination on the basis of disability (40), sex (48), retaliation (40), race (20), religion (5), national origin (4), and age (3).[99] Common issues raised include discharge (60), harassment (53), reasonable accommodation (25), and hiring (25).[100] The following chart shows a year-over-year comparison for the last five years (FY 2016-2021) for the aforementioned bases of the lawsuits filed by the EEOC.



For the past six years, the EEOC's reports also provided information on the most frequently identified issues that are the subjects of its litigation efforts.[101] Every year, these most frequently identified issues have been the same – they include harassment, hiring, reasonable accommodations, and discharge. The chart below demonstrates the variance by issue for each fiscal year.

99 FY 2021 APR, p. 32.
100 *Id.*
101 *Id.*



D. Increased Focus on Combatting Harassment

As noted, the Commission has renewed its attention to tackling systemic employment discrimination in all forms and on all bases, including unlawful harassment.[102] With respect to litigating harassment claims, the EEOC's FY 2021 APR further demonstrates its intent to address this issue in the private sector. The report states:

> Combatting all forms of workplace harassment also remains an important priority of the agency. In fiscal year 2021, the EEOC filed 53 lawsuits challenging workplace harassment: 34 cases raised claims of hostile work environment based on sex, 19 based on race, 5 based on national origin, 2 based on disability, 1 based on religion, and 1 based on age. Twenty-three harassment suits were individual cases, 25 were class cases, and 5 were systemic cases. In all, just over 45.6% of all lawsuits filed by the agency included an allegation of harassment. The EEOC successfully resolved 51 harassment suits in fiscal year 2021. Eight of these resolutions involved allegations of systemic harassment. The EEOC recovered over $19 million for 895 individuals subjected to harassment through its litigation program.[103]

E. Increased Focus on Advancing Racial Justice

In addition to combatting workplace harassment, other areas the Commission targeted its efforts in FY 2021 included advancing racial justice through several initiatives[104] as well as educating the public about the rise in violence, harassment, and bias against members of the Asian American and Pacific Islander communities during the COVID-19 pandemic.[105] According to the EEOC, over the past five fiscal years, "approximately a third of all charges filed with the agency have alleged some form of racial discrimination."[106]

With respect to the EEOC's racial justice and equity initiatives, the Commission indicates that it successfully resolved 21 lawsuits that had allegations of race or national origin discrimination. The agency touts the fact that it was able to obtain approximately $15 million in monetary relief from these resolutions. Race was also the predominant protected category that appears in its systemic litigation filings. Indeed, nine (9) of the 13 systemic cases alleged race claims, while seven (7) involved race-based harassment, one

102 FY 2021 AFR, p. 19.
103 FY 2021 APR, p. 34.
104 *Id.* at pp. 33-34.
105 *Id.* at pp. 11, 30, 39-41.
106 *Id.*, p. 20.

(1) pertained to disparate pay based on race, and one (1) involved an English-only rule. Fourteen individual "merits" cases alleged race or national origin discrimination.

F. Mediation Efforts

In its FY 2021 AFR, the EEOC notes that it achieved 6,644 successful mediations in resulting in $176.6 million in monetary benefits for complainants through its mediation program.[107] Due to the pandemic, the EEOC's mediation program has conducted only telephone and video mediations since March 2020. During the past fiscal year, the EEOC expanded its Mediation Survey Modernization Project to include EEOC mediators as well as mediation participants.[108]

G. Significant EEOC Settlements and Monetary Recovery

During FY 2021, the EEOC secured approximately $350.7 million for parties in private sector and state and local government workplaces through mediation, conciliation, and settlements. The EEOC's efforts in conciliation and pre-determination settlement alone resulted in $39.7 million for claimants during this period.[109] According to the EEOC, it successfully resolved 41.1% of conciliations, a slight decrease from the 43.6% resolution rate in FY 2020.[110] During the past fiscal year, the EEOC entered into at least 11 consent decrees and 3 conciliation agreements for at least $500,000. Eight of these settlements exceeded $1 million.

In most of these high-dollar settlement cases, the EEOC alleged that the employer engaged in a pattern or practice of discrimination. In one decade-long lawsuit, the EEOC claimed the employer systematically discriminated against Somali Muslim employees by, among other things, denying them prayer breaks. The parties entered into a $5.5 million consent decree, whereby the employer agreed, among other changes, to make impacted class members eligible for rehire, and to employ translators for trainings, disciplinary discussions, and other meetings involving requests for religious accommodation or complaints of discrimination.

In a separate pattern-or-practice case alleging failure to hire or promote women, the employer agreed under a five-year consent decree to pay $5 million in relief to the affected class members who were not hired, and $75,000 to the group of women who were not promoted. The company also agreed to create a new position—Vice President of Diversity—to ensure hiring decisions are made without regard to sex, and to oversee the company's compliance efforts. Hiring preferences are also given to qualified class members, while the company also agreed to a provision guaranteeing it would not rehire two former employees implicated in the complaint.

A notable $3.525 million conciliation agreement was entered into after the EEOC alleged a national placement agency engaged in systemic age, race, and sex discrimination in the hiring and placement of individuals assigned to its clients. Half of the settlement will go to the impacted class members, while the other half will be donated to organizations that support education, reskilling, and employment opportunities for under-served communities.

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

H. Appellate Cases

Over the past few years, the EEOC has filed fewer notices of appeal in federal circuit courts of appeals but continues to actively participate as *amicus curiae* in private lawsuits. During FY 2021, the EEOC filed no new appeals in federal court, but filed briefs as *amicus curiae* in at least 23 appellate cases.[111] According to the FY 2021 APR, the EEOC secured over $10.9 million in monetary relief ordered in EEOC federal appellate decisions.[112] Two notable appellate decisions are discussed below.

1. Notable Win for the EEOC

In *EEOC v. West Meade Place, LLP*, the Sixth Circuit reversed summary judgment for the employer on a disability discrimination claim based on an alleged wrongful termination.[113] Under the ADA, it is unlawful to terminate an employee either because the

107 FY 2021 APR, p. 10.
108 *Id.*, p. 7.
109 *Id.*, p. 37.
110 *Id.*
111 EEOC appellate and amicus briefs can be searched on the EEOC's webpage, *available at* https://www1.eeoc.gov/eeoc/litigation/briefs.cfm.
112 FY 2021 APR, p. 29.
113 841 Fed. Appx. 962 (6th Cir. 2021).

employee is disabled, has a record of being disabled, or is regarded by the employee as being disabled. This case hinged on the showing required to establish the employer regards an employee as being disabled.

The employee performed her work as a laundry assistant for a Tennessee healthcare facility with no accommodations for several months until interactions with coworkers caused a flare-up of her longstanding anxiety disorder. Because she had not worked for the employer for at least 12 months, her request for FMLA leave was denied and the employer explained any leave would need to be unpaid. Believing herself unable to afford an unpaid leave, the employee quickly submitted documentation allowing her immediate return to work without restrictions. The healthcare facility believed the return-to-work paperwork fraudulent and argued it terminated the employee's employment on that basis.

The Sixth Circuit disagreed with the district court that the ADA required any showing the employee was disabled so long as there was a triable issue of material fact whether the employer regarded the employee as disabled. The termination documentation was less than clear as to the reason for termination (the manager testified she did not want to harm the employee's ability to obtain unemployment compensation benefits by listing fraud as the termination reason and some of the paperwork had been lost) and, therefore, the court found a triable issue of disputed material fact whether the employer believed the employee was disabled and terminated her employment on that basis.

2. Notable Win for Employers

Affirming summary judgment in favor of a large retailer, the Seventh Circuit held that, under the United States Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*,[114] the employer did not violate Title VII when it rescinded an assistant manager job offer because accommodating the employee's religious objection to working on the Sabbath would impose more than a *de minimis* ("slight burden") on the retailer. Accommodating the employee's religious objections meant that other managers would need to work additional weekends, the store would be understaffed, or the retailer would need to hire an additional manager. The latter two accommodations posed more than a slight burden and the solution of requiring the other managers to take on additional weekend shifts would displace the burden from the employer to the employees, which Title VII does not require. The Seventh Circuit did not address the issue of whether the retailer was required to search for and make available other positions because the retailer established the employee was offered an hourly assistant manager position and chose not to pursue it.

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

114 432 U.S. 63, 84 (1977).

III. EEOC AGENCY AND REGULATORY-RELATED DEVELOPMENTS

A. EEOC Leadership

As we enter the second full year of the Biden administration, the composition of the five-member Commission remains unchanged. Currently, the Commission is chaired by Democratic Commissioner Charlotte A. Burrows, whose term expires in July 2023. Jocelyn Samuels, also a Democrat, serves as vice chair; on July 24, 2021, she was confirmed for a second term which will expire in July 2026. The remaining three commissioners are Republican former Chair Janet Dhillon, whose term expires in July of this year (she may continue in that position until the end of the year, conceivably, if President Biden's nomination of Kalpana Kotagal[115] to replace her is still pending); Commissioner Keith Sonderling, whose term expires in July 2024; and Commissioner Andrea R. Lucas, whose term expires in July 2025.

The general counsel's position has remained unfilled since former General Counsel Sharon Fast Gustafson was removed from the position by the White House in March 2021; career Associate General Counsel Gwendolyn Reams served as acting general counsel from March 2021 until her term in that position expired on December 30, 2021. Deputy General Counsel Christopher Lage now oversees operation of the Office of General Counsel, and in the absence of a designated acting officer, any authority vested solely within the general counsel may be exercised by the chair.

The chair of the Commission exercises significant control over the administration and operations of the agency and its 53 offices around the country. The vast majority of day-to-day operations of the Commission and its field staff largely proceed apace, irrespective of which party holds the chair. The chair also has broad discretion in setting the Commission's agenda—what items the agency will consider and vote upon, and which it will not, as well as scheduling meetings of the Commission to examine issues or vote on disputed matters (the agency has held a number of telephonic public meetings throughout the course of the COVID-19 pandemic). Significant policy changes, however, require the approval of the full Commission. Chair Burrows has not had a Democratic majority on the Commission since assuming her position. As a practical matter, this means that the agency has been limited in its ability to revisit polices from the prior administration, or to move forward on substantive policies in line with the Biden administration's agenda. When the Commission has a Democratic majority (conceivably as early as July of this year), we expect the agency to begin to move aggressively on new policy priorities of the chair and the administration more broadly. As of this writing, the White House has not submitted to the Senate a nomination for the general counsel's position (nor has it submitted any nominee to succeed Commissioner Dhillon upon the expiration of her term).

B. Delegation of Litigation Authority

One important policy that remains in effect (at least until a Democratic-controlled Commission repeals or modifies it) is the limitation adopted in January 2021 on the general counsel's authority to file suit without the approval of the Commission. The delegation of authority now provides that the full Commission must vote to approve all:

- cases involving an allegation of systemic discrimination or a pattern or practice of discrimination;
- cases expected to involve a major expenditure of agency resources, including staffing and staff time, or expenses associated with extensive discovery or expert witnesses;
- cases presenting issues on which the Commission has taken a position contrary to precedent in the circuit in which the case will be filed;
- cases presenting issues on which the *g*eneral counsel proposes to take a position contrary to precedent in the circuit in which the case will be filed;
- other cases reasonably believed to be appropriate for Commission approval in the judgment of the *g*eneral counsel, including but not limited to, cases that implicate areas of the law that are not settled and cases that are likely to generate public controversy; and
- all recommendations in favor of Commission participation as *amicus curiae*.

115 On April 5, 2022, the White House announced the nomination of Kalpana Kotagal to be a member of the Equal Employment Opportunity Commission for a term expiring July 1, 2027. *See* The White House, *Nominations Sent to the Senate* (Apr. 5, 2022). Ms. Kotagal is a partner in a Washington, D.C. law firm, where she is a member of the firm's Civil Rights & Employment Practice. According to the firm's *website*, "A highly-acclaimed employment and civil rights plaintiffs' litigator, Ms. Kotagal represents women and other disenfranchised people in employment and civil rights class actions, involving often cutting-edge issues related to the Title VII, Equal Pay Act, the Americans with Disabilities Act, Family Medical Leave Act, as well as wage and hour issues."

Perhaps more notable, even where cases do not fall within the above criteria, the revised delegation provides that before filing any case, the general counsel must circulate it to all commissioners for a period of five business days. If during that period a majority of the commissioners notifies the general counsel and the other commissioners that the case should be submitted to the Commission for a vote, the litigation may not be filed without approval of the majority of the Commission. This means, as a practical matter, that any bloc of three commissioners can effectively "veto" the filing of a case (first by requiring that it be presented for a Commission vote, then by voting to disapprove the recommendation to file suit).

Employers facing potential litigation by the EEOC (*e.g.*, after a failed conciliation) should consult with counsel to determine if these new procedures may provide an opportunity to avert litigation. Commission votes on litigation (and other matters that come before the Commission for consideration) are made publicly available on the agency's website.[116]

In at least one case, an employer challenged the EEOC's authority to institute civil litigation without it having been formally approved by the Commission. In *EEOC v. Route 22 Sports Bar*,[117] the employer argued that the EEOC was required to obtain approval from its commissioners prior to filing complaints alleging systemic discrimination (there was no evidence that the Commission had actually voted to approve the filing of the lawsuit). The court rejected this argument, finding that the Commission's decision to bring litigation was within its discretion and not reviewable by the court, and that the agency's internal litigation procedures did not create a substantive basis on which defendants could challenge the suit. While the case ultimately settled, it will be interesting to see if courts going forward adopt similar analyses, or if there is room for employers to challenge litigation where the Commission may not have adhered to its own internal requirements.

C. Conciliation Procedures

Where the Commission has been unable to act on prior administration policy, Congress has stepped in to fill the void. One notable example was the Commission's final regulations updating its conciliation procedures issued at the end of the Trump administration (by way of background, "conciliation" refers to the statutory requirement that, after the EEOC has found reasonable cause to believe discrimination occurs, the agency must "endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" prior to filing suit).[118] The regulations were designed to ensure that employers were provided a minimum amount of baseline information regarding the Commission's findings and proposed conciliation offer so as to meaningfully be able to assess and respond to the Commission's proposal, and were widely well-received by employers. With Democratic control of both chambers of Congress, these regulations were repealed pursuant to the Congressional Review Act in June of 2021. Having been repealed in this fashion, the Commission is prohibited from adopting "substantially similar" regulations without explicit congressional approval. That said, it seems unlikely that a Democratic administration would seek to regulate conciliation in any manner more favorable to employers.

D. COVID-19

COVID-19 Technical Assistance. EEOC has, throughout the pandemic, maintained updated guidance as to employers' and employees' rights and responsibilities with respect to the pandemic and federal civil rights laws prohibiting discrimination on the basis of disability, religion, genetic information, and pregnancy.[119] Last spring, the agency updated its FAQs regarding vaccinations, making clear that an employer's merely asking for proof of vaccination is not a "medical examination" and does not implicate ADA concerns (employers should be aware, however, that asking why an employee is not vaccinated—or engaging in pre-vaccination questions where the employer or a third party with whom it contracts is vaccinating workers—likely do implicate the ADA insofar as they are questions that are likely to elicit information about a disability). In October 2021, it provided additional guidance regarding the rights of employees requesting accommodation of sincerely held religious beliefs or practices with respect to COVID vaccination requirements, and in November 2021, updated its FAQs to clarify the circumstances under which an employee's COVID-related activity (such as requesting an accommodation) may be protected under statutory non-retaliation provisions.

In December of last year, the agency provided guidance on whether and when COVID-19 may constitute a protected disability under the ADA. It explained that where an employee has an asymptomatic case of COVID, or where an individual experiences only mild symptoms (congestion, fever, headaches that resolve within weeks), that will generally *not* be perceived as a disability under the ADA. In contrast, significant symptoms such as respiratory disorders or heart palpitations that last for several months likely

116 U.S. EEOC, Commission Votes, *https://www.eeoc.gov/commission-votes*.
117 2021 U.S. Dist. Lexis 115532 (N.D.W.V. June 22, 2021).
118 EEOC, *Update of Commission's Conciliation Procedures*, 86 Fed. Reg. 2974-2986 (Jan. 14, 2021).
119 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, last updated March 14, 2021.*

indicate a protected disability under the statute. The EEOC also indicated that "long COVID"—a condition where symptoms such as intestinal pain, vomiting, or nausea linger for many months—may well be a covered "disability" under the law.

Finally, on March 14, 2022, the EEOC issued a technical assistance document providing guidance on COVID-19 pandemic and caregiver discrimination under federal employment discrimination laws.[120] The EEOC also updated its COVID-related FAQs to include a discussion of discrimination against employees and job seekers with family caregiving responsibilities.[121]

Litigation. On the litigation front, in September 2021, in the context of COVID, the EEOC brought its first case alleging that an employer violated the ADA by failing to accommodate an employee by allowing her to continue to work remotely. The agency brought suit in the Northern District of Georgia, alleging that the employer terminated the employment of a health and safety manager who requested to work remotely.[122] By way of background, from March through June 2020, the company required all employees to telework four days a week. In June 2020, when the company re-opened its worksite, the employee requested that, because of an underlying pulmonary condition that made breathing difficult and placed her at heightened risk of COVID-19, she be allowed to continue to work remotely two days each week, and take breaks when working onsite. EEOC's complaint alleges that while other employees were permitted to work from home, this manager's request was denied, and her employment was terminated shortly thereafter. The case is currently pending in the district court.

The issue of remote work clearly is one the EEOC is continuing to revisit, as shown by a pre-COVID claim filed on behalf of an individual charging party who suffered from anxiety and depression and was denied requested remote work. The EEOC filed a lawsuit on behalf of the charging party against the employer in the District of Maryland on August 20, 2020.[123] Therein, the employee who worked as a sales administrator had job duties that included using a computer to research new projects, reviewing online applications for employment, and conducting telephone interviews of job applicants. The employee requested to telework one day a week for three to four weeks, which was denied, despite the claim that it was possible for her to complete her duties remotely. Other employees also allegedly were allowed to work remotely. The charging party's employment was thereafter terminated. While the lawsuit was based on an individual claim, the consent decree, which included broad-based injunctive relief, included a finding that the "(d)efendant…and all others acting on its behalf….are enjoined from refusing to allow qualified individuals with disabilities from teleworking when telework is a reasonable accommodation for the employer\e's disability."[124]

While it is too early to tell how far EEOC will push the envelope with respect to employees requesting telework as a reasonable accommodation in light of COVID-19 (and each case will turn on its own facts), employers should be aware that the agency has started down this road. While courts came to differing conclusions as to whether "physical attendance" was an essential requirement of some jobs prior to the pandemic, it is likely that they will be more sympathetic to employee requests for remote work, particularly where they and others were able to telework successfully during the pandemic.

Relatedly, the agency has also brought lawsuits alleging ADA violations where an employee with asthma was not permitted to wear a mask at work, and harassed for doing so, and where employees with disabilities were not permitted to return to work until a COVID-19 vaccine was developed, notwithstanding that they were ready and willing to work.[125] We have not yet seen the EEOC file a case alleging discrimination in violation of Title VII for an employer's failure to grant a COVID-related accommodation to an employee's sincerely held religious belief or practice—but we can report that employees are filing charges,[126] and we can expect that at some point in the near future, the agency will bring suit (perhaps shedding some light on how it views "sincerely held religious objections" to COVID-19 vaccination, testing, and masking, and/or what it views as "unreasonable hardship" for employers asked to accommodate these requests.

Civil Rights Impact of COVID-19. Although it is hoped the instances of infection will continue to decline, the impact of the pandemic on civil rights in the workplace will likely linger. To that end, the EEOC in its FY 2023 Congressional Budget Justification describes various initiatives launched in FY 2021 it plans to continue, one of which addressing the civil rights impact COVID-19 has had on individuals. According to the agency, the pandemic "has proved to be a civil rights crisis in addition to a public health crisis and economic crisis. COVID-19 and its economic fallout have disproportionately impacted people of color, women, older workers, individuals with disabilities, and other vulnerable workers."[127] The agency held a virtual public hearing on this topic

120 EEOC, *The COVID-19 Pandemic and Caregiver Discrimination Under Federal Employment Discrimination Laws*, EEOC-NVTA-2022-1 (Mar. 14, 2022).
121 EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, last updated March 14, 2022.
122 EEOC, Press Release, *EEOC Sues ISS Facility Services for Disability Discrimination (Sept. 7, 2021).*
123 *See EEOC v. Design & Integration, Inc.* Case No. 1:20-cv-02350 (D. Md., Baltimore Division) (Filed: Aug. 14, 2020).
124 *Id.*, Docket No. 13 (Filed: Apr. 22, 2021).
125 *See* EEOC, Press Release, *EEOC Files Disability Lawsuits in El Paso and Ft. Worth Based on COVID Related Discrimination* (Sept. 24, 2021).
126 *See COVID-19 Labor & Employment Litigation Tracker*, Littler Insight (updated weekly).
127 *FY 2023 EEOC Congressional Budget Justification*, (FY 2023 Budget) p. 3.

on April 28, 2021, and will continue to "provide numerous resources to assist employers and employees as they grapple with pandemic-related issues."[128]

E. New Agency Priorities

Particularly as the COVID-19 pandemic shows signs of beginning to recede, and as the agency contemplates a Democratic majority, we expect activity around a number of items the new chair and administration have articulated as priorities.

Racial Justice and Systemic Discrimination. As discussed in Part II of this Report,[129] the EEOC has renewed its attention to tackling systemic employment discrimination in all forms and on all bases, including race discrimination. According to the Commission, over the past five fiscal years, "nearly a third of all charges filed with the agency have alleged some form of racial discrimination. The focus on systemic discrimination while also investigating individual charges will help address the long-standing problem of discrimination based on race more effectively than a focus on individual charges alone."[130]

As to advancing racial justice and equity initiatives, the Commission indicates that it successfully resolved 21 lawsuits that had allegations of race or national origin discrimination in FY 2021. The Commission obtained approximately $15 million in monetary relief from these resolutions. Race was also the predominant protected category that appears in its systemic litigation filings—9 of the 13 systemic case filings alleged race discrimination.[131]

The EEOC also conducted 261 outreach sessions that focused specifically on issues relating to race.[132] In particular, the Commission noted in several places in both its FY 2021 AFR and FY 2021 APR that it has made concerted efforts to respond to the spike in violence and harassment against the Asian American and Pacific Islander (AAPI) communities during the COVID-19 pandemic.[133] Specifically, in March 2021, the agency unanimously approved a resolution condemning the violence against AAPIs.[134] The Commission also noted its collaboration with the Federal COVID-19 and Civil Rights Interagency Work Group hosted by the Department of Justice, the White House Initiative on Asian Americans, Native Hawaiians, and Pacific Islanders (WHIAANHPI), and the White House Office of Public Engagement in response to the rise in hate crimes and incidents against AAPIs around the nation.

As noted in its FY 2023 Budget Justification, addressing these issues will continue to be an agency focus.

Strengthening the Agency. The Commission intends to make it a priority to "rebuild and strengthen the agency."[135] As noted in Part II of this Annual Report,[136] the Commission increased its headcount by approximately 450 new hires in FY 2021, most of whom are front-line staff (investigators, mediators, attorneys, and administrative staff). Chair Burrows stated, "[t]he addition of these new employees in mission-critical positions is a down payment on what I hope will be a long-term investment to ensure that the EEOC has resources commensurate with its task."[137]

Pay Equity. Narrowing the pay gap continues to be a key priority. In its Budget Justification, the EEOC claimed it would "continue to use all of the tools at its disposal, including outreach and education, enforcement and, where necessary, litigation to address pay discrimination and unjustified wage gaps."[138]

Compensation data collection appears to be one way in which the EEOC intends to help advance pay equity and combat pay discrimination. During the Obama administration, the EEOC revised its Form EEO-1 to require employers to report detailed information about employee compensation and hours worked, broken out by race, ethnicity, and gender. The Trump administration discontinued this collection (although a federal court ultimately found the suspension of the collection unlawful and ordered the agency to collect two years of pay data). A National Academy of Sciences panel is currently evaluating the compensation data collected by the EEOC to determine its utility, and potentially make recommendations regarding future data collection. We predict it is likely that the Biden EEOC will attempt again to require employers to submit employee compensation data to the agency; whether the collection mirrors what was previously done, or adopts a different approach, remains to be seen. Again, this policy is unlikely to be implemented so long as Republicans hold a majority of seats on the Commission.

128 *Id.*, pp. 3-4.
129 Annual Report, Part II (E).
130 FY 2023 Budget, p. 3.
131 FY 2021 APR, p. 10.
132 *Id.* at 10-11, 33-34
133 FY 2021 AFR, p. 21, 23-24; FY 2021 APR, pp. 11, 30, 39-41.
134 Available at *https://www.eeoc.gov/resolution-us-equal-employment-opportunity-commission-condemning-violence-harassment-and-bias* (last visited Apr. 2, 2022).
135 FY 2023 Budget, p. 4.
136 Annual Report, Part II (A).
137 FY 2023 Budget, p. 4.
138 *Id.*, p. 3.

The EEOC had previously suspended collection of EEO-1 data in 2020, in light of the pandemic; in 2021, it collected compensation data for calendar years 2019 and 2020. We expect normal EEO-1 reporting for 2021 to occur later in this year.

Hiring Initiative to Reimagine Equity (HIRE). A joint effort with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), the Hiring Initiative to Reimagine Equity (HIRE) remains a Commission priority for the coming year. HIRE is a multi-year collaboration between the two agencies that will: (1) host a series of roundtables, meetings, and public forums on promoting organizational policies and practices that enhance diversity, equity, inclusion, and accessibility as well as reimagine equity and expand opportunities in hiring; (2) identify strategies to remove unnecessary hiring barriers as well as promote effective, job-related hiring and recruitment practices to cultivate diverse pools of qualified applicants; (3) promote equity in the use of technology-based hiring systems; and (4) develop resources to promote adoption of innovative and evidence-based, recruiting and hiring practices that advance equity.[139] This initiative will likely dovetail with the EEOC's focus on AI in hiring and decision-making, discussed below.

Artificial Intelligence in Employment Decision-Making. In October 2021, the EEOC launched an initiative relating to the use of artificial intelligence (AI) in employment decision-making.[140] As stated by the EEOC, the initiative is intended to examine how technology impacts the way employment decisions are made, and give applicants, employees, employers, and technology vendors guidance to ensure that these technologies are used lawfully under federal equal employment opportunity laws. In its rollout of the initiative, the EEOC indicated that the agency plans to:

- Establish an internal working group to coordinate the agency's work on the initiative;
- Launch a series of listening sessions with key stakeholders about algorithmic tools and their employment ramifications;
- Gather information about the adoption, design, and impact of hiring and other employment-related technologies;
- Identify promising practices; and
- Issue technical assistance to provide *g*uidance on algorithmic fairness and the use of AI in employment decisions.

In 2016, the EEOC held a public hearing on the equal employment opportunity implications of big data in the workplace, and the EEOC intends to build on that work. Focus areas of that hearing included potential discrimination, privacy concerns, and the possibility that disabled applicants or employees may be disadvantaged.[141]

The EEOC's initiative further underscores the interest in such systems, and that care must be taken when deploying such systems to avoid running afoul of anti-discrimination laws.142 Based on the announcement on March 28, 2022 of its FY 2021 Performance Report and FY 2023 Budget Justification, EEOC Chair Charlotte Burrows underscored that the proposed budget would be used, in relevant part, to advance the EEOC initiative launched in 2021 "to ensure that employment-related artificial intelligence and algorithmic decision -making tools comply with federal civil rights laws."[143]

LGBT Issues and Gender Identity. In June, the agency updated its website's landing page,[144] and issued a "technical assistance document" regarding issues relating to LGBTQ workers, and what the EEOC is now terming "SOGI (Sexual Orientation/Gender Identity) Discrimination."[145] This is the first substantive update of EEOC guidance in this area since the Supreme Court's decision in *Bostock v. Clayton County*, in which the Court held that Title VII's prohibition on sex discrimination extends to include discrimination on the basis of sexual orientation and gender identity. Most notably, the document makes clear the EEOC's position that where an employer maintains separate restrooms for men and women, Title VII requires employers to allow employees to use the facility that corresponds to their gender identity, rather than assigned sex at birth. Employers navigating these issues in their workplaces should consult with counsel to ensure that legal and practical considerations are adequately met.

139 Available at *https://www.eeoc.gov/hiring-initiative-reimagine-equity-hire-fact-sheet (last visited Apr. 2, 2022).*

140 EEOC, Press Release, *EEOC Launches Initiative on Artificial Intelligence and Algorithmic Fairness (Oct. 28, 2021).*

141 Among the Commissioners, EEOC Commissioner Keith Sonderling has taken the most significant leadership role on this issue. *See, e.g.*, Lisbeth Perez, *EEOC Commissioner: Companies Must Mitigate the Use of AI for Employment Decisions*, MeriTalk (Oct. 19, 2021); *Employment Law Now V-108 - EEOC Commissioner Sonderling on Artificial Intelligence in the Workplace* (podcast), JDSupra (Dec. 10, 2021).

142 Of importance to global employers, earlier this year the European Union published a proposed regulation aimed at creating a regulatory framework for the use of AI. In the hierarchy discussed in the EU's proposed regulation, AI systems that are implemented in the recruitment and management of talent should be classified as high-risk. Given that classification, among other requirements, employers or vendors using such systems would be required to develop a risk management system, maintain technical documentation, adopt appropriate data governance measures, meet transparency requirements, maintain human oversight, and meet registration requirements. It remains to be seen how U.S. regulators may utilize the tenets set forth in the EU's proposed regulation.

143 *See* EEOC, Press Release, *EEOC Releases Fiscal Year 2021 Performance Report and Fiscal Year 2023 Budget Justification* (Mar. 28, 2022); EEOC, *Artificial Intelligence and Algorithmic Fairness Initiative*.

144 EEOC, *Sexual Orientation and Gender Identity (SOGI) Discrimination.*

145 EEOC, OLC Control No. NVTA-2021-1, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity (June 15, 2021).*

In addition, on March 31, 2022, the EEOC announced that it had revised its discrimination charge intake process to include a non-binary gender option.[146]

Anti-Retaliation. Finally, signaling the resolve of the Biden administration to enforce workers' rights collaboratively across the government (and its emphasis on unlawful retaliation), the EEOC, U.S. Department of Labor, and National Labor Relations Board announced in November 2021 that the three agencies were embarking upon a joint initiative to "raise awareness" about retaliation issues when workers exercise protected employment-law rights.[147] As indicated in the tri-agency rollout, the initiative "will include collaboration among these civil law enforcement agencies to protect workers on issues of unlawful retaliatory conduct, educate the public and engage with employers, business organizations, labor organizations and civil rights groups in the coming year." The announcement of the effort was quickly followed by a virtual dialogue with employer stakeholders regarding workplace retaliation. Whether the initiative results in any substantive change to enforcement policy or is meant more to "signal" the agencies' enforcement priorities, is not yet clear.

146 EEOC, Press Release, *EEOC to Add Non-Binary Gender Option to Discrimination Charge Intake Process (Mar. 31, 2022).*

147 EEOC, Press Release, *U.S. Department of Labor, National Labor Relations Board, U.S. Equal Employment Opportunity Commission Align to End Retaliation, Promote Workers' Rights* (Nov. 10, 2021).

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

A. EEOC Investigations

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions if an employer fails to provide requested information or data or to make requested personnel available for interview. The EEOC continues to exercise this option, particularly when dealing with systemic investigations.[148] As discussed below, the EEOC's authority to issue subpoenas and conduct investigations is quite broad.

1. 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.[149] 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."[150]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, commissioner's charges),[151] 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.[152]

2. Scope of EEOC's Investigative Authority

The touchstone of the EEOC's subpoena authority is the text of its originating statute. By statute, the Commission's authority to request information arises under Title VII, which permits it "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."[153] The leading case interpreting the scope of this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[154] frequently cited for the proposition that "relevance" in this context extends "to virtually any material that might cast light on the allegations against the employer."[155] Less cited is the Court's admonition that "Congress did not eliminate the relevance requirement, and [courts] must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[156]

What if the initial reason for the charge no longer exists? Courts of appeals for the Ninth and Seventh Circuits have already held that, even if the EEOC issues a right-to-sue letter or even if the charge is withdrawn, the EEOC's authority to investigate remains unabated.[157] But is the same true if the charging party's underlying lawsuit is dismissed on the merits? Such was the issue of first

148 *See* Appendix C to this Report, which includes information on select subpoena enforcement actions the EEOC initiated in FY 2021.
149 *See* 42 U.S.C. § 2000e-5(b).
150 *EEOC v. Caterpillar, Inc.*, 409 F.3d 831, 832 (7th Cir. 2005). But *see EEOC v. Burlington Northern Santa Fe Railroad*, 669 F.3d 1154 (10th Cir. 2012) (denying enforcement of the EEOC's subpoena expanding the scope of its investigation involving two individuals); *EEOC v Royal Caribbean Cruises, Ltd.*, 771 F.3d 757 (11th Cir. 2014) (denying the EEOC's attempt to subpoena information to help support an pattern-or-practice claim, when the case at issue involved one individual only).
151 *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").
152 *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").
153 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.
154 *EEOC v. Shell Oil Co.*, 466 U.S. 54 (1984).
155 Shell Oil Co., 466 U.S. at 59.
156 *Id.*
157 *Watkins Motor Lines, Inc.*, 553 F.3d 593 (7th Cir. 2009); *EEOC v. Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of its authority to continue its investigation).

impression for the Seventh Circuit in *EEOC v. Union Pacific Railroad*.[158] There, an employer challenged the EEOC's legal authority to continue an enforcement action after issuing a right-to-sue letter and after the underlying charges of discrimination in a private lawsuit had been dismissed on the merits.[159] While the federal appellate courts have been split on this issue,[160] the Seventh Circuit treated the issue as answered by the Supreme Court's decision in *Waffle House*, where the Court held that the charging individual's agreement to arbitrate did not bar further action on the part of the EEOC.[161]

In *Waffle House*, the Court held that "[t]he statute clearly makes the EEOC the master of its case and confers on the agency the authority to evaluate the strength of the public interest at stake."[162] This established, for the *Union Pacific* court, that the EEOC's authority is not derivative.[163] And if issuing a right-to-sue letter does not end the EEOC's authority, then the court did not see how the entry of judgment in the charging individual's civil action had any more bearing. "To hold otherwise," concluded the court, "would not only undercut the EEOC's role as the master of its case under Title VII, it would render the EEOC's authority as 'merely derivative' of that of the charging individual contrary to the Supreme Court's holding in *Waffle House*."[164] The upshot is that, however disposed of, the outcome of a valid charge in the Seventh Circuit does not seem to determine or define the EEOC's authority.

The Ninth Circuit in *EEOC v. VF Jeanswear LP* reaffirmed its position that the EEOC's power to investigate instances of discrimination extend beyond the allegations of the individual charging party.[165] Citing Ninth Circuit precedent, the court emphasized, "there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."[166]

a. Applicable Timelines for Challenging Subpoenas (Waiver Issue)

As part of its investigatory authority, the EEOC can and does issue subpoenas to employers seeking information or data. An employer may challenge an EEOC subpoena, but may be barred from doing so in a subpoena-enforcement action in circumstances where it fails to challenge or modify the subpoena in accordance with statutorily imposed deadlines.[167] 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.[168] This requirement is set forth in the regulations governing the EEOC's investigative authority. Namely, "any person served with a subpoena who intends not to comply shall petition" the EEOC "to seek its revocation or modification . . . within five days . . . after service of the subpoena."[169]

In recent years, the EEOC has taken an aggressive stance on this "waiver" issue when dealing with employers that have generally failed to respond to its requests for information and subpoenas. The most notable case on this issue is the Seventh Circuit's 2013 decision in *EEOC v. Aerotek*,[170] in which a federal appeals court supported the EEOC's position 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 accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of

158 *EEOC v. Union Pacific Railroad*, 867 F.3d 843 (7th Cir. 2017).
159 Union Pacific Railroad, 867 F.3d at 845.
160 *See EEOC v. Hearst*, 103 F.3d 462 (5th Cir. 1997) (holding that the EEOC's authority to investigate a charge ends when it issues a right-to-sue letter); *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. May 1, 2019) ("there is no legal basis for limiting the scope of the relevance inquiry only to the parts of the charge relating to the personally-suffered harm of the charging party."); *Fed. Express Corp.*, 558 F.3d 842 (9th Cir. 2009) (holding that the issuance of a right-to-sue letter does not strip the EEOC of authority to continue to process the charge, including independent investigation of allegations of discrimination on a company-wide basis).
161 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 291 (2002).
162 Waffle House, Inc., 534 U.S. at 291.
163 Union Pacific Railroad, 867 F.3d at 851.
164 *Id.*
165 *EEOC v. VF Jeanswear LP*, No. 17-16786, 769 Fed. Appx. 477 (9th Cir. 2019), petition for cert. filed, (U.S. Oct. 1, 2019) (No. 19-446), cert. denied (U.S. Apr. 6, 2020).
166 VF Jeanswear LP, 769 Fed. Appx. 477, slip op. at 3, citing *EEOC v. Fed. Express Corp.*, 558 F.3d 842, 855 (9th Cir. 2009).
167 *See, e.g., EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. 2011) (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).
168 *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).
169 29 C.F.R. § 1601.16(b)(1).
170 *EEOC v. Aerotek*, 498 Fed. Appx. 645 (7th Cir. 2013).

demographic information, including the age, race, national origin, sex, and date of birth of all internal and contract employees dating back to January 2006," in addition to information about recruitment, selection, placement, and termination decisions by the company and its clients. Despite receiving from the company about 13,000 pages of documents in response to the subpoena, the EEOC claimed the company failed to provide additional requested information. In addition, although the staffing agency had filed objections to the EEOC's petition, the objections were filed *one day* beyond the statutorily required five days. The district court determined that the company's objections were waived and ordered it to comply with a broadly worded subpoena, which had been pending for more than three years, because the company filed objections with the agency six days after receipt. The Seventh Circuit agreed with this decision, finding that the defendant "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 [defendant] has waived its right to object."[171]

Since *Aerotek*, there have been examples where a court has disagreed with the EEOC's contention that an employer has waived objections to a subpoena due to its failure to timely or properly petition for revocation or modification of the subpoena. Those courts have scrutinized the justifications offered by an employer for failing to file a petition to modify or revoke within the five-day period, and applied the four-factor test articulated in *EEOC v. Lutheran Social Services*.[172]

In *Lutheran*, the U.S. Court of Appeals for the D.C. Circuit held that there is a "strong presumption that issues parties fail to present to the agency will not be heard . . ." but it also stated that the court should still consider "whether the facts and circumstances surrounding [non-compliance] are sufficiently extraordinary" to excuse non-compliance.[173] It further explained that factors that may amount to such exceptional circumstances include whether (1) the subpoena advised the recipient of the five-day petition deadline expressly or by citing the relevant law or regulation; (2) the agency investigator informed the subpoena recipient of the missed deadline; (3) the subpoena recipient repeatedly raised its objections to the agency in some form other than a revocation petition; and (4) the objections are not within the "special competence" of the EEOC.[174] The *Lutheran* court also suggested, however, that this standard would be "quite different" in the more "typical situation where a subpoena recipient's objections rest on relevance."[175]

b. Procedural Issues

It is well established that to bring and maintain an enforcement action, certain procedural requirements must be met. For example, in 2020 the Fifth Circuit addressed whether these procedural requirements were satisfied in *EEOC v. Vantage Energy Services, Inc*.[176] Specifically, the issue on appeal was whether a "later-verified intake questionnaire" was sufficient to constitute a charge under the ADA's requirement that charge be filed within 300 days.[177]

In *Vantage Energy Services*, the claimant worked on a deep-water drillship for the defendant, and suffered a heart attack while at sea.[178] The defendant subsequently placed him on short-term disability leave, and on the day he was due to return to work, the defendant fired him, citing poor work performance.[179] The claimant, through his legal counsel, submitted a letter to the EEOC asserting the defendant had violated the ADA, and included with the letter an EEOC intake questionnaire.[180] The questionnaire included the claimant's name, address, nature of the discrimination claim, and the defendant's stated reason for the termination.[181] The claimant also checked the box at the end of the questionnaire, which stated that he "wanted 'to file a charge of discrimination' and 'authoriz[ed] the EEOC to look into the discrimination' claim," and included his unverified signature.[182]

After receiving the intake questionnaire from the claimant, the EEOC added a charge number to the questionnaire, handwriting it at the top of the document.[183] This number remained the same throughout the course of the matter.[184] The EEOC then sent the

171 Aerotek, 498 Fed. Appx. at 648.
172 *EEOC v. Lutheran Social Servs.*, 186 F.3d 959 (D.C. Cir. 1999).
173 *Id.* at 959.
174 *Id.* at 964-66.
175 *Id.* at 959.
176 *EEOC v. Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560 (5th Cir. Apr. 3, 2020).
177 *Id.* at **5-6.
178 *Id.* at *2.
179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.* at **2-3. "Following [*Federal Express Corp. v.*] *Holowecki*, the EEOC revised its Intake Questionnaire to require claimants to check a box to request that the EEOC take remedial action. . . . Under the revised form, an employee who completes the Intake Questionnaire and checks Box 2 unquestionably files a charge of discrimination." *Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 113 (3d Cir. 2014).
183 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *3.
184 *Id.*

claimant two letters, which, respectively, acknowledged receipt of the "charge" and requested him to supplement the questionnaire with his address and phone number.[185] The defendant also received notice of the charge, but was informed no action was required pending receipt of a perfected charge.[186]

The perfected charge, belatedly received by the EEOC, was signed under the penalty of perjury and was dated more than 300 days after the claimant's job termination.[187] Upon receipt of the perfected charge, the EEOC informed the defendant and requested a position statement, which the defendant submitted.[188]

After conducting an investigation, the EEOC determined there was reasonable cause to believe that the defendant violated the ADA, and the parties submitted to conciliation, which was unsuccessful, resulting in the filing of an enforcement action.[189] The defendant moved to dismiss the EEOC's complaint, arguing that it failed to exhaust administrative remedies because the formal charge was filed more than 300 days after the employee's termination.[190] The EEOC opposed the motion, asserting that the intake questionnaire, which was filed within 300 days, satisfied the requirement to exhaust administrative remedies, and it was inconsequential that the intake questionnaire was not verified pursuant *Edelman v. Lynchburg College*.[191]

Although the district court was persuaded by the defendant and dismissed the EEOC's enforcement action with prejudice, the Fifth Circuit reversed the decision, noting that the defendant's arguments, upon which the district court relied, were "all contrary to considerable precedent."[192] The Fifth Court first explained that the Supreme Court previously ruled in *Federal Express Corp. v. Holowecki*[193] that an intake questionnaire could qualify as a charge if it satisfied the charge-filing requirements and could be construed as a request for the agency to take remedial action.[194] Because the claimant's intake questionnaire in *Vantage Energy Services* identified the parties, described the action complained of, specifically, the claimant's belief that the defendant had discriminated against him by discharging him immediately after finishing his short-term disability leave, and indicated that the claimant wanted to file a charge and authorized the EEOC to investigate the alleged conduct, the Fifth Circuit concluded that the intake questionnaire satisfied the *Holowecki* test.[195]

In reaching this conclusion, the Fifth Circuit noted that the EEOC's treatment of the questionnaire was ambiguous because it emphasized the need for the claimant to verify the intake questionnaire, but also had assigned it a charge number. Still, it determined that, while instructive, "the EEOC's characterization of the questionnaire is not dispositive. What constitutes a charge is determined by objective criteria."[196]

Relying on *Edelman*, the appeals court also ruled that the fact the intake questionnaire was not verified upon receipt or within the 300-day filing deadline did not render the charge untimely.[197] It explained that the purposes of the verification requirement was to protect employers from the expense and disruption of a claim unless it was supported by an oath subject to the liability for perjury.[198] The Fifth Circuit reiterated that, under *Edelman*, this purpose is maintained if the technical defect, such as a lack of verification, is corrected by the time an employer must respond to the charge.[199] Thus, because the claimant eventually complied with the verification requirement, it "related back" to the time the intake questionnaire was filed.[200]

Finally, the Fifth Circuit rejected the defendant's argument that its due process rights would be violated if the intake questionnaire was treated as a charge because it did not receive formal notice of the charge with 10 days of the EEOC's receipt, as required by 42 U.S.C. § 20003-5(e)(1).[201] The court rejected the argument because the defendant failed to demonstrate what prejudice it suffered by the delay, and there was no evidence of bad faith on part of the EEOC.[202]

185 *Id.*
186 *Id.*
187 *Id.* at **4-5.
188 *Id.* at *4.
189 *Id.*
190 *Id.* at **4-5.
191 *Id.* at *5, citing *Edelman v. Lynchburg College*, 535 U.S. 106 (2002).
192 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
193 *Fed. Express Corp. v. Holowecki*, 552 U.S. 389 (2008).
194 *Vantage Energy Servs., Inc.*, 2020 U.S. App. LEXIS 10560, at *6.
195 *Id.* at **7-9.
196 *Id.* at **9-10.
197 *Id.* at *11.
198 *Id.*
199 *Id.*
200 *Id.* at **11-12.
201 *Id.* at *13.
202 *Id.*

3. Standard for Reviewing Subpoena Enforcement

The Supreme Court in FY 2017 decided what standard a court of appeals should use when reviewing a district court's decision to enforce or quash an EEOC subpoena. While almost all circuits used the deferential abuse-of-discretion standard, the Ninth Circuit had stood alone in applying the more searching *de novo* standard. Such was the state of the law until the Court's 2017 decision,[203] in which it brought the Ninth Circuit into line with her sister circuits. Rejecting the Ninth Circuit's approach, the Court held that a district court's decision to enforce an EEOC subpoena should be reviewed for abuses of discretion, not *de novo*.[204] In so holding, the Court was guided by two principles: (1) the longstanding practice of the courts of appeals in reviewing a district court's decision to enforce or quash an administrative subpoena; and (2) whether, "as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question."[205] For the Court, each favored a more deferential standard. While the Court explained that district courts need not defer to the EEOC on what is "relevant," it did emphasize *Shell Oil*'s "established rule" that the term "relevant" be understood "generously" to permit the EEOC "access to virtually any material that might cast light on the allegations against the employer."[206]

4. Review of Recent Cases Involving Broad-Based Investigation by EEOC Subpoena Enforcement

As discussed, the EEOC usually is given wide latitude to investigate charges of discrimination, provided it can demonstrate it acted within the scope of its authority and the information sought is relevant and reasonable in scope. As a result, a district court typically will enforce a subpoena issued by the agency, unless the subpoenaed party can show judicial enforcement of the subpoena would be an abuse of process or create an undue burden.

In *EEOC v. Stanley Black & Decker, Inc.*, both the EEOC's investigatory powers and alleged undue burden created by its subpoena were at issue.[207] In *Stanley*, the charging party, a former employee, filed a charge with the EEOC alleging (1) he experienced racial discrimination during his tenure with the company; (2) he was fired due to his race, and (3) upon termination, he was offered an agreement and general release providing severance if he agreed, among other things, to waive his right to file an EEOC charge.[208] The complainant alleged this waiver was retaliatory and interfered with his rights under Title VII, the American with Disabilities Act (ADA), Genetic Information Nondiscrimination Act (GINA), the Equal Pay Act (EPA), and the Age Discrimination in Employment Act (ADEA).[209] In connection with this charge, the EEOC requested that the company identify other employees who had been provided similar releases, to which the company objected.[210] In response, the EEOC issued an administrative subpoena seeking this information, asserting that its authority included the ability to investigate whether there was a practice of requiring employees to waive their rights to file EEOC charges in exchange for severance pay.[211] The company continued to object, stating, among other things, the information requested was not pertinent to the complainant's individual claims and that the EEOC could expand its investigation beyond the scope of his charge once a violation had been found.[212]

Rather than continue to pursue this administrative subpoena, the EEOC issued a new charge against the company focusing on the company's compliance with the ADEA, including whether discharged employees were required to release their rights to file a charge with the EEOC.[213] In the charge, the EEOC sought information pertaining to which employees had been provided general release agreements requiring this waiver.[214] When the company failed to respond to the new charge, the EEOC issued a new subpoena seeking this information, which was the subject of the instant lawsuit.[215] In refusing to respond to this second subpoena, the company argued that it was an abuse of the EEOC's investigatory powers and that the request did not seek information pertaining to a plausible unlawful employment practice under the ADEA.[216]

203 *McLane Co. v EEOC*, 137 S. Ct. 1159 (2017).
204 *Id.* at 1170.
205 *Id.* at 1166-67.
206 *Id.* at 1163. On remand, in the applicable case, *McLane Co. v. EEOC*, 857 F. 3d 813 (9th Cir. 2017), the Ninth Circuit reached the same decision, even under the deferential abuse-of-discretion standard. Citing Justice Ginsburg's concurrence in the above-referenced Supreme Court decision, the court held that, by requiring an unduly heightened showing of relevance, the district court had abused its discretion. The court therefore remanded the case to the lower court, where the employer was free to renew its argument that the EEOC's pedigree information, while perhaps not irrelevant, was unduly burdensome.
207 *EEOC v. Stanley Black & Decker, Inc.*, 2021 U.S. Dist. LEXIS 93627 (D. Md. May 17, 2021).
208 *Id.* at *2.
209 *Id.*
210 *Id.*
211 *Id.* at **2-3.
212 *Id.at* *3.
213 *Id.* at **3-4.
214 *Id.*
215 *Id.* at *4.
216 *Id.* at *6.

Regarding the first point, the company asserted the new subpoena was an "end-run around its more limited authority to investigate [the complainant's] original individual charge."[217] The court, however, disagreed. It explained the EEOC's authority to initiate investigations into compliance with the ADEA contained no "charge-based relevancy requirement."[218] The court also concluded that, contrary to the company's contention, there was no evidence of bad faith where the EEOC had obtained evidence, in the course of its investigation into the complainant's charge, which suggested the company may have a systemic policy involving violations of the ADEA and the information at issue in the subpoena related to the claimed ADEA violations.[219]

Regarding the latter point, the court was not persuaded by the company's argument that the investigation sought records of a release which did not evidence a plausible unlawful employment practice.[220] In this regard, the court pointed out that the company's claim, that the offer of an agreement which required the waiver of the right to file an EEOC charge was not retaliatory, was not a finding that was binding on the Fourth Circuit, especially given the EEOC's authority to investigate potential ADEA violations.[221] Moreover, the court further explained that the authority relied upon by the company, *EEOC v. Nucletron Corp*., at least suggested that the alleged conduct may constitute retaliation.[222]

Finding that the subpoena was appropriately issued and sought relevant information, the *Stanley* court next addressed whether the EEOC's subpoena imposed an undue burden. In support of its claim of undue burden, the company submitted a declaration by the company's vice president for labor and employee relations detailing the type of review that needed to be conducted and the amount of staff time such a review would take.[223] Missing from the declaration, however, was a comparison of this cost against the company's normal operating costs or an explanation relating to how the company's functions would be disrupted.[224] Nevertheless, the court acknowledged that the declaration submitted indicated the total time to conduct the review—at least 2,250 hours—was significant, and thus ordered the parties to meet and confer to reach an agreement about scope of the subpoena as it related to time and geographic reach.[225] The court, however, still recognized that the EEOC may still seek further production if "justified."[226]

More information on the EEOC's subpoena enforcement activities for FY 2021 can be found in Appendix C to this Report.

B. Conciliation Obligations Prior to Bringing Suit

Before filing a lawsuit under Title VII based on pattern-or-practice claims under Section 707 or "class" claims under Section 706, the EEOC must investigate and then try to eliminate any alleged unlawful employment practice by informal methods of conciliation.[227] Only after pursuing such conciliation attempts may the EEOC file a civil action against the employer.[228] 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.

Employers in recent years have challenged the sufficiency of the EEOC's investigation and conciliation efforts. In April 2015, the Supreme Court addressed EEOC conciliation obligations in *Mach Mining v. EEOC*.[229] In this case, the Court held that the EEOC's attempts to conciliate a discrimination charge prior to filing a lawsuit *are* judicially reviewable, but that the EEOC has broad discretion in the efforts it undertakes to conciliate.

Specifically, the Court held that to meet its statutory conciliation obligation, the EEOC must inform the employer about the specific discrimination allegation(s), describing what the employer has done and which employees (or class of employees) have suffered. It also held that the EEOC must try to engage the employer in discussion to give the employer a chance to remedy the allegedly discriminatory practice. It then concluded that judicial review of whether these requirements are met is appropriate, but "narrow." In its view, a court is just to conduct a "barebones review" of the conciliation process and is not to examine positions the EEOC takes during the conciliation process, since the EEOC possess "expansive discretion" to decide "how to conduct conciliation efforts" and "when to end them."

217 *Id.*
218 *Id.* at **6-7.
219 *Id.* at **7-8.
220 *Id.* at *10.
221 *Id.* at *14.
222 *Id.* at **14-15.
223 *Id.* at *18.
224 *Id.*
225 *Id.* at **17, 20.
226 *Id.* at *20.
227 42 U.S.C. § 2000e-5(b).
228 42 U.S.C. § 2000e-5(f)(1).
229 *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

The Court noted that a sworn affidavit from the EEOC stating that it has performed these obligations generally would suffice to show that the agency has met the conciliation requirement, provided that if an employer presents concrete evidence that the EEOC did not provide the requisite information about the charge or try to engage in a discussion about conciliating the claim, then a reviewing court would have to conduct "the fact-finding necessary to resolve that limited dispute." The Court then held that, even if a court finds for an employer on the issue of the EEOC's failure to conciliate, the appropriate remedy merely is to order the EEOC to undertake the mandated conciliation efforts. Thus, while some courts previously had dismissed lawsuits based on the EEOC's failure to meet its conciliation obligation, that remedy appears no longer to be available based on the Court's decision.

On remand, the EEOC moved to strike part of Mach Mining's memorandum in opposition to the EEOC's motion for partial summary judgment because it contained information from confidential settlement discussions (and the EEOC wished to bar any future disclosure of "anything said or done" during conciliation).[230] The U.S. District Court for the Southern District of Illinois held that because the Supreme Court determined that "[a] court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions," it would grant the motion to strike and would bar the parties from "disclosing anything said or done during and/or as part of the informal methods of 'conference, conciliation, and persuasion.'"[231] The court also held that the defendant-employer had no right to inquire about calculations for damages during the conciliation process.[232]

While courts continue to clarify how charges and conciliations affect the EEOC's authority to investigate and litigate, there are no FY 2021 cases addressing this issue.

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

In *EEOC v. CVS Pharmacy, Inc.*,[233] the EEOC argued that Section 707(a) of Title VII authorizes it to bring actions challenging a "pattern or practice of resistance" to the full enjoyment of Title VII rights without alleging that the employer engaged in discrimination and without following any of the pre-suit procedures contained in Section 706, including conciliation. Specifically, the EEOC argued that Section 707(a) creates an independent power of enforcement to pursue claims alleging a pattern or practice "of resistance" and that Section 707(e), by contrast, requires only that claims alleging a pattern or practice "of discrimination" comply with Section 706 procedures.[234] The Seventh Circuit rejected this argument, holding that "there is no difference between a suit challenging a 'pattern or practice of resistance' under Section 707(a) and a 'pattern or practice of discrimination' under Section 707(e)," and that "Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes—it simply allows the EEOC to pursue multiple violations of Title VII . . . in one consolidated proceeding."[235] Adopting the EEOC's interpretation, the court reasoned, would read the conciliation requirement out of Title VII because the EEOC could always contend that it was acting pursuant to its broad authority under Section 707(a).[236] Noting that the EEOC's interpretation would undermine both the spirit and letter of Title VII, the court held that the EEOC is required to comply with all of the pre-suit procedures contained in Section 706 when it pursues pattern-or-practice violations.[237]

230 *EEOC v. Mach Mining, LLC*, 161 F. Supp. 3d 632, 635-636 (S.D. Ill. 2016).
231 *Id.* at 635-636.
232 *Id.* at 635.
233 *EEOC v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015).
234 *Id.* at 340-41.
235 *Id.* at 341-42.
236 *Id.* at 342.
237 *Id.* at 343. *But see EEOC v. Doherty*, 126 F. Supp. 3d 1305 (S.D. Fla. 2015), in which a district court took the opposite view.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Lack of Particularity

In *EEOC v. K&L Auto Crushers, LLC*, a decision from the Eastern District of Texas, the court denied the defendant's motion to dismiss the EEOC's lawsuit for failure to state a claim.[238] The EEOC alleged in the complaint, among other things, that the former employee, the company's Controller, was diagnosed with cancer and would be undergoing chemotherapy.[239] It is alleged that an agreement had been entered into where the employee's work schedule would be modified so she would only work when she felt well enough.[240] In addition, the complaint asserted that the employee requested to work from home, to which no response was provided, and that the employee was specifically told not to return until she could return on a regular schedule.[241] Ultimately, the employee was terminated despite never being informed that her absence was causing a problem for the business or that she was in danger of termination.[242]

The EEOC brought suit asserting violations of the ADA and the defendant moved to dismiss. The defendant argued that a *prima facie* case of discrimination was not sufficiently pled because (1) the charging party did not request any specific reasonable accommodation for her disability and the complaint did not allege that she requested accommodation; (2) she did not allege that she provided a specific date for her anticipated return to work; and, (3) indefinite leave is not a reasonable accommodation under the ADA.[243] The defendant also raised various arguments on the merits, which the court declined to consider.[244]

The court, relying on *Swierkiewicz v. Sorema, N.A.*, first noted that a complaint need not make a showing of every element of a *prima facie* case in order to state a claim for relief.[245] Still, the court generally went through the elements to establish that sufficient facts were pled in the complaint. In this regard, it noted that defendant did not dispute cancer constituted a disability for purposes of establishing disability discrimination.[246] The court then found that the complaint contained sufficient facts to establish the employee was a qualified individual, meaning she could perform the essential functions of her position with or without an accommodation. The court relied on the allegations asserting that defendant agreed to a modified work schedule for the employee, hired help so that the employee could finish treatment, and told the employee not to return until she could work a regular schedule, who then requested to work from home, a request to which defendant failed to respond.[247] In the court's view, these allegations demonstrated the company believed the employee was qualified and could perform the essential functions of her job or could perform them with an accommodation.[248] The court also found that the charging party had been terminated.[249]

OverWelall, and contrary to defendant's argument that a *prima facie* case was not pled, the court found these alleged facts provided a "short and plain statement," giving defendant fair notice of the employee's claim for disability discrimination and the grounds upon which the request for relief rested.[250] These facts were also sufficient to support the failure to accommodate claim.[251]

2. Key Issues in Class-Related Allegations

a. Challenges to Pattern-or-Practice Claims (including Section 706/707 issues)

In *EEOC v. Route 22 Sports Bar, Inc.*, defendants moved to dismiss the EEOC's complaint because, in their view, the EEOC was "mandated to obtain approval from its Commissioners prior to filing complaints alleging systemic discrimination," and, according to public records, no such vote was held.[252] Thus, defendants argued, in a motion for judgment on the pleadings made pursuant to

238 *EEOC v. K&L Auto Crushers*, 2021 U.S. Dist. LEXIS 20248 (E.D. Tex. Feb. 1, 2021), *report and recommendation adopted*, 2021 U.S. Dist. LEXIS 35569 (E.D. Tex. Feb. 25, 2021).
239 *Id.* at *2.
240 *Id.*
241 *Id.* at *2-3.
242 *Id.* at *3.
243 *Id.* at *7.
244 *Id.* at *7 n.1.
245 *Id.* at *10-11.
246 *Id.* at *12.
247 *See id.* at **14-16.
248 *Id.* at *15.
249 *Id.*
250 *Id.* at **15-16.
251 *Id.* at **17-18.
252 *EEOC v. Route 22 Sports Bar, Inc.*, 2021 U.S. Dist. LEXIS 115532, **3, 6-7 (N.D.W.V. June 22, 2021).

Fed. R. Civ. P. 12(c), the EEOC had failed to satisfy all conditions precedent to initiating its lawsuit to bring a claim of a hostile work environment based on sex on a class-wide basis.[253] In response, the EEOC asserted that a full commissioners' vote was not required by statute to bring a lawsuit, and that its internal procedures to obtain such a vote was not a prerequisite to allowing the agency to exercise its discretion with respect to litigation.[254] In reply, defendants maintained that a full vote was required and asserted that the EEOC's internal procedures were intended to protect business owners, such that the failure to follow them caused substantial prejudice by requiring defendants to defend the lawsuit.[255] The district court ultimately disagreed with defendants.

In rejecting defendants' arguments, the court explained that, under Section 706(b), the only four statutory conditions precedent to filing suit are: "(1) a charge of discrimination and a notice of that charge to the employer; (2) an investigation; (3) a reasonable cause determination; and (4) an attempt to conciliate the violations found in the determination," which, taking the allegations in the complaint as true, were satisfied.[256] The court further explained that any decision to institute an enforcement action is an exercise of discretion committed to EEOC personnel, which is not a justiciable matter, nor subject to any statutory or regulatory controls, other than the four conditions precedent identified in Section 706(b).[257] In this regard, the district court also stated that the internal procedures referenced by defendants were not implemented to protect business owners, as alleged, but were imposed to guide the EEOC's prosecutorial discretion, and that defending a lawsuit is not a cognizable claim of prejudice.[258] Finally, even assuming the EEOC was required to submit the litigation for a full Commission vote, the district court determined that the current lawsuit was not unauthorized because defendants' argument was premised, incorrectly, on the assertion that the litigation raised claims on a systemic, rather than class, basis.[259] As the complaint was brought on behalf of a class, the district court found it was not within its purview, on a motion to dismiss, to adjudge whether the Commission correctly interpreted its own claims and accurately implemented its own internal approval process prior to bringing the suit.[260]

In addition to the foregoing, the district court ruled that defendants' affirmative defense asserting a failure to attempt conciliation failed as a matter of law.[261] Importantly, in making this ruling, the district court followed *Mach Mining, LLC v. EEOC*,[262] in which the Supreme Court held that the scope of judicial review of the EEOC's duty to attempt conciliation is narrow, does not require good faith, and only requires the EEOC to satisfy two factors: (1) informing the employer about the unlawful employment practice the EEOC found reasonable cause to believe occurred; and (2) attempting to engage the employer in some form of discussion to give the employer an opportunity to remedy the alleged unlawful practice.[263] Thus, because the district court in *Route 22 Sports Bar, Inc*. concluded there were sufficient facts alleged to show the EEOC had found reasonable cause to believe Title VII had been violated and that it had attempted to engage in some form of discussion to remedy the violation, the district court struck the affirmative defense asserting otherwise.[264]

Lastly, the district court rejected defendants' affirmative defense asserting unnamed class members were barred from any potential relief due to failure to exhaust administrative remedies.[265] It held that the EEOC, as the primary enforcer of Title VII, possessed litigation authority that was broader than the authority provided to private parties who seek to remedy private harms.[266] It concluded that, so long as one valid charge of discrimination is filed, the EEOC has the authority to pursue remedies under Section 706 for other aggrieved persons who have not filed a charge of discrimination.[267]

b. Other Issues

When the EEOC determines there is sufficient evidence to support some, but not all, of the alleged unlawful employment practices asserted in a complainant's charge of discrimination, the EEOC is authorized to pursue relief for those claims for which it has found reasonable cause. For example, in *EEOC v. Pediatric Health Care Alliance, P.A.*, the district court denied the defendant's

253 *Id.* at **6-9.
254 *Id.* at *7.
255 *Id.* at **7-8, 11-12.
256 *Id.* at *9 (citing 42 U.S.C. § 2000e-5(b).
257 *Id.* at **11-12.
258 *Id.* at **13-14, 16-17.
259 *Id.* at **17-19.
260 *Id.* at *20; *See also id.* at **36-39 (explaining that seeking relief for a class of aggrieved persons does not mean a case involves a claim of systemic discrimination, *i.e.*, a "pattern or practice" claim, and noting that the EEOC is permitted to pursue claims on behalf of a class in its enforcement capacity under Section 706 or 707).
261 *Id.* at *25.
262 *Mach Mining, LLC v. EEOC*, 575 U.S. 480 (2015).
263 Route 22 Sports Bar, Inc., 2021 U.S. Dist. LEXIS 115532 at **26-28.
264 *Id.* at *28.
265 *Id.* at *29.
266 *Id.* at **29-31.
267 *Id.* at **31-32.

motion to dismiss the EEOC's complaint where the EEOC had determined the complainant's claim of sexual harassment was not sufficiently supported but that there was sufficient evidence to show retaliation for reporting sexual harassment.[268] In doing so, the court found that the complaint only asserted a claim of retaliation, and not one for sexual harassment, even if the complaint contained allegations related to the claim of sexual harassment.[269] It also determined there was no basis to strike the allegations about sexual harassment, which the EEOC argued provided relevant background for the claim of retaliation, because the court could not conclude there was no relation to the retaliation claim or that they prejudiced defendant.[270] The court found defendant's argument in this regard pertained to the merits, and was not appropriate to consider on a motion to dismiss.[271]

With respect to a motion for summary judgment, a court in the Southern District of Florida denied an intervenor-plaintiff's motion to file a sur-reply because it disagreed with her argument that defendant had raised new arguments or made misstatements of law.[272] There, the intervenor-plaintiff, who had asserted violations of the Equal Pay Act and Title VII, opposed defendant's motion for summary judgment by relying on her declaration and the declaration of a third party, and in its reply brief, defendant argued that the intervenor-plaintiff failed to rebut certain facts and relied on inadmissible declarations.[273] In evaluating whether to grant the intervenor-plaintiff's motion to file a sur-reply, the court considered the applicable Local Rule, which limited reply memorandum "to rebuttal of matters raised in the memorandum in opposition without re-argument of matters covered in the movant's initial memorandum of law."[274] It also analyzed defendant's reply, noting that it largely was limited to addressing the arguments and evidence asserted in the intervenor-plaintiff's opposition, which it found did not qualify as "new arguments."[275] As a result, the court concluded the request to file a sur-reply would be denied.[276] In addition, the court disagreed with the intervenor-plaintiff's position that a sur-reply was necessary to address defendant's assertion that the intervenor-plaintiff had conceded facts or made misstatements of law as those issues were capable of being addressed by the court's review and analysis of the summary judgment briefing.[277]

3. Who is the Employer?

In FY 2021, several district courts addressed the issue of joint liability for successor, affiliated, or integrated entities for claims brought by the EEOC.

The Western District of Michigan[278] considered whether successor liability is a doctrine that effectuates the "broad equitable powers" that Congress gave to courts to "eradicate the present and future effects of past discrimination."[279] On or about June 2018, the EEOC brought an action against a restaurant named "Georgina's LLC," (Georgina's) alleging that its owner created a hostile work environment.

As the case progressed, the EEOC amended its complaint to bring a claim against "Anthony's Little G's, LLC" (Little G's) for successor liability. The EEOC alleged that Little G's was liable for successor liability because Georgina's closed its restaurant in May 2020, but moved to a new location on July 1, 2020, while telling customers it intended to serve the same menu items, to staff the restaurant with the same employees, and to continue accepting Georgina's gift cards. Georgina's also changed their named to Little G's on Facebook, but was owned by the same owner. Little G's argued the EEOC had not alleged sufficient facts to support successor liability and asked for a judgment on the pleadings.

The court recognized successor liability is not automatic and considered the nine factors to determine whether there is successor liability.[280] Little G's argued that the EEOC had not pleaded facts to support the most important factor, whether Georgina's could provide relief. However, the court concluded enough facts were pled by Little G's and alleged by Georgina's to

268 *EEOC v. Pediatric Health Care Alliance, P.A.*, 2020 U.S. Dist. LEXIS 205660, **2, 4 (M.D. Fla. Nov. 4, 2020).
269 *Id.* at *4.
270 *Id.*
271 *Id.* at **4-5.
272 *EEOC v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 107819, **1-3 (S.D. Fla. June 9, 2021).
273 *Id.* at *2.
274 *Id.*
275 *Id.* at *4.
276 *See id.*
277 *Id.* at **5-6.
278 *EEOC v. Georgina's, LLC*, 2020 WL 7090215, at *1 (W.D. Mich. Dec. 4, 2020).
279 *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1091 (6th Cir. 1974).
280 Specifically, the court reviewed the following factors: (1) whether the successor company has notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether the new employer uses the same plant; (4) whether there has been substantial continuity of business operations; (5) whether the new employer uses the same or substantially same workforce; (6) whether the new employer uses the same or substantially same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether [the defendant] uses the same machinery, equipment and methods of production; and (9) whether [the defendant] produces the same product.

demonstrate Georgina's did not have the ability to provide complete relief. The court also noted the plaintiff need not plead facts demonstrating each factor to state a plausible claim and emphasized a motion for judgment on the pleadings is not the proper method for challenging the truth of the allegations in the complaint. The court, therefore, denied the motion for judgement on the pleadings, finding the EEOC had stated a viable claim against Little G's.

In March 2021, the court in the North District of New York considered whether it was permissible for plaintiffs to move to amend the complaint to add entities believed to be affiliated with the defendant, Birchez Associates, LLC (Birchez) under the integrated enterprise doctrine.[281] The EEOC asserted that, during discovery, it had discovered other business entities potentially associated with Birchez. So, the EEOC issued further discovery regarding the relationship between the defendant and the newly identified entities at issue. Specifically, the EEOC sought finances, corporate structure, and tax information for each entity, to which Birchez objected on the ground that it was not relevant. The EEOC then filed its motion to amend the complaint, and Birchez opposed, contending it was futile and also appearing to suggest it was brought in bad faith. The court disagreed with Birchez's reasoning, finding the discovery was reasonably calculated to determine the nature of potentially affiliated entities and Birchez (while also acknowledging that some of the requests were overbroad). More importantly, the court held that the integrated enterprise doctrine involved a "fast-specific inquiry," which the Second Circuit recognized is a question of fact not suitable to resolution at the pleading stage.[282] The court stated that the EEOC had pleaded specific allegations to show the entities were part of an integrated enterprise with Birchez, and while Birchez disputed the allegations, it had also refused to provide relevant information in discovery. In addition to the integrated enterprise doctrine, the court considered the EEOC's motion to add an entity based on a successor liability theory. The court again noted the facts pled and the lack of discovery related to the entity. Finally, the court rejected Birchez's inference of bad faith, observing the EEOC's deadline to amend coupled with Birchez's refusal to provide certain information in discovery created an appropriate justification for the EEOC to seek leave to amend the complaint. The court allowed the plaintiff to amend its complaint and also allowed some of the discovery requests related to the relationship amongst the various entities.

In the District Court for Maryland,[283] the EEOC filed a motion for summary judgment, seeking judicial determination that factually distinct corporate entities may be treated as an "integrated enterprise" as a matter of law because facts related to their relationship are undisputed. In support of its motion, the EEOC alleged that certain facts were undisputed, and there were certain legal consequences that flowed from those facts. The defendant objected on procedural grounds but failed to present any substantive opposition to the EEOC's motion, asserting instead that the status of the defendants' corporate interrelation was of no significance in the litigation. As a result, the court granted EEOC's motion for summary judgment and held that all defendants were the charging party's joint employer.

4. Challenges to Affirmative Defenses

In the Northern District of Indiana, the court considered the EEOC's Rule 12(f) motion to strike affirmative defenses in the defendant's answer.[284] The court found that striking defendant's affirmative defenses is appropriate when they are insufficient on the face of the pleading. The court found that "bare bones conclusory allegations," "insufficient facts," or "lack of plausibility" all provide grounds to strike affirmative defenses. The court opined that affirmative defenses subject to all pleading requirements of the Federal Rules of Civil Procedure. Accordingly, to be sufficiently pled, an affirmative defense must include a short and plain statement of facts and allege the necessary elements of the alleged claim.[285] Additionally, the court found that stating "defendant reserves the right to add or amend its affirmative defense as facts become known through discovery" is not in and of itself an affirmative defense and so can also be stricken. Based on the foregoing, the court ultimately granted the EEOC's motion striking seven of the twelve affirmative defenses.

In August 2021, the Western District of New York Court[286] granted the EEOC's motion to strike defendant's affirmative defenses. The defendant had included affirmative defenses asserting that the EEOC's claims were barred by the applicable statute of limitations and the doctrine of laches, and further were unconstitutional. After considering arguments on both sides, the court struck defendant's statute of limitations defense, finding that there was no plausible basis for it and the defendant had not alleged sufficient facts to assert such a defense. The court also found that the doctrine of laches is unavailable because the EEOC is a

281 *EEOC v. Birchez Assocs., LLC*, 2021 WL 1115513, at *1 (N.D.N.Y. Mar. 24, 2021), *report and recommendation adopted*, 2021 WL 1660484 (N.D.N.Y. Apr. 28, 2021).
282 *Brown v. Daikin Am. Inc.*, 756 F.3d 219, 226 (2d Cir. 2014).
283 *EEOC v. CACI Secured Transformations, LLC*, 2021 WL 1840807, at *1 (D. Md. May 7, 2021).
284 *EEOC v. HZ OPS Holdings, Inc.*, 2021 U.S. Dist. LEXIS 108009 (N.D. Ind. June 9, 2021).
285 *Id.* at *4, citing *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1294 (7th Cir. 1989).
286 *EEOC v. Green Lantern Inn, Inc.*, 2021 WL 4086148, at *10 (W.D.N.Y. Aug. 19, 2021), *report and recommendation adopted*, 2021 WL 4081109 (W.D.N.Y. Sept. 8, 2021).

governmental entity and it undertook to enforce a public right or to protect the public interest by bringing this action – even if it was somewhat delayed. Lastly, the court held that because the EEOC has express authority to bring the underlying suit against defendant, the affirmative defense for unconstitutionality was insufficient as a matter of law and should therefore be stricken.

5. Motion to Amend Complaint

In Colorado, the U.S. District Court[287] granted plaintiffs' motion to the amend the complaint to add or address specific allegations, although the motion was filed nine years after the initial amended complaint. The court found that the amendments were appropriate because they would clarify plaintiffs' allegations and would not cause defendants undue prejudice. The court further held there would be no undue delay because the court had not yet issued a scheduling order for Phrase II of the litigation. Without a scheduling order, which would involve determination of the individual plaintiffs' claims, the court held that the defendant would have adequate time to "prepare it defenses and will not be prejudiced by the filing of the proposed amended complaints."

B. Statutes of Limitations and Unreasonable Delay

1. Limitations Period for Pattern-or-Practice Lawsuits

Individual claims under Section 706 of Title VII are subject to certain administrative prerequisites, including that the discrimination charge is filed with the EEOC within 300 days of the alleged discriminatory act; that the EEOC investigate the charge and make a reasonable cause determination; and that the EEOC first attempt to resolve the claim through conciliation before initiating a civil action.[288] Section 707, governing pattern-or-practice actions, incorporates Section 706's procedures, raising the implication that the EEOC must bring pattern-or-practice cases within the 300-day period defined in Section 706.

There has yet to be a court of appeals decision determining whether the EEOC may seek relief under Section 707 on behalf of individuals who were allegedly subjected to a discriminatory act more than 300 days prior to the filing of an administrative charge. The EEOC has often argued that individuals whose claims of alleged harm occurred more than 300 days before the filing of the charge could still be eligible to participate in a pattern-or-practice lawsuit.

In 2018, a district court held that held that alleged victims of pattern-or-practice discrimination are not bound to file timely claims within 300 days of discriminatory conduct under Title VII or the ADA, "so long as the additional discriminatory practices, or victims, have been ascertained in the course of a reasonable investigation of the charging party's complaint and the EEOC has provided adequate notice to the defendant-employer of the nature of such charges to allow resolution of the charges through conciliation."[289] The court also agreed with the EEOC's contention that ADEA actions "are indisputably not subject to the 300-day charge-filing period applicable to private actions."[290]

A handful of other district courts in recent years have similarly held that the nature of pattern-or-practice cases is inconsistent with the application of the 300-day limitations period.[291] For example, 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, but then held that "the very nature" of pattern-or-practice cases attacking systemic discrimination "seems to preclude" use of the 300-day period.[292] In doing so, the court followed the reasoning set forth in *EEOC v. Mitsubishi Motor Manufacturing of America, Inc.*, a 1998 Illinois district court case that held, "[a]fter careful consideration, this Court has concluded that the limitations period applicable to Section 706 actions does not apply to Section 707 cases, despite the language of Section 707(e), which mandates adherence to the other procedural requirements of Section 706."[293] The *Mitsubishi* court noted that, when the EEOC files a pattern-or-practice charge, it is usually unable to articulate any specific acts of discrimination until the investigation begins. Therefore, it would be impossible to determine at that point if the charge was timely filed within 300 days of the discriminatory conduct and it would be arbitrary to bar liability for all conduct occurring more than 300 days before the filing of the charge.[294] 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

287 *EEOC v. JBS USA, LLC*, 2021 WL 457728, at *1 (D. Colo. Feb. 8, 2021).
288 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.
289 *EEOC v. Staffing Solutions of WNY, Inc.*, 2018 U.S. Dist. LEXIS 207186, at *4 (W.D.N.Y. Dec. 6, 2018), citing *EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 WL 5312645, at *3 (W.D.N.Y. 2018).
290 *Staffing Solutions*, 2018 U.S. Dist. LEXIS 207186, at *5.
291 *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).
292 *New Prime*, 2014 U.S. Dist. LEXIS 112505, at *34.
293 *EEOC v. Mitsubishi Motor Mfg. of America, Inc.*, 990 F. Supp. 1059, 1085 (C.D. Ill. 1998).
294 *Id.* at 1085, accord *EEOC v. LA Weight Loss*, 509 F. Supp. 2d 527, 535 (D. Md. 2007).

preserve stale evidence," the *Mitsubishi* court proposed allowing the "evidence [of discrimination to] determine when the provable pattern or practice began."[295]

As another recent example in pattern-or-practice cases, a district court decision in *EEOC v. Staffing Solutions of WNY, Inc*. upheld the magistrate judge's report and recommendation in declining to limit the EEOC to seek redress for only those claims that occurred within 300 days prior to the filing of the charge.[296] The *Staffing Solutions* court went further in agreeing that the EEOC is not subject to the 300-day charge-filing period for ADEA claims.[297] However, 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.[298]

If a 300-day limitations period is applied, generally, it is triggered by the filing of a charge. (The court will count back 300 days from the date of filing of the charge and require that the discriminatory act occur within that timeframe to be actionable.)[299] If the discriminatory act is a termination, the "date of the termination" is considered to be the date the employer gives the employee unequivocal notice of the termination.[300] An employer should assert the statute of limitations defense as soon as it has knowledge of facts suggesting that the discriminatory act occurred outside the 300-day window.[301] In rebutting a statute of limitations defense, the EEOC may be granted additional time to conduct discovery shedding light on which acts will be encompassed in the lawsuit.[302]

Some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.[303] This is helpful to employers because it shortens the period during which the EEOC can reach back to draw in additional claimants.

In *Arizona ex rel. Horne v. Geo Group, Inc.*, however, the Ninth Circuit disagreed, finding Section 706's "plain language" did not permit tethering the 300-day period to any event other than the filing of the charge.[304] The Ninth Circuit observed that the trial court's choice to instead use the date of the Reasonable Cause Determination may have been due to the initial charge's failure to provide notice to the employer of potential class claims by other aggrieved female employees, but stated, "this concern fails to distinguish the time frame in which the employee is required to file their charge of discrimination (*i.e.*, 300 days after the alleged unlawful employment practice occurred) from the EEOC's responsibility to notify the employer of the results of the EEOC's investigation."[305]

Given the district court trend to apply the 300-day limitation to pattern-or-practice cases, the EEOC is increasingly relying on creative arguments or equitable defenses. For example, in cases involving age discrimination under the ADEA, the EEOC can attempt to avoid section 706 and 707 prerequisites altogether by bringing a pattern-or-practice suit outside of Title VII. For enforcement actions by the EEOC, the ADEA does not have a 300-day limitation.[306] In such a case, the Commission claims its authority to bring a pattern-or-practice case derives from the ADEA's 29 U.S.C. § 626(b), which adopts "the powers, remedies, and procedures provided in" the Fair Labor Standards Act (FLSA).[307]

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295 *Id.* at 1087.

296 *EEOC v. Staffing Solutions of WNY, Inc.*, 2020 U.S. Dist. LEXIS 40474, at *3 (W.D.N.Y. Dec. 6, 2018) (citing *EEOC v. Upstate Niagara Cooperative, Inc.*, 2018 U.S. Dist. LEXIS 183904, 2018 WL 5312645, at *4 (W.D.N.Y. Oct. 26, 2018); *EEOC v. Sterling Jewelers, Inc.*, 2010 U.S. Dist. LEXIS 649, 2010 WL 86376, at *5 (W.D.N.Y. Jan. 6, 2010).

297 *Id.*

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

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

300 *EEOC v. Orion Energy Sys. Inc.*, 145 F.Supp.3d 841, 845-46 (E.D. Wis. Nov. 12, 2015) (date plaintiff overheard employer planned to terminate her employment was not unequivocal notice of final termination decision).

301 *Id.* at 844 (employer lacked diligence by waiting to assert statute of limitations defense where employee had disclosed her knowledge of the alleged discriminatory act, as well as the date she gained that knowledge, during her termination meeting).

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

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

304 Arizona ex rel. *Horne v. Geo Group, Inc.*, 816 F.3d 1189, 1203 (9th Cir. 2016).

305 *Id.*

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

307 29 U.S.C. § 201, *et seq.; EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018), at *26 (explaining but not deciding the EEOC's argument it could pursue a pattern or practice age discrimination claim without resort to Title VII).

In *EEOC v. New Mexico*, the district court accepted this premise without analysis, allowing the EEOC to reach back to 2009 to include the claims of 99 additional aggrieved individuals even though some of these individuals last experienced alleged discrimination well before 300 days prior to the filing of the charge and even though their names had not been disclosed to the employer prior to discovery in the lawsuit, filed in 2015.[308] The court granted summary judgment to the EEOC on the employer's statute of limitations defense because the court found that Title VII's 300-day deadline did not apply to EEOC enforcement actions under the ADEA.[309]

2. Equitable Theories to Support Untimely Claims

In an effort to resurrect claims barred by the 300-day statute of limitations applicable to Sections 706 and 707, the EEOC often turns to equitable theories, such as waiver, estoppel, equitable tolling, the single-filing rule—which allows the EEOC to litigate a substantially related non-filed claim where it arises out of the same time frame and similar conduct as a timely filed claim—and the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period.[310] In FY 2018, one district court conceded the application of the continuing violation doctrine in pattern-or-practices cases was a "close call" but ultimately was bound by Tenth Circuit precedent to apply the doctrine.[311] The court further found the EEOC sufficiently alleged the continuing violations theory, denying the employer's motion to dismiss untimely disability discrimination-in-hiring claims.[312]

The continuing violation doctrine only allows the enforcing party to reach back to conduct that is not "discrete."[313] Although it is sometimes difficult to draw a distinction between discrete and non-discrete actions, the guiding principle is that a discrete action is "actionable on its own" and thus alerts the charging party as to the necessity of pursuing their claim.[314] Termination, failure to promote, and denial of overtime are all examples of discrete actions that are only reachable if within the 300-day limitation, even if they occur as part of a hostile work environment.[315]

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

> Under the EEOC's proposal, the continuing violation doctrine protects those who have slept on their rights and resurrects their otherwise expired claims, whenever a subsequent employee whom the dilatory one may never know or be aware of fortuitously appears on scene, is subject to the same type of harassing conduct, and sees fit to file a timely charge. That cannot be the rule.[316]

Likewise, during FY 2021, in *EEOC v. USF Holland, LLC*, the court rejected the EEOC's continuing-violation argument and dismissed its claims on behalf of persons passed over for jobs since 1986, notwithstanding the agency's allegations of a discriminatory pattern and practice.[317] The court explained that "[f]ailure to hire is a 'discrete act' which is easy to identify and distinguished from hostile work environment claims, which the Supreme Court has found amenable to the continuing violation doctrine."[318] It therefore concluded that the EEOC "cannot evade the limitations period by invoking the 'continuing violation doctrine,' as it does not apply to failure-to-hire claims, even when a 'systemic policy' or a 'pattern and practice' are alleged."[319]

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

309 *Id.* at **14-15 (D.N.M. Mar. 27, 2018).

310 *EEOC v. Draper Development LLC*, 2018 U.S. Dist. LEXIS 115124, at **9-10 (N.D.N.Y. July 11, 2018) (adopting flexible approach and excusing charging party's failure to verify charge where employer not prejudiced); *EEOC v. East Columbus Host, LLC*, 2016 U.S. Dist. LEXIS 118993, at *26 (S.D. Ohio Sept. 2, 2016) (restaurant server's claims against the harasser's coworker permitted where another server had timely filed a charge of discrimination against the main harasser and where the EEOC had given notice that the harassing behavior was not limited to one person); Princeton Healthcare Sys., 2012 U.S. Dist. LEXIS 150267, at *10 (D.N.J. Oct. 18, 2012) (where the employer's conduct forms a continuing practice, an action is timely if the last act evidencing the practice falls with the limitations period and the court will deem actionable even earlier related conduct that would otherwise be time-barred); *EEOC v. Global Horizons, Inc.*, 904 F. Supp. 2d 1074, 1093, n. 5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.*, 872 F.Supp.2d 1107, 1112 (E.D. Wash. 2012); *EEOC v. Pitre, Inc.*, 908 F.Supp.2d 1165, 1175 (D.N.M. Nov. 30, 2012).

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

312 Horizontal Well Drillers, LLC, 2018 U.S. Dist. LEXIS 102434, at *23; *See also, EEOC v. PMT Corp.*, 2014 U.S. Dist. LEXIS 119465, at **5-6 (D. Minn. Aug. 27, 2014) (300-day limit does not apply to pattern-or-practice cases where a "continuing violation" is alleged); *See also, EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at **50-51 (D. Md. Apr. 17, 2018) (court denied summary judgment based on timeliness in multi-plaintiff hostile work environment case where EEOC claimed continuing violations defense).

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

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

315 *EEOC v. Phase 2 Inv. Inc.*, 2018 U.S. Dist. LEXIS 65719, at *51.

316 *EEOC v. Discovering Hidden Hawaii Tours, Inc.*, 2017 U.S. Dist. LEXIS 154576, at *5 (D. Haw. Sept. 21, 2017).

317 *EEOC v. USF Holland, LLC*, 2021 U.S. Dist. LEXIS 188211, at *5 (N.D. Miss. Oct. 4, 2021).

318 *Id.* (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)).

319 *Id.* (citing *Frank v. Xerox Corp.*, 347 F.3d 130, 136 (5th Cir. 2003)).

To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers may point to *Discovering Hidden Hawaii*, *USF Holland*, and other district court decisions holding that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the 300-day window.[320] 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 can make the argument that the continuing violation doctrine does not apply.

Of course, the employer can also raise equitable defenses. In *EEOC v. Baltimore County*, the court found the EEOC's eight-year unreasonable delay in bringing its lawsuit barred any award of backpay or other retroactive relief.[321] In FY 2018, another district court refused to grant summary judgment to the EEOC on the employer's laches defense, finding it an issue of fact whether the EEOC's six-year delay between the filing of the charge and the lawsuit prejudiced the employer.[322]

On the other hand, in *EEOC v. LogistiCare Solutions LLC*, the United States District court for the District of Arizona refused to grant summary judgment against the EEOC on the employer's equitable defense of laches, notwithstanding the fact that the agency had waited seven years after the relevant charges of discrimination were filed before filing suit.[323] The court began by observing that, because "[p]rejudice is 'the essential element of laches,'"[324] a delay that does not result in prejudice is insufficient to establish the defense, even where the delay is both lengthy and unexcused.[325] The court also explained that assertions of prejudice "must be supported by evidence establishing specific prejudicial losses that occurred during the period of delay."[326] On considering the employer's evidence, the court found genuine factual issues remained as to whether the delay, even if "unreasonable," had resulted in actual prejudice.[327] For instance, while the employer adduced evidence that important fact witnesses had taken other employment during the delay period, the court was not satisfied that the employer had taken even "simple steps to contact the former employees, such as by using their contact information from when they were employed."[328] Similarly, the court was not persuaded by the argument that the delay may result in an increased back pay award. The court opined that back pay alone "is not enough to show prejudice" because the court may "take the EEOC's delay into account when crafting a remedy."[329]

Similarly, in *EEOC v. Stan Koch & Sons Trucking, Inc.*, the United States District Court for the District of Minnesota granted summary judgment against the employer's laches defense upon finding the employer could not adduce competent evidence of prejudice from the EEOC's six-year delay in filing suit.[330] In its complaint, the EEOC alleged the employer, a trucking company, had made employment decisions based on a physical-abilities test that had a disparate impact on female drivers.[331] Following discovery, the EEOC moved for summary judgment.[332] The employer maintained that its laches defenses should survive because there was evidence that its "policies and personnel had changed" during the delay period, "such that it no longer had the resources to successfully mount its defense."[333] The court, however, could find no such evidence. It observed that "[c]ounsel for the EEOC represented at oral argument that the EEOC deposed every person [the employer] identified as having been involved in [its] use

320 *EEOC v. Swissport Fueling, Inc.*, 916 F. Supp. 2d 1005, 1033-34 (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).

321 *EEOC v. Baltimore Cty.*, 202 F.Supp.3d 499, 522 (D. Md. 2016).

322 *EEOC v. Wynn Las Vegas, LLC*, 2018 U.S. Dist. LEXIS 115042, at **17-18 (D. Nev. July 10, 2018) (employer must show prejudice resulting from delay in order to prevail on laches defense).

323 *EEOC v. LogistiCare Sols. LLC*, 2020 U.S. Dist. LEXIS 215486, at *10 (D. Ariz. Nov. 18, 2020). The court also denied the employer's alternative motion to dismiss. *See id.* at *3. The employer maintained it was clear from the EEOC's complaint that the delay in filing suit was "unreasonable," which, along with prejudice, is one of the two elements of a laches defense. *Id.* The court, however, was not persuaded. It explained that even if the allegations in the complaint revealed a lengthy delay, the allegations not "provide insight on why the delay occurred." *Id.*

324 *Id.* at *5 (quoting *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 972 (9th Cir. 1979)).

325 *Id.* (citing *Grand Canyon Trust v. Tucson Elec. Power Co.*, 391 F.3d 979, 988 (9th Cir. 2004)). Notably, the court rejected the employer's contention that a lengthy delay suffices to raise a rebuttal presumption of prejudice, which it had supported with a citation to the Ninth Circuit's decision in *Boone v. Mechanical Specialties Co. Id.* at *5 n.1 (citing *Boone v. Mech. Specialties Co.*, 609 F.2d 956 (9th Cir. 1979)). The court explained the Ninth Circuit has since clarified that its statement in *Boone* was dictum, and that "'prejudice should not lightly be presumed from delay in Title VII cases.'" *Id.* (quoting *Bratton v. Bethlehem Steel Corp.*, 649 F.2d 658, 667 n.8 (9th Cir. 1980)).

326 *Id.* at *5.

327 *Id.* at *5-6.

328 *Id.* at *8. The court also observed that the employer had "not yet provided evidence that the potential witnesses have forgotten the alleged incident," other than "the conclusory statement that memories fade over time." *Id.* at *9.

329 *Id.* at * 9 (citing *Boone v. Mech. Specialties Co.*, 609 F.2d 956, 959 n.1 (9th Cir. 1979)).

330 *EEOC v. Stan Koch & Sons Trucking, Inc.*, ___ F. Supp. 3d ___, 2021 U.S. Dist. LEXIS 168297, at *37 (D. Minn. Aug. 30, 2021). Notably, the court explained it was "inclined to agree with the reasoning" of courts that had rejected the contention, advanced by the EEOC in Koch, that the laches defense is categorically inapplicable as against the EEOC in actions brought by the agency under Title VII. *See id.* at **30-33. The court ultimately did not have occasion to rule on the issue, however, because the employer could not "in any event meet its burden to establish a prejudicial delay." *Id.* at *33.

331 *Id.* at *2.

332 *Id.*

333 *Id.* at **33-34.

of the [physical-abilities test], and that all voluntarily appeared for their depositions."[334] By contrast, "[e]ven when pressed at oral argument, [the employer's] counsel could not identify a specific key player or relevant information that was no longer available."[335] The employer did cite instances in deposition testimony where the deponent could not recall certain facts, such as dates when cutoff scores for the physical-abilities test were modified.[336] However, the court found that even if the deponents could recall these details, the information "would fall far short of the evidence needed" to show that the test was job-related or used because of a business necessity.[337] Because the court found no evidence from which a reasonable factfinder could infer prejudice, it concluded that the employer's laches defense did not stand as a barrier to granting summary judgment to the EEOC on liability issues.[338]

It is worth posing one additional question before moving on to the next subsection. Setting aside whether a discrete act occurring outside the 300-day limitations period is *actionable*, may it be *considered* as relevant evidence in the context of a hostile work environment claim? In FY 2018, a district judge issued a ruling in favor of the EEOC in an enforcement action, addressing whether the court could consider discrete acts—occurring outside the 300-day limitations period—when evaluating a hostile work environment.[339] The EEOC brought suit against alleged joint employers on behalf of nine former employees and other aggrieved individuals, complaining of discrimination, retaliation, and harassment on the basis of race, sex, color, and/or national origin.[340] (Seven of the individuals joined as intervenors as well.) In their motion to dismiss, defendants argued that the Title VII claims must be limited to acts occurring on or after February 10, 2009, which marked 300 days prior to the filing of a discrimination charge by the initial claimant.[341] In response, the EEOC and intervening plaintiffs pointed out that conduct predating the 300-day period may be considered by a fact-finder as part and parcel of a hostile work environment claim, and as "'background evidence' of discriminatory intent."[342] The court noted that the U.S. Supreme Court had not expressly decided the question of "whether discrete acts of discrimination falling outside the 300-day window may be considered in conjunction with a hostile work environment claim."[343] Nonetheless, the court ultimately agreed with the plaintiffs and declined to adopt a rule "categorically barring the use of discrete acts to support a hostile work environment claim."[344] By the same reasoning, the court refused to dismiss claims based on conduct alleged in the complaint that did not include specific dates or a temporal context.[345]

C. Intervention and Consolidation

This section examines intervention and consolidation by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs in litigation brought by the EEOC, and the standards courts apply to determine whether to grant motions to intervene. This section also surveys recent intervention-related issues decided by courts, including allowing intervention by individuals who have not exhausted their individual administrative remedies, allowing intervention by individuals who have previously stipulated to a dismissal of claims, allowing intervention by individuals whose claims are subject to mandatory arbitration, the complicated issues that arise when hundreds of individuals litigate their individual claims alongside EEOC pattern-and-practice claims, and the balancing of factors used in determining whether cases are consolidated.[346]

1. EEOC's and Other Non-Charging Parties' Permissive Intervention in Private Litigation

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

334 *Id.* at **34-35.
335 *Id.* at *35.
336 *Id.* at **35-36.
337 *Id.* at *36.
338 *Id.* at **36-37.
339 *EEOC v. Jackson Nat'l Life Ins. Co.*, 2018 U.S. Dist. LEXIS 156258 (D. Colo. Sept. 13, 2018).
340 *Id.* at **2-15.
341 *Id.* at *16.
342 *Id.* at *18.
343 *Id.*
344 *Id.* at **22-25.
345 *Id.* at **25-27.
346 For a more in-depth discussion regarding rules applicable to intervention and case law interpreting it, please see Barry A. Hartstein, *et al., Annual Report on EEOC Developments: Fiscal Year 2013*.

In Title VII actions, at the court's discretion, the EEOC may intervene in private lawsuits where "the case is of general public importance."[347] Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general public importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration.[348] The same approach is followed in dealing with intervention in ADA actions.[349]

Federal Rule of Civil Procedure 24(b) generally addresses "permissive intervention" in civil cases, and provides that anyone may intervene who "(A) is given a conditional right to intervene by a federal statute [such as Title VII's grant of a conditional right to intervene to the EEOC]; or (B) has a claim or defense that shares with the main action a common question of law or fact."[350] Rule 24(b) instructs courts to consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights in determining whether to grant motions to intervene.[351]

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

- whether the EEOC has certified that the action is of "general importance"; and
- whether the request is timely.[352]

Courts have stated that the timeliness requirement is flexible, subject to district judge discretion. The factors to determine timeliness include: (a) the length of time the applicant knew or should have known of its interest before making the motion; (b) prejudice to existing parties resulting from the applicant's delay; (c) prejudice to the applicant if the motion is denied; and (d) the presence of unusual circumstances militating for or against a finding of timeliness.[353] With respect to the knowledge factor, in *EEOC v. Birchez Associates*,[354] a court denied intervention to two non-charging parties who attempted to intervene a year and a half after the complaint had been filed, reasoning that they knew or should have known of their interest well before they made the motion. Similarly, in *EEOC v. Danny's Restaurants, LLC*,[355] the court denied intervention to the individual owner of the defendant restaurant who sought to intervene well after the trial on damages had concluded.

2. A Charging Party's Right to Intervene in EEOC Litigation

A charging party may want to intervene in a lawsuit filed by the EEOC to preserve their opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC's and the charging party's interests diverge.

Title VII and the ADA expressly permit a charging party to intervene in an action brought by the EEOC against the charging party's employer.[356] The ADEA, on the other hand, makes no mention of intervention. Thus, once the EEOC pursues a lawsuit under the ADEA, the charging party's right to intervene or commence their own lawsuit terminates.[357]

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

Rule 24(a) provides:

347 42 U.S.C. § 2000e-5(f)(1).

348 *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).

349 42 U.S.C. § 12117.

350 Fed. R. Civ. P. 24(b) (as amended Dec. 1, 2007).

351 *Id.*

352 *See EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975); *See also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 16958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated, "the court must consider three requirements: (1) whether the petition was timely; (2) whether a common question of law or fact exits; and (3) whether granting the petition to intervene will unduly delay or prejudice the adjudication of rights of the original parties." *See also EEOC v. Am. Airlines Inc.*, 2018 U.S. Dist. LEXIS 68680 (D. Ariz. Apr. 24, 2018) (denying intervention because plaintiff-intervenors failed to comply with pleading requirements under Rule 24(c) and finding untimeliness when plaintiff-intervenors sought to intervene five months after judgment was entered thereby prejudicing the parties).

353 *Floyd v. City of New York*, 770 F.3d 1051, 1058 (2d Cir. 2014).

354 *EEOC v. Birchez Assocs.*, 2021 U.S. Dist. LEXIS 81104, at *6 (N.D.N.Y. Apr. 28, 2021).

355 *EEOC v. Danny's Rest., LLC*, 2021 2021 U.S. Dist. LEXIS 153632, at *1 (S.D. Miss. Aug. 16, 2021) ("The motion is not well taken and is denied. The trial of this matter has concluded, and a verdict has been rendered. The motion, therefore, is not timely.")

356 *See* 42 U.S.C. § 2000e-5(f)(1) ("The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision.").

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

(a) Intervention of Right. On timely motion,[358] the court must[359] permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

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

Given Title VII's and the ADA's language expressly permitting an aggrieved person to intervene in a lawsuit brought by the EEOC, most courts analyze a charging party's motion to intervene under Rule 24(a). While courts construe Rule 24 liberally in favor of potential intervenors, an applicant for intervention bears the burden of showing that they are entitled to intervene.[360] A minor overlap between the impetus for the EEOC's case and a proposed intervenor's allegations are insignificant where the facts constituting the proposed intervenor's allegations and their requested relief are substantively different from the aggrieved's claims and requested relief.[361] If pendent claims are involved (*e.g.*, tort claims or claims arising out of state anti-discrimination statutes), those claims are analyzed under Rule 24(b).[362] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[363] or the movant is a governmental entity other than the EEOC.[364] Note, however, that some courts have allowed intervention solely on the basis that a motion to intervene is uncontested,[365] but will deny intervention under a traditional Rule 24(a) analysis. For example, in *EEOC v. 1618 Concepts Inc.*,[366] the court denied intervention on the remaining claims of breach of contract and constructive discharge in violation of public policy because the plaintiff failed to show that he had an interest in the subject matter of the action.

A plaintiff-intervenor's Title VII complaint in intervention is limited to the scope of the EEOC investigation that can reasonably be expected to "grow out of the charge of discrimination."[367] An individual is not required to thoroughly describe the discriminatory practices in order to meet the requirements of Rule 24(a).[368] Courts will also permit intervention even when the individual's complaint includes claims that are legally barred, reasoning that these claims may be used to support a claim that is timely.[369]

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

Although employees must generally exhaust their administrative remedies in order to file a Title VII or ADA civil suit independently, one court allowed the intervention of 10 former or prospective employees who had not filed a charge of discrimination at all with respect to their claims. In *EEOC v. Stone Pony Pizza, Inc.*,[370] the EEOC initiated a pattern-or-practice lawsuit alleging the company discriminated against Black employees/prospective employees by failing to hire them for front-of-house positions. Eleven individuals intervened in the action, including 10 who never filed charges of discrimination. The company filed a motion for summary judgment seeking dismissal of these individuals' claims due to their failure to exhaust their administrative remedies. The intervenors argued they were entitled to intervene as a matter of right because they were "persons aggrieved" by the company's alleged unlawful employment practices under 42 U.S.C. § 2000e-5(f)(1) or, alternatively, were entitled to permissive intervention under the "single filing rule," otherwise known as the "piggybacking rule," allowing them to exhaust their administrative remedies vicariously based on the lone charging party's exhaustion. The court allowed intervention by the 10 individuals because it found the individuals alleged "essentially the same claim" as the charging party-plaintiff—although the court

358 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187 (S.D. Cal. Aug. 31, 2017) (citing *U.S. v. Oregon*, 745 F.2d 550, 552 (9th Cir. 1984) ("Mere lapse of time is not determinative")) and *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620 (W.D. Okla. Nov. 16, 2016) ("When determining timeliness for purposes of intervention…[t]he analysis is contextual; absolute measures of timeliness should be ignored.") (citing *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)); But *see U.S. EEOC v. JC Wings Enters., L.L.C.*, 2019 U.S. App. LEXIS 26465 (5th Cir. 2019) (denying intervention for failure to file motion to intervene within 90-day prescription period mandated by ADEA); *EEOC v. Giphx10 LLC*, 2021 U.S. Dist. LEXIS 44157, at *3 (W.D. Wash. Mar. 9, 2021) (finding timeliness as motion was made at "a very early stage of the proceedings.").

359 *See EEOC v. STME, LLC*, 938 F.3d 1305 (11th Cir. 2019) (finding error in district court's failure to consider and rule on the merits of the motion to intervene because plaintiff had an unconditional statutory right to intervene).

360 *EEOC v. Herb Hallman Chevrolet*, 2020 U.S. Dist. LEXIS 16743, at *3 (D. Nev. Feb. 3, 2020).

361 *Id.* at *9.

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

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

364 *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)).

365 *EEOC v. 1618 Concepts Inc.*, 2020 U.S. Dist. LEXIS 2090, at **20-22 (M.D.N.C. Jan. 7, 2020); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2020 U.S. Dist. LEXIS 174176 (E.D. Mich. Sept. 23, 2020).

366 2020 U.S. Dist. LEXIS 2090, at **22-22.

367 *EEOC v. Denton Cty.*, 2017 U.S Dist. LEXIS 202499 (E.D. Tex. Dec. 8, 2017).

368 *Id.* at *5.

369 *Id.* at *6.

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

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

One court has also applied the "single filing rule" to a charging party-plaintiff who failed to timely file her EEOC charge. In *United States EEOC v. JCFB, Inc.*,[371] the charging party-plaintiff filed almost a year after the statutory period for filing a charge of discrimination ended. However, in rejecting defendant's attempts to distinguishing plaintiffs' claims, the court exempted the plaintiff from the administrative requirement to timely file and found that the timely filed plaintiff's claims were identical to the late-filed plaintiff's claims.

In *EEOC v. J & R Baker Farms, LLC*,[372] the court granted a motion to amend the complaint to add 10 additional plaintiff-intervenors in the EEOC's pattern-or-practice lawsuit, even though the individuals were not eligible to participate in the lawsuit under the single-filing rule. (The court had previously ruled that potential plaintiff-intervenors whose claims arose after the date any representative plaintiff filed a representative charge could not take advantage of the single-filing rule.) Yet, the court held those individuals could permissively intervene under Rule 24(b)(1)(B) because their claims shared common questions of law and fact with those in the lawsuit.

In *EEOC v. Horizontal Well Drillers, LLC*,[373] the plaintiff-intervenor alleged class claims despite stating in his charge that he brought his charge individually. However, during the course of the EEOC investigation, the EEOC had requested additional information, including the employer's hiring policies, methods for screening and recruiting, and records of everyone hired and not hired from the applicant pool. The EEOC later issued a "Notice of Expanded Investigation and Request for Additional Info." Despite the plaintiff-intervenor failing to state that he sought to represent others on his charge, the court permitted intervention. The court was satisfied that the employer was on sufficient notice and should have reasonably expected class claims to grow out of the charge upon receipt of the Notice of Expanded Investigation, along with the requests for additional information.

A mandatory arbitration agreement does not preempt an individual's right to intervene. In *EEOC v. PJ Utah, LLC*,[374] the Tenth Circuit reversed the district's court's denial of intervention by the allegedly aggrieved employee. The EEOC brought an enforcement action against the employer for allegedly denying a workplace accommodation to the employee and terminating his employment for requesting an accommodation. The employee sought to intervene in the EEOC's lawsuit, but the district court held the employee's claims were subject to mandatory arbitration under an agreement the employee's mother had signed on his behalf. The court of appeals overturned the district court's decision, holding that the denial of a motion to intervene is a final order subject to immediate review, and finding the arbitration agreement did not affect the employee's unconditional right to intervene under Rule 24(a). The court of appeals further held the district court's order compelling arbitration was not yet appealable because it was not a final decision—as the EEOC's claim against the employer remained.

3. Adding Pendent Claims

Courts may allow individual intervenors to assert pendent state or federal law claims in addition to the EEOC's federal claims, but are willing to entertain defendants' motions to dismiss pursuant to Rules 12(b)(6) and 24(b) as discussed below. While determining timeliness for purposes of intervention is not a fixed requirement, courts will uphold the statute of limitations for pendent state law claims.[375] In some instances, courts have permitted leave to amend the complaint to add factual detail related to pendent claims even when the plaintiff-intervenors knew most if not all of the alleged facts at the time they filed their initial complaint in intervention. In *EEOC v. JBS USA, LLC*,[376] the plaintiff-intervenors filed amended complaints adding factual detail supporting their pendent claims in response to the defendant's motion for judgment on the pleadings arguing the initial complaints did not contain sufficient factual detail. Although the initial complaints were filed almost nine years prior to the motion to amend, the court permitted amendment, reasoning the first time the plaintiff-intervenors were on notice of a potentially deficient complaint was when the defendant filed a motion for judgment on the pleadings, which occurred only two months before the plaintiff-intervenors' motion to seek leave to amend.

As explained above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact." In exercising its discretion, the court "must consider

371 *United States EEOC v. JCFB, Inc.*, 2019 U.S. Dist. LEXIS 102862 (N.D. Cal. June 19, 2019).
372 *EEOC v. J & R Baker Farms, LLC*, 2016 U.S. Dist. LEXIS 29167 (M.D. Ga. Mar. 8, 2016).
373 *EEOC v. Horizontal Well Drillers, LLC*, 2018 U.S. Dist. LEXIS 102434 (W.D. Okla. June 18, 2018).
374 *EEOC v. PJ Utah, LLC*, 822 F.3d 536 (10th Cir. 2016).
375 *EEOC v. OnSite Solutions, LLC*, 2016 U.S. Dist. LEXIS 158620, at **8-9 (W.D. Okla. Nov. 16, 2016).
376 *EEOC v. JBS USA, LLC*, 2021 U.S. Dist. LEXIS 24079, at **21-23 (D. Col. Feb. 8, 2021).

whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." This standard is commonly used for analyzing pendent claims. Further, courts will rely on 28 U.S.C. §1367 in asserting supplemental jurisdiction over state law discrimination claims in intervention actions.[377] A recent court decision in *EEOC v. Norval Electric Cooperative, Inc.*,[378] however, held that in order for the court to hear an intervenor's state law claims, the intervenor must seek leave from the court to file an amended complaint that contains both her federal and state law claims, reasoning that the court lacked authority to remove or consolidate a state court action to federal court. Further, the court also declined to exercise supplemental jurisdiction over the intervenor seeking judicial review of proceedings before the state Human Rights Commission, reasoning there was nothing to be gained in terms of judicial economy or avoidance of risk of conflicting decisions.[379]

In *EEOC v. Mayflower Seafood of Goldsboro, Inc.*,[380] the court allowed the plaintiff-intervenor to assert her state law claims for assault, battery, intentional and negligent infliction of emotional distress, negligent hiring, supervision, training, and retention, and wrongful discharge because the factual bases for these claims and the Title VII gender discrimination and sexual harassment claims were closely related, and it would not require a lengthy extension of the case deadlines. Likewise, in *EEOC v. Favorite Farms*,[381] the plaintiff-intervenor survived a motion to dismiss her state law claims for assault and battery because the issue of vicarious liability was more appropriately addressed at the summary judgment stage.

In contrast, in *EEOC v. Norval Electric Cooperative, Inc.*,[382] a Montana district court held that while it could exercise pendent jurisdiction over an intervenor's state law claims that arise from the same nucleus of facts as the federal claims, in order for the court to hear those state law claims, the intervenor must ask the court for leave to file an amended complaint that contains both her federal and state law claims.

Note that in *EEOC v. LXL Learning, Inc.*,[383] the court permitted intervention even though the parties had stipulated to dismissal of a prior lawsuit with prejudice. After the dismissal and after the EEOC had initiated its own lawsuit, the plaintiff-intervenor sought to intervene on the Title VII claim (which the employer did not oppose based on the prior agreement) under a different factual theory. The intervenor also sought to add a state law claim previously not asserted. The employer opposed such additions on the basis that the stipulated dismissal barred the plaintiff-intervenor from any claims or theories in the case beyond what the EEOC had included in its complaint. However, while the court agreed that the employer did not consent to expand the case, the court conditionally permitted intervention with the understanding that the employer may further pursue its *res judicata* defense.

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

Courts have made clear that only the EEOC may pursue Section 707 pattern-or-practice claims, and individuals may not assert such claims.[384] Where individual employees or the EEOC also assert individual claims in a pattern-or-practice lawsuit initiated by the EEOC, however, managing the various individual claims becomes complicated because of the different proof schemes.

In *EEOC v. JBS USA, LLC*,[385] the EEOC sued a meatpacking company—alleging it discriminated against Somali, Muslim, and Black employees. The agency asserted several pattern-or-practice claims. At the outset of the case, the EEOC and the employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) the EEOC's pattern-or-practice claims (Phase I); and (2) individual or Section 706 claims (Phase II). More than 200 individuals intervened. At the trial of the Phase I claims, the court found in the employer's favor, and the action proceeded to Phase II. In Phase II, over 200 intervenor-plaintiffs sought relief for their individual Title VII and state law claims and the EEOC brought suit under Section 706 on behalf of 57 individuals, some of whom were also intervenor-plaintiffs.

The employer moved to dismiss the claims of several categories of employees, including those who were proceeding *pro se* and not engaging in discovery. The court granted the employer's motion to dismiss the claims of 16 *pro se* plaintiff-intervenors for failure to prosecute their cases. The employer also argued that the EEOC could not seek relief on behalf of 18 other individuals whose claims had previously been dismissed for failure to prosecute. The court agreed and held, based on *res judicata* principles, the EEOC could not assert claims on behalf of the individual plaintiff-intervenors whose claims had been dismissed. In a later

377 *EEOC v. PC Iron, Inc.*, 2017 U.S. Dist. LEXIS 141187, at **9-10 (S.D. Cal. Aug. 31, 2017); *EEOC v. Cappo Mgmt. XXIX*, 2021 U.S. Dist. LEXIS 64326, at **3-4 (E.D. Cal. Mar. 31, 2021) (exercising supplemental jurisdiction over California FEHA disability and common law claims under §1367).
378 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at ** 10-11 (D. Mont. Apr. 2, 2020).
379 Id at *7.
380 *EEOC v. Mayflower Seafood of Goldsboro, Inc.*, 2016 U.S. Dist. LEXIS 101154 (E.D.N.C. Aug. 2, 2016).
381 *EEOC v. Favorite Farms, Inc.*, 2018 U.S. Dist. LEXIS 1482 (M.D. Fla. Jan. 4, 2018).
382 *EEOC v. Norval Elec. Coop. Inc.*, 2020 U.S. Dist. LEXIS 58548, at **10-11 (D. Mont. Apr. 2, 2020).
383 *EEOC v. LXL Learning, Inc.*, 2017 U.S. Dist. LEXIS 200184 (N.D. Cal. Dec. 4, 2017).
384 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
385 *EEOC v. JBS USA, LLC*, 2016 U.S. Dist. LEXIS 110697 (D. Neb. Aug. 19, 2016).

proceeding, the court dismissed 13 remaining plaintiff-intervenors for failure to comply with a court order for each plaintiff-intervenor to file written notice of their current address and telephone number.[386]

The employer also moved to dismiss 36 individuals' claims due to their failure to file Title VII charges. The individuals argued their claims were saved under the single-filing rule, described above. The court declined to adopt a categorical rule that the single-filing rule only applies to class actions and noted only the Third Circuit has so held.[387] Hence, the court denied dismissal and held seven individuals' claims were subject to the single-filing rule because the employer was on notice of potential class allegations, given that multiple employees filed charges alleging similar discriminatory treatment on the same day.

5. Consolidation

Under Rule 42, a court may "join for hearing or trial any or all matters at issue in the actions; consolidate the actions; or issue any other orders to avoid unnecessary cost or delay" if actions before the court involve a common question of law or fact.[388] While a plaintiff's lawsuit may involve a common question of law or fact brought in a separate lawsuit by the EEOC, courts will use a balancing test to determine whether consolidation would avoid unnecessary costs or delay.

In *EEOC v. Faurecia Auto Seating, LLC*,[389] two plaintiffs with separate lawsuits sought to consolidate their cases with an EEOC lawsuit filed on behalf of 15 claimants. Both plaintiffs alleged ADA discrimination by the same employer and the EEOC did not oppose consolidation. The court denied consolidation, however, given that a significant amount of discovery had already been conducted, including 29 depositions. Thus, the court noted that seeking to add the additional parties would require all 29 deponents to be re-deposed and would expand the scope and extend the time of discovery. The court further noted consolidation would also result in a significant risk of prejudice to the employer and increase litigation costs for the parties.

D. Class Issues in EEOC Litigation

1. ADEA Litigation

When the EEOC files suit under the Age Discrimination in Employment Act seeking relief on behalf of employees, it looks to Section 16(c) of the Fair Labor Standards Act (FLSA) for the procedures it must follow. In FY 2020, a Maryland district court held that the EEOC was not required to adhere to the "opt-in" procedural requirements associated with collective actions under Section 16(b) of the FLSA, because the "ADEA's statutory scheme [including legislative history] plainly permits the EEOC to pursue an enforcement action under its provisions without obtaining the consent of the employees it seeks to benefit."[390] The EEOC, therefore, could seek relief on behalf of a class under the ADEA without obtaining the consent of employees.

2. Religious Accommodation

In *EEOC v. JBS United States, LLC*,[391] the EEOC attempted to reverse the court's Phase I (trial) dismissal. In Phase I,[392] the EEOC sued the employer for religious discrimination, among other things, alleging that the employer engaged in a pattern or practice of unlawfully denying Muslim employees reasonable religious accommodations to pray and break their Ramadan fast.[393] In finding against the EEOC in Phase I, the court concluded that while the employer had denied Muslim employees a reasonable religious accommodation, the EEOC had failed to make a requisite showing that the employees suffered a materially adverse employment action as a result of the employer's policy denying unscheduled prayer breaks.[394] Importantly, the court cited the employer's "credible and legitimate concern about work stoppages," and explained that "[i]t is error to assume … that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy *must* be based on illegal discrimination because of an employee's protected class characteristics."[395]

On appeal, the EEOC argued that "the 10th Circuit's en banc decision in *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784 (10th Cir. 2020), a disability-accommodation case brought under the ADA, [wa]s an intervening change in Title VII religious-

386 *EEOC v. JBS USA, LLC*, 2017 U.S. Dist. LEXIS 63879 (D. Neb. Apr. 27, 2017).
387 *See Communications Workers of Am. v. New Jersey Dep't of Personnel*, 282 F.3d 213, 217 (3d Cir. 2002).
388 Fed. R. Civ. P. 42.
389 *EEOC v. Faurecia Auto Seating, LLC*, 2018 U.S. Dist. LEXIS 105391 (S.D. Miss. June 25, 2018).
390 *EEOC v. Baltimore Cty.*, No. CV RDB-07-2500, 2019 U.S. Dist. LEXIS 185913, 2019 WL 5555676 (D. Md. Oct. 28, 2019).
391 *EEOC v. JBS United States, LLC*, 2021 U.S. Dist. LEXIS 13012, at *1 (D. Colo. Jan. 25, 2021).
392 *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135 (D. Colo. Sept. 24, 2018).
393 *Id.* at 1149.
394 *Id.* at 1187-88.
395 *Id.* at 1192.

accommodation law."[396] Rejecting this argument, the court reiterated the requirement in Title VII religious-accommodation cases for the plaintiff to show an adverse employment action.[397] As such, *Exby-Stolley* did not represent a change in the law controlling Title VII religious-accommodation cases.[398]

3. Pay Discrimination

Discovery of information not directly related to systematic pay discrimination claims may still be permitted. For example, in *EEOC v. University of Miami*,[399] the EEOC alleged that the university violated the Equal Pay Act and Title VII by paying a female professor less than a male professor because of the female professor's sex. The EEOC's third motion to compel requested data from the University even though the data request was not tailored to the information the University considered in making the salary decisions at issue.[400] In particular, the EEOC argued that it needed the requested information to test the University's explanations for its salaries.[401] Since the University had explained how it determined the contested salaries, the court decided that some of the data requested by the EEOC was proportional to the needs of the case, and ordered the university to produce existing faculty salary analysis spreadsheets without redactions, starting salary information for specific faculty, and any documents or information the University utilized in making the starting salary decisions.[402]

E. Other Critical Issues in EEOC Litigation

1. Confidentiality Agreements and Protective Orders

In *EEOC v. University of Miami*,[403] which involved claims of Equal Pay Act violations, the parties entered into a confidentiality agreement stipulating specific contents of documents to be designated as confidential. During discovery, the University produced documents relating to its salary recommendations and justifications for multiple faculty members, as well as documents relating to the decision to promote the plaintiff professor and her alleged comparator.[404] The University attached redacted versions of these documents to its motion for summary judgment, and filed a motion to seal the unredacted versions.[405] Plaintiffs opposed the motion and the court agreed.[406] The court noted that since the documents were filed with a pretrial motion requiring judicial resolution on the merits, they were subject to the common law right of access.[407] Only a showing of good cause could overcome the right of access, which the University failed to demonstrate.[408] The court stated that the University's motion to seal, without the benefit of reviewing the unredacted documents at issue, did not show the University's interest in redacting the names of individuals involved in the promotion and tenure review process, nor did it describe the process.[409]

While a protective order commonly governs discovery in most employment law cases, protective orders may also be used to assist in settlement discussions. In one FY 2019 case,[410] a magistrate judge held a pre-discovery settlement conference with the parties in which she suggested that disclosure of certain confidential financial information and documents might be beneficial for the settlement process.[411] Although discovery had not yet commenced, the parties agreed to be bound by a protective order for the limited purpose of engaging in settlement discussions with the magistrate judge.[412]

The public generally has a right to judicial records. A party seeking to limit public access to such records has the burden to show that sealing is appropriate and must support its position with specific reasons. In a disability discrimination case,[413] a federal

396 2021 U.S. Dist. LEXIS 13012, at *8 (D. Colo. Jan. 25, 2021).
397 *Id.* at *10.
398 This lawsuit ultimately settled in May 2021 for $5.5 million as reviewed in Appendix A; *See also* Patrick Dorrian, *JBS Inks $5.5 Million Pact With EEOC in Suit Over Muslim Prayer*, Bloomberg Law (May 24, 2021).
399 *EEOC v. Univ. of Miami*, 2020 U.S. Dist. LEXIS 203841, at *2 (S.D. Fla. Nov. 2, 2020).
400 *Id.*
401 *Id.*
402 *Id.* at **3-4.
403 *EEOC v. Univ. of Miami*, 2021 U.S. Dist. LEXIS 89226, at *2 (S.D. Fla. May 11, 2021).
404 *Id.*
405 *Id.*
406 *Id.* at **2-5.
407 *Id.* at *6.
408 *Id.* at *5.
409 The University filed an unopposed motion for reconsideration that provided additional facts regarding the tenure review process along with a sworn declaration. The court granted the motion and allowed the University to redact the names of certain individuals involved in the promotion and tenure review process.
410 *EEOC v. Prestige Care, Inc.*, 2018 U.S. Dist. LEXIS 217857 (E.D. Cal. Dec. 27, 2018).
411 *Id.* at **1-2.
412 *Id.*
413 *EEOC v. Loflin Fabrication LLC*, 2020 U.S. Dist. LEXIS 119252, 2020 WL 3845020 (M.D.N.C. July 8, 2020).

court in North Carolina granted, in part, the parties' request to seal certain personal and private medical information of a kind not ordinarily made public, holding that privacy interests override the public's interest in access to such records. The court sealed personal and medical information of limited or no relevance to the case, such as claimant's medical records concerning irrelevant health conditions. The court also granted defendant's request to seal deposition transcripts and OSHA records that contained health information of employees not parties or claimants on the grounds that this information was not relevant. The court declined, however, to seal information about the nature of injuries suffered by employees because it was relevant to the court's decision. The court also denied the parties' requests to seal other types of information. For example, the court disagreed that the name of the claimant's prescription drug at issue in her discharge and the results of a drug test were otherwise sensitive information. The court also refused to seal information concerning dates of treatment and diagnoses because these were relevant to the court's summary judgment decision in the case. A table listing prescriptions employees disclosed per company's drug disclosure policy, but which did not contain personally identifiable detail, also was not confidential.

2. ESI: Electronic Discovery-Related Issues

With respect to electronically stored information (ESI), courts have been inclined to permit reasonable discovery considering the nature of the litigation. This past fiscal year in the District of Colorado, a federal court reviewed the proper scope of ESI in a case involving sexual harassment of employees at a skilled nursing facility.[414] The magistrate judge conducted a hearing and set the temporal scope of discovery from January 1, 2015 to January 1, 2021. The defendants objected, claiming the scope should be from May 5, 2016 until May 5, 2019, a period which "encompasse[d] the *entirety* of alleged facts and relevant circumstances."[415] The defendants admittedly did not believe it was an ESI-intensive case, but they argued it would be unnecessary and unduly burdensome to collect, review, and potentially produce thousands of documents for the longer period set by the magistrate judge. They further asserted the longer period "may also result in tens of thousands of dollars of unnecessary discovery expenses" and was "almost certain to cause protected discovery disputes."[416] In response, the EEOC claimed it had already disclosed seven aggrieved individuals, it expected to identify more, and that violations were on-going. The EEOC asserted these individuals alleged harassment from 2014 until May 2019.[417]

The court deferred to the magistrate judge's ruling in its entirety, finding no basis for holding the order was clearly erroneous or contrary to law. The court found the temporal scope appeared eminently reasonable given the number of aggrieved individuals and the period of alleged harassment. Additionally, the court noted that "in light of Defendants' stated belief that this is not an ESI-intensive case, their stated concerns about the potential burdens commensurate with the temporal scope seem overblown."[418]

In the Western District of New York, a federal court considered, among other motions brought by the EEOC, a motion for sanctions based on the defendant's failure to produce ESI.[419] The case concerned discrimination against female restaurant workers, who were allegedly subjected to a hostile work environment on the basis of sex. The court had previously ordered the defendants to produce certain ESI, including searching email accounts, cell phones, and social media accounts for several individuals.[420] Instead of complying, the defendants' counsel stated they would not produce the documents and that they planned to appeal the discovery order; however, the docket did not contain an appeal. In analyzing the EEOC's motion for sanctions, the court found the defendants' failure to comply with the discovery order was intentional and prolonged.[421] Rather than apply more drastic sanctions, the court ordered defendants to pay the EEOC's costs and attorney's fees for the motion for sanctions. The court also ordered counsel to meet and confer regarding ESI production and to submit a status report within 30 days. While the court noted it was "hesitant to punish [the defendants] for its counsel's actions," this ruling was intended to put the defendants on notice that their counsel's actions were unacceptable and of the possibility for further action should the issues regarding ESI persist.[422]

3. Reliance on Experts, Including in Systemic Cases

Expert testimony has continued to be a frequently litigated issue in EEOC cases. In a case from the Northern District of Iowa, a federal court considered motions from both parties to strike the opposing party's expert testimony. In the underlying case, the

414 *EEOC v. SSC Montrose San Juan Operating Co., LLC*, 2021 U.S. Dist. LEXIS 152539 (D. Colo. Aug. 13, 2021).
415 *Id.* at *3.
416 *Id.*
417 *Id.*
418 *Id.* at *4.
419 *EEOC v. Green Lantern Inn*, 2021 U.S. Dist. LEXIS 157379 (W.D.N.Y. Aug. 19, 2021).
420 *Id.* at **22-23.
421 *Id.* at *24.
422 *Id.* at **25-26.

EEOC alleged the defendant's use of an isokinetic strength test had a disparate impact on female job applicants for driver positions because of sex.

One aspect of the expert testimony issue concerned the proper use of rebuttal evidence. The defendant moved to strike the EEOC's rebuttal expert's opinions regarding "alternative assessments and approaches" as improper rebuttal opinions because the defendant's expert report did not address that issue.[423] The defendant claimed rebuttal evidence may challenge opinions offered by the defendant's expert, but the EEOC cannot use that evidence to establish its case-in-chief. The EEOC argued that, in a disparate impact case, evidence regarding a less-discriminatory alternative is offered after a defendant shows the test is job-related and consistent with business necessity and its effectiveness in achieving that outcome.[424] The defendant cited no case where opinions addressing less-discriminatory alternatives in a rebuttal expert report were stricken because the defendant's expert did not address them. Noting a lack of authority supporting the defendant's position, the court denied the defendant's motion to strike the EEOC rebuttal expert's opinions regarding alternative assessments.[425]

Similarly, the EEOC moved to exclude the defendant's expert witness report.[426] The defendant's expert was an industrial/organizational psychologist who claimed to have examined the use of the isokinetic test at issue and found it "valid" as a selection tool that aimed to lower the incidence and cost of workers' compensation injuries.[427] The EEOC claimed the field of industrial/organizational psychology relies on the government's Uniform Guidelines on Employee Selection Procedure and the Society for Industrial Organizational Psychology's Principles for the Validation and Use of Personnel, that these documents set out specific standards to be used when validating selection procedures, and that the defendant's expert's work frequently departs from these methods and standards.[428] Applying *Daubert*, the court determined the expert's report was reliable and would assist the trier of fact and therefore denied the EEOC's motion.[429]

Finally, in a case out of the Eastern District of Wisconsin, a federal court considered the EEOC's pre-trial motion in limine to exclude the defendant's expert testimony.[430] The case concerned claims of disability discrimination brought by an individual with Down Syndrome against her former employer. The defendant's expert was a clinical and forensic psychologist whose clinical services focus on children, adolescents, and families and forensic services include evaluations of adults, adolescents, and children.[431] The EEOC argued the expert's testimony was not relevant to any issue the jury would be asked to decide. The EEOC also asserted the expert, a child psychologist, lacked the specific qualifications and experience to offer an opinion on the intellectual functioning of persons with Down Syndrome, as well as a geriatric diagnosis of dementia for an individual with Down Syndrome.[432] The court, however, determined that based on the expert's qualifications, experience, and expertise, he was qualified to offer his expert medical opinion in this case and any disagreement regarding the expert's opinions could be challenged at cross-examination.[433]

F. General Discovery by Employer

1. General Issues

In FY 2021, some cases addressed time limits on depositions and the scope of information that may be obtained in EEOC investigator depositions.

In *EEOC v. CACI Secured Transformations, LLC*,[434] involving claims of disability discrimination, the employer was permitted an additional three hours beyond the seven-hour limit for depositions based on the deponent's mental condition. The employer demonstrated additional time was needed based on the deponent's apparent cognitive issues, reflected in her slowness to answer questions and need for rephrasing of most questions.[435] The court noted that "these observations about the witness' mental state [were] consistent with the allegations in the complaint that [she] suffered from a serious head injury in a...car accident."[436]

423 *EEOC v. Schuster Co.*, 2021 U.S. Dist. LEXIS 79813 (N.D. Iowa Apr. 13, 2021).
424 *Id.* at **4-5.
425 *Id.* at *5.
426 *EEOC v. Schuster Co.*, 2021 U.S. Dist. LEXIS 79812 (N.D. Iowa Apr. 13, 2021).
427 *Id.* at **1-2.
428 *Id.* at **1-2.
429 *Id.* at *5.
430 2021 U.S. Dist. LEXIS 115941 (E.D. Wis. June 22, 2021).
431 *Id.* at *3.
432 *Id.* at *6.
433 *Id.* at **9-10.
434 *EEOC v. CACI Secured Transformations, LLC*, 2020 U.S. Dist. LEXIS 228058, at *2 (D. Md. Dec. 3, 2020).
435 *Id.* at *3.
436 *Id.* at *4.

In *EEOC v. Defender Association of Philadelphia*,[437] the court allowed the defendant employer to take the deposition of an EEOC investigator, assigned to the charging party's ADA claim, but with caveats. The EEOC had objected to the deposition on multiple grounds: (1) the investigator could not provide relevant evidence; (2) the agency previously had produced the investigative file; (3) requiring the investigator to prepare and appear for a deposition would unduly burden his ability to perform his job duties; (4) inquiry into the conciliation process was barred by law; and (5) the deliberative process privilege barred the investigator's deposition.[438] The court permitted the deposition, but prohibited inquiries which would implicate the conciliation process or deliberative process privilege.[439]

2. Third-Party Subpoenas

In *EEOC v. Club Demonstration Services, Inc*,[440] a district court analyzed the permissible scope of discovery by an employer in an action alleging violations of the Americans with Disabilities Act. The EEOC moved to quash or modify subpoenas, directed to the aggrieved party's former employers.[441] The subpoenas sought in 14 separate items documents from plaintiff's former employers, which the court determined broadly covered the "entirety of the personnel files in question."[442] Noting that the principal issue was the charging party's accommodation on her job with the defendant, the court held that the charging party's performance in different jobs with different employers "distracted from focus on [her] ADA action."[443] The court denied the motion to quash, but granted EEOC's alternative motion to modify.[444] The court allowed the defendant to subpoena information related only to its affirmative defense of mitigation of damages.[445]

In *EEOC v. Dolgencorp, LLC*,[446] the court granted the EEOC's motion for a protective order and an order to quash a subpoena to a third-party employer. The EEOC had sued, alleging that the defendant created a sexually hostile work environment and constructively discharged the charging party. Based on information from charging party's deposition, the employer sent a subpoena to her prior employer, requesting "[a]ny and all records maintained in the ordinary course of business with respect to [charging party]…including but not limited to [her] personnel file, disciplinary records, and any complaint or investigation records." EEOC moved to quash on grounds that the records sought were (1) disproportional, (2) irrelevant, and (3) intended to harass and embarrass charging party.

The court held that, while prior employment records may be relevant and discoverable for credibility determinations, a party seeking the records must demonstrate a legitimate, good-faith basis to question credibility, and the employer in this case did not meet that burden. The court found the broad subpoena unsupported and the secondhand assertion from a deposition that charging party "was trouble" at a prior employer insufficient since it had no relevance to the case and it was undisputed that the charging party was a good employee. Agreeing that the records sought were overbroad, irrelevant, carried the potential to embarrass the charging party and calling the subpoena "a quintessential 'fishing expedition,'" the court granted the protective order and quashed the subpoena.

G. General Discovery by EEOC/Intervenor

1. Scope of Permitted Discovery by EEOC

A few FY 2021 cases addressed the scope of information the EEOC can obtain in discovery. The notable decisions are discussed below.

In *EEOC v. Rogers Behavioral Health*, the district court granted the EEOC's motion to amend the scheduling order to allow EEOC to depose defendant's expert and denied the defendant's motion for protective order.[447] The court's initial scheduling order had given the parties eight and one-half months for discovery.[448] A month before that discovery period ended, the EEOC identified

437 *EEOC v. Def. Ass'n of Philadelphia*, 2021 U.S. Dist. LEXIS 110521, at *1 (E.D. Pa. June 11, 2021).
438 *Id.* at *2.
439 *Id.* at *4.
440 *EEOC v. Club Demonstration Servs., Inc.*, 2021 U.S. Dist. LEXIS 17627, at *1 (D. Alaska Jan. 26, 2021).
441 *Id.* at *2.
442 *Id.* at *5.
443 *Id.* at *6.
444 *Id.*
445 d.
446 2019 U.S. Dist. LEXIS 220340 (Dec. 23, 2019).
447 *EEOC v. Rogers Behavioral Health*, 2020 U.S. Dist. LEXIS 212341, at *1 (E.D. Wis. Nov. 13, 2020).
448 *Id.* at *3.

nine witnesses for deposition, so the parties stipulated to extend discovery for another four months.[449] None of the witnesses identified were employees of the defendant.[450] Two weeks before the close of the extended discovery deadline, EEOC served a subpoena for a corporate representative deposition of a third-party witness pursuant to Rule 30(b)(6), scheduling the deposition two days before the discovery deadline.[451] Due to the unavailability of counsel and the 30(b)(6) witnesses, the third-party witness suggested dates for the 30(b)(6) deposition a month later.[452] The EEOC then moved to extend the discovery deadline for another 30 days so that it could complete the depositions of the corporate representative and defendant's expert witness.[453] On the same day, the defendant moved for a protective order, asking the court to quash the EEOC's subpoena for the corporate representative deposition.[454] While motions were pending, the EEOC filed a status report, notifying the court that the corporate representative deposition of the third-party witness was no longer necessary because the EEOC had obtained a declaration from the third party.[455]

Although the defendant's motion for a protective order as to the corporate representative deposition was now moot, the court noted that it "is troubled by the defendant's apparent attempt to get around what likely would be a standing issue had it filed a motion to quash the Rule 30(b)(6) subpoena by casting the motion as a motion for a protective order."[456] The court granted the EEOC's motion to extend discovery, explaining that "defendant's reaction and allegations of deliberate delay tactics seems unwarranted."[457] The court also noted that the initial scheduling order did not provide "an inordinately long period of discovery, particularly given the fact that during the last eight months, the pandemic has created unique restrictions on the ability of parties to conduct discovery."[458] The court concluded the EEOC's request for an additional month of discovery was reasonable.[459]

In *EEOC v. Staffing Solutions of WNY, Inc.*, the district court upheld a magistrate judge's grant of the EEOC's proposed discovery order, requiring defendant to produce documents showing the identity of potential new claimants from the conclusion of EEOC's investigation forward to present-day, approximately a four and a half-year period.[460]

The defendant made three arguments why the magistrate judge's grant of the EEOC's proposed discovery order violated Fed. R. Civ. P. 26.[461] First, the defendant argued that the magistrate's order violates Fed. R. Civ. P. 26's proportionality requirement "that discovery be proportionate to the issues in the case and the parties [sic] resources."[462] The district court concluded that the magistrate judge fully considered proportionality, dedicating three pages of his seven-page decision and order to the issue, and determined that the EEOC properly narrowed the scope of discovery originally requested and further that the documents sought were "centrally located" and could be produced "within 'a couple of hours.'"[463] Second, the defendant argued that magistrate "fail[ed] . . . to take into account the lack of merit/weakness of the claims brought by the EEOC."[464] The district court disagreed, noting that the magistrate judge found the requested discovery would allow the EEOC to identify potential new claimants who suffered discrimination after February 2016 when the EEOC's investigation ended.[465] The district court held that the magistrate judge had "considered the importance of the discovery in resolving the dispute.[466] Third, the defendant claimed the magistrate judge "ignor[ed] the substantial record evidence and admissions by the EEOC, that the claims of many, if not most, of the claimants identified during its investigation lack merit, rais[ing] fundamental questions under the Due Process Clause of the Constitution."[467] The district court disagreed, finding that the merits of the discrimination claims were contested and that claims of violation of due process "are conclusions supported by nothing more than rhetoric."[468] The district court thus affirmed the discovery order, noting that "[b]oth sides may face difficult decisions about how to obtain additional information from claimants and witnesses identified by the proposed discovery . . . but that does not make the proposed discovery irrelevant, disproportionate, or unconstitutional."[469]

449 *Id.*
450 *Id.*
451 *Id.* at **3-4.
452 *Id.* at *4.
453 *Id.* at **4-5.
454 *Id.* at *4.
455 *Id.* at *8.
456 *Id.* at *9.
457 *Id.* at **9-10.
458 *Id.* at *10.
459 *Id.*
460 *EEOC v. Staffing Solutions of WNY, Inc.*, 2020 U.S. Dist. LEXIS 192294, at **1, 5 (W.D.N.Y. Oct. 16, 2020).
461 *Id.* at *2.
462 *Id.* at **2, 6
463 *Id.* at **6-7.
464 *Id.* at **2, 7.
465 *Id.* at **7-8.
466 *Id.* at *8.
467 *Id.* at **2, 8.
468 *Id.* at *8.
469 *Id.* at *9.

In *EEOC v. University of Miami*, the district court granted in part a third EEOC motion to compel discovery.[470] The EEOC sought to compel production of documents showing starting salaries offered to tenured or tenure-track faculty in the College of Arts and Sciences for a 12-year period and in the School of Business for a 9-year period, documents showing how such salaries were set, and additional documents showing the background, experience and employment details for each person.[471] The EEOC also sought documents on annual salary increases for tenure-track faculty in the Political Science Department for a 21-year period, including assessments, evaluations, tenure, promotions and the like.[472] The EEOC contended it needed the requested discovery to allow it enough data "to test the explanations advanced by Defendant" as to how salaries of the plaintiff-intervenor and other comparators were determined.[473] The district court found some of what was sought exceeded the bounds of relevance and did not "take into account what information Defendant actually considered in making salary increase decisions, nor is it remotely tailored to discovering the salary increase decisions of the professors at issue in this case."[474] The district court did order the defendant to produce some of the requested information, including unredacted Faculty Salary Analysis Spreadsheets and starting salary information for the Political Science faculty for three specific years.[475]

In *EEOC v. Green Lantern Inn, Inc.*, the district court granted the EEOC's application to compel discovery, ordering the defendant to produce certain financial information related to a punitive damages claim and responsive electronically stored information (ESI).[476] The EEOC had requested production of defendant's financial records for purposes of damages and to determine whether the defendant and another entity were a single employer under Title VII.[477] The defendant objected to these requests as "excessive," "premature because there has been no 'proof of wrongdoing'" and "just big government overreach" because the allegation that the termination decision was pretextual "is an outright lie."[478] The defendant also argued that discovery of its financial information should not be permitted until after a finding of liability.[479] The district court determined the more efficient procedure was to allow discovery of financial records and that it had discretion on whether to bifurcate the issue of punitive damages at trial.[480] Although the defendant raised concerns with the confidentiality of producing such information, the court found those concerns could be addressed through a protective order.[481]

The EEOC also requested production of certain ESI.[482] At that time, the defendant had not produced any ESI.[483] According to an email described in the order, the approximate cost to produce the ESI was around $33,000, but the defendant did not object to the cost burden.[484] As with the financial records, the court noted that any privacy concerns with the ESI could be resolved through a protective order.[485] As a result, the court ordered production of responsive ESI, including from searching computer hard drives, cell phones, email accounts, social media and other systems, in the format the EEOC requested.[486]

2. Failure to Respond to Discovery

In a case brought by the EEOC, a federal court issued two decisions on requests for sanctions by a plaintiff-intervenor as a result of the defendant's failure to respond to discovery.

In *EEOC v. Excel Hospitality Group, LLC*, a plaintiff-intervenor filed five motions to compel discovery responses.[487] When the defendant failed to respond, the court granted two of the motions, ordering the defendant to provide discovery responses within 10 days and pay the intervenor's reasonable attorneys' fees.[488] When the defendant did not comply, the intervenor moved for sanctions, seeking to strike the defendant's answer, entry of a default judgment and an award of reasonable attorneys' fees.[489] The

470 *EEOC v. Univ. of Miami*, 2020 U.S. Dist. LEXIS 203841, at *1 (S.D. Fla. Nov. 2, 2020).
471 *Id.* at **1-2.
472 *Id.* at *2.
473 *Id.* at **2-3.
474 *Id.* at *3.
475 *Id.* at **3-4.
476 *EEOC v. Green Lantern Inn, Inc.*, 2021 U.S. Dist. LEXIS 9841, at **1, 5-6 (W.D.N.Y. Jan. 19, 2021).
477 *Id.* at *2.
478 *Id.* at **1-2.
479 *Id.* at *3.
480 *Id.*
481 *Id.*
482 *Id.*
483 *Id.*
484 *Id.* at **3-4.
485 *Id.* at *4.
486 *Id.* at *5.
487 *EEOC v. Excel Hospitality Group, LLC*, 2020 U.S. Dist. LEXIS 186537, at *1 (M.D. Fla. Oct. 8, 2020).
488 *Id.* at **1-2.
489 *Id.* at *2.

defendant again failed to respond, so the intervenor filed a second motion for sanctions.[490] The court ordered the defendant to show cause why the two motions for sanctions should not be granted.[491] In its decision, the court noted that the explanation from defendant's counsel "demonstrate[s] a complete failure to manage the case," including acknowledgment of receipt of the court orders, but failure to calendar deadlines that "slipped off of [his] radar."[492] Because the court was uncertain whether these failures were due to bad faith or negligence, it imposed less-severe sanctions.[493] It declined to strike the answer or enter default judgment or strike the answer, but ordered payment of attorneys' fees.[494] The court cautioned defense counsel that it "will not hesitate to impose severe sanctions if they fail to comply with this (or other) Court Orders."[495]

Two weeks later, the intervenor again moved for sanctions in the form of default judgment and attorneys' fees because the defendant had not complied.[496] The defendant cured its mistakes and filed a response, advising that it had complied and that its belated noncompliance was oversight that was now corrected.[497] Based on that representation, the court denied the request for entry of default judgment.[498] It did, however, order the defendant to pay $2,820 in attorneys' fees incurred by the intervenor's counsel.[499]

3. Misconduct by EEOC

In *EEOC v. George Washington University*,[500] the court found that the EEOC's counsel violated Rule 26(b)(5)(B) when she reviewed two email chains, containing in part attorney-client privileged communications, after being informed by defendant of the privileged information in the documents.[501] The EEOC argued that its counsel was entitled to review the documents to determine whether the emails were actually privileged, but the court rejected that argument, noting that Rule 26(b)(5)(B) states that where a claim of privilege is disputed it will be resolved by the court—not the party in possession of the potentially privileged material.[502] Although the court noted that review of the email chains was especially improper after being put on notice of the claim of privilege, the court declined to impose sanctions, finding insufficient evidence of bad faith to justify them.[503] The court did, however, warn the EEOC and its counsel to comply with the Federal Rules of Civil Procedure and their ethical responsibilities, and noted that further breaches of duties under Rule 26(b)(5)(B) might result in sanctions.[504]

H. Summary Judgment

In FY 2021, federal courts issued more than a dozen decisions addressing summary judgment motions by either the EEOC or the employer in cases brought by the EEOC. Most of these decisions involved either alleged disability discrimination or alleged sex discrimination. In most cases, motions for summary judgment were denied, but when granted, the decisions favored employers and the EEOC evenly.

The following discusses some notable summary judgment decisions from FY 2021.

1. Summary Judgment Win Equates to Prevailing Party for Purposes of Rule 54

One FY 2021 decision, *EEOC v. Doherty Group*,[505] involved Federal Rule of Civil Procedure 54, which allows a prevailing party to recover costs other than attorney's fees. The court ordered the EEOC to pay approximately $7,385.02 in costs to the defendant who had won summary judgment.[506]

490 *Id.*
491 *Id.*
492 *Id.* at *3.
493 *Id.* at **6-7.
494 *Id.*
495 *Id.* at *7.
496 *EEOC v. Excel Hospitality Group, LLC*, 2020 U.S. Dist. LEXIS 206016, at *2 (M.D. Fla. Nov. 4, 2020).
497 *Id.* at *2.
498 d.
499 *Id.* at *4.
500 No. 17-cv-1978, 2020 U.S. Dist. LEXIS 206835 (D.D.C. Nov. 5, 2020).
501 *Id.* at *7.
502 d. at *14.
503 *Id.* at **20, 55-56.
504 *Id.* at *56.
505 No. 14-cv-81184, 2020 U.S. Dist. LEXIS 245353, at *1 (S.D. Fla. Dec. 29, 2020).
506 *Id.* at **4, 21.

2. Sex Discrimination

As noted, a number of FY 2021 decisions dealt with claimed sex discrimination, and these decisions involved a variety of theories, including disparate treatment, systemic disparate treatment and disparate impact. Proving disparate treatment requires establishing that the employer's actions were based on a discriminatory motive by relying on direct, circumstantial or statistical evidence. Direct evidence of unlawful discriminatory motive is rare, but when such evidence is present, it is difficult for the employer to obtain summary judgment.

In that regard, in *EEOC v. NDI Furniture, LLC*,[507] the EEOC sued on behalf of the charging party (and a class of female job applicants), alleging that the employer discriminated against the charging party because of her sex when it failed to hire her (and other women) in the defendant's Birmingham warehouse and that defendant had a pattern or practice of discriminating against women.[508] The charging party claimed she applied for the position of warehouse coordinator, but was told by the employer's warehouse manager that defendant did not hire women for positions in the warehouse.[509] The court denied the employer's motion for summary judgment, finding the direct evidence (*i.e.*, statements attributed to the employer's warehouse manager and owner) created a factual dispute as to whether the employer, absent any discriminatory motive, would have still declined to hire the charging party and hired a man for the warehouse coordinator position.[510] The court further concluded a reasonable jury could find that the defendant engaged in pattern or practice of discriminating against women as the discriminatory remarks suggested a broad discriminatory policy toward all women.[511]

The defendant argued there was evidence to refute any such policy, including that it employed women in both non-warehouse and warehouse roles after 2015.[512] The court concluded, however, that balancing this evidence against other evidence, such as the fact that defendant employed no women in a warehouse role when the remarks were made and did not hire any of the 11 women who applied for the position, presented issues to be resolved by a jury.[513]

Title VII also prohibits employment practices that are facially neutral but cause a disparate impact on the basis of sex (*i.e.*, fall more harshly on one group than another) and cannot be justified by business necessity. Unlike a claim of disparate treatment discrimination, disparate impact claims do not require a showing of discriminatory motive or intent.

The EEOC scored a notable summary judgment win as to liability in *EEOC v. Stan Koch & Sons Trucking, Inc.*,[514] a case in which it alleged that the employer's use of a physical abilities test (CRT test) disproportionately screened out women who were qualified for truck driver positions with defendant.[515] In support of its summary judgment motion, the EEOC presented evidence of its experts' analysis of defendant's records, showing that 94% of male applicants passed the physical abilities test, but only 52% of female applicants passed.[516] The defendant produced no analysis or data to rebut these findings.[517] As a result, the court found that the EEOC had sufficiently stated a *prima facie* case of disparate impact discrimination because the CRT test did, in fact, disproportionately screen out women who either received conditional offers of employment or were already employed by defendant but who were required to take test to return to work after an injury.[518]

The court granted summary judgment in the EEOC's favor, concluding the employer failed to demonstrate the existence of a triable issue of fact since the employer had not produced any evidence to show that the test was job-related and consistent with business necessity, such as reducing workers' compensation costs and improving driver safety.[519] The court reasoned that the fact that defendant had changed the cut-off scores used to determine whether applicants passed, changed the circumstances under which it would allow applicants to retake the test, and ultimately, stopped using the test altogether in 2018 and did not replace it with another way to measure applicants' strength, further undercut any showing of business necessity.[520]

507 No. 2:18-cv-01952-RDP, 2021 U.S. Dist. LEXIS 118908, at *1 (N.D. Ala. June 25, 2021).
508 *Id.* at **21-22.
509 *Id.* at *23.
510 *Id.* at **24-25.
511 *Id.* at *26.
512 *Id.* at *27.
513 *Id.*
514 No. 19-cv-2148, 2021 U.S. Dist. LEXIS 168297, at *1 (D. Minn. Aug. 30, 2021).
515 *Id.* at *7.
516 *Id.*
517 *Id.*
518 *Id.* at *16 (noting the disparities were so great they could not have occurred by chance and record evidence did not support another plausible explanation).
519 *Id.* at **24-25.
520 *Id.* at **25-28. In December 2021, the parties entered a five-year consent decree to end the litigation. Under this decree the defendant agreed, among other things, to pay $500,000 in monetary damages.

In *EEOC v. University of Miami*,[521] the EEOC alleged that the University discriminated against a female political science professor based on her sex in violation of the Equal Pay Act and Title VII of the Civil Rights Act by paying her $25,000 less than a male counterpart.[522] The University moved for summary judgment on both claims arguing, among other things, that the professors did not perform similar jobs and even if they did, their pay was based on factors other than sex.[523] The University asserted that the charging party and her male counterpart did not perform the same job because they did not teach the same classes, publish in the same publications or specialize in the same teaching areas.[524] The court rejected that argument, noting that inquiry as to whether two individuals perform equal work in an equal position focuses on the primary duties of each job and emphasizes actual job content over formal job titles or descriptions.[525] The court concluded that a reasonable juror could find the positions were substantially equal as both individuals were tenure-track, full-time professors in the University's political science department and both generally taught the same number of courses at the introductory and upper-class levels.[526] The court also determined that summary judgment record, when viewed in the light most favorable to the EEOC and charging party, indicated gender played a role in salary disparities and as a result the issue of whether the professors' pay was based on favors other than sex was to be resolved by a jury. Thus, summary judgment was denied.[527] At trial, however, a jury returned a verdict on March 11, 2022, in favor of the University, finding that gender was not a motivating factor in the pay differential.

3. Disability Discrimination

In *EEOC v. Cash Depot, LTD*,[528] the EEOC claimed the employer failed to accommodate charging party's lifting restriction to not lift more than 25 pounds, imposed after he suffered a stroke.[529] The employer moved for summary judgment, arguing the EEOC could not meet its burden of establishing that charging party could perform his job with or without a reasonable accommodation.[530] The employer claimed it was impossible to accommodate his lifting restriction as the essential functions of his job required him to perform daily tasks exceeding the 25-pound restriction.[531] The EEOC contended this was speculation.[532] The court granted summary judgment for the employer, concluding that the EEOC had failed to identify a reasonable accommodation the employer reasonably could have considered. The court also said that the EEOC's speculation that a reasonable accommodation existed and the charging party's insistence that he could do his job does not overcome the employer's business judgment on how the job is done.[533] The court also emphasized the burden to engage in the interactive process was not just on the employer but also on the charging party.[534] The EEOC has filed a notice of appeal to the Fifth Circuit in this case.

4. Retaliation

A few summary judgment cases involved retaliation claims. In *EEOC v. Proctor Financial, Inc.*,[535] the EEOC alleged the employer retaliated against charging party (a claims examiner) by suspending her for filing a charge of race discrimination with the EEOC based on failure to promote. The defendant argued it suspended the charging party for failure to pass certain licensing exams and providing a doctored copy of her test results to her manager.[536]

The charging party's charge triggered a string of emails describing her claim as "baseless" and eventually including a discussion about how to get rid of her. The parties filed cross motions for summary judgment.[537] The court found the emails constituted direct evidence of retaliation because they reflected a clear intent to terminate or take adverse action against the charging party because of her protected activity.[538] The court, however, denied summary judgment, saying that while the evidence of retaliation was strong,

521 No. 19-23131-CIV, 2021 U.S. Dist. LEXIS 186479, at *1 (S.D. Fla. Sept. 29, 2021).
522 *Id.*
523 *Id.* at *21.
524 *Id.* at *26.
525 *Id.* at *23.
526 *Id.*
527 *Id.* at *36.
528 No. H-20-3343, 2021 U.S. Dist. LEXIS 185146, at *1 (S.D. Tex. July 21, 2021).
529 *Id.*
530 *Id.*
531 *Id.* at **3-4.
532 *Id.* at *4.
533 *Id.* at *3.
534 *Id.* at *5.
535 No. 19-11911, 2021 U.S. Dist. LEXIS 189562, at *1 (E.D. Mich. Sept. 30, 2021).
536 *Id.*
537 *Id.* **7-10.
538 *Id.* at *18.

a genuine issue of material fact existed as to whether the reason offered by the defendant for charging party's suspension was a pretext for unlawful retaliation.[539] Thus, case should proceed to a jury.[540]

In *EEOC v. NDI Furniture*, the EEOC brought two claims of retaliation against the defendant—one on behalf of charging party and the other on behalf of her son.[541] When the charging party was advised by defendant's warehouse manager that it did not hire women for warehouse positions, the charging party complained such policy was discriminatory.[542] Twelve days later, the defendant fired her son, who also was an employee, and failed to offer her a position.[543] The court denied the employer's summary judgment motion on both retaliation claims, finding a reasonable juror could conclude terminating an employee's son shortly after the employee engaged in protected activity is retaliatory both as to the son and the employee.[544]

Additional information on these and other summary judgment decisions issued in FY 2021 can be found in Appendix D of this Report.

I. Default Judgment

In FY 2021, courts addressed whether, and to what extent, default judgments were appropriate in cases brought by the EEOC.

In *EEOC v. Elite Wireless Group, Inc.*,[545] the EEOC sued the defendant, alleging sexual harassment and discrimination in violation of Title VII. At the time the EEOC filed the complaint, the parties had engaged in informal settlement discussions and other dialogue.[546] After the defendant failed to answer in time, the clerk entered default, but no default judgment, and defendant moved to set aside the default.[547]

The court recognized that, under Rule 55(c), it could set aside the default for "good cause" shown, which "is determined by three factors: whether the defendant's culpable conduct led to the default; whether the defendant does not have a meritorious defense; and whether setting aside the default would prejudice the plaintiff."[548] The court also reiterated that these factors are more liberally applied with respect to a request to set aside a default, as opposed to a default judgment.[549]

Considering the three "good cause" factors, the court set aside the default. The court first found that there was no "culpable conduct" because, based largely on the parties' earlier dialogue, "counsel's actions do not suggest an intention to take advantage of the opposing party, interfere with judicial decisionmaking, or otherwise manipulate the legal process," and "a defendant's neglectful failure to answer, without more, is typically not culpable unless there is no explanation of the default inconsistent with a devious, willful, or bad faith failure to respond."[550] The court also found that, given the early stage of the case, "the present record certainly does not affirmatively show the absence of a meritorious defense."[551] Finally, the court found no prejudice would result from vacating the default because "there is no indication that plaintiff's ability to pursue its claim will be hindered by the delay in setting aside the Clerk's entry of default."[552] The court also denied EEOC's request to award attorneys' fees.

In *EEOC v. Protocol of Amherst, Inc.*,[553] the EEOC alleged that the defendant violated Title VII by subjecting its female employees to a hostile work environment based on sex.[554] After defendant's attorney withdrew, the court gave the defendant additional time to secure new counsel.[555] When the defendant failed to do so, the EEOC obtained entry of default and moved for default judgment.[556] The defendant secured counsel, who requested an extension to respond to the default judgment motion to

539 *Id.* at *23.
540 *Id.*
541 2021 U.S. Dist. LEXIS 118908 at *21.
542 *Id.* at *16.
543 *Id.*
544 *Id.* at *38.
545 *EEOC v. Elite Wireless Grp., Inc.*, 2020 U.S. Dist. LEXIS 185151 (E.D. Cal. Oct. 5, 2020).
546 *Id.* at **2-3.
547 *Id.*
548 *Id.* at **3-4.
549 *Id.* at *4.
550 *Id.* at **6-7 (citations and internal quotation marks omitted).
551 *Id.* at **8-9.
552 *Id.* at **9-10.
553 *EEOC v. Protocol of Amherst, Inc.*, 2020 U.S. Dist. LEXIS 201158 (W.D.N.Y. Oct. 27, 2020).
554 *Id.* at **1-2.
555 *Id.*
556 *Id.*

allow the parties to discuss settlement.[557] While the resolution of the default was pending, the parties agreed to settlement terms, which were subsequently set forth in a consent decree executed by the parties.[558]

The defendant subsequently sought to withdraw from the consent decree because of changed financial circumstances.[559] Applying traditional principles of contract law, the court recognized that the validity of a contract is to be determined at the time it was made. Thus, while not "unsympathetic" to defendant's changed financial circumstances, the court recognized that "inability to pay is no defense to performance" and "sympathy is not a ground for equitable relief."[560] Thus, the court recommended that the EEOC's motion for approval and entry of consent judgment be granted.[561]

In *EEOC v. MSDS Consultant Services, LLC*,[562] the EEOC alleged that the defendant violated the ADA.[563] After the defendant failed to answer the complaint in a timely manner, default was entered against the defendant.[564] The defendant then requested that the court vacate the default, but, because it failed to do so through counsel, the court struck the request -- instructing defendant that it was required to appear through counsel.[565] The EEOC moved for default judgment and the defendant failed to respond or appear.[566]

Accepting the well-pleaded factual allegations in the complaint as true, the court found that the defendant failed to accommodate employee's disability, created a hostile work environment, and retaliated against the employee. With respect to damages, however, the court found that the EEOC failed to offer evidence sufficient to calculate or award damages (including punitive damages), and therefore deferred ruling on damages to provide the EEOC an opportunity to submit the requisite evidence.[567] The court denied the EEOC's request for injunctive relief, finding that (1) the requested relief "simply mirrors the terms of the ADA, when [defendant] is bound already adhere to the statute absent such an injunction" and (2) there was no evidence suggesting a cognizable danger of recurrent violations.[568]

In *EEOC v. Limenos Corp.*,[569] the court considered numerous arguments seeking to set aside a default and default judgment entered against the defendant. First, the defendant's counsel moved to set aside the default judgment, arguing that there was "excusable neglect" under Rule 60(b).[570] Counsel argued that the following constituted excusable neglect: (1) she only appeared on a limited basis, in order to file a motion to stay; (2) she was confused as to whether the attorneys at the helm of the bankruptcy case would take over for her in the instant case; (3) the electronic notification informing her that the EEOC moved for the entry of default judgment went to her spam folder instead of to her inbox; (4) there was a COVID-19 outbreak at one of her client's facilities that she had to address; and (5) two of her close friends passed away.[571] The court held that these explanations did "not amount to the level of 'excusable neglect' which would call for the Court to set aside the default judgment."[572]

Defendant then sought to set aside the default,[573] arguing that there was "good cause" to do so under Rule 55(c).[574] The court stated that, while there was no mechanical formula, the following factors were relevant to the analysis: (1) whether the default was willful; (2) whether setting it aside would prejudice the adversary; (3) whether a meritorious defense is presented; (4) the nature of the defendant's explanation for the default; (5) the good faith of the parties; (6) the amount of money involved; (7) the timing of the motion to set aside the entry of default.[575] The court found that defendant could not satisfy the good cause standard because its motion was filed almost four months after the entry of default and "was anchored to blank assertions stating that the EEOC would not be prejudiced if the default were set aside" and that it had meritorious defenses.[576]

557 *Id.* at **2-3.
558 *Id.*
559 *Id.* at **3-4.
560 *Id.* at **4-5 (citations and internal quotation marks omitted).
561 *Id.* at *5.
562 *EEOC v. MSDS Consultant Servs., LLC*, 2021 U.S. Dist. LEXIS 119262 (D. Md. June 25, 2021).
563 *Id.* at **5-6.
564 *Id.*
565 *Id.*
566 *Id.*
567 *Id.* at **13-15.
568 *Id.* at **15-16.
569 *EEOC v. Limenos Corp.*, 2021 U.S. Dist. LEXIS 171442 (D.P.R. Sept. 9, 2021).
570 *Id.* at **3-7.
571 *Id.*
572 *Id.*
573 Defendant sought reconsideration of an earlier order denying relief, however, the court primarily analyzed the merits of the motion as if it was considering it in the first instance.
574 *Id.* at **7-9.
575 *Id.*
576 *Id.*

The court further rejected the defendant's attempt to set aside the default judgment pursuant to Rules 55(c) and 60(b) for the same reasons as set forth above, finding that there was no "good cause" and the failings of the defendant's counsel would fall on defendant.[577] The defendant also contended that the default judgment should be set aside under Rule 59(e) because the defendant was not provided proper notice prior to a hearing on damages and the court failed to hold a hearing on damages.[578] In rejecting this argument, the court stated "because no hearing for any of the events listed in *Rule 55(b)(2)(A) - (D)* was deemed necessary and therefore did not take place, a notice regarding such a hearing was not necessary."[579] While the court declined to vacate the default judgment, after examining the record, it vacated the damages portion of the default judgment to "schedule a hearing for the sole and exclusive purpose of determining damages."[580]

The court rejected defendant's remaining arguments for vacating the default judgment, many of which the court concluded were repetitive, finding that the judgment was not void, there were no "extraordinary circumstances," there was no due process violation, and, at bottom, defendant "has not provided a good reason for the default judgment, or the default—for that matter—to be set aside."[581]

J. Trial

The pandemic continued to have an impact on the number of lawsuits brought to trial in FY 2021. According to the EEOC's Annual Performance Report, the EEOC's Office of General Counsel conducted six trials during this time period: four were in-person jury trials and two were bench trials.[582] The agency won four and lost two of these trials.[583]

Few cases involved notable pre-trial motions compared to prior years.

1. Pre-Trial Motions

In a decision out of the Eastern District of Wisconsin, the EEOC sought to quash defendant's trial subpoena seeking the EEOC's entire investigation files concerning the defendant's employee.[584] The EEOC argued that the trial subpoena should be quashed for two reasons: (1) the issuance of a trial subpoena to obtain the EEOC's file was an improper attempt to circumvent the (already passed) discovery deadline imposed by the court; and (2) the EEOC cannot lawfully produce or disclose investigative files that do not result in litigation.[585] The court determined that the first ground was a sufficient basis to quash the subpoena.[586]

The court reiterated the general rule that "trial subpoenas may not be used as a means to engage in discovery after the discovery deadline has expired."[587] Thus, while the court suggested that defendant "may have been entitled to the documents had it requested them before the discovery period expired"—calling into question the EEOC's second asserted basis for quashing the subpoena—the court found that the defendant "offers no explanation why it waited until after the discovery deadline expired to request such information."[588] Consequently, because the defendant failed to show "good cause," and because allowing the subpoena would "potentially handicap the opposing party's trial preparation since it would be required to scramble to obtain these documents at the last minute," the court quashed the trial subpoena.[589]

In *EEOC v. Danny's Restaurant, LLC*,[590] the court considered the defendant's motion to dismiss, as a sanction, alleging that the EEOC engaged in witness tampering by "fraudulently inducing and coercing a key witness in this case into giving a statement that is incomplete, misleading and which appears to erroneously support the Plaintiff's claims against the Defendant," and further, by "suppressing material exculpatory evidence."[591] The court denied defendant's motion for a number of reasons.

First, the court found that the motion to dismiss was untimely because the motion was filed after the deadline for dispositive motions, was filed well after defendant was aware of the allegedly offending conduct, and defendant failed to show good cause or

577 *Id.* at **9-15.
578 *Id.*
579 *Id.*
580 *Id.*
581 *Id.* at **16-19.
582 FY 2021 APR, p. 32.
583 *Id.*
584 2021 U.S. Dist. LEXIS 115942 (E.D. Wis. June 22, 2021).
585 *Id.* at **1-2.
586 *Id.*
587 *Id.* at **2-3.
588 *Id.* at * 3.
589 *Id.* at * 4.
590 *EEOC v. Danny's Restaurant, LLC*, 2021 U.S. Dist. LEXIS 156727 (S.D. Miss. Aug. 19, 2021).
591 *Id.* at **1-2.

excusable neglect for the delay.[592] Second, the defendant failed to comply with the "safe harbor" provision of Rule 11 before filing its motion seeking sanctions under that rule.[593] Third, "Defendant has not stated a factual basis sufficient to meet the high threshold for a finding by this court that it should use its inherent authority to sanction the Plaintiff."[594] Fourth, even if accepted as true, the defendant's allegations, when "the sensational verbiage is stripped away," did not "rise to the level of a sanctionable offense."

2. Trial

The EEOC was successful in at least one case that went to trial in FY 2021, a year in which civil trials were affected by closures and restrictions surrounding the Covid-19 pandemic. In this case, the EEOC sued on behalf of five female librarians against Enoch Pratt Free Library, alleging the library violated the federal Equal Pay Act (EPA) because it paid a male librarian more than the charging parties for performing the same work.[595]

The EPA prohibits employers from discriminating on the basis of sex in the wages paid to employees.[596] To sustain an EPA claim, a plaintiff must demonstrate that (1) the defendant paid her lower wages than her male counterpart; and (2) the plaintiff performed equal work requiring equal skill, effort, and responsibility as compared to her male coworker.[597] Establishing a *prima facie* case creates a presumption that the defendant violated the EPA. To determine whether work is "equal," the fact finder must determine "whether the jobs to be compared have a 'common core' of tasks, *i.e.*, whether a significant portion of the two jobs is identical."[598] If the jobs share a "common core" of duties, then the fact finder must determine whether any additional duties make the jobs "substantially different." Once plaintiff establishes a *prima facie* case, a defendant may avoid liability upon a showing that the wage differential is based on a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.[599]

While the parties vigorously disputed whether the EEOC established by a preponderance of evidence the second prong, *i.e.*, whether the five female librarians performed "substantially equal work" to the male comparator librarian, the court concluded that the job duties were substantially similar.[600] The court also concluded that defendants failed to establish the fourth affirmative defense: that the male comparator was paid more than the five female librarians due to a "factor other than sex."[601] Accordingly, after reviewing the evidence, testimony and argument following a five-day bench trial, the court concluded that defendants violated the EPA. Specifically, the court found that the pay disparity was not justified by a factor other than sex. The court awarded the charging parties stipulated back wages and liquidated damages.

In another case that went to trial in FY 2021, the verdict in favor of the employer came down to witness credibility. In *EEOC v. Ecology Services, Inc.*,[602] the EEOC filed a complaint on behalf of a trash truck driver, alleging the employer subjected the driver to a hostile work environment in violation Title VII. The EEOC alleged a co-worker sexually harassed the charging party, who notified the employer of the conduct, but the employer failed to correct the hostile environment. The EEOC further alleged that the charging party was constructively discharged as a result of the sexual harassment. The court found in favor of the employer following a four-day bench trial.

The charging party was the first witness the EEOC called to testify. She testified that "helpers" assigned to assist with her route made sexual comments and gestures towards her, sometimes in the presence of co-workers, but she never identified any during her testimony. The charging party testified that one of the helpers exposed himself to her while she was driving and made her touch his genitals. The first time this happened, the charging party allegedly did not notify her supervisor immediately because she was embarrassed, but when she finally did her supervisor said he would "take care of it."[603] After the second alleged incident, she testified she did not report it on the same day because nothing happened the first time.[604] The allegedly harassing conduct continued until the charging party requested an in-person meeting with her supervisor. The charging party testified that she was depressed, felt powerless and embarrassed. She explained that she stopped working on November 7, 2016 due to the harassment.

592 *Id.* at **4-5.
593 *Id.* at **5-6.
594 *Id.* at *6.
595 *EEOC v. Enoch Pratt Free Library*, 509 F. Supp. 3d 467, 469 (D. Md. 2020).
596 29 U.S.C. § 206(d)(1).
597 *Id.*
598 *Enoch Pratt Free Library*, 509 F. Supp. 3d at 476, quoting *Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986).
599 29 U.S.C. § 206(d)(1).
600 Enoch Pratt Free Library, 509 F. Supp. 3d at 477.
601 *Id.* at 479-80.
602 No. CV ADC-18-1065, 2021 WL 3549978, at *1 (D. Md. Aug. 11, 2021).
603 *Id.* at *2.
604 *Id.*

On that day, she called in late and spoke to her supervisor who told her that her lateness was an issue. He allegedly told her she had four prior warnings and could have been fired after the third warning, but he gave her another chance. He also brought up another issue regarding a garden hose which the charging party refused to allow on her truck since she believed it would not be accepted at the recycling center. The charging party became argumentative with her supervisor, who suspended her for two days. Shortly thereafter, the charging party texted "I QUIT" to her supervisor, allegedly because he was going to make her work again with one of her alleged sexual harassers.

To establish a *prima facie* case of sexual harassment based on a hostile work environment, a plaintiff must prove (1) unwelcome conduct; (2) based on the plaintiff's sex; (3) sufficiently severe or pervasive to alter the plaintiff's conditions of employment and create an abusive work environment; and (4) that is imputable to the employer.[605] Conduct is "unwelcome" when it continues after the employee sufficiently communicates that it is unwelcome.[606] To determine whether an environment is hostile, the court looks at all of the circumstances, which "may include frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[607]

The crux of this case came down to the credibility of the witnesses and the court ultimately found that the charging party's testimony was not credible.[608] It noted that the charging party stated that one of the helpers made inappropriate comments about her body every time they worked together in the presence of co-workers, but she failed to name or present evidence of any of these co-workers.[609] Even assuming, *arguendo*, that the EEOC established a *prima facie* case of hostile environment based upon sexual conduct, the court found that it failed to produce credible evidence that the charging party reported the conduct to her supervisors in order to correct the sexual harassment.[610] The court also found apparent bias and inconsistencies with other witnesses who testified that they saw a helper make sexual gestures towards the charging party. As a result, the court did not find them to be credible witnesses, or that their testimony bolstered the charging party's otherwise unsupported allegations.

After reviewing all of the evidence submitted along with the testimony, the court found that the EEOC failed to prove by a preponderance of evidence that the charging party was subjected to a sexually hostile environment so severe and pervasive to justify the constructive discharge, and entered judgment in favor of the employer.[611]

3. Post-Trial Motions

In another case brought to trial in FY 2021,[612] the EEOC asserted both failure-to-accommodate and termination claims under the ADA on behalf of a charging party. This case involved an employee with serious developmental, visual, and intellectual impairments could perform the essential functions of his job as a cart attendant with reasonable accommodations and whether a full-time job coach was a reasonable accommodation. A jury awarded $200,000 in compensatory damages and $5,000,000 in punitive damages against defendants for failing to provide the charging party with a reasonable accommodation and ending his employment due to his disability. The court evaluated the EEOC's requests for equitable and injunctive relief, denying its request for a permanent injunction but awarding the charging party $41,224.07 in back pay, $58,124.53 in front pay, $4,495.72 in prejudgment interest, and $19,097.14 representing adverse tax consequences.

At issue was defendants' request for judgment as a matter of law under Fed. R. Civ. Proc. 50, a new trial, and a reduction in compensatory damages. Defendants sought judgment on both claims on the following grounds: (1) the evidence failed to prove that the charging party is a qualified individual who could perform the essential functions of his cart attendant position without his job coach doing some of the work; (2) providing the charging party a full-time job coach would impose an undue hardship on defendants; (3) defendants did not act with the discriminatory intent necessary to support EEOC's claims for discriminatory termination and punitive damages; and (4) the EEOC's "novel" theory of liability—*i.e.*, asserting a job coach is a reasonable accommodation—did not entitle the charging party to punitive damages.[613]

605 *Id.* at *8.
606 *Id.*
607 *Id.*, quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).
608 *Id.* at *8.
609 *Id.* at **8-10.
610 *Id.* at *10.
611 *Id.* at **11-12.
612 503 F. Supp. 3d 801 (W.D. Wis. 2020).
613 *Id.* at 806.

While the case presented close questions, particularly about whether the charging party could perform the essential functions of his job as a cart attendant with reasonable accommodations and whether a full-time job coach was a reasonable accommodation, the court ultimately concluded that the close questions were factual ones within the purview of the jury, and the jury reached a verdict that was adequately supported by the evidence. Accordingly, the court denied all parts of defendants' motion.

In *EEOC v. Joe's Old Fashioned Bar-B-Que, Inc.*,[614] the EEOC and the plaintiff-intervenor filed claims alleging that her employer subjected her to a racially hostile work environment, constructively discharged her, and negligently retained a fellow employee. Following a jury trial, the jury returned a verdict in favor of the employer.[615]

Prior to submission of the case to the jury, the plaintiff-intervenor moved orally for judgment as a matter of law on all claims against her employer. The court denied the motion. The plaintiff-intervenor then renewed her motion for judgment as a matter of law on all claims against her employer and for a new trial and filed a motion to disallow costs. The court denied the motion for judgment as a matter of law and new trial, finding that the evidence presented at trial was sufficient to support the jury's verdict, and that the plaintiff-intervenor failed to show that the jury's verdict was against the clear weight of the evidence.[616] The court, however, granted the motion to disallow costs based on, *inter alia*, the plaintiff-intervenor's showing of her modest financial means and the difficulty of the factual issues presented in the case.[617]

In a separate case, *EEOC v. JBS USA, LLC*,[618] the EEOC attempted to reverse an adverse ruling at an initial trial phase. The EEOC initiated this Title VII lawsuit against defendant in 2010, alleging a pattern or practice of discrimination on the basis of race, national origin, and religion, as well as claims of retaliation. The court bifurcated the case, and Phase I addressed: (1) whether defendant engaged in a pattern or practice of unlawfully denying Muslim employees reasonable religious accommodations to pray and break their Ramadan fast from December 2007 through July 2011; (2) whether defendant engaged in a pattern or practice of disciplining employees on the basis of race, national origin, or religion during Ramadan 2008, and (3) whether defendant engaged in a pattern or practice of retaliating against a group of black, Muslim, Somali employees for engaging in protected activity in opposition to discrimination during Ramadan 2008.[619] If a plaintiff proves its pattern or practice allegations in Phrase I, the court hears individual damage claims in Phase II.

In this case, the court ultimately dismissed the EEOC's Phase I pattern or practice claims, holding that (1) while defendant had denied Muslim employees a reasonable religious accommodation to pray during Ramadan (other than in 2009 and 2010), the EEOC had not made a requisite showing that any employees suffered a materially adverse employment action as a result of defendant's policy denying unscheduled prayer breaks; (2) the EEOC failed to prove defendant's disciplinary actions during Ramadan 2008 were motivated by a discriminatory animus; and (3) the EEOC failed to demonstrate that defendant's discipline of employees during Ramadan 2008 was for a retaliatory purpose rather than for engaging in a work stoppage. The court determined that, while defendant may have made some "bad decisions that ultimately disadvantaged certain Muslim employees," "the evidence, as a whole, does not indicate that JBS was motivated by bias as opposed to other factors, such as JBS management's credible and legitimate concern about work stoppages."[620] The court went on to hold that, "because the EEOC has not shown that JBS's adverse employment actions during Ramadan 2008 were motivated by discriminatory animus, the Court will enter judgment in favor of JBS on the EEOC's Phase 1 pattern-or-practice discriminatory discipline claim."[621]

In response, the EEOC filed a "Second Motion for Partial Reconsideration of the Phase I Findings of Fact and Conclusions of Law" based on the Tenth Circuit's *en banc* decision in *Exby-Stolley v. Bd. of Cnty. Comm'rs*, 979 F.3d 784 (10th Cir.), a disability-accommodation case brought under the ADA, which the EEOC argued represented an intervening change in the controlling law for claims brought under Title VII's religious accommodation framework. In *Exby-Stolley*, the Tenth Circuit held that an adverse employment action is not required to prove a failure-to-accommodate claim under the ADA.

The court determined that *Exby-Stolley* is not an intervening change in the law controlling Title VII religious-accommodation cases.[622] "As the Court explained in its Phase I Findings, and as the Tenth Circuit stated in *Exby-Stolley*, the adverse employment

614 2020 WL 7318145 (W.D.N.C. Dec. 11, 2020).
615 *Id.* at *1.
616 *Id.* at **1-2.
617 *Id.* at **2-3.
618 2021 WL 236312 (D. Colo. Jan. 25, 2021).
619 *EEOC v. JBS USA, LLC*, 339 F. Supp. 3d 1135, 1149 (D. Colo. 2018).
620 *Id.* at 1192, citing *EEOC v. Flasher Co.*, 986 F.2d 1312, 1319-20 (10th Cir. 1992) ("It is error to assume ... that differential treatment between a minority employee and a non-minority employee that is not explained by the employer in terms of a rational, predetermined business policy must be based on illegal discrimination because of an employee's protected class characteristics.") (emphasis in original).
621 986 F.2d at 1192. This lawsuit settled in May 2021 for $5.5 million (see Appendix A).
622 2021 WL 236312, at *2 (D. Colo. Jan. 25, 2021).

action requirement for Title VII religious-accommodation claims is not new."[623] The law concerning religious-accommodation claims under Title VII, therefore, remains the same as it was before the *Exby-Stolley* decision.

K. Remedies

1. Remedies Generally

The cases decided in FY 2021 contained several helpful discussions of the remedies available under statutes administered by the EEOC. The first such discussion appears in *EEOC v. AZ Metro Distributors, LLC*,[624] in which the court granted in part and denied in part post-trial motions, following a jury's verdict finding that the defendant violated the Age Discrimination in Employment Act (ADEA). The court deemed it apparent that defendant was not entitled to judgment as a matter of law.[625] The court noted that, at trial, the EEOC clearly proffered "competent evidence of circumstances that would be sufficient to permit a rational finder of fact to infer a discriminatory motive."[626] With respect to mitigation, the court recognized that a "plaintiff who has proven a discharge in violation of the ADEA is, as a general matter, entitled to back pay from the date of discharge until the date of judgment."[627] The court also recognized that an employee forfeits the right to back pay if they fail to mitigate damages following termination.[628] The court observed that whether the employee has exercised reasonable diligence in mitigating their loss is a question of fact for the jury.[629] When addressing whether an employer "is released from the duty to establish the availability of comparable employment if it can prove that the employee made no reasonable efforts to seek such employment," the court noted the burden remains on the employer.[630]

One claimant testified that he searched for work only in the six-month period following his termination before he "decided to fully retire" on August 1, 2014.[631] The court found that awarding that claimant backpay beyond the point where he "fail[ed] to remain in the labor market" would be contrary to well-established law.[632] Hence, the court recognized and enforced a legal limitation to the jury's damages award, and the jury's back pay award for that claimant was set aside as a matter of law, but only insofar as it awarded back pay beyond August 1, 2014.[633]

Another claimant testified that he sought numerous alternative employment opportunities following his termination.[634] The court found, however, that the EEOC's failure to provide evidence of that other claimant's claimed mitigation after June 10, 2016 (the date of the claimant's deposition), was a "self-inflicted wound that cannot be allowed to prejudice defendant" and that the defendant has satisfied its burden to show that claimant's failure to mitigate.[635]

The EEOC also sought an award of front pay in lieu of reinstatement for this claimant, who testified that he had planned to work until he was "about 75." The EEOC therefore sought front pay until that date. In denying this award, the court found that even if the claimant's personal testimony were entitled to any weight, the defendant could still invoke the failure to mitigate affirmative defense. An award of "either front pay or reinstatement in the teeth of a finding that he did not mitigate his loss going forward from the time of his pretrial deposition would be to effectively compensate him for discrimination that did not occur. Relief unhinged from actual discrimination by the employer is not permitted under" the ADEA and the court cannot compensate him for discrimination that did not occur.[636]

The court also found no merit as to the defendant's arguments regarding purported hearsay evidence, authenticity of phone records, comparator evidence, performance write-ups, and alleged error with jury instructions concerning summation.[637] With respect to injunctive relief, the court ordered the defendant to take certain measures designed to eliminate future age discrimination in accordance with the ADEA.[638]

623 *Id.*
624 *EEOC v. AZ Metro Distribs., LLC*, 2020 U.S. Dist. LEXIS 237752 (E.D.N.Y. Dec. 16, 2020).
625 *Id.* at *9.
626 *Id.*
627 *Id.* at *13.
628 *Id.*
629 *Id.* at *14.
630 *Id.* at **14-15.
631 *Id.* at *15.
632 *Id.*
633 *Id.* at **16-17.
634 *Id.* at *18.
635 *Id.* at **19-20.
636 *Id.* at **24-25.
637 *Id.* at **25-34.
638 *Id.* at **35-39.

FY 2021 cases also included *EEOC v. Enoch Pratt Free Library*,[639] which involved female librarians asserting that the defendants failed to pay them an equal salary for equal work in violation of the Equal Pay Act of 1963 (EPA), 29 U.S.C. § 206(d)(1), of the Fair Labor Standards Act (FLSA). Following a five-day bench trial, the court concluded the defendants violated the EPA, which entitled the librarians to back wages, corresponding adjustments to their retirement plans, and liquidated damages.[640] The court found that the pay disparity was not based on a "factor other than sex."[641] The court then awarded the parties' stipulated back wages.[642] The EEOC requested the court award liquidated damages in an amount equal to the unpaid wages based on the EPA violation, which are available under the FLSA.[643] The court explained that it awarded liquidated damages in an amount equal to the librarians' back wages because the court could not find that the library acted in good faith when it continued to pay its employees the same way despite learning of the disparity.[644] The EEOC also requested injunctive relief.[645] Although the court denied the request to enjoin the defendants from all potential further violations of the EPA, the court granted the request for the directive that the defendants take necessary steps to ensure the librarians' pensions reflect the pay rate each should have received.[646]

In *EEOC v. Danny's Rest., LLC*,[647] the EEOC alleged race discrimination in violation of Title VII of the Civil Rights Act of 1964 and Title 1 of the Civil Rights Act of 1991 on behalf of former and current cabaret dancers. On October 1, 2018, the court found that the defendant violated Title VII.[648] The remaining issues of damages went to trial from May 6, 2019 to May 13, 2019, where the EEOC sought relief for emotional pain, mental anguish, lost wages, and punitive damages.[649] The jury returned a verdict awarding the dancers back pay, compensatory damages, and punitive damages.[650] Then, the EEOC moved for injunctive relief.[651] The court recognized that Section 706(g)(1) of Title VII authorizes the court to grant injunctive relief.[652] The defendant argued that injunctive relief was not warranted because the EEOC had offered no proof of the "likelihood of future violations" and that the "totality of the circumstances should be considered when evaluating the likelihood of future violations."[653] The court noted that, in the Fifth Circuit, the defendant bears the burden to show that recurring violations are unlikely.[654] Siding with the EEOC, the court found that the defendant failed to meet its burden, as the only evidence presented by the defendant was a witness's excluded testimony that he never witnessed discrimination.[655] The court explained that it was persuaded that injunctive relief was appropriate in the case based on the trial record and post-trial hearings --which included evidence that the defendant continued to discriminate against its Black employees despite signing three Consent Decrees explicitly forbidding such discrimination.[656]

The EEOC specifically requested that the court enjoin the defendant, its officers, agents, successors, employees, and other person in active concert or participation with them, or any of them from engaging in business practices that discriminate against Black dancers on the basis of their race in violation of Title VII for five years.[657] The defendant contended that the requested injunctive relief was overbroad.[658] The court rejected that argument, finding that the requested general injunction language was tethered to the harm in the complaint and proved at trial was appropriate, and not overbroad.[659] The court further agreed to other injunctive relief, including the appointment of an injunctive relief manager; creating and posting written anti-discrimination policies; training for all employees; notifying successors of the injunction's terms; maintaining an independent hotline for reporting complaints and/or concerns of discrimination, harassment or retaliation; and EEOC-monitored compliance.[660]

In *EEOC v. RockAuto, LLC*,[661] following a jury verdict that the defendant violated the ADEA when the defendant refused to hire the charging party, the court awarded the EEOC's requests for back pay, prejudgment interest, and permanent injunction — but

639 *EEOC v. Enoch Pratt Free Library*, 509 F. Supp. 3d 467 (D. Md. Dec. 23, 2020).
640 *Id.* at 476.
641 *Id.* at 479-80.
642 *Id.* at 480.
643 *Id.*
644 *Id.* at 481.
645 *Id.* at 481-82.
646 *Id.* at 482.
647 *EEOC v. Danny's Rest., LLC*, 2021 U.S. Dist. LEXIS 153633 (S.D. Miss. Aug. 16, 2021).
648 *Id.* at *2.
649 *Id.*
650 *Id.*
651 *Id.* at *1.
652 *Id.* at *3.
653 *Id.* at *4.
654 *Id.*
655 *Id.*
656 *Id.* at **4-7.
657 *Id.* at **7-8.
658 *Id.* at *8.
659 *Id.*
660 *Id.* at **9-15.
661 *EEOC v. RockAuto, LLC*, 2021 U.S. Dist. LEXIS 148707 (W.D. Wis. Aug. 9, 2021).

denied the EEOC's request for front pay. The court averred that the ADEA permits an award of back pay if the plaintiff has proven age discrimination, that the EEOC has the initial burden of establishing the back pay amount, and that the burden "shifts to the defendant to show that the plaintiff failed to mitigate damages or that damages were in fact less than the plaintiff asserts."[662] The court recognized that to establish the affirmative defense that the charging party failed to mitigate their damages, the defendant has the burden to establish two elements: (1) charging party failed to exercise reasonable diligence to mitigate their damages; and (2) there was a reasonable likelihood that charging party might have found comparable work by exercising reasonable diligence.[663] Since the charging party did find work for a period of time, was employed for some time, and tried to find alternative employment—and the defendant failed to show that the charging party had a reasonable likelihood of finding comparable work if he had continued his efforts—the court rejected the defendant's theory that the charging party failed to mitigate his damages.[664]

When reviewing the applicable time period to award back pay, the court noted the purpose of back pay is to make the victim of discrimination whole, so there is "a strong presumption" that a victim of discrimination is "entitled to a back pay award on the basis of what [he] would have earned absent the discrimination."[665] In its analysis of the applicable wage rate, the court found no evidence that the defendant would have paid more than the minimum rate of pay to the charging party.[666] When determining the back pay amount, the court factored in lost benefits the charging party would have received from the defendant had he been hired and deducted what the charging party earned at a subsequent employer.[667]

The court declined to order front pay or reinstatement, as the court concluded neither front pay nor reinstatement was required to make the charging party whole.[668] Although the decision to award interest is a matter within the court's discretion, the court recognized it is presumptively available for violations of federal law.[669] Thus, the court awarded prejudgment interest, as the parties agreed that the charging party should receive prejudgment interest calculated on an annual basis.[670] After considering that the defendant's discriminatory conduct could possibly persist in the future, the court granted the EEOC's request for a permanent injunction, including a revised prohibition on age discrimination in hiring, adoption of an anti-discrimination policy, implementation of anti-discrimination training, and assurance of compliance.[671]

In *EEOC v. MSDS Consultant Servs., LLC*,[672] the court addressed a motion for default judgment from the EEOC. The EEOC brought suit under the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq* against the employer, claiming the employer failed to accommodate an employee's disability (post-traumatic stress disorder (PTSD) and panic disorder), in addition to claiming hostile work environment and retaliation.[673] Upon observing that the employer failed to respond to the motion or even obtain counsel to defend against default judgment and that the facts of the complaint established the failure to accommodate, hostile work environment, and retaliation claims, the court granted the motion for default judgment.[674] After finding that the EEOC was entitled to default judgment on all claims, the court deferred ruling on whether to award compensatory damages, including backpay, prejudgment interest, and front pay, since the EEOC did not submit any evidence for the court to calculate such damages.[675] The court then denied the EEOC's request for injunctive relief.[676] In reviewing the standard for injunctive relief, the court noted that "[b]efore granting injunctive relief, the court must … conclude that a 'cognizable danger of recurrent violation' exists" and any injunction issued should be "no more burdensome to the defendant than necessary to provide complete relief to the plaintiff."[677] The court recognized that the EEOC's request to enjoin the employer from "committing further violations of law" is exactly the "sort of go-thy-way-and-sin-no-more provision" the U.S. Court of Appeals for the Fourth Circuit has rejected.[678] Thus,

662 *Id.* at *3.
663 *Id.* at *4.
664 *Id.* at **5-6.
665 *Id.* at *7.
666 *Id.* at *9.
667 *Id.* at **10-17.
668 *Id.* at **17-18.
669 *Id.* at *18.
670 *Id.* at **18-19.
671 *Id.* at **19-24.
672 *EEOC v. MSDS Consultant Servs., LLC*, 2021 U.S. Dist. LEXIS 119262 (D. Md. June 25, 2021).
673 *Id.* at **2, 7-8.
674 *Id.* at **6, 8-13.
675 *Id.* at *13.
676 *Id.* at *16.
677 *Id.* at *15.
678 *Id.* at *16 (quoting *Lowery v. Circuit City Stores*, 158 F.3d 742, 767 (4th Cir. 1998); abrogated on other grounds in light of *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999)) (citing *Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1328 (4th Cir. 1986)).

the court concluded the EEOC's requested injunction simply mirrors the terms of the ADA, to which the employer is already bound absent an injunction.[679]

2. Punitive Damages

In the FY 2021 case of *EEOC v. MSDS Consultant Servs., LLC*,[680] discussed above, the court deferred ruling on whether to award punitive damages following entry of a default judgment as to liability. The court began its analysis by explaining that an employee seeking punitive damages on an ADA claim must prove that the employer engaged in discrimination "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[681] Specifically, the employee does not need to prove malice if the employee can demonstrate "recklessness in its subjective form." To prove recklessness, the employee "must establish that the employer at least discriminated in the face of a perceived risk that its actions" would violate federal law.[682] The court noted that the U.S. Supreme Court made clear that "malice" and "reckless indifference" pertain to the employer's knowledge that it may be acting in violation of federal law, not its knowledge that it may be discriminating.[683] As such, the court recognized that an employee must demonstrate that the employer knew it "may be acting in violation of federal law" to warrant punitive damages on a motion for default judgment.[684] It further observed that the court has a "great deal of discretion" in deciding the amount of punitive damages to award.[685] Upon considering the information and evidence before it, the court concluded that it simply did not have enough information or evidence to make a determination either way; if the EEOC wished to pursue punitive damages, it must submit evidence to show that the employer acted with the requisite state of mind and to support the specific amount of the award requested.[686]

L. Settlements

Two FY 2021 decisions included important reminders for parties submitting consent decrees for approval by a district court. The first issued from the U.S. District Court for the Western District of New York. The second issued from the U.S. District Court for the Middle District of Florida.

In the first case, *EEOC v. Protocol of Amherst*, also discussed in the Default section, *supra*, the court delivered the difficult reminder that "sympathy is not a ground for equitable relief."[687] The case involved an action by the EEOC alleging that the defendant corporation, through the individual who owned it, subjected various female employees to a hostile work environment based on sex.[688] The EEOC obtained a default judgment against the defendant after it failed to appear through counsel following the withdrawal of its previous counsel.[689] The court then allowed the defendant an additional opportunity to appear through counsel for the limited purpose of contesting damages.[690] This time, the defendant obtained counsel, who informed the court on June 30, 2020, that the parties planned to commence settlement discussions.[691] On July 17, 2020, the defendant informed the court that "the parties have reached a settlement in principle" and "must now reduce those settlement terms to a consent decree for approval."[692] Thereafter, the parties signed a consent decree, "the terms of which were personally guaranteed" by the defendant's owner.[693]

On August 28, 2020, the defendant submitted a letter to the court with the following message: "[C]ircumstances have changed which make it very unlikely that [the defendant] will be able to meet the obligations imposed by the Consent Decree. Therefore, [the defendant] hereby withdraws its execution of said Consent Decree and further states it does not consent to the terms of the Consent Decree or submission of same to the Court."[694] Later, when opposing the EEOC's motion to confirm the consent decree,

679 *Id.* at *16.
680 2021 U.S. Dist. LEXIS 119262 (D. Md. Jun. 25, 2021).
681 *Id.* at *13-14.
682 *Id.* at *14.
683 *Id.* at *14 (citing *Kolstad v. American Dental Ass'n*, 527 U.S. 526, 527 (1999)).
684 *Id.*
685 *Id.*
686 *Id.* at *14-15.
687 *EEOC v. Protocol of Amherst, Inc.*, 2020 U.S. Dist. LEXIS 201158, at *5 (W.D.N.Y. Oct. 30, 2020). The district court accepted and adopted the magistrate judge's report and recommendation in on December 14, 2020. *See EEOC v. Protocol of Amherst, Inc.*, 2020 U.S. Dist. LEXIS 231548, at **2-3 (W.D.N.Y. Dec. 14, 2020).
688 *See* 2020 U.S. Dist. LEXIS 201158 at *2.
689 *Id.*
690 *Id.*
691 *Id.*
692 *Id.* at **2-3.
693 *Id.* at *3.
694 *Id.*

the defendant explained that the "financial arrangement which undergirded Defendant's decision to enter the Consent Decree evaporated" shortly after the defendant's owner signed the decree.[695]

When ruling on the EEOC's motion for approval and entry of the consent judgment, the court observed that "'[w]hile a consent decree is a judicial pronouncement, it is principally an agreement between the parties and as such should be construed like a contract.'"[696] Under traditional contract principles, a party's "'inability to pay is no defense to [its] performance.'"[697] Nor should a court sitting in equity "'intrude itself where knowledgeable parties contract and where they have not been overborne by actions of the other party.'"[698] The court acknowledged it was "not unsympathetic to the situation in which [the defendant] and [its owner] find themselves."[699] The court nonetheless concluded that the consent decree should be enforced because "'courts, even in equity must respect lawful contracts made by competent persons.'"[700]

In the second case, *EEOC v. Pirtek USA LLC*, the court reminded the parties that a consent decree containing an injunction must command the enjoined party to do something more specific than "obey the law."[701] The EEOC and the employer sought approval from the court of a consent decree in an action involving alleged violations of the ADA.[702] The proposed decree had a three-year term and provided for both monetary and injunctive relief.[703] The injunctive relief contemplated by the proposed decree included, among other elements, a provision entitled "No Discriminatory Practices."[704] That provision read as follows:

> [The employer] shall take all affirmative steps to ensure that it does not subject its employees to discrimination based on disability or perceived disability.
>
> [The employer], its owners/members, representatives, agents, managers, officers, supervisors, employees, partners, successors and assigns, are enjoined from engaging in, encouraging, or permitting discrimination on the basis of disability or perceived disability.705

When analyzing the parties' proposed injunction, the court recognized that Rule 65 of Federal Rules of Civil Procedure requires that "every order granting an injunction must . . . 'state its terms specifically.'"[706] It then explained that "[t]he specificity requirement of Rule 56(d) is no mere technicality; 'the command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order.'"[707] Given that a party that violates an injunction is subject to the "possibility of contempt," no injunction is enforceable unless it contains "an operative command" that is "tailored to remedy the specific harms shown rather than enjoin all possible breaches of the law."[708]

Turning to the "No Discriminatory Practices" provision, the court observed that the first clause directed the employer "to take 'all affirmative steps' to ensure it does not discriminate on the basis of disability or perceived disability, but provide[d] no specificity as to what those steps are, and provide[d] no operative command that is capable of enforcement."[709] Likewise, the court opined that the second clause enjoined the employer from "engaging in, encouraging, or permitting discrimination based on disability or perceived disability" but contained no command to engage in or refrain from any specific conduct.[710] The court therefore concluded that the "No Discriminatory Practices" injunctions were unenforceable because they amounted to nothing more than "a direction to obey the law."[711]

M. Recovery of Attorneys' Fees by Employers

Title VII provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[712] By

695 *Id.*
696 *Id.* at *4 (quoting *Crumpton v. Bridgeport Education Ass'n*, 993 F.2d 1023, 1028 (2d Cir. 1993)).
697 *Id.* (quoting *Sunflower Oil Co. v. Wilson*, 142 U.S. 313, 321 (1892)).
698 *Id.* a *5 (quoting *In re M & M Transportation Co.*, 13 B.R. 861, 868 (Bankr. S.D.N.Y. 1981)).
699 *Id.*
700 *Id.* (quoting *In re Albracht*, 505 B.R. 347, 360 (Bankr. N.D. Ga. 2013)).
701 *EEOC v. Pirtek USA LLC*, 2020 U.S. Dist. LEXIS 227698, at *6 (M.D. Fla. Dec. 7, 2020).
702 *Id.* at *2.
703 *Id.* at *2.
704 *Id.* at *4.
705 *Id.*
706 *Id.* at *3 (citing Fed. R. Civ. P. 65(d)(1)).
707 *Id.* (quoting *Fla. Ass'n of Rehab. Facilities v. Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1223 (11th Cir. 2000)).
708 *Id.*
709 *Id.* at *6.
710 *Id.*
711 *Id.* at *7.
712 42 U.S.C. § 2000e-5(k).

its terms, this provision allows either a prevailing private plaintiff or a prevailing defendant to recover attorneys' fees. The award of attorneys' fees to a prevailing plaintiff, however, involves different considerations from an award to a prevailing defendant. The prevailing plaintiff is acting as a "private attorney general" in vindicating an important federal interest against a violator of federal law, and therefore "ordinarily is to be awarded attorney's fees in all but special circumstances."[713]

The opposite is true of a prevailing defendant. A prevailing defendant not only is not vindicating any important federal interest, according to the governing standard, but the award of attorneys' fees to prevailing defendants as a matter of course would undermine that interest by making it riskier for "private attorneys general" to bring claims.[714] Accordingly, before a prevailing defendant may be awarded fees, it must demonstrate that a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so."[715] This stringent standard does not, however, require proof that the EEOC or a private plaintiff acted in bad faith.[716] A decision to award fees is committed to the discretion of the trial judge who is "on the scene" and in the best position to assess the considerations relevant to the conduct of litigation.[717]

The last significant EEOC litigation on this issue occurred in 2019 in the Eighth Circuit. In *EEOC v. CRST Van Expedited, Inc.*, the EEOC was required to pay a prevailing employer $3.3 million in attorneys' fees for pursuing a "class" sexual harassment claim after it knew or should have known the claims were frivolous.[718] In the decade-old lawsuit, the EEOC alleged that the employer engaged in a pattern or practice of discrimination against female truck drivers and driver trainees who claimed they were sexually harassed. The employer prevailed at the district court level in 2009, but, on appeal, the Eighth Circuit held that the EEOC did not owe the company costs and fees because the EEOC's claims had not been dismissed on the merits—but rather for procedural deficiencies. The Supreme Court disagreed, finding that the EEOC can be ordered to pay costs and fees when some or all of its claims are dismissed for failure to satisfy the EEOC's pre-lawsuit requirements, and remanded the matter back to the district court.

On remand, the district court once again held that the company was entitled to attorneys' fees, expenses, and costs. Specifically, the district court applied the *Christiansburg* standard and in an exhaustive, claim-by-claim analysis, determined that the 78 claims dismissed on summary judgment were frivolous, groundless, and/or unreasonable. On appeal, the Eighth Circuit upheld the fee award, finding that the district court did not abuse its discretion in applying the *Christiansburg* standard. The Eighth Circuit agreed that the EEOC's failure to conciliate and investigate the claims was an unreasonable litigation tactic that resulted in frivolous, unreasonable, or groundless claims. In addition, the Eighth Circuit noted that the district court made particularized findings of frivolousness, unreasonableness, and groundlessness as to each individual claim dismissed on summary judgment. The Eighth Circuit also rejected the EEOC's allegation that it sought relief for the remaining women based on the pattern-or-practice burden of proof because the EEOC never actually alleged the company was engaged in "a pattern or practice" of illegal sex-based discrimination. The Eighth Circuit agreed with the district court's reasoning that, "[a]s the master of its own complaint, it was frivolous, unreasonable and/or groundless for the EEOC to fail to allege a pattern-or-practice violation and then proceed to premise the theory of its case on such a claim."[719]

In regard to company's calculation of attorneys' fees, the Eighth Circuit agreed that the company properly distinguished between costs associated with defending against frivolous, unreasonable, and/or groundless claims and those that did not meet that standard. In doing so, the Eighth Circuit held that the district court is not required "to become a green-eyeshade accountant pour[ing] over the record to calculate each individual claim. Instead the district court did rough justice by finding that the general method by which [the company] calculated the fees it now seeks was appropriate."[720]

713 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 416–17 (1978).
714 *Id.* at 422.
715 *Id.*
716 *Id.* at 421.
717 *EEOC v. Propak Logistics, Inc.*, 746 F.3d 145, 151 (4th Cir. 2014) (quoting *Arnold v. Burger King Corp.*, 719 F.2d 63, 65 (4th Cir. 1983)).
718 *EEOC v. CRST Van Expedited, Inc.*, 944 F.3d 750 (8th Cir. 2019).
719 *Id.* at 757.
720 *Id.* at 759 (quoting *EEOC v. CRST Van Expedited, Inc.*, 277 F. Supp. 3d 1000, 1052 (N.D. Iowa 2017) (internal quotations omitted)).

VI. APPENDICES

APPENDIX A - EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[721]

Select EEOC Settlements in FY 2021-2022[722]

Settlement Amount	Claim	Description	Court	EEOC Press Release
$18,000,000*	Sex Harassment Pregnancy Discrimination Retaliation	The EEOC alleged defendants subjected female employees to sexual harassment, discrimination based on pregnancy, and retaliation. Under the terms of the three-year consent decree, the defendants agreed to hire a third-party EEO consultant and to create an internal EEO position to work with the external consultant; submit to audits of its pending and current discrimination and harassment complaints; provide semi-annual reports to the EEOC; perform climate surveys; conduct anti-harassment and anti-discrimination training that includes bystander intervention and civility training; expand mental health counseling services to employees who have experienced sexual harassment; create a tracking system for complaints; institute a toll-free complaint reporting hotline; implement a performance review system for managers, supervisors and human resources personnel that includes an EEO component; and institute recordkeeping and reporting mechanisms.	U.S. District Court for the Central District of California	*3/30/2022*
$10,000,000	Race Discrimination	The EEOC alleged the employer discriminated against Black employees in promotion decisions. The parties agreed to settle the case for more than $10 million. As part of the conciliation agreement, the employer also agreed to make substantial changes to its policies and practices, and to report periodically to the EEOC to make sure it remains in compliance with the law.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	n/a
$5,500,000	National Origin Discrimination Race Discrimination Religious Discrimination	In this decade-long pattern-or-practice lawsuit, the EEOC alleged the defendant discriminated against Somali Muslim employees by, among other allegations, denying them prayer breaks. Under the terms of the two-year consent decree, the defendant will provide up to $5.5 million in compensatory damages, lost wages and benefits, interest, and attorneys' fees to eligible class members. In addition, the defendant agreed that impacted class members are eligible for rehire. The defendant also agreed to revise its nondiscrimination and religious accommodation policies; conduct additional training; provide translators for trainings, disciplinary meetings, and other meetings involving requests for religious accommodations, or complaints of discrimination or retaliation; provide reasonable accommodations for religious beliefs/practices; maintain a 24-hour "Ethics Line" hotline for receiving discrimination complaints; and continue to support a Diversity Committee.	U.S. District Court for the District of Colorado	*6/9/2021*

721 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2021 and the early months of FY 2022. 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 notable jury verdicts and judgments.

722 Included in this appendix are high-dollar conciliation and consent decrees entered into during FY 2021 and early FY 2022. FY 2022 settlements are marked with an asterisk (*).

Settlement Amount	Claim	Description	Court	EEOC Press Release
$5,075,000	Sex Discrimination	The EEOC alleged a national marketer and food distributor engaged in a pattern or practice of failing to hire a class of female applicants for operative positions at one of its facilities, and failed to promote a qualified female employee. Under the terms of the five-year consent decree, the company will pay $5,000,000 in monetary relief to the class of female applicants who were not hired and $75,000 in monetary relief to the female worker who was not promoted. The company also agreed to hire a Vice President of Diversity to ensure that hiring decisions for certain positions are made without regard to sex, to oversee the company's compliance with the terms of the consent decree, and to report to the EEOC. The company agreed to give hiring preference to class members who are qualified female applicants, and will conduct affirmative recruitment activities towards qualified female applicants, perform management performance evaluations, and agree not to re-hire two former employees implicated in the complaint.	U.S. District Court for the District of Maryland	*12/16/2020*
$5 million*	Sex Discrimination	EEOC alleged that the defendant engaged in a nationwide pattern or practice of sex discrimination against female job applicants for sales positions. Under the terms of the three-year consent decree, the company agreed to appoint a Title VII coordinator to implement the company's EEO policies and procedures and oversee compliance with the decree. The company will also develop a recruitment plan for women in sales positions and provide anti-discrimination training to all employees. In addition, the company will offer positions to qualified female applicants who were denied positions. Specifically, one in every five new vacancies will be offered to women who are part of the settlement. The company will provide reports to the EEOC on its recruitment and hiring efforts.	U.S. District Court for the Northern District of Alabama	*2/2/2022*
$3.525 million	Age Discrimination Sex Discrimination Race Discrimination	EEOC alleged a national placement agency engaged in systemic age, race, and sex discrimination in the hiring and placement of individuals assigned to its clients. Under the terms of the conciliation agreement, half of the $3.525 million settlement will be provided to two charging parties and a class of older workers who worked as contract employees between October 1, 2012 and March 14, 2014. The remaining funds will be donated to organizations that support education, re-skilling, and employment opportunities for under-served communities. The company has also agreed to provide anti-discrimination training, conduct internal EEO audits of its placement of temporary workers, distribute EEO policies, and provide periodic reports to the EEOC on its compliance efforts.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*10/1/2021*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$2 million	Race Discrimination Race Harassment Retaliation	The EEOC alleged a transportation provider and staffing company discriminated against Black workers by subjecting them to ongoing harassment, slurs, and epithets. The EEOC further alleged that an employee was fired three days after complaining. The lawsuit also claimed Black workers were unfairly treated in terms of their work assignments, training, promotions, discipline, and terminations. Both the transportation provider and staffing company agreed to each pay $1 million to settle the lawsuit. In addition, under the terms of the transportation provider's two-year consent decree with the EEOC, it will designate an EEO coordinator, create a centralized tracking system for race-based harassment, discrimination, and retaliation complaints, establish an internal complaint process, review its policies, and institute training for all employees. The staffing agency has agreed to provide neutral references for all of the claimants, and will re-hire those who wish to return. Under the terms of its two-year consent decree, the staffing agency will also hire a bilingual third-party EEO monitor, institute anti-discrimination/harassment policies, establish a complaint procedure, and provide all employees with anti-discrimination and harassment training.	U.S. District Court for the Central District of California	*5/26/2021*
$1.6 million	Systemic National Origin Discrimination Retaliation	EEOC alleged a government contractor engaged in a pattern or practice of discrimination against African employees and retaliated against an employee who complained. Specifically, the EEOC claimed a project manager who oversaw approximately 400 security personnel, about half of whom were born in Africa, complained there were "too many Africans," mocked their accents, and said he would fire them to reduce their number on the contract. The EEOC claimed the company also systematically denied these employees leave, forced them to work on their days off, subjected them to increased job scrutiny, threatened poor job reviews, among other adverse employment actions. Under the terms of the two-year consent decree, the company agreed to pay $1.6 million to nine charging parties and a class of similarly situated employees. The company also agreed to expunge the employees' termination and disciplinary records and provide them security clearance/background letters. In addition, the company agreed to name its vice president of human resources as an internal consent decree monitor. The consent decree further prevents the employer from engaging in further national origin discrimination and/or retaliation.	U.S. District Court for the District of Maryland	*12/17/2020*
$1.45 million	Race Harassment Retaliation	The EEOC alleged the defendant company subjected Black employees and those assigned to work for it to harassment because of their race. Following complaints, the defendant allegedly did not take immediate action to stem the harassment, and instead retaliated against those who complained. In addition to the $1.45 million to be paid to the impacted individuals, the company and staffing agency agreed to two separate two-year consent decrees. Injunctive relief includes the requirement to hire an equal employment opportunity monitor, conduct audits, review and revise policies prohibiting discrimination, institute an internal complaint procedure, maintain a toll-free complaint hotline, and provide training.	U.S. District court for the Central District of California	*7/9/2021*

Settlement Amount	Claim	Description	Court	EEOC Press Release
$1.1 million	Race Discrimination Race Harassment	The EEOC alleged that the defendant engaged in a pattern or practice of denying employment to Black applicants, and subjecting Black employees to race-based harassment. Under the terms of the three-year consent decree, the company agreed to pay over $1.1 million to four workers who brought the race harassment claims, as well as class of job applicants who applied since January 2012 but were not hired on account of race. In addition, the company will prioritize class members for hire, implement anti-harassment and discrimination policies and trainings, and create a new internal complaint and investigation process, including a toll-free hotline in which to report acts of discrimination.	U.S. District Court for the Northern District of Illinois	10/7/2021
$1 million*	Sex Harassment Retaliation	The EEOC alleged the defendant subjected female applicants and employees to sexual harassment and created a hostile working environment. In addition, the EEOC claimed the defendant engaged in unlawful retaliation. As part of the three-year conciliation agreement, the defendant agreed to provide monetary relief to the charging party and establish a class fund to compensate applicants and employees who were subjected to sexual harassment. The defendant also agreed to hire an EEO consultant or employment counsel to review and potentially revise its sexual harassment and anti-retaliation policies. The new employee will also be responsible for handling internal and external complaints. The company agreed to include a provision in its performance plans for managers addressing accountability for compliance with the company's EEO policies and procedures. The company will conduct anonymous climate surveys to assess the effectiveness of its new policies.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	12/20/2021
$900,000	Race Discrimination	The EEOC alleged the defendant failed to post supervisory and management positions at its retail locations nationwide and failed to promote Black employees into those positions. In addition to providing $900,000 in back pay and compensatory damages to those unlawfully denied promotions, the company has agreed, under the two-year consent decree, to revise its job-posting process, reach out to historically Black colleges and universities for recruitment purposes, develop and post written promotion policies for its stores nationwide, post supervisor and manager vacancies, provide anti-discrimination training, and create a dedicated email address and telephone number for reporting failure-to-promote complaints.	U.S. District Court for the Eastern District of Arkansas	10/9/2020
$825,000	Race Discrimination	The EEOC's lawsuit alleged a beverage distributor discriminated against the charging party, who is Black, and 34 other Black current and former employees on the basis of their race by failing to promote them or assign them to vacant, route sales positions. As part of the three-year consent decree, the company agreed to pay $825,000 to the class, provide anti-discrimination training, and review and revise its hiring and promotion policies.	U.S. District Court for the Northern District of Alabama	6/3/2021

Settlement Amount	Claim	Description	Court	EEOC Press Release
$725,000	National Origin Harassment Race Harassment	The EEOC alleged a construction company discriminated against Black and Hispanic/Mexican workers, including by subjecting them to racially offensive graffiti and verbal remarks. Under the terms of the two-year consent decree, the company agreed to retain an external equal employment opportunity monitor to review its compliance with Title VII and the decree. The company will also review and revise its harassment and retaliation policies and procedures, provide training to all employees on racial harassment and retaliation and establish a centralized tracking and monitoring system for racial harassment complaints and to prevent retaliation. In addition, the company agreed to hold subcontractors accountable by requiring them to verify having policies, procedures, and training against harassment, discrimination, and retaliation.	U.S. District Court for the Central District of California	5/13/2021
$700,000	Age Discrimination	The EEOC alleged a company discriminated against older workers by targeting those were 40 or older in a series of layoffs. Under the terms of the two-year consent decree, the company agreed not to lay off employees on account of age, and to pay $700,000 to those older former employees who were impacted by the layoffs. The company also agreed to review and revise its layoff procedures as necessary. In addition, the defendant's parent company must issue a statement to all employees that age discrimination will not be tolerated.	U.S. District Court for the Southern District of New York	12/11/2020
$690,000*	Sex Harassment	The EEOC alleged that the defendant restaurant's former managing partner sexually harassed female employees. Under the terms of the 2.5-year consent decree, the defendant will pay $690,000 to those impacted by the harassment. The company will also implement a new sexual harassment policy and investigation procedures nationwide, as well as provide training to certain HR and management officials on sexual harassment.	U.S. District Court for the Middle District of Florida	12/9/2021
$500,000*	Sex Discrimination	The EEOC alleged the defendant company discriminated against women by using physical abilities test in hiring, which tended to screen out women. Under the terms of the five-year consent decree, the company will pay $500,000 to the class of women whose job offers were revoked on account of the test results. The agreement also prevents the company from using the physical abilities test at issue, and if it opts to use an alternative test that has a disparate impact on women, it must first demonstrate it is job-related for the position and consistent with business necessity. The consent decree also requires the company to provide reports to the EEOC on its hiring practices.	U.S. District Court for the District of Minnesota	12/8/2021
$500,000	Sex Harassment Retaliation	The EEOC alleged women were sexually harassed by management and customers at a country club/athletic facility, and that managers retaliated against those who complained. Under the terms of the five-year consent decree, the employer agreed to pay $500,000, hire an external EEO monitor, review and revise its policies concerning discrimination, harassment and retaliation, and develop an internal complaint/reporting system, which will include a hotline number. The employer also agreed to provide training on EEO laws and maintain recordkeeping and reporting procedures regarding its discrimination complaints. The employer will implement these procedures at all 24 of its locations.	U.S. District Court for the Southern District of California	4/21/2021

Settlement Amount	Claim	Description	Court	EEOC Press Release
$500,000	Sexual Harassment Retaliation	The EEOC alleged an employer sexually harassed and retaliated against a group of employees. Under the conciliation agreement, the employer agreed to pay $500,000 to the affected employees, as well as revise its EEO policies. The company also agreed to put procedures in place for investigating and resolving harassment complaints. As part of the agreement, the employer will hire an external bilingual EEO consultant to provide training and ensure the employer complies with the terms of the conciliation agreement, and notify its customers in writing about its commitment to maintaining a workplace free from discrimination and harassment.	This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	*2/1/2021*

Select EEOC Jury Awards or Judgments in FY 2021[723]

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$125 million (reduced to $419,662.59 on account of damages cap)	Disability Discrimination	The EEOC alleged a retailer discriminated against an employee with Down Syndrome by changing her schedule, which allegedly caused attendance problems, for which her employment was terminated. A jury awarded the charging party $150,000 in compensatory damages. The remaining amount of the $125 million verdict was for punitive damages. This amount was later reduced on account of the $300,000 damages cap under the ADA. The court ultimately ordered defendant to pay a total of $419,662.59 ($150,000.00 in compensatory damages, $150,000.00 in punitive damages, $44,757.80 in backpay, $5,978.63 in prejudgment interest, and $68,926.16 for tax consequences).	Civil Action No. 1:17-cv-00070, in the U.S. District Court for the Eastern District of Wisconsin	*7/16/2021*
$500,000	Sex Discrimination	EEOC alleges a car dealership discriminated against a female sales manager by denying her a promotion, claiming that she was qualified but too "motherly" for the job. The jury returned a unanimous verdict in favor of the EEOC, awarding the charging party $500,000 in punitive damages.	Civil Action No. 8:18-cv-02055-CPT, in U.S. District Court for the Middle District of Florida	*8/3/2021*
$194,748.44	Pay Discrimination	The EEOC alleged a library engaged in pay discrimination by paying a male librarian a higher salary than that paid to female librarians with more experience. The EEOC claimed it paid the male comparator more because of his "unique" prior experience. Following a five-day bench trial, the court disagreed, finding the pay disparity was not justified by a factor other than sex. The court held that the defendants violated the EPA and determined the five claimants were entitled to an award of stipulated back pay and liquidated damages. The liquidated damages award was equal to each claimant's back wage payment.	Civil Action No. 1:17-cv-02860, in the U.S. District Court for the District of Maryland	*12/29/2020*
$136,146.38	Age Discrimination	The EEOC alleged the charging party, who had years of experience as well as relevant bachelor's and master's degrees, applied for a position as a supply chain manager at defendant auto parts seller. He was asked what year he received his undergraduate decree, which was over 20 years prior to the date of application. He was not hired or asked to advance through the interview process. The EEOC claims the company passed other, significantly younger applicants who lacked the charging party's experience and credentials through its interview and hiring process. Following a two-day trial, a jury found in favor of the EEOC. The court ordered the defendant to pay $109,323.60 in back pay, $14,612.55 in prejudgment interest, and $12,210.23 in costs.	Civil Action No. 3:18-cv-00797, in the U.S. District Court for the Western District of Wisconsin	*6/14/2021*

723 Judgments and verdicts in favor of the defendant are shaded. Judgments and verdicts entered into in FY 2022 are denoted with an asterisk (*).

Jury or Judgment Amount	Claim	Description	Case Citation	EEOC Press Release
$130,691	Sex Harassment and Retaliation	The EEOC alleged the owner/general manager of the defendant restaurant subjected a female server to sexual harassment and retaliated against her when she complained by making her working conditions so intolerable that she was forced to resign. The court granted the EEOC's motion for default judgment, and awarded the complainant $130,691, and ordered the defendant to provide anti-harassment training and submit annual written reports on any complaints of sex-based discrimination for the next five years.	Civil Action No. 20-1143, in the U.S. District Court of Puerto Rico	*6/23/2021*
n/a; the Defendant has filed a Bill of Costs with the court seeking $11,307.67. As of the date of publication, the court had not yet ruled on the motion	Sexual Harassment Constructive Discharge	EEOC alleged the defendant subjected the charging party to a hostile work environment. Specifically, the EEOC claimed a co-worker sexually harassed the charging party, who gave notice to her employer, but the employer allegedly failed to correct the hostile environment. The EEOC claimed the employee was constructively discharged and that her resignation was due to the sexual harassment. After a virtual, four-day bench trial, the court found in favor of the defendant. It determined that the charging party's testimony was not credible.	Civil Action No. 1:18-cv-01065, in the U.S. District Court for the District of Maryland	n/a
n/a*	Pay Discrimination	The EEOC alleged the defendant university unlawfully paid a female $28,000 less than a male colleague who performed similar work on account of her gender. On March 11, 2022, the jury returned a verdict in favor of the employer, finding sex was not a motivating factor in any pay differential.	Civil Action No. 1:19-cv-23131, in the U.S. District Court for the Southern District of Florida	n/a

APPENDIX B – FY 2021 EEOC Amicus and Appellant Activity[724]

FY 2021 – Appellate Cases Where the EEOC Filed an Amicus Brief

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Chambers v. DC	U.S. Court of Appeals for the D.C. Circuit No. 19-7098	3/12/2020 (amicus filed) 2/9/2021 (decided)	Title VII	Sex **Result:** Pro-Employer
Background: Plaintiff alleged sex discrimination, claiming defendant permitted male employees to transfer to other departments but denied her request based on her sex. The district court granted summary judgment for defendant, reasoning that the denial of a lateral transfer with no change in pay is not an adverse employment action. **Issues EEOC is Addressing as Amicus:** (1) Whether denial of a lateral transfer request involving no diminution in pay or benefits, on the basis of the requesting employee's sex, constitutes discrimination "with respect to compensation, terms, conditions, or privileges of employment" under Title VII. **EEOC's Position:** The EEOC argued that all discriminatory job transfers (and discriminatory denials of requested job transfers) are actionable under Title VII. Specifically, the EEOC requested the court hold its decision and any subsequent briefing on the issue until the Supreme Court's disposition of *Forgus v. Esper*, dealing with the same question of law. **Court's Decision:** The D.C. Circuit affirmed the district court's grant of summary judgment to the defendant because the plaintiff failed to show materially adverse consequences arising from the denials of her purely lateral transfer requests.				
Massaro v. New York City Department of Education	U.S. Court of Appeals for the Third Circuit No. 21-266	5/28/2021 (amicus filed)	ADEA	Retaliation Harassment **Result:** Pending
Background: Plaintiff filed suit in 2011 against the Board of Education of the City School District of the City of New York (the Board), alleging age discrimination. The district court dismissed her suit in 2013, but the plaintiff alleges that the Board subjected her to continuous retaliatory conduct related to performance ratings and staffing. **Issues EEOC is Addressing as Amicus:** (1) Whether the *Burlington Northern* materially-adverse-action standard applies to ADEA retaliatory harassment claims. (2) Whether the district court erred in its analysis of the timeliness of the retaliatory harassment claim. **EEOC's Position:** (1) The EEOC argued that the materially-adverse-action standard applies to retaliatory harassment claims. In order for the allegedly retaliatory conduct to be actionable under Title VII or the ADEA, it must be materially adverse to the plaintiff. (2) The district court erred in analyzing the timeliness of the plaintiff's retaliatory harassment claim under the "continuing violation doctrine." Instead, the court should have defined the plaintiff's retaliatory harassment claim to include all the non-discrete acts of retaliatory harassment from 2012-2016, with any time-barred alleged retaliatory discrete acts available as background evidence on the question of liability. **Court's Decision:** Pending.				

724 The information included in Appendix B, including the "FY 2021–Appellate Cases Where the EEOC Filed an Amicus Brief" and "FY 2021–Appellate Cases Where the EEOC Filed as the Appellant" were pulled from the EEOC's publicly available database of appellate activity *available at* http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database. The cases are arranged in order by circuit.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Kengerski v. Allegheny County	U.S. Court of Appeals for the Third Circuit No. 20-1307	5/13/2020 (amicus filed) 7/29/2021 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: Plaintiff, a white correctional officer, complained about "harassment and inappropriate racial text messages" stemming from an interaction with a colleague who made racially offensive remarks regarding his family member, who is biracial, and about other minority groups. The plaintiff was fired seven months after the complaint. The county employer alleged the plaintiff was fired for encouraging subordinates to provide false information in an internal investigation and for revealing the existence of the investigation to its subject. The plaintiff alleges these reasons were pretext for retaliation. The plaintiff sued, and the court granted the employer's motion for summary judgment as to the retaliation claim, finding the complaint did not constitute protected opposition activity because he could not have had an objectively reasonable, good-faith belief that the conduct about which he complained was unlawful under Title VII. Specifically, the plaintiff did not have an objectively reasonable, good-faith belief that he was complaining about a hostile work environment under Title VII because the co-worker's harassment was directed at Black and Asian individuals, and plaintiff was not a member of either protected group. The district court reasoned that even if the Third Circuit were to recognize a claim for "associational" discrimination, the plaintiff's connection to his biracial grand-niece (and to the coworkers referenced in the text messages) was too "remote" to support such a claim. Second, even if he had standing, the conduct was not sufficiently severe or pervasive to establish a hostile work environment.

Issue EEOC is Addressing as Amicus: Whether the district court erred when it determined that Title VII's antiretaliation protections do not extend to a plaintiff-employee's opposition to a coworker's discriminatory statements about the employee's interracial association with a family member and the coworker's subsequent racist text messages.

EEOC's Position: To be protected under the opposition clause of Title VII's antiretaliation provision, 42 U.S.C. 2000e-3(a), it is sufficient for an employee to hold an objectively reasonable, good-faith belief that complained-of conduct violates Title VII. The district court misapplied this standard by making several legal errors in identifying whether plaintiff engaged in conduct protected by Title VII. First, harassment toward an employee because of the employee's association with a person of a different race may give rise to an objectively reasonable, good-faith belief that the conduct violates Title VII. The proper analysis of such a claim focuses on whether the employee was discriminated against on the basis of their race by virtue of maintaining an interracial association, not on the degree of closeness of that interracial relationship. Second, discriminatory workplace harassment need not be "severe or pervasive" for an employee who opposes it to receive protection from reprisal under Title VII. To hold otherwise would contravene the purpose of Title VII's antiretaliation provision by exposing to reprisal individuals who promptly report discriminatory behavior while protecting only those who stand silently by until harassment becomes "severe or pervasive."

Court's Decision: The Third Circuit vacated the district court's grant of summary judgment and remanded, finding that Title VII protects all employees from retaliation when they reasonably believe that behavior at their work violates the statute and they make a good-faith complaint. In the context of this case, harassment against an employee because he associates with a person of another race, such as a family member, may violate Title VII by creating a hostile work environment. The appellate court vacated the grant of summary judgment because a reasonable person could believe that the place of employment was a hostile work environment for the plaintiff. The court remanded to the lower court for it to consider whether the plaintiff has sufficiently shown he was fired because of his Title VII complaint, and not for mishandling a sexual harassment claim, which is what his employer asserted.

Martinez v. UPMC Susquehanna	U.S. Court of Appeals for the Third Circuit No. 19-2866	4/16/2020 (amicus filed) 1/29/2021 (decided)	ADEA	Age **Result:** Pro-Employee

Background: Plaintiff alleged that his job termination violated the ADEA. Specifically, plaintiff alleged that defendant abruptly terminated his employment after acquiring his former employer and replaced him with "a significantly younger, less qualified, less experienced individual." The district court granted a motion to dismiss for defendant, ruling that the complaint failed to identify his replacement's age or inferior qualifications, and thus presented no facts other than legal conclusions in support of his claim.

Issues EEOC is Addressing as Amicus: Did the district court err in concluding that a complaint failed to state a plausible claim of age discrimination under the ADEA when it only referred to a "significantly younger" and "less qualified" replacement?

EEOC's Position: The EEOC argued that the pleading standard under Swierkiewicz, Twombly, and Iqbal requires only alleging facts that make out a facially plausible claim for relief, providing the defendant fair notice of the claim and its factual basis. Specifically, the EEOC contended that the complaint provided defendant with fair notice of the claim as well as the grounds upon which it rested. The complaint identified plaintiff's age, his qualifications, described his termination, identified his replacement by name, and provided that his replacement was "significantly younger" and "less qualified." As a result, the EEOC contended, defendant had ample notice of the legal claims to provide a response.

Court's Decision: The Third Circuit reversed the lower court's decision, reasoning that "[t]he hospital knows the younger doctors' exact ages and specialties, and discovery will let [the employee] uncover those and other details in time for summary judgment and trial." Calling the replacement employee "significantly younger" "is a commonsense description of a subsidiary fact, not the ultimate issue the plaintiff must prove." Thus, the employee plausibly pleaded a case for age discrimination under the ADEA.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Simko v. U.S. Steel Corp.	U.S. Court of Appeals for the Third Circuit No. 20-1091	4/30/2020 (amicus filed) 3/29/2021 (decided)	ADA	Charge Processing **Result:** Pro-Employer

Background: Plaintiff filed a claim against defendant alleging retaliation for terminating his employment after filing an EEOC charge alleging disability discrimination for failing to provide him a reasonable accommodation and by paying him at the wrong rate while training for a new position. After filing his charge, plaintiff's job was terminated for "unsatisfactory work." Plaintiff grieved the dismissal and was reinstated under a "last chance agreement," but was subsequently suspended and then terminated for a safety violation. Shortly thereafter, plaintiff wrote a letter to the EEOC stating that he was terminated twice and placed on a last-chance agreement and that "anyone who familiarizes themselves with the detail of the case will clearly see it as retaliation for filing charges with the EEOC." After conducting an investigation more than one year after plaintiff filed his charge, the EEOC worked with plaintiff to amend his charge to include allegations for retaliatory discharge. Plaintiff submitted his amended charge almost four years after filing his initial charge with the EEOC. The EEOC found reasonable cause to believe defendant retaliated against plaintiff, and after efforts to conciliate were unsuccessful, plaintiff filed this lawsuit claiming that defendant has retaliated against him. The district court dismissed plaintiff's complaint, holding that his retaliation claim was not fairly within the scope of his original complaint because the charge's core grievance was discrimination, not retaliation. The court also held that none of the qualifying circumstances for equitable tolling applied because plaintiff was not actively misled by defendant, he was not prevented from asserting his rights, and he had not timely asserted his rights in the wrong forum.

Issues EEOC is Addressing as Amicus: (1) Did plaintiff's November 2014 letter to the EEOC constitute a valid administrative charge because the letter can reasonably be construed as a request for the EEOC to take action, and plaintiff's subsequent verification related back to the original filing date? (2) Even if plaintiff's November 2014 letter did not constitute a valid charge, should the district court have tolled the charge-filing period because the EEOC violated its own regulations by failing to help him file a charge? (3) Can plaintiff allege retaliation for the filing of a previous charge without having filed a new charge, because the EEOC actually investigated his allegations? (4) If this court believes that its prior precedent precludes consideration of whether the EEOC actually investigated plaintiff's allegations, should the court hear the case initially en banc?

EEOC's Position: The EEOC argued that plaintiff's November 2014 letter to the EEOC satisfied all the required elements of an administrative charge because it alleged that defendant had retaliated against plaintiff for filing a charge in 2013, which was an implicit request for the EEOC to consider retaliation as part of its ongoing investigation. The EEOC also argued that even if plaintiff's letter did not qualify as a charge, the district court erred by refusing to toll the charge-filing deadline because the EEOC violated its mandatory obligation to assist plaintiff in filing a retaliation charge. The EEOC further contended that whether plaintiff filed a new charge or not is irrelevant because circuit precedent provides that an individual need not file a new charge if the EEOC actually investigates the new allegations, which is what occurred here. Finally, the EEOC supported plaintiff's request for a hearing en banc because the retaliation claim is reasonably related to the original charge.

Court's Decision: The Third Circuit agreed with the district court's holding that the employee's later claim of retaliation was not encompassed within the earlier charge. Therefore, his failure to timely file a retaliation charge was fatal to his claim, as he failed to exhaust his administrative remedies.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Elledge v. Lowe's Home Centers LLC	U.S. Court of Appeals for the Fourth Circuit No. 19-1069	4/19/2019 (amicus filed) 11/18/2020 (decided)	ADA ADEA	Disability Age Retaliation **Result:** Pro-Employer

Background: Plaintiff worked for defendant for 22 years, climbing the ranks and culminating with his role as the market director overseeing 12 stores. In that role, plaintiff worked 50-60 hours per week, most of which were spent on his feet. After plaintiff underwent a knee replacement surgery, his physician restricted plaintiff to an eight-hour workday and four hours of walking or standing. After plaintiff's physician recommended that plaintiff's work restrictions be permanent, defendant determined it could not accommodate plaintiff's permanent restrictions as the market director. At that point, defendant advised plaintiff that he needed to find a new job at the company within 30 days but if he needed additional time to search for a job, defendant could place him on a leave of absence. Plaintiff utilized leave for several months while he searched for other positions, but he ultimately requested early retirement. Thereafter, plaintiff filed suit against defendant alleging disability discrimination, age discrimination, and retaliation for filing an EEOC charge of discrimination.

The district court granted summary judgment in favor of defendant on all claims. Regarding his disability discrimination claim, the district court rejected plaintiff's contention that he was entitled to special treatment regarding defendant's job application and hiring policy, and instead, that he was required to adhere to the policy and "compete on equal footing with other employees and outside applicants." Additionally, the court reasoned that plaintiff's requested accommodation of reassignment to another director-level position was not reasonable under the ADA because as long as the employer has a competitive hiring policy, it need not reassign disabled employees to vacant, equivalent positions. The court went on to say that plaintiff was not a qualified individual under the ADA because he rejected a reasonable accommodation offered to him (use of a motorized scooter). Further, the court rejected plaintiff's age discrimination claim, reasoning that plaintiff was not qualified for any of the director positions for which he applied. As to plaintiff's retaliation claim, the court found that such claim was "stale" because he was rejected for a position five months after he filed his charge of discrimination with the EEOC.

Issues EEOC is Addressing as Amicus: (1) Whether an employer's competitive hiring policy complies with its obligation under the ADA regarding the reassignment duty when the employer allows an employee to apply for a vacant position in accordance with the competitive hiring policy; (2) Whether the district court erroneously determined the employer's competitive hiring policy effectively trumps the ADA duty to reassign.

EEOC's Position: The EEOC argued that the ADA requires employees to reassign, not just permission to compete for a position, meaning that an employer is required to appoint employees to vacant positions for which they are qualified when they are no longer able to perform the essential functions of their current positions due to a disability. In support, the EEOC pointed to the statutory interpretation of the ADA itself, arguing that the statutory term "reassignment to a vacant position" does not mean "permission to compete for jobs with other employees." Additionally, the EEOC argued that an employer may be required to make exceptions to its competitive hiring policies in order to reasonably accommodate a disabled employee as necessary to achieve the ADA's goal of equal opportunity.

Court's Decision: The Fourth Circuit upheld the district court's decision. With respect to the reassignment issue, the court cited the Supreme Court's decision in *U.S. Airways v. Barnett*, 535 U.S. 391, 122 S. Ct. 1516 (2002), explaining that "Barnett does not require employers to construct preferential accommodations that maximize workplace opportunities for their disabled employees. It does require, however, that preferential treatment be extended as necessary to provide them with the same opportunities as their non-disabled colleagues." Moreover, Barnett requires courts to weigh the stability in employee expectations, which the Court "invoked as the 'most important' reason justifying the precedence of the employer's seniority-based system over the disabled employee's otherwise valid right to reassignment." *Elledge v. Lowe's Home Centers*, LLC, 2020 U.S. App. LEXIS 36236, *24 (4th Cir. Nov. 18, 2020), citing Barnett, 535 U.S. at 404-05. In this instance, the Fourth Circuit determined that the employer's system was "on its face, disability neutral. It invites, rewards, and protects the formation of settled expectations regarding hiring decisions. And most importantly, it is a reasonable, orderly, and fundamentally fair way of directing employee advancement within the company. In the ordinary 'run of cases,' reassignment in contravention of such a policy would not be reasonable." 2020 U.S. App. LEXIS 36236, **25-26.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Lyons v City of Alexandria	U.S. Court of Appeals for the Fourth Circuit No. 20-1656	9/22/2020 (amicus filed)	Title VII	Race **Result:** Pending
Background: A firefighter, who is Black, was required to participate in the Advanced Life Support Internship Program. He alleged the city employer discriminated against him on the basis of race by assigning three white employees to participate in the program before allowing him to participate. The district court granted the defendant's motion for summary judgment, finding that when a plaintiff's claim involves "actions short of firing, demotion, or other clearly 'ultimate' employment decisions—such as reassignments—the Fourth Circuit has held that the plaintiff must show 'some significant detrimental effect on [him].'" The district court held the plaintiff's claim failed because he had not shown a significant detrimental effect on him or his continued employment with the city. **Issues EEOC is Addressing as Amicus:** Whether delaying placement in an internship program that is a prerequisite for a promotion, on the basis of race, constitutes discrimination "with respect to * * * [the] terms, conditions, or privileges of employment" under Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1), without a showing that such discrimination had a significant detrimental effect on the employee. **EEOC's Position:** Delaying placement, on the basis of race, in an internship program that is a prerequisite for a promotion is actionable under Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), and that no showing of a "significant detrimental effect" is required. **Court's Decision:** Oral argument was heard on October 28, 2021. The matter is still pending.				
Perdue v. Sanofi-Aventis U.S.	U.S. Court of Appeals for the Fourth Circuit No. 19-2094	1/9/2020 (amicus filed) 6/8/2021 (decided)	ADA	Disability **Result:** Pro-Employer
Background: Plaintiff worked for defendant for 16 years as a sales professional and sued for failure to accommodate and discriminatory termination based on plaintiff's disability. During her employment, plaintiff was diagnosed with several autoimmune diseases. Plaintiff was able to manage her condition after rehabilitation and with medication and was able to continue working successfully through defendant's "FlexWorks" policy. Following a restructuring of defendant's sales organization, plaintiff was assigned a larger territory. Plaintiff claimed her health deteriorated with all the additional driving she had to do to cover her new territory. Plaintiff claimed she discussed this issue with her territory supervisor and the potential accommodation of returning to a FlexWorks arrangement. Plaintiff's territory supervisor identified a potential opening for a FlexWorks arrangement that would allow plaintiff to enter into a work-share with another employee, but this accommodation was not feasible given the needs of the territory plaintiff wanted to work in. As an alternative, defendant offered plaintiff hotel stays and a more comfortable car to assist her with the long drives in her new territory. Plaintiff rejected these proposed accommodations and claimed that her doctor did not believe they would help her perform the job. On September 19, 2017, plaintiff's job was terminated while she was on leave because she could not return to her full-time position and could not provide a date when she would be able to return to work with or without accommodations. Plaintiff then sued defendant for failure to accommodate and discriminatory termination. The district court granted defendant's motion for summary judgment, finding that the ADA does not require defendant to make an exemption to its policy that work-share arrangements must meet its business needs to accommodate plaintiff. The district court also found that plaintiff failed to proffer sufficient evidence to overcome defendant's showing that it denied her accommodation request for legitimate nondiscriminatory reasons. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred in granting summary judgment on plaintiff's failure-to-accommodate claim where defendant rejected her proposed reasonable accommodation and then merely advised her to search for open positions on her own and apply for long-term disability benefits. (2) Whether the district court erred in granting summary judgment on plaintiff's wrongful termination claim where a reasonable jury could find that defendant's explanation for denying the reasonable accommodation she requested was a pretext for disability discrimination. **EEOC's Position:** The EEOC argued the district court made four principal errors. First, the EEOC argued that although plaintiff was the non-moving party, the court viewed critical, disputed facts in the light most favorable to defendant and substituted its own judgment and inferences for those of the factfinder. Second, the EEOC argued that the court misread the Supreme Court's decision in *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002) as requiring a proposed accommodation to yield to any disability-neutral policy. Third, the EEOC argued that the district court improperly applied the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) burden-shifting analysis to plaintiff's failure-to-accommodate claims, which do not require a plaintiff to establish the employer's motive. Lastly, the EEOC argued that the district court placed the burden of identifying a reasonable accommodation solely on plaintiff when the ADA's interactive process requires bilateral cooperation, and that a reasonable jury could find that defendant failed to participate in that process in good faith. **Court's Decision:** The Fourth Circuit affirmed the lower court's decision, as the ADA does not require an employer to create a new position to accommodate a disabled employee, and that in this case, the part-time, job-share position did not exist at the time of the accommodation request.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Roberts v. Glenn Industrial Group, Inc.	U.S. Court of Appeals for the Fourth Circuit No. 19-1215	5/9/2019 (amicus filed) 5/21/2021 (decided)	Title VII	Harassment Sex **Result:** Mixed

Background: Plaintiff worked for defendant from July 2015 to April 2016 and sued for same-sex harassment and retaliation in violation of Title VII. He claimed that during his tenure his supervisor repeatedly ridiculed and demeaned him by calling him gay, using sexually explicit and derogatory language towards him and physically threatening him. He also claimed he was slapped, put in a headlock and pushed. Plaintiff claimed he was fired in retaliation for complaining about the alleged harassment to other supervisors. The district court rejected plaintiff's claims and granted defendant summary judgment. It stated that in *Oncale v. Sundowner Offshore Services, Inc.* "the Supreme Court identified three situations that may support a same-sex claim of harassment based on gender: (1) the plaintiff presents credible evidence that the alleged harasser is homosexual and made 'explicit or implicit proposals of sexual activity'; (2) the plaintiff shows that the harasser was motivated by general hostility to the presence of members of the same sex in the workplace; or (3) the plaintiff offers 'direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.'" Oncale, 523 U.S. at 80-81. The district court concluded that none of the three Oncale factors had been met because the alleged harasser was a straight man and while his conduct was inappropriate and vulgar, it was not of a sexual nature. Moreover, there was no evidence he was hostile towards men in the workplace and defendant's workplace was all men, removing the possibility of comparative evidence.

Issues EEOC is Addressing as Amicus: (1) Whether besides the Oncale factors there are other ways of establishing same-sex harassment; (2) Whether physical abuse that is not sexual but perpetrated by an individual who has engaged in other explicitly sex-based abuse can be sex-based; and (3) Whether an employer is entitled to the Faragher-Ellerth affirmative defense when plaintiff reported the alleged harassment to multiple company officials but not to the CEO.

EEOC's Position: The EEOC argues that a plaintiff may establish same-sex harassment using other evidence besides the three Oncale factors. The EEOC also contends that that district court was wrong in concluding that "facially neutral" physical conduct cannot be sex-based. Finally, the EEOC argues that the defendant is not entitled to the Faragher-Ellerth defense because it did not exercise reasonable care to prevent and correct sexual harassment since it failed to investigate and address plaintiff's repeated complaints.

Court's Decision: The Fourth Circuit affirmed the district court's grant of summary judgment to the employer on the retaliation claim, but vacated summary judgment as to the sexual harassment claim and remanded. With respect to the sexual harassment claim, the court agreed with the plaintiff that the district court misconstrued and misapplied the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, when it rejected his claim that his supervisor harassed him on the basis of sex in violation of Title VII. "The district court erred in its interpretation of Oncale. Nothing in Oncale indicates the Supreme Court intended the three examples it cited to be the only ways to prove that same-sex sexual harassment is sex-based discrimination." Moreover, the Supreme Court's holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), "makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes." The court also determined that the lower court erred by disregarding the evidence of physical assaults on the plaintiff because they were "not of a sexual nature." The lower court erred in failing to examine whether such assaults were part of a pattern of objectionable, sex-based discriminatory behavior. With respect to the retaliation claim, however, the appellate court found that the plaintiff "failed to establish a *prima facie* case of retaliatory termination. He has not presented sufficient evidence to demonstrate a causal relationship between his protected activity and his employer's adverse action. [The employer] did not have actual knowledge of [plaintiff's] complaints of sexual harassment when he terminated him, and there was a lack of temporal proximity between [plaintiff's] last complaint and his termination."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Sempowich v. Tactile Systems	U.S. Court of Appeals for the Fourth Circuit No. 20-2245	2/16/2021 (amicus filed) 12/3/2021 (decided)	Title VII EPA	Sex Equal Pay **Result:** Pro-Employee

Background: Plaintiff initially worked as a Regional Sales Manager (RSM) for defendant for the Mid-Atlantic region in April 2014. A male RSM joined the company in September 2014 and oversaw the Southern region. Defendant pays RSMs a base salary, paid bi-weekly, and production-based sales commissions. Defendant assigns base salaries based "primarily" on "management experience and work history." Defendant paid the male RSM a higher base salary than the plaintiff each year from 2015 through 2017, but plaintiff earned higher commissions.

In January 2018, because of high employee turnover in the Mid-Atlantic region and slower recruitment than the company desired, defendant decided to remove plaintiff as RSM for the Mid-Atlantic region and reassigned her to manage another division, which would market a new product. Plaintiff filed suit alleging that defendant violated the EPA by paying her a lower base salary than a male RSM and that it violated Title VII by reassigning her to the new position and ultimately firing her because of her sex and sex-plus-age.

Defendant moved for summary judgment, maintaining, in relevant part, that plaintiff could not show a *prima facie* case under the EPA because she had earned more total income than the male RSM when their respective commissions were added to their base salaries. Defendant also argued that plaintiff's Title VII claim failed because she did not suffer an adverse employment action.

The district court granted summary judgment to defendant on plaintiff's EPA claim because plaintiff did not offer sufficient evidence that her employer paid higher wages to an employee of the opposite sex because the male RSM earned a lower salary in total compensation—base salary plus commissions—from 2015 to 2017. The court said it was adopting the EEOC's definition of "wages," which includes "all payments made to [or on behalf of] an employee as remuneration for employment." 29 C.F.R. § 1620.10.

With respect to plaintiff's Title VII claim, the district court held that there was a genuine issue of material fact as to whether the company's decision to transfer her to the head and neck manager job was an adverse employment action. According to the court, reassignment and a corresponding change in working conditions may constitute an adverse employment action, but "only if it has a 'significant detrimental effect' on the plaintiff.'" *Boone v. Goldin*, 178 F.3d 253, 255 (4th Cir. 1999). The court explained that term's meaning, adding "[a] lateral transfer that does not affect pay, benefits, or seniority … is not an adverse employment action." *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 376 (4th Cir. 2004). The court also noted that "an employee's perception of the new position is close to irrelevant" and the fact that a new job assignment is less appealing to the employee does not make it an adverse employment action. In this case, however, the court emphasized that the new position lacked supervisory responsibilities, while plaintiff had been supervising 15 employees as an RSM, and defendant's suggestion that plaintiff was better suited to the new job suggested that the RSM job was "different in character."

Issues EEOC is Addressing as Amicus: Whether the district court erred in holding that the plaintiff could not establish a *prima facie* case of discrimination under the EPA where her base salary rate was lower than that of a male comparator, but she earned more in total compensation, including sales commissions, over a three-year period.

EEOC's Position: Based upon the plain language and statutory purpose of the EPA, the district court erred in holding that the plaintiff could not establish a *prima facie* case under the EPA because, although she was paid a lower base salary than a male comparator, her total compensation including sales commissions exceeded the comparator's over a three-year period. Specifically, the EEOC argues that the EPA makes it unlawful for an employer to "pay[ ] wages to employees … at a rate less than the rate at which he pays wages to employees of the opposite sex … for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1). It contends that the EPA itself defines neither "wages" nor "wage rate" and the EEOC's regulatory guidelines define the term "wage rate," as used in the EPA, to be "the standard or measure by which an employee's wage is determined and is considered to encompass all rates of wages whether calculated on a time, commission, piece, job incentive, profit sharing, bonus, or other basis." 29 C.F.R. § 1620.12. Therefore, "Wages," in turn, include "all forms of compensation irrespective of the time of payment, whether paid periodically or deferred until a later date, and whether called wages, salary, profit sharing, expense account, monthly minimum, bonus, uniform cleaning allowance, hotel accommodations, use of company car, gasoline allowance, or some other name." 29 C.F.R. § 1620.10; *See also* EEOC Compliance Manual, § 10-IV (Dec. 2000).

Court's Decision: The Fourth Circuit vacated and remanded the ruling on the plaintiff's EPA claim, holding that the lower court applied an incorrect legal standard for determining "wages" under the first prong of a prima facia case. The court reasoned that the EEOC's interpretation of "wages" under the statute is unnecessary because the plain language of the EPA makes no reference to "total wages," but does refer to wage "rates." "The text of the Equal Pay Act unambiguously states that an employer may not 'discriminate … between employees on the basis of sex by paying wages to employees … at a rate less than the rate at which he pays wages to employees of the opposite sex.'" Second, the appellate court held that the district court misinterpreted the EEOC's definition of "wages" under 29 C.F.R. §1620.10 to include commissions. The Fourth Circuit held that although "wages" includes commissions, "just as with salary, an employer could not pay commissions to a female employee at a lower rate than a similarly situated male employee [but] [t]his does not mean that all types of remuneration should be combined into one lump sum when comparing earnings of a male and female employee." Finally, the court noted that the EEOC's regulations imply the same conclusion because, under 29 C.F.R. §1620.19, "an employer would be prohibited from paying higher hourly rates to all employees of one sex and then attempting to equalize the differential by periodically paying employees of the opposite sex a bonus." The Fourth Circuit extrapolated that, under this logic, an employer would be prohibited from paying a female employee a lower salary than a similarly situated male employee and then avoid liability if the female employee works hard enough to equalize the difference through commissions or bonuses.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Garcia v. Morris	U.S. Court of Appeals for the Fifth Circuit No. 21-20094	6/7/2021 (amicus filed) 9/15/2021 (dismissed)	ADA	Disability **Result:** Pro-Employer
Background: Plaintiff fell and injured his elbow and arm, requiring surgery. After he returned to work he attempted to "work around" the surgery to the extent possible, but was only able to work four to five hours each day. Plaintiff's sales production decreased as a result of his limited hours during the recovery period. Plaintiff's employer terminated his employment based on low sales numbers and plaintiff filed suit alleging violations of the ADA. The district court concluded on summary judgment that the plaintiff could not pursue his ADA termination claim because he had not shown he had a disability. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred in its analysis of whether plaintiff could establish that he is disabled for purposes of ADA coverage; (2) Whether the district court abused its discretion by severely restricting plaintiff's ability to conduct discovery. **EEOC's Position:** The district court erred in its analysis of whether plaintiff could establish that he is disabled for purposes of ADA coverage, arguing that the district court relied on incorrect legal standard in concluding he did not have an actual disability and that the district court failed to consider plaintiff's argument that he could establish regarded-as coverage. (2) The district court erred in curtailing plaintiff's discovery, arguing that the court should reverse the restrictive discovery order as it did in *McCoy v. Energy XXI GOM, L.L.C.*, 695 F. App'x 750, 753 (5th Cir. 2017). **Court's Decision:** The court granted the motion to dismiss the appeal.				
Gosby v. Apache Industrial Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 21-40406	8/25/2021 (amicus filed)	ADA	Disability **Result:** Pending
Background: The plaintiff, who is diabetic, was hired into an unskilled position expected to last up to six months. Within her first month of employment, she injured her finger, but was allegedly discouraged from seeking medical care and was warned that if she did, her employment may be terminated. Plaintiff later experienced a diabetic episode at work and was laid off six days later, along with 11 other employees. Defendant alleged the layoffs were due to a workforce reduction, but other employees told plaintiff that the real reason she was terminated was because of her medical incident. Plaintiff filed suit, claiming the causal connection for a *prima facie* case was established not only by the close temporal proximity between her diabetic episode and discharge, but also through warnings to avoid seeking medical attention at all costs. The district court granted defendant's motion for summary judgment, holding that plaintiff failed to establish a *prima facie* case. In so holding, the district court noted that because plaintiff's position was likely to last only six months, defendant would "only be able to terminate [plaintiff] during a small portion of her employment without being at risk of a temporal proximity argument." Accordingly, the court gave little weight to the temporal proximity between plaintiff's diabetic attack and her termination. The court also rejected the warnings and statements from other employees, finding them irrelevant to a *prima facie* case because they were not made by those involved or influencing layoff decisions. **Issues EEOC is Addressing as Amicus:** (1) Whether the district court erred by rejecting plaintiff's evidence of close temporal proximity to establish the causation element of her *prima facie* case, solely because plaintiff's job was short-term in nature; and (2) Whether the district court erred by ignoring plaintiff's evidence of statements by her lead man that seeking medical care at the worksite could – and did – cause her to lose her job. **EEOC's Position:** The EEOC argued that the district court erred in ignoring precedent that evidence of close temporal proximity at least suffices to meet the minimal initial burden to show some causal connection—a less stringent standard than the "but for" test. It argued that the operative consideration was not how long the plaintiff's job was expected to last, but rather, the length of time between the disability-related incident (six days) and discharge vis-à-vis the length of time she expected to continue work (approximately five months). The EEOC further argued that the court ignored plaintiff's evidence that she was warned to avoid seeking medical attention and also wrongly discounted the relevance of employee statements challenging the real reason for her termination—especially where the court has previously considered such circumstantial evidence as relevant and not categorically excludable. **Court's Decision:** Pending.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Johnson v. Pride Industries, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 19-50173	6/17/2019 (amicus filed) 8/6/2021 (decided)	Title VII	Harassment Race **Result:** Mixed
Background: Plaintiff, a Black man, sued for race discrimination and retaliation alleging that he was subjected to a hostile work environment. Plaintiff claimed that a co-worker frequently called him the Spanish language equivalent of the n-word, frequently addressing him as "boy," "pinch mayate" and "mano." The co-worker also victimized and harassed plaintiff in other ways such as hiding his work tool and the paperwork for his promotion. Plaintiff claimed that the alleged harassment escalated after he complained to various company officials. The district court rejected plaintiff's claims and granted defendant summary judgment holding that the use of racial slurs alone is not sufficient to establish a *prima facie* claim for hostile work environment based on race. The district court also concluded that since plaintiff failed to show he experienced sufficiently pervasive or severe harassment, he was not subjected to a constructive discharge. **Issues EEOC is Addressing as Amicus:** (1) Whether plaintiff's complaint stated a plausible claim for a hostile work environment where he alleges that another employee frequently called him the Spanish language equivalent of a racial slur, and victimized him in other ways not obviously discriminatory; and (2) Whether the court erred in concluding that it had ancillary jurisdiction over plaintiff's constructive discharge, even though he failed to file a new EEEOC charge, because the claim grew out of an administrative charge properly before the court. **EEOC's Position:** The EEOC argues that the district court erred when it determined that the sole use of slurs is insufficient to establish hostile work environment. It contends that the frequent use of racial slurs is adequately severe and pervasive to establish a claim for workplace harassment. The EEOC also claims that when the alleged harasser also engages in various forms of abuse, some of which is explicitly discriminatory and some is not, all of it constitutes a single discriminatory conduct. The EEOC argues that the district failed to consider the totality of circumstances. Finally, the EEOC contends that it is unnecessary for a plaintiff to exhaust administrative remedies prior to urging a constructive discharge claim growing out of an earlier charge. **Court's Decision:** The court affirmed the lower court's decision in part, reversed in part, and remanded. Specifically, the court agreed that summary judgment for the employer was proper as to most of the plaintiff's claims, but that the district court erred in its ruling on the plaintiff's hostile work environment claim. With respect to the hostile work environment claim, the appellate court disagreed that the use of racial slurs was "isolated." "Viewing the all of the evidence in the light most favorable to [the plaintiff], we do not think the harassment here is properly characterized as isolated." In addition, the plaintiff presented other evidence of mistreatment that a jury could perceive as racial harassment. Moreover, the plaintiff presented evidence that the employer knew about but did not take appropriate action to the harassment. Therefore, the lower court's grant of summary judgment was reversed and remanded for trial. The court found, however, that the district court did not err in granting summary judgment in favor of the employer on the constructive discharge and retaliation claims.				
Lockhart v. Republic Services, Inc.	U.S. Court of Appeals for the Fifth Circuit No. 20-50474	9/23/2020 (amicus filed) 10/25/2021 (decided)	ADEA	Discrimination Race **Result:** Pro-Employer
Background: The plaintiff worked as a waste disposal driver for the defendant and alleged that the employer discriminated against him with respect to his compensation, terms, conditions and privileges of employment on account of his race. He alleged his employment was terminated because he complained about the pay system; the employer presented evidence of disciplinary infractions. The district court held that the plaintiff did not show an adverse employment action connected to race OR any comparators who were treated more favorably. In addition, the court held that the employer articulated a legitimate, nondiscriminatory reason for the plaintiff's discipline and termination pursuant to the company's progressive discipline policy. **Issues EEOC is Addressing as Amicus:** The EEOC is asking whether the district court erred—because the plaintiff sued under Title VII and not the ADEA—it required him to offer comparator evidence as part of his *prima facie* case of discrimination. The EEOC also asks whether the lower court erred by failing to consider as circumstantial evidence of race discrimination that the decision maker and an employee who influenced the termination decision allegedly used racial slurs to refer to the plaintiff and other Black employees. **EEOC's Position:** Title VII does not require evidence of comparators to establish a *prima facie* case of race discrimination. Even assuming, arguendo, that the ADEA and Title VII do have different causation standards, it would not explain why the *prima facie* case standard in a Title VII case would be narrower and more difficult to meet than under the ADEA. Moreover, the decision makers' use of racial slurs to refer to plaintiff and other Black employees is strong circumstantial evidence that race discrimination was at least partially responsible for the termination. **Court's Decision:** The Fifth Circuit affirmed summary judgment dismissal of the employee's claims, finding he raised no genuine issues of material fact with respect to either his claims of racial discrimination under Title VII or overtime violations and retaliation under the Fair Labor Standards Act.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Randle v. Dragados USA, Inc.	U.S. Court of Appeals for the Fifth Circuit 21-20054	5/14/2021 (amicus filed) 5/27/2021 (dismissed)	Title VII	Retaliation **Result:** Pro-Employer

Background: In January 2018, plaintiff began working as a laborer and equipment operator on a highway construction project for defendant. The plaintiff alleged that, in early February 2018, a bulldozer operator touched him on the buttocks on two occasions. Both incidents occurred in front of the plaintiff's supervisor, but he did not discipline the employee for this behavior. The plaintiff then complained to the human resources manager about the two incidents.

Shortly thereafter, the plaintiff received a "Disciplinary Action Form," describing his workplace conduct violations as "[t]aking long unauthorized breaks," "[b]eing on the phone inside the car and away from the crew during working hours," and "[n]ot following directions when operating equipment." Subsequently, the plaintiff again contacted human resources to ask whether she had addressed the situation. On March 9, 2018, the plaintiff's employment was terminated.

The plaintiff filed suit alleging discrimination in violation of the Texas Commission on Human Rights Act based on his race, color, and sex, and in retaliation for engaging in protected activity. Defendants moved for summary judgment on all claims. The district court granted summary judgment to the defendants on all claims. The court found that the plaintiff's complaints to HR constituted protected activity. Next, although the parties had not disputed that the written discipline and termination constituted materially adverse actions, the court held that only the termination qualified. As support for its conclusion, the court cited J*ackson v. Honeywell International, Inc.*, 601 F. App'x 280, 286 (5th Cir. 2015) (unpubl.), a decision addressing a Title VII retaliation claim, for the proposition that "written warnings and unfavorable performance reviews are not adverse employment actions where colorable grounds exist for disciplinary action or where the employee continues to engage in protected activity." According to the court, defendants had provided "colorable grounds" for the written warning. The court also pointed to the plaintiff's deposition testimony that after he complained about the conduct to human resources in February of 2018, he returned to complain on March 9, 2018, to ask about her investigation—which, it stated, "shows that the written warning did not dissuade Plaintiff from continuing to engage in arguably protected conduct." From this, the court concluded that the written warning did not constitute a materially adverse action.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in ruling that an employee who continues to engage in protected activity after experiencing allegedly retaliatory discipline from his employer cannot establish that the discipline constitutes a materially adverse action for purposes of a Title VII retaliation claim; (2) Whether the district court erred in concluding that, if an employer can show that "colorable grounds" exist for issuing written discipline to an employee, that discipline cannot constitute a materially adverse action for purposes of a Title VII retaliation claim.

EEOC's Position: (1) The district court erred in assessing whether plaintiff had been subjected to a materially adverse action by reference to *Jackson v. Honeywell International, Inc.*, 601 F. App'x 280, 286 (5th Cir. 2015), an unpublished decision involving a Title VII retaliation claim. On this point, *Jackson* states that "written warnings and unfavorable performance reviews are not adverse employment actions where colorable grounds exist for disciplinary action or where the employee continues to engage in protected activity." 601 F. App'x at 286. According to *Jackson* and the district court here, if an employee should remain undeterred from engaging in protected activity by an act of employer discipline—no matter how strong the evidence of a retaliatory motive for the discipline—that action cannot form the basis for a retaliation claim. The EEOC argues that in so ruling, the court erred. The approach taken by Jackson and the district court here contravenes *Burlington Northern's* objective standard by shifting the focus from whether the disciplinary action might dissuade a reasonable worker from engaging in protected activity to whether it did in fact dissuade the particular plaintiff in the case. (2) The EEOC also argues that the district court's "colorable grounds" basis for assessing whether disciplinary action is materially adverse is irreconcilable with *Burlington Northern*. Specifically, the court contravened *Burlington Northern* by confusing the second element of a retaliation claim, materially adverse action, with the third, causation. Moreover, the EEOC argues that the district court's "colorable grounds" approach conflicts with controlling authority governing the analysis of retaliation claims on summary judgment. In particular, the EEOC contends that the district court held that plaintiff had not even satisfied the first stage of the *McDonnell Douglas* framework (the *prima facie* case) because the employer, in effect, satisfied its second-stage burden by invoking "colorable grounds"—that is, by producing evidence that it took the contested action for a legitimate, nonretaliatory reason. Accordingly, the EEOC says that the approach the court took deprived the plaintiff of the opportunity to challenge the defendants' explanation as false and to show that its true motivation was retaliatory.

Court's Decision: The court dismissed the appeal pursuant to 5th Circuit Rule 42 for failure to file record excerpts.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Scott v. U.S. Bank National Association	U.S. Court of Appeals for the Fifth Circuit No. 21-10031	4/21/2021 (amicus filed) 11/2/2021 (decided)	Title VII	Retaliation **Result:** Pro-Employee
Background: A Black plaintiff overheard a white manager tell plaintiff's Black manager that he intended to terminate four Black employees. In turn, plaintiff told his fellow employees what he had overheard, prompting an employee to report concerns of race discrimination to HR. Plaintiff provided a statement in the subsequent investigation. Around a month later, plaintiff reported to Human Resources that he was experiencing various retaliatory acts, including verbal warnings and harassment, which he believed were in retaliation for providing a witness statement. A month later, plaintiff was terminated. Plaintiff sued for retaliation under 42 U.S.C. § 1981, but the district court dismissed his complaint with prejudice for failure to state a claim. The court denied plaintiff any opportunity to amend his complaint because plaintiff could not demonstrate that he held a reasonable belief that the employer was engaged in unlawful employment practices. **Issues EEOC is Addressing as Amicus:** Whether plaintiff adequately pled that he engaged in protected activity because he opposed employment practices that he believed to be unlawful. **EEOC's Position:** The EEOC argued the district court made errors in discussing the framework to be used for evaluating whether plaintiff's comments supported a reasonable belief of unlawful employment practices under the "opposition clause." It argued that reactive statements solicited by an employer during an internal investigation could constitute "opposition" to unlawful employment practices if the plaintiff made such statements with a reasonable belief, as assessed from the perspective of a layperson, that such practices were unlawful, even if they ultimately are not. It further argued that the district court improperly considered plaintiff's witness statement in isolation, rather than considering his oppositional acts "as a whole," including reports of retaliation and harassment. **Court's Decision:** The Fifth Circuit affirmed in part, reversed in part, and remanded for further proceedings. It affirmed the judgment of the district court as to the denial of leave to amend the complaint, reversed the judgment of the district court granting defendant's motion to dismiss, and remanded for further proceedings. Plaintiff sufficiently alleged facts that, interpreted in the light most favorable to him, supported a reasonable belief that his employer engaged in an unlawful practice. The district court erred when it engaged in a factual analysis akin to McDonnell Douglas and discounted these facts.				
Woods v. Cantrell	U.S. Court of Appeals for the Fifth Circuit No. 21-30150	6/16/2021 (amicus filed) 3/24/2022 (decided)	Title VII	Race Harassment **Result:** Pro-Employee
Background: Black former employee of the City of New Orleans filed suit against the city officials and employees claiming that he was subject to a discriminatory hostile work environment based on race and color in violation of Title VII. Specifically, the former employee alleges that his supervisor called him a racial slur in the presence of coworkers and that the supervisor and other senior officials engaged in additional hostile behavior. **Issues EEOC is Addressing as Amicus:** Whether the district court erred in holding that "a single utterance of a racial epithet, despicable as it is, cannot support a hostile work environment claim" under Title VII. **EEOC's Position:** The EEOC argues that the district court made at least two errors in analyzing the sufficiency of the plaintiff's complaint to state a Title VII hostile work environment claim. First, the court stated that "a single utterance of a racial epithet… cannot support a hostile work environment claim,' which the EEOC argues contradicts clear and consistent precedent. Second, the district court failed to give adequate weight to the seriousness of the epithet alleged or the context in which it was used. **Court's Decision:** The Fifth Circuit affirmed in part, reversed in part and remanded, finding that the district court erred when it found a single use of a racial slur could not support a hostile work environment claim.				

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Wright v. Union Pacific Railroad Co.	U.S. Court of Appeals for the Fifth Circuit No. 20-20334	9/25/2020 (amicus filed) 3/5/2021 (decided)	Title VII	Retaliation **Result:** Pro-Employee on the EEO portion of the claim

Background: The plaintiff alleged that her former employer retaliated against her in violation of Title VII by suspending and terminating her because of her 2016 lawsuit against the company and her July 2018 internal complaint to the EEO line about the alleged hostile work environment. The plaintiff was suspending pending the internal investigation. The district court granted the defendant's motion to dismiss the retaliation claim, explaining that the plaintiff claims that the defendant violated Title VII by retaliating against her for her earlier lawsuit against the company and for filing an internal complaint against her supervisor. The court determined her claim showed no connection between her termination and her 2016 lawsuit, which was settled in February 2018, and that there was no evidence to support the allegation her supervisor retaliated against her after she complained. The court noted the supervisor removed the plaintiff from service because she refused to complete required coaching.

Issues EEOC is Addressing as Amicus: Whether the district court erred in granting the defendant's motion to dismiss the plaintiff's Title VII retaliation claim under Federal Rule of Civil Procedure 12(b)(6) on the ground that the operative complaint purportedly failed adequately to allege causation.

EEOC's Position: The plaintiff's complaint alleged that her employer suspended and terminated her employment after she filed a Title VII suit against the company and shortly after she lodged an internal sex-discrimination complaint, activity that is protected by Title VII's antiretaliation provision. The district court granted the defendant's motion to dismiss the Title VII retaliation claim under Federal Rule of Civil Procedure 12(b)(6), holding that her complaint did not adequately allege any causal connection between her protected activity and her suspension and termination. In reaching that conclusion, the district court accepted the employer's explanation for taking these actions and faulted the complaint for providing "[n]o evidence" of retaliation. This was in error, as the purpose of the pleading requirement is to ensure that a plaintiff alleges sufficient facts, "taken as true," to put the defendant on notice of the plaintiff's claim, *Bell Atlantic Corp. v. Twombly*, 550 U.S. at 555-56 (2007), and complaints that provide such notice should "unlock the doors" to discovery. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Requiring more at the complaint stage prevents the plaintiff from proceeding to the stage of litigation designed to allow her to acquire the evidence needed to prove her claim. In this appeal, only the "ultimate element" of causation is at issue, and the complaint asserted sufficient facts to support a causal link between the plaintiff's protected activity and her suspension and job termination.

Court's Decision: The Fifth Circuit affirmed the district court's decision in part, reversed in part, and remanded. With respect to the pleadings issue, the court found the district court erred to the extent it required the plaintiff to substantiate her Title VII retaliation claim with evidence at the pleading stage. Specifically, the appellate court held that the plaintiff "plausibly alleged a causal link between her 2018 internal EEO complaint and her subsequent suspension and termination. We therefore reverse the district court's Rule 12(b)(6) dismissal of [her] Title VII claim and remand for further proceedings." Regarding the claim that the employer retaliated against the plaintiff in violation of the Railway Labor Act for requesting labor representation, about which the EEOC did not opine, the Fifth Circuit affirmed the district court's dismissal of that claim.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Ayers v. Enviro-Clean Services	U.S. Court of Appeals for the Sixth Circuit No. 20-1628	10/2/2020 (amicus filed) 9/1/2021 (decided)	ADA	Charge Processing **Result:** Pro-Employee

Background: Pro se plaintiff appealed the dismissal of his ADA complaint against defendant "for failure to exhaust administrative remedies." Plaintiff sued both his employer and the school district. His complaint alleges that, before filing this action, he "exhausted his administrative remedies by filing a timely charge of discrimination against his employer with the [EEOC] ... on April 4, 2018," which was 291 days after the last alleged act of discrimination. Defendant moved to dismiss the complaint, contending, in relevant part, that plaintiff's lawsuit was untimely as a matter of law because he failed to file it within the contractual 180-day time limit in the job application he signed.

Two weeks later, the Sixth Circuit ruled such contractual time limits invalid for claims brought under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq. *Logan v. MGM Grand Detroit Casino*, 939 F.3d 824, 825-26 (6th Cir. 2019). In supplemental briefing, defendant urged dismissal of plaintiff's lawsuit on the ground that plaintiff's EEOC charge was untimely. Defendant argued that, to benefit from the 300-day charge-filing timeframe applicable under Title VII (and the ADA), a plaintiff first must institute proceedings with a state or local agency.

The district court granted defendant's motion to dismiss, ruling that plaintiff's EEOC charge was not timely filed. The court noted that an aggrieved individual has 300 days to file an EEOC charge only "if [he] also files with the relevant state or local agency"; otherwise he "must file an EEOC charge within 180 days after the allegedly discriminatory conduct." (quoting *Logan*, 939 F.3d at 827). The court observed that here, since plaintiff filed his charge 291 days after the events in question, and his complaint "did not allege that he filed a charge with any state or local agency to benefit from the 300-day deadline," it was untimely.

Issues EEOC is Addressing as Amicus: (1) Whether the plaintiff who filed an EEOC charge 291 days after the alleged discrimination and alleged in his complaint that he filed a timely charge with the EEOC adequately plead satisfaction of the conditions precedent to an ADA lawsuit without needing to allege that he filed a charge with a state or local agency before filing it with the EEOC? (2) Whether the 300-day limitations period applied regardless of whether the plaintiff, himself, filed his charges or someone else filed them on his behalf when the alleged discrimination occurred in a jurisdiction with a state agency authorized to address claims of disability-based workplace discrimination?

EEOC's Position: (1) Plaintiff's EEOC charge was not untimely because the alleged discrimination occurred in Michigan, a deferral jurisdiction, and he filed his charge within the statutory 300-day charge-filing deadline that applies in deferral states. The fact that plaintiff did not specifically plead he had filed a discrimination charge with the appropriate state agency before filing one with the EEOC is not dispositive as the Federal Rules of Civil Procedure do not require plaintiffs to plead satisfaction of conditions precedent to suit with that level of specificity. (2) The 300-day limitations period applied regardless of whether the plaintiff filed the charges himself. Title VII states that in deferral jurisdictions such as Michigan, administrative proceedings must be instituted with the appropriate state or local fair employment practices agency (FEPA) before the EEOC may file the charge and begin its administrative process. In accordance with the EEOC regulations and work-sharing agreements with FEPAs in these jurisdictions, administrative proceedings are automatically instituted with the FEPA before the EEOC files the charge. Therefore, the deadline is extended to 300 days. Regardless, the 300-day deadline applied here because plaintiff's mother filed a charge on his behalf with the Michigan Department of Civil Rights before filing it with the EEOC.

Court's Decision: The Sixth Circuit vacated the district court's judgment, holding that the plaintiff timely filed a charge of discrimination with the EEOC, thus timely exhausting his administrative remedies.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Corbin v. Steak N Shake	U.S. Court of Appeals for the Sixth Circuit Nos. 20-3519 & 20-3553	11/6/2020 (amicus filed) 7/2/2021 (decided)	Title VII	Sex Harassment **Result:** Mixed

Background: Plaintiff was a minor who worked as a server at the defendant restaurant. She filed suit for sexual harassment, alleging a hostile work environment, gender discrimination, and retaliation pursuant to Title VII of the Civil Rights Act of 1964 and Ohio law. After a five-day trial, the jury returned a verdict for plaintiff on the hostile work environment claim, and awarded her $308 in back pay, $1,000 in compensatory damages, and $50,000 in punitive damages. Defendant moved to alter or amend the judgment to reduce the punitive damages award, arguing it violated due process. The court denied the motion, finding $50,000 in punitive damages to be consistent with three guideposts to determine whether an award of punitive damages violates the Due Process Clause (reprehensibility, ratio to compensatory damages, and comparison to sanctions in comparable cases). Defendant appealed.

Issues EEOC is Addressing as Amicus: (1) Whether Title VII punitive damages awards below the statutory caps, 42 U.S.C. § 1981a(b)(3), necessarily comport with due process, obviating the need for additional constitutional scrutiny under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996); (2) Alternatively, whether the $50,000 punitive damages award for sexual harassment of the 17-year-old plaintiff satisfied Gore's three guideposts—reprehensibility, ratio to compensatory damages, and comparison to sanctions in comparable cases—where her adult male co-worker repeatedly made inappropriate, harassing comments.

EEOC's Position: The EEOC argued that the 38:1 award of punitive damages was constitutional. It argued the federal statute imposes caps on damages that themselves comport with due process, application of Gore's guideposts is redundant and inapplicable because any punitive damages award under such cap is necessarily constitutional. Alternatively, the EEOC argued the $50,000 award of punitive damages satisfied Gore's three guideposts. With respect to these, it argued: (1) Reprehensibility was satisfied by Title VII's requirement that the employer must have acted intentionally with malice or with reckless indifference sufficient to warrant punitive damages; (2) The ratio analysis was satisfied because the conduct was particularly egregious and produced a small amount of economic harm, while noneconomic harm was difficult to calculate. It also fell below other, higher ratios upheld by the court; and (3) Comparisons to sanctions in comparable cases was satisfied, as the $50,000 award was one-sixth of the $300,000 statutory cap for employers of defendant's size, which had a net worth between $500-$600 million, evidencing the affordability of the award.

Court's Decision: The Sixth Circuit affirmed the jury's award of punitive damages after reviewing the district court's denial of remittitur for an abuse of discretion. It specifically disagreed with the EEOC's arguments and explained that while federal caps address limits on awards, they do not determine the proportionality of the award. It reinforced that Gore plays a key role in determining whether the punitive damages award is both reasonable and proportionate to the harm suffered. It ultimately held that, based on the Gore factors, the district court did not abuse its discretion in denying defendant's remittitur motion on punitive damages.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Jackson v. Genesee County Road Commission	U.S. Court of Appeals for the Sixth Circuit No. 20-1334	8/10/2020 (amicus filed) 5/27/2021 (decided)	Title VII	Retaliation **Result:** Pro-Employee

Background: Plaintiff worked as Human Resources Director and Equal Employment Opportunity Officer for defendant. In her position she investigated discrimination complaints and revised the defendant's EEO policy. She concluded a race discrimination complaint against an employee had merit, and recommended he be placed on administrative leave and undergo a psychological evaluation. Following the evaluation, the plaintiff did not want the accused employee to return, while her supervisor did. She ultimately negotiated a severance agreement for the employee and was fired two months later. The employer alleged it was because of her abrasive and offensive communication style; she alleged her termination was in retaliation for investigating the discrimination complaint and for her handling of contractors' EEO plan submissions. After filing suit, the district court held that the plaintiff's Title VII retaliation claim failed, in part, because she had not engaged in protected activity. The district court rejected her allegations under both the participation and opposition clauses of Title VII's anti-retaliation provision. On the opposition clause, the district court held that Jackson had not engaged in protected activity because she had not shown that her actions "were beyond her regular job duties."

Issues EEOC is Addressing as Amicus: Whether the district court erred in requiring the plaintiff to show that her actions as the Human Resources Director "were beyond her regular job duties" to constitute protected activity under the opposition clause of Title VII's antiretaliation provision, which prohibits discrimination against "any" employee "because he has opposed any practice made an unlawful employment practice by this subchapter," 42 U.S.C. 2000e-3(a).

EEOC's Position: The district court erred in concluding that the plaintiff did not engage in "opposition" within the meaning of Title VII's anti-retaliation provision. Even if she had established that she engaged in protected activity, the district court held that she failed to show a causal connection between that activity and her termination. And, even if the plaintiff had established that she engaged in protected activity that was causally related to her termination, the court held that she failed to rebut the defendant's legitimate, non-discriminatory reason for her termination. The opposition clause of Title VII's anti-retaliation provision prohibits an employer from "discriminat[ing] against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII]." 42 U.S.C. 2000e-3(a). An employee can generally be said to have "opposed" an unlawful employment practice if she informs her employer that she believes unlawful discrimination occurred in the workplace. Because the district court found that her opposition did not go "beyond her job duties" as HR Director, however, it held that she had not engaged in protected activity. In so holding, the district court erred by following the "manager rule" that some courts have adopted under the Fair Labor Standards Act (FLSA). Whatever its validity under the FLSA, the manager rule cannot be grafted onto Title VII's plain text or squared with Sixth Circuit and Supreme Court precedent.

Court's Decision: The Sixth Circuit reversed the lower court's grant of summary judgment in the employer's favor, finding the plaintiff had indeed engaged in protected activity, so there remains a genuine factual dispute as to causation. The appellate court found that the plaintiff's reasonable actions to oppose unlawful discrimination are sufficient to establish protected activity, and that a reasonable juror could find that her conduct as EEO Officer was protected activity.

Pelcha v. MW Bancorp	U.S. Court of Appeals for the Sixth Circuit No. 20-3511	2/10/2021 (amicus filed)	ADEA	Age **Result:** Pro-Employer

Background: Plaintiff, who was fired from her job, cited three ageist comments by her employer-bank's CEO as evidence she was fired because of her age (47) in violation of the ADEA, and not for insubordination. A Sixth Circuit panel found there was insufficient evidence to support the employee's claim. To prevail in an age discrimination case, employees must still prove that age was the determinative factor, not just one of many factors.

Issues EEOC is Addressing as Amicus: What standard should courts apply to private sector ADEA claims?

EEOC's Position: Under *Gross v. FBL Financial Services, Inc.*, the courts must apply a but-for causation standard – not a sole-causation standard – to private sector ADEA claims. Because the Supreme Court has interpreted Gross to reject a sole-causation standard in *Burrage v. U.S.*, 571 U.S. 204 (2014), the 6th Circuit must give that interpretation controlling weight.

Court's Decision: The court denied a rehearing and rejected the EEOC's view on what constitutes causation under the ADEA. The appellant filed a petition for a writ of certiorari with the Supreme Court, but the Court denied the petition on November 9, 2021.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Threat v. City of Cleveland	U.S. Court of Appeals for the Sixth Circuit No. 20-4165	1/4/2021 (amicus filed) 7/26/2021 (decided)	Title VII	Race **Result:** Pro-Employee

Background: The plaintiffs-appellants are Black individuals employed as Captains in the City of Cleveland's Emergency Medical Services (EMS) Division. Their schedules are divided into day or night shifts and Captains bid on their schedule to choose their shift. Generally, the city uses seniority to assign shift schedules but under the applicable collective bargaining agreement, the EMS Commissioner can assign up to four captains to a different schedule, regardless of seniority. In 2018, the Commissioner reassigned some of plaintiff-appellant Anderson's shifts to white captains to prevent those shifts from being staffed entirely by Black EMS personnel.

Plaintiffs subsequently filed suit, among other things, alleging discrimination under Title VII. The city moved for summary judgment on plaintiff Anderson's race discrimination claim, which the court granted, holding that Anderson failed to show he was subjected to a "materially adverse employment action." The court noted that "[p]laintiff Anderson's shift change, while unfair and inconvenient, does not rise to the level of a materially adverse employment action." The court relied on a series of unpublished decisions from the Sixth Circuit Court holding that "[a shift change] is not materially adverse without some reduction in pay, prestige, or responsibility." *Harper v. Elder*, 803 F. App'x 853, 858 (6th Cir. 2020); *Aman v. Potter*, 105 F. App'x 802, 807-808 (6th Cir. 2004); *Miller v. Peck-Hannaford & Briggs Co.*, 142 F.3d 435 (6th Cir. 1998). The court stated, "Anderson's family life preference for day shift does not change things" because "[w]orking night shift is not objectively less desirable than day shift or viewed * * * as a duty performed by lower-ranking employees."

Issues EEOC is Addressing as Amicus: Whether reassigning some of plaintiff's shifts to white captains to prevent those shifts from being staffed entirely by Black EMS personnel is sufficient to establish a materially adverse employment action?

EEOC's Position: As the United States recently explained its views on the scope of Section 703(a)(1) in a brief in opposition to the petition for a writ of certiorari in *Forgus v. Esper*, 2020 WL 5882216 (S. Ct. Oct. 5, 2020) (cert. petition denied), and in an amicus brief in support of the petition for a writ of certiorari in *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (cert. petition voluntarily dismissed), the EEOC takes the position that Section 703(a)(1) is not limited to "ultimate employment decisions" or other employment actions having a "a significant detrimental effect."

In a short brief, the EEOC argues that § 703(a)(1) prohibits all discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1), and that a shift assignment is a term or condition of employment. The EEOC does not cite to any cases to support this argument, but requests the court revisit its prior unpublished rulings.

Court's Decision: The Sixth Circuit reversed in part, finding that triable issues of fact remain over the anti-discrimination claims because the employees' shifts count as "terms" of employment under Title VII, 42 U.S.C. 2000e-2(a)(1), and the shift change is not "de minimus."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Muldrow v. City of St. Louis	U.S. Court of Appeals for the Eighth Circuit No. 20-2975	12/10/2020 (amicus filed) 4/4/2022 (decided)	Title VII	Sex **Result:** Pro-Employer

Background: Plaintiff, a sergeant with the St. Louis Metropolitan Police Department, was assigned to work in the Department's Intelligence Division, to handle matters that included relating to public corruption, human trafficking, and gun and gang violence. In April 2017, the Department hired a captain who became plaintiff's supervisor. The captain reorganized the Intelligence Division and requested that plaintiff be transferred from the Division so that she could be replaced with a male officer, with whom the captain had previously worked, to oversee the "very dangerous work." Plaintiff was transferred to a patrol unit and filed suit under Title VII, alleging her transfer was discriminatory on the basis of sex. The district court granted summary judgment to St. Louis, holding that plaintiff could not show she suffered an "adverse employment action" because her transfer did not reduce her pay or rank, and did not significantly change her work responsibilities. Plaintiff appealed.

Issues EEOC is Addressing as Amicus: (1) Whether an involuntary job transfer, involving no diminution in pay and benefits, allegedly made on the basis of the employee's sex, constitutes actionable discrimination "with respect to ... compensation, terms, conditions, or privileges of employment" under Section 703(a)(1).

EEOC's Position: The EEOC argued that the court erred in holding that discriminatory job transfers are not actionable under Section 703(a)(1) of Title VII absent a showing of "significant" or "material." As support, it discussed and incorporated arguments advanced in two recent Supreme Court cases, *Forgus v. Esper*, cert. denied, 2020 WL 5882216 (S. Ct. Oct. 5, 2020) and *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (petition voluntarily dismissed). In Forgus, the Department of Labor filed a brief in opposition to a petition for writ of certiorari, arguing that the court erred in holding that a discriminatory denial of a transfer is not actionable where pay is not reduced and results in only a minor change to working conditions. In Peterson, the EEOC filed an amicus brief arguing that the district court erred in holding that "terms, conditions, or privileges of employment" was limited to "ultimate employment decisions," like hiring, firing, or granting leave, and excluded discriminatory working conditions, such as assignment of more difficult work or unequal break times. The EEOC urged the court to reconsider any precedent limiting Section 703(a)(1) to actions producing "material employment disadvantage."

Court's Decision: The appellate court affirmed the lower court's grant of summary judgment in the city's favor, reaffirming the court's position that an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Sellars v. CRST Expedited, Inc.	U.S. Court of Appeals for the Eighth Circuit No. 19-2708	11/19/2019 (amicus filed) 9/8/2021 (decided)	Title VII	Retaliation **Result:** Mixed

Background: Plaintiffs were female truck drivers for defendant that sued for retaliation and constructive discharge based on defendant's policy that required any sexual harassment complainant to exit the truck, which resulted in them being ineligible for pay for 48 hours. Plaintiffs alleged that in practice this policy often prevented them from receiving any pay until they were on another truck, regardless of whether their wait time exceeded 48 hours. The district court certified a class of all women employed as team truck drivers who were subjected to retaliation as a result of defendant's policy requiring them to exist the truck in response to their complaints of sexual harassment. The district court granted defendant's motion for summary judgment finding that a reasonable jury could not infer the defendant had a retaliatory motive in requiring employees who complain of sexual harassment to exit the truck. The district court also found that plaintiff's constructive discharge claims failed because a reasonable jury could not conclude that defendant deliberately created intolerable working conditions with the intent that any plaintiff would resign her employment.

Issue EEOC is Addressing as Amicus: (1) Does a plaintiff establish causation in a Title VII retaliation case if she shows that her employer has a policy of subjecting employees who complain of sexual harassment to an action that she alleges is adverse, or must she also show that her employer intended to harm her for complaining about harassment? (2) (a) If raised by defendant as an alternative ground for affirmance, did the district court correctly conclude that defendant's pre-July 2015 practice of removing certain drivers who complained of harassment from their trucks without pay was materially adverse for purposes of plaintiffs' Title VII retaliation claims? (b) To show that defendant's subsequent practice of removing drivers who complained of harassment from their trucks and providing "HR layover pay" was materially adverse for purposes of their Title VII retaliation claims, were plaintiffs required to establish that the pay they received was "significantly" or "substantially" less than the pay they otherwise would have earned? (3) Must a plaintiff bringing a Title VII constructive discharge claim prove that her employer deliberately made her working conditions intolerable in an effort to induce her to quit?

EEOC's Position: The EEOC argued the district court erred in granting defendant summary judgment on plaintiffs' retaliation claims because plaintiffs proved their protected conduct was a "but-for" cause of the alleged adverse actions, and there is no requirement that they also must demonstrate defendant acted with malicious retaliatory motive. The EEOC further argued that the district court erred with respect to plaintiffs' retaliation claims because it failed to consider whether employees hired after defendant's policy change would nonetheless reasonably believe they might suffer an adverse consequence for complaining. The EEOC also argued that the district court erred in granting defendant summary judgment on plaintiffs' constructive discharge claims because the Supreme Court's ruling in *Green v. Brennan*, 136 S. Ct. 1769 (2016) abrogated prior precedent requiring constructive discharge plaintiffs to prove their employer acted with the specific intent of forcing them to resign.

Court's Decision: The appellate court affirmed the district court in part, reversed in part, and remanded. The Eighth Circuit determined that the lower court's grant of summary judgment in favor of the employer was proper as to the employees' individual retaliation, hostile work environment, and constructive discharge claims. The court noted that while the employees showed that the employer's removal policy was materially adverse, they did not create a genuine dispute as to whether retaliatory intent likely motivated the employer, that the employer created intolerable working conditions, or took otherwise discriminatory actions. The appellate court found, however, that the lower court erred in granting the employer's motion for summary judgment regarding the employees' post-2015 class members' class retaliation claim because the employer subjected the post-2015 class members to the same adverse employment action as against the pre-2015 class members when it concealed the change to its payment policy.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Christian v. Umpqua Bank	U.S. Court of Appeals for the Ninth Circuit No. 18-35522	2/12/2019 (amicus filed) 12/31/2020 (decided)	Title VII	Harassment Sex **Result:** Pro-Employee

Background: Plaintiff was employed by defendant in Vancouver, Washington. Plaintiff opened a checking account for a customer in late 2013/early 2014. Plaintiff identified receiving approximately 2-3 notes from the same customer, a flower delivery over Valentine's day in February of 2014, and two page-long, handwritten notes from the customer. The customer did not deliver any of these items directly to plaintiff. Plaintiff also noted that the customer had contacted other bank employees about her. The customer also asked plaintiff for a date, in person, and she said no. Plaintiff told her manager she was frightened, and the store manager said he would prohibit the customer from visiting the branch where plaintiff worked, but the manager did not tell the customer this. The customer returned to the branch and asked to open another account in September 2014; the store manager directed plaintiff to do so and when she declined, pointing to the customer's prior behavior, another bank associate opened the account. Plaintiff said it took two hours and he continuously glanced at her, making her uncomfortable. Plaintiff contacted corporate security and Human Resources who began an investigation. Plaintiff went home early for the weekend and stayed out sick for an additional three days. Her manager told her she could hide in the breakroom if she was uncomfortable, pending investigation and a formal trespassing order. When plaintiff returned, she agreed to a transfer to a different branch. After the transfer, she had several documented performance errors. Before a written disciplinary action was delivered to her, she resigned. Plaintiff filed suit for violation of Title VII, alleging sexual harassment (hostile work environment) and retaliation for complaining. The district court granted summary judgment in the bank's favor. First, it determined that a jury could not reasonably deem the customer's conduct severe or pervasive based on the incidents in question, rejecting consideration of any incidents that did not directly involve the plaintiff (*i.e.*, the customer's contact with employees at other branches, or inquiries about her), pointing to a seven-month lapse between the Valentine's Day flower delivery and the customer's September 2014 encounter with plaintiff, and focusing mostly on the customer's September 2014 visit to the bank to open a new account as insufficient to create a hostile work environment. Second, the district court determined that the bank could not be liable for the harassment because it immediately responded to plaintiff's concerns. Third, the court determined that plaintiff could not demonstrate she engaged in protected opposition activity when she complained about the customer's conduct to bank management and the bank's alleged failure to remedy the conduct. The court also stated that the complaints were not protected because the customer's conduct could not be imputed to the bank and because plaintiff did not identify any materially adverse employment actions, and she failed to establish a causal link between her complaints and the employment actions in question.

Issues EEOC is Addressing as Amicus: Whether the district court erred in granting summary judgment on the plaintiff's hostile work environment claim because a jury could conclude that a reasonable woman in plaintiff's position would deem the customer's conduct objectively hostile, and that her employer was liable for the hostile work environment created by the customer. Whether the district court also erred in granting summary judgment on the plaintiff's retaliation claim when it determined that she had not engaged in protected opposition activity.

EEOC's Position: The district court erred when focusing on a single incident that it deemed insufficient to constitute a hostile workplace—the plaintiff's September 2014 visit to open a new account—because although plaintiff may not have been physically present for delivery of notes, flowers, and the customer's communications with her co-workers at her branch and another bank branch, his behavior can still create a hostile work environment for her. The district court should have assessed the customer's behavior as stalking, which has regularly been considered by courts as examples of conduct that may contribute to a hostile work environment. The court should have considered the fact that romantic overtures can be harassing, analogizing *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), where the romantic overtures perpetuated by the plaintiff's co-worker were such that a reasonable woman could have considered the co-worker's conduct sufficiently severe and pervasive to create an abusive working environment. The district court also should have considered other individuals' assessments of the customer's conduct as evidence that plaintiff's reaction was well-founded. The district court also erred in concluding that the temporal gap between the incidents in February 2014 and September 2014 indicated that the conduct was not severe or pervasive because a reasonable jury could find that the time did not dilute the cumulative effect of the customer's conduct as a whole. A reasonable jury also could have concluded that defendant's actions were not reasonably calculated to end the harassment because the manager did not take personally take action and tell the customer he was no longer welcome at the branch or that it was inappropriate for him to send plaintiff flowers in February 2014 and the customer was permitted to come to the branch and open up a separate account, despite defendant's actions to take out a trespassing order and investigate plaintiff's concerns in September 2014. A reasonable jury could also find that placing the burden on plaintiff to manage the issue and recommend solutions, including requiring her to transfer, was an inadequate response. A reasonable jury could also have determined that plaintiff held a reasonable belief that she was being subjected to workplace harassment based on the actions of the customer when she complained to her employer and that it was reasonable for her to believe that her employer had an obligation to intervene when she complained.

Court's Decision: The Ninth Circuit reversed and remanded, finding that the district court "erred in isolating the harassing incidents of September 2014 from those of February 2014. They should be evaluated together. . . The district court's overly narrow approach—which ignored the reality 'that a hostile work environment is ambient and persistent, and that it continues to exist between overt manifestations'—was error." In addition, the Ninth Circuit found the lower court erred in declining to consider incidents in which the complainant did not have direct interactions with the customer/harasser. Finally, the appellate court found that the district court also erred in neglecting to consider record evidence of interactions between the customer and third persons. As for liability, the court determined there was sufficient evidence to create a genuine issue of material fact as to the adequacy of the employer's response.

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Morgan v. USSF	U.S. Court of Appeals for the Ninth Circuit No. 21-55356	9/30/2021 (amicus filed)	Title VII EPA	Sex **Result:** Pending

Background: Plaintiffs allege that the U.S. Soccer Federation (USSF) discriminates against its female players by paying them less than male players on the men's national team and subjecting them to unequal working conditions. Plaintiffs moved for summary judgment that USSF has violated both the EPA and Title VII. Defendant moved for summary judgment. The district court concluded that the women's national team (WNT) players failed to establish a *prima facie* case under the EPA because, according to the USSF expert, USSF paid the women more in total and per game when total compensation was divided by number of games each team played and the district court granted summary judgment to USSF.

Issues EEOC is Addressing as Amicus: (1) Whether the district court erred in holding that the plaintiffs could not establish a *prima facie* case of discrimination under the EPA where they offered evidence that their rate of compensation was lower than the U.S. men's soccer team (MNT), but they earned more in total because they won significantly more—and more important—games than the MNT, including two World Cup tournaments; (2) Whether the district court erred in granting summary judgment to the defendants on the plaintiffs' Title VII disparate pay claim where a reasonable jury could find that the women would have earned $64 million more had they been working under the MNT's collective bargaining agreement.

EEOC's Position: (1) The plaintiffs adduced sufficient evidence to support a reasonable jury finding that USSF violated the EPA by compensating them at a lower rate of pay to perform the same job as the men's team. To prove an EPA violation, the women's team players had the burden of establishing a *prima facie* case of discrimination by showing that employees of the opposite sex were paid different wages for equal work. It is undisputed that the respective team members perform substantially equal work. Thus, the only issue before the Ninth Circuit is whether the women's team players met their *prima facie* burden of demonstrating that their rate of pay is less than that of the men's team players. (2) EEOC argues that the plaintiffs' evidence would support a reasonable jury finding of actionable pay discrimination under Title VII based on the explicit classification by sex of USSF's payment schemes to WNT and MNT players, which the agency calls "facially discriminatory." The EEOC also argues that the district court erred as a matter of law in relying on the defendant's disputed calculations to hold that the plaintiffs did not "demonstrate[] a triable issue that WNT players are paid less than MNT players."

Court's Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Exby-Stolley v. Board of County Commissioners	U.S. Court of Appeals for the Tenth Circuit No. 16-1412	3/1/2019 (amicus filed) 10/28/2020 (decided)	ADA	Disability **Result:** Pro-Employee

Background: Plaintiff worked as a health inspector for the County and alleged that she suffered an injury that left her without full use of her right arm. After this injury, plaintiff's work performance began to suffer as her inspections took longer, and she could not complete the number of inspections that her position required. Plaintiff was given a temporary part-time assignment while she and the County discussed longer-term accommodations. Plaintiff ultimately resigned from her employment with the County and filed suit in 2013. At trial, plaintiff asserted that after numerous meetings with the County to discuss her injury and attempts to find a long-term accommodation, her supervisor told her to resign. For its part, the County asserted that plaintiff had voluntarily resigned mid-way through its process for determining what permanent accommodations could be made for her. The sole claim on which the district court instructed the jury was plaintiff's failure-to-accommodate claim under Title I of the ADA. The district court instructed the jury that plaintiff had to demonstrate that she "was discharged from employment or suffered another adverse employment action." The court further instructed the jury that, "[a]n adverse employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The district court then provided the jury with a seven-question special interrogatory verdict form for this claim. At Question 3, the jury found that plaintiff had not "proven by a preponderance of the evidence that she was [discharged from employment][not promoted][or other adverse action] by [the County]." This finding against plaintiff meant that the jury "found for the Defendant" as to plaintiff's failure-to accommodate claim.

On appeal, plaintiff asserted that the district court erred by "instructing the jury that she had to prove she had suffered an adverse employment action" to prevail on her Title I failure-to-accommodate claim.

Issues EEOC is Addressing as Amicus: Whether the district court erred in instructing the jury that to prevail on a failure-to-accommodate claim under Title I of the ADA, the plaintiff had to prove that she suffered an "adverse employment action," which the court defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."

EEOC's Position: The EEOC took the position that the district court erred in instructing the jury that to prevail on her Title I failure-to-accommodate claim, plaintiff had to prove an "adverse employment action," which it defined as "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." In support of its position, the EEOC argued that the district court's instruction that plaintiff must prove an "adverse employment action" appears nowhere in the text of Title I. The EEOC also argued that the district court's "adverse employment action" instruction in this case too narrowly construed Title I's text and undermined its purpose. Here, the EEOC argued that, under the district court's framework, there would be no violation of Title I unless a failure to provide a reasonable accommodation results in "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." The EEOC also argued that the panel majority's suggestion that the term "adverse employment action" can be read as mere "judicial shorthand" for the statutory phrase "terms, conditions, and privileges of employment" could be accurate if courts truly treated "adverse employment action" as synonymous with the statutory language. Here, the EEOC stated that many courts, including the district court, construe "adverse employment action" far more narrowly than actions that pertain to the "terms, conditions, and privileges of employment," and that such a narrow interpretation not only conflicts with Title I's text, but it also defeats its purpose. Specifically, it would defeat the ADA's purpose of furthering "integration of persons with disabilities into the economic and social mainstream," to require that disabled employees suffer an "adverse employment action,"—*i.e.*, termination or other significant change in employment status—before they could enforce Title I's requirement that employers reasonably accommodate their known disabilities.

Court's Decision: A divided panel of the appellate court had rejected this argument, finding that an "adverse employment action—that is, a materially adverse decision regarding 'application procedures, hiring, advancement, discharge, compensation, training, or other terms, conditions, and privileges of employment'—is an element of all discrimination claims under the ADA." On December 18, 2019, the Tenth Circuit granted rehearing en banc. On October 28, 2020, the full Tenth Circuit reversed itself, finding that an adverse employment action is not a required element of an ADA failure-to-accommodate claim. "It is undisputed that the language 'adverse employment action' does not expressly appear in the plain terms of the failure-to-accommodate statutory provision, § 12112(b)(5)(A), nor in the 'General rule' of § 12112(a) that the failure-to-accommodate provision particularizes." The court therefore concluded that the lower court "erred when it charged the jury that an adverse employment action is a requisite element of a failure-to-accommodate claim."

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Neri v. Albuquerque Public Schools	U.S. Court of Appeals for the Tenth Circuit No. 20-2088	11/16/2020 (amicus filed) 6/14/2021 (decided)	ADA	Disability **Result:** Pro-Employee on the adverse employment issue

Background: Plaintiff-appellant claims to have post-traumatic stress and anxiety disorders. She quit her employment with Albuquerque Public Schools after the Board transferred her from her position as an individualized education plan (IEP) teacher to a position as a math teacher. Plaintiff sued under Title I of the ADA and under state law complaining that her involuntary transfer to a math teacher position discriminated against her on the basis of disability.

The district court, adopting the magistrate judge's recommendation, granted summary judgment for the defendant holding that the "transfer from the IEP teacher position to a math teacher position was not an adverse employment action because it was a purely lateral transfer within the same school and because both positions carried the same salary and medical benefits and were governed by the same terms and conditions of employment." The district court cited an unpublished Title VII decision from the Tenth Circuit for the proposition that such "lateral transfer[s]" are not actionable. *Watson v. Norton*, 10 F. App'x 669, 678 (10th Cir. 2001).

Issues EEOC is Addressing as Amicus: Whether an involuntary lateral job transfer where plaintiff maintained the same salary and benefits constitutes an adverse employment action under Title I of the ADA?

EEOC's Position: Like in *Threat v. Cleveland*, the EEOC cites to its recent briefs in *Forgus v. Esper*, 2020 WL 5882216 (S. Ct. Oct. 5, 2020) (cert. petition denied), and in an amicus brief in support of the petition for a writ of certiorari in *Peterson v. Linear Controls, Inc.*, 140 S. Ct. 2841 (2020) (cert. petition voluntarily dismissed), where the EEOC took the position that Section 703(a)(1) is not limited to "ultimate employment decisions" or other employment actions having a "a significant detrimental effect."

The EEOC argues that Title I of the ADA has the identical language to § 703(a)(1) of Title VII's prohibition of all discrimination with respect to "compensation, terms, conditions, or privileges of employment." 42 U.S.C. 2000e-2(a)(1). However, unlike Threat, the EEOC also cites to a Tenth Circuit case explaining that the phrase "terms, conditions, and privileges" in Title I, as in Title VII, is not limited only to discriminatory actions that result in a "significant change in employment status." *Exby-Stolley v. Board of Cnty. Comm'rs*, No. 16-1412, 2020 WL 6304349, at 22-23 (10th Cir. Oct. 28, 2020) (en banc); see also id., at 39-41 (McHugh, J., dissenting) (agreeing that a "plaintiff can make out an ADA discrimination claim by showing an express [or constructive] change or disparity in the terms or conditions of employment" and noting that prior decisions have too narrowly construed what constitutes an adverse employment action).

The EEOC argues that based upon the plain language of Title I and the reasoning in Exby-Stolley, "a discriminatory lateral transfer is actionable when a plaintiff brings a claim for disparate treatment under Title I because such discrimination plainly involved the 'terms' and 'conditions' of employment."

Court's Decision: The Tenth Circuit affirmed in part and reversed in part. The court found there are genuine issues of material fact as to whether the transfer constituted an adverse employment action, but was not persuaded that a reasonable factfinder could conclude that the school was an objectively hostile work environment or that the conditions were so intolerable that she was constructively discharged.

Nelson v. Health Services, Inc.	U.S. Court of Appeals for the Eleventh Circuit No. 21-11319	6/8/2021 (amicus filed)	Title VII	Retaliation **Result:** Pending

Background: Plaintiff, an executive assistant to the CEO and interim HR Director, brought another employee's complaint of sexual harassment management's attention. Five months after her report, the CEO transferred her and reduced her salary by 25%. Plaintiff filed suit under Title VII, alleging retaliation for reporting the sexual harassment complaint. The district court granted defendant's motion for summary judgment and held that actions plaintiff took in connection with bringing an employee's complaint of sexual harassment to the attention of defendant's management did not qualify as protected opposition activity under Title VII. It concluded that plaintiff did not engage in protected activity under the "manager rule," which provides, "a management employee that, in the course of her normal job performance, disagrees with or opposes the actions of an employer, does not engage in 'protected activity.'" Because plaintiff reported the complaint as part of her normal job duties, it did not qualify as "protected activity."

Issues EEOC is Addressing as Amicus: Whether the district court erred in concluding that the "manager rule" applies to Title VII opposition-clause cases.

EEOC's Position: The EEOC argued that the "manager rule," applicable to cases under the Fair Labor Standards Act (FLS"), was inapplicable in the context of Title VII. It challenged the district court's reliance on *Brush v. Sears Holding Corp.*, 466 F. App'x 781 (11th Cir. 2012), an unpublished Eleventh Circuit opinion applying the "manager rule" to Title VII, despite that the rule arose in the FLSA context. It urged the court to join every other appellate court in deciding that the "manager rule" had no place in Title VII opposition-clause cases because it is fundamentally inconsistent with Title VII's text and purposes. It argued that applying the manager rule to Title VII would disincentivize managers and HR employees to report perceived unlawful conduct.

Court's Decision: Pending

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
Thompson v. DeKalb County, Georgia	U.S. Court of Appeals for the Eleventh Circuit No. 19-11260	7/5/2019 (amicus filed) 11/17/2021 (decided)	ADEA Title VII	Age Race **Result:** Pro-Employer

Background: Plaintiff worked for defendant as an attorney in its law department assisting with civil matters. After being promoted to Senior Assistant County Attorney, plaintiff defended the county in a breach of contract case by a county contractor. In his investigation into that case, plaintiff discovered the county contractor defrauded the county with a county employee's assistance. In 2013, a new county attorney was appointed, and she divided the department's attorneys into four teams, each with a different focus. The county attorney stated in staff meetings she wanted to hire "baby lawyers" and planned to "fill the nursery" with them. Meanwhile, plaintiff continued defending the county in the breach of contract case, but as the case became more complex, the new county attorney hired outside counsel for assistance. Plaintiff disagreed with opposing counsel over appellate strategy and asked to withdraw from the case. The county contractor ultimately requested attorney's fees against the county and plaintiff individually, so plaintiff sought the advice of outside counsel and the county attorney. There was disagreement during that meeting, the new county attorney advised plaintiff to find a new job, and plaintiff was fired three weeks later. After plaintiff's departure, defendant redistributed plaintiff's caseload among the remaining attorneys and hired a younger attorney to assign other responsibilities.

Plaintiff filed suit against defendant alleging violations of the Georgia Whistleblower Act, race discrimination under Title VII, and age discrimination under the ADEA. After discovery, defendant moved for summary judgment. The district court adopted the magistrate judge's recommendation and granted summary judgment in favor of defendant on plaintiff's ADEA claim, reasoning that plaintiff did not show he was replaced by someone outside the protected class or treated less favorably than similarly-situated individuals outside the protected class.

Issues EEOC is Addressing as Amicus: (1) Whether the district court wrongly held that plaintiff failed to establish a *prima facie* case of age discrimination for summary judgment purposes because the next attorney hired, although 24 years younger, was not assigned plaintiff's former caseload; and (2) Whether the district court erred in failing to consider as circumstantial evidence of discrimination (a) repeated statements by the county attorney responsible for firing plaintiff that reflected age bias and (b) evidence that the county attorney consistently replaced departing older attorneys with attorneys in their thirties.

EEOC's Position: The EEOC argued that a plaintiff's burden to establish a *prima facie* case of discrimination under the ADEA is minimal and intended to be applied flexibly. More specifically, the EEOC argued that it was error for the district court to conclude that the attorney hired after plaintiff's termination was not a replacement because he did not inherit the exact same cases. Further, the EEOC argued that plaintiff set forth a "convincing mosaic" argument the age discrimination motived the termination decision, but the district court only addressed part of the evidence.

Court's Decision: The Eleventh Circuit agreed that the plaintiff created a genuine dispute that he was replaced by a younger lawyer, but affirmed the lower court's grant of summary judgment for the county because the plaintiff "failed to show that the county's legitimate, non-discriminatory reasons for his termination were pretexts and because he failed to present a convincing mosaic of circumstantial evidence that would allow a jury to infer the county's discriminatory intent."

Yelling v. St Vincent's	U.S. Court of Appeals for the Eleventh Circuit No. 21-10017	5/3/2021 (amicus filed)	Title VII	Race Harassment **Result:** Pending

Background: Defendant hired plaintiff, a licensed registered nurse and a Black woman, five years before she alleged that coworkers and supervisors began regularly and repeatedly making racially derogatory and offensive comments to her or within earshot. Plaintiff alleges that she complained and received no response, after which she filed suit asserting a hostile work environment based on race.

Issues EEOC is Addressing as Amicus: (1) In assessing plaintiff's hostile work environment claim, did the district court wrongly exclude all conduct that occurred more than 180 days before plaintiff filed her first EEOC charge? (2) Did the district court wrongly grant summary judgment to defendant because a reasonable jury, viewing plaintiff's evidence under the correct legal standards, could find that racially hostile comments were both sufficiently severe and sufficiently pervasive to violate Title VII?

EEOC's Position: (1) The district court wrongly excluded from plaintiff's hostile work environment claim alleged conduct that occurred more than 180 days before she filed her first EEOC charge. The EEOC argues that the district court's exclusion of all conduct that occurred more than 180 days before plaintiff filed her first EEOC charge contradicts clear, longstanding, and binding Supreme Court and circuit precedent, and that ruling had a material effect on the court's "severe or pervasive" analysis in at least two respects: the court omitted consideration of a racially humiliating remark made by one of plaintiff's supervisors, and it truncated the duration of the harassment significantly, thereby masking its true pervasiveness; (2) A reasonable jury could find her work environment both severe enough and pervasive enough to violate Title VII. The EEOC first argues that the district court failed to appreciate the severity of disparaging language about Black people, including references to primates and "go back to Africa," "welfare queens," and "ghetto fabulous." Second, the agency argues that the court wrongly minimized the severity of racist comments on the ground that they were not directed at plaintiff personally.

Court's Decision: Pending

FY 2021 – Select Appellate Cases in Which the EEOC was a Party

Case Name	Court and Case Number	Date of Amicus Filing and/or Court Decision	Statutes	Basis/Issue/Result
EEOC v. West Meade Place, LLP	U.S. Court of Appeals for the Sixth Circuit No 19-6469	2/8/2021 (decided)	ADA	Disability **Result:** Pro-EEOC
Background: Employee worked as a laundry assistant for defendant, a rehabilitation and healthcare center, from February 2015, until her termination in November 2015. Employee was diagnosed with an anxiety disorder by her physician prior to her employment with defendant. During her employment, employee submitted a form that was intended to provide medical documentation for leave requested under the Family and Medical Leave Act. The form stated that the employee was "not able to work during flare-ups/episodes" and that she would need 1-3 days of leave per month. Employee was told she did not qualify for FMLA leave because she had worked for defendant for less than 12 months, but met with her supervisor to discuss taking intermittent leave. Following this meeting, employee's supervisor believed that she was subject to significant restrictions and would need a medical release to work. Because the employee did not have a medical release, her job was terminated on the basis that she was unable to perform her job duties. The EEOC filed suit on the employee's behalf, alleging that defendant violated the ADA by terminating employee on the basis of her disability and by denying her reasonable accommodation for her anxiety disorder. The district court concluded that no reasonable jury could find that employee met any of the three statutory definitions of "disability," and granted summary judgment to defendant. **Issues on Appeal:** Could a reasonable jury conclude that defendant regarded employee as having an impairment, thus satisfying the third prong of the definition of "disability" in the amended ADA, based on evidence showing that defendant terminated the employee because it believed she had an anxiety disorder or another serious medical condition that rendered her unable to perform her job functions? **EEOC's Position on Appeal:** The EEOC argued that a reasonable jury could determine that defendant regarded the employee as having an impairment under the ADA based on evidence the decision maker terminated her employment because of an actual or perceived impairment. The EEOC also argued that a jury could find that the record supports the conclusion that the decision maker terminated the employee's employment based on her belief that an anxiety disorder or another serious medical condition would preclude the employee from working and rose to the level of an impairment. Based on this, the EEOC argued that the district court erred by improperly weighing the evidence itself rather than asking whether the evidence presented a sufficient disagreement to require submission to a jury. The EEOC also noted that the district court required it to make certain showings that are unnecessary under the ADA. **Court's Decision:** The Sixth Circuit reversed the grant of summary judgment to the employer, finding there were genuine issues of material fact outstanding and that a reasonable jury could find that the employer regarded the employee as having an impairment. The conflicting testimony and evidence "creates a classic credibility dispute, and 'determining the credibility of witnesses is a task for the jury[.]'"				
EEOC v. Roark-Whitten Hospitality 2, LP	U.S. Court of Appeals for the Tenth Circuit No. 20-2023	5/27/2020 (appeal filed) 3/10/2022 (decided)	Title VII	Race National Origin Retaliation **Result:** Pro-EEOC
Background: The EEOC sued the defendant hospitality company (RW2) alleging that it engaged in unlawful employment practices against employees at a hotel the defendant owned. After learning that the defendant sold the hotel, the EEOC filed an amended complaint naming the successors (Jai and SGI) as defendants. After counsel for the defendant and successors withdrew, the court entered default judgment against the defendant and successor on all issues of liability and set a hearing to determine damages and injunctive relief. Notwithstanding the default judgment, the successors argued that dismissal of the complaint was warranted because the EEOC failed to plead that the successor had notice of the claims in a manner sufficient to hold the successors liable under a theory of a successor liability. The court dismissed the claims against the successors, holding that the operative complaint failed to state a plausible claim of successor liability because it did not plausibly allege that the successors had notice of the charges. The district court awarded a collective $35,000 in compensatory damages for the 11 claimants. **Issues on Appeal:** Whether the district court erred in dismissing Jai and SGI from the case under Rule 12(b)(6) on notice grounds, given that there is no set formula to determine successor liability and, in any event, the EEOC's complaint pled constructive notice; Whether the district court abused its discretion in awarding only a collective $35,000 in compensatory damages for 11 aggrieved individuals who attested that RW2's discrimination and retaliatory terminations caused them anxiety, stress, and humiliation, and, for some, financial strain, vomiting, homelessness, headaches, depression, and suicidal thoughts. **EEOC's Position on Appeal:** The district court erred in dismissing Jai and SGI for failure to state a claim of successor liability on notice grounds. It is well established that the successor liability doctrine applies under Title VII. The EEOC plausibly pled successor liability against Jai and SGI including, if required, that each had constructive notice. The district court's sole basis for dismissing the successor liability claims against Jai and SGI was the EEOC's purported failure to adequately plead notice. That dismissal constituted reversible error for three reasons: 1) the district court improperly applied a heightened pleading standard; 2) notice is not necessarily required for successor liability, an equitable doctrine; and 3) even if it were, the EEOC plausibly pled that Jai and SGI had constructive notice of the charges and claims, which satisfies the notice factor. Finally, the district court abused its discretion in awarding only $35,000 in compensatory damages for the 11 aggrieved individuals. That minimal award was so low as to constitute an abuse of discretion. **Court's Decision:** In a 2-1 split panel decision, the Tenth Circuit affirmed the lower court's decision to dismiss the complaint as to Jai (the first successor) but reversed the lower court's decision as to successor liability for SGI (the second successor). The majority held that with due diligence SGI should have been aware of the underlying lawsuit and the EEOC's claims at the time of purchase. The panel was unanimous in striking down the damages award, as the lower court did not sufficient justify the amount awarded.				

Appendix C – Subpoena Enforcement Actions Filed by EEOC in FY 2021[725]

Filing Date	State	Court Name / Case Number / Judge	Defendant Industry	Individual Charging Party or Systemic Investigation	Result
3/18/2021	AZ	USDC Arizona 2:21mc11 Hon. Michael T Liburdi	Staffing Agency	Individual Charging party	Court granted EEOC's request for dismissal of its Application to Show Cause following voluntary compliance.
Commentary: The EEOC was investigating a charge of disability discrimination under the ADA involving a staffing agency. During its investigation, the EEOC issued a request for production seeking documents related to the investigation. The Respondent staffing agency did not respond, so the EEOC issued a subpoena requesting: (1) Charging Party's complete personnel file, including but not limited to all documents that are or reflect: (a) Charging Party's application for employment and supporting materials; (b) The selection, hire, and onboarding of Charging Party; (c) Performance evaluations of Charging Party and all documents pertaining to Charging Party's job performance, whether formal or informal, positive, negative, or otherwise; (d) Discipline of Charging Party; (e) Charging Party's job duties and responsibilities; (f) Formal and informal departmental and desk files for Charging Party; (g) Notes kept by any manager(s) and or supervisor(s) regarding Charging Party; (h) Complaints made by Charging Party; (i) Complaints made about Charging Party; (j) Reason(s) for the termination of Charging Party's employment at third-party client; (k) Reason(s) for the termination of Charging Party's employment at Respondent; (l) Consideration of Charging Party for other positions after the termination of his employment at third-party client; (m) Leave or other time off that was approved or denied to Charging Party by third-party client and/or Partners Personnel. (2) All job descriptions, including all minimum qualifications, for all jobs Charging Party was considered for at third-party client; (3) Documents showing all communications between Respondent's employees about Charging Party; (4) Documents showing all communications between Respondent's employees about the position at third-party client for which Charging Party was hired; (5) Documents showing all communications between Respondent and third-party client about Charging Party; (6) Documents showing all communications between Respondent and third-party client about the position held by Charging Party at third-party client; (7) Documents showing all communications with Charging Party; (8) Documents showing all of Respondent's policies and procedures regarding the ADA, ADA-covered leave, reasonable accommodations, medical leave, leaves of absence, and Family Medical Leave, including paid and unpaid time off, since the beginning of Charging Party's employment with Respondent; (9) Documents showing all ADA training provided to employees since the beginning of Charging Party's employment with Respondent, including but not limited to all policies and/or handout(s) provided to all employees. The Respondent did not respond, and the EEOC issued a new subpoena to ensure proper service of process. The EEOC alleged the Respondent had not responded to either subpoena nor filed a petition to revoke or modify. The court ordered the Respondent to appear and show cause why it should not be compelled to comply with the subpoena. Shortly thereafter, the EEOC issued a notice of voluntary dismissal, which the court granted as moot, as the Respondent provided documents response to the EEOC's subpoena.					
6/4/2021	CA	USDC Central District of California 2:21mc990 Hon. Karen L Stevenson	Beauty Salon/Spa	Individual Charging Party	Court granted EEOC's request for dismissal of its Application to Show Cause following voluntary compliance.
Commentary: The charging party filed a charge of discrimination under Title VII alleging her employer discriminated against her on the basis of sex (female) and national origin (Taiwanese / non-Chinese). The charging party also alleged the employer harassed a class of women based on sex. The charging party alleges she was subjected to sexual harassment by the owner's husband and was subsequently discharged. As part of its investigation into these allegations, the EEOC sought information from the employer via a Request for Information, which the respondent employer failed to provide. The EEOC followed up with a series of subpoenas seeking: Subpoena #1 (Respondent's response or position statement to the charging party's charge of discrimination; and her personnel file); Subpoena #2-3 (Respondent's policy manuals, complaint procedures, and training documents relating to sexual harassment, national origin discrimination from April 2018 to the present); Subpoena #4, 5, 7 (information and documents from April 2018 related to the charging party's complaints of sexual and national origin discrimination; any complaints of sexual harassment or discrimination against the owner's husband; and any other complaints of sexual harassment / national origin discrimination); Subpoena #6 (A list of employees and their contact information from April 1, 2018 to the present); Subpoena #8-9 (documents reflecting why Respondent terminated the charging party's employment around August 31, 2019 and information about the management officials who terminated her); and Subpoena #10-11 (information about the termination of employees who were terminated for the same or similar reason as the charging party, and information about employees who were hired to replace her). As of the date the Application to Show Cause was filed, the Respondent had yet to respond to the subpoenas. On June 28, 2021, the court granted the EEOC's request that its application for an order to show cause be dismissed without prejudice, following the Respondent's compliance with the subpoena.					

725 The summary contained in Appendix C reviews select administrative subpoena enforcement actions filed by the EEOC in FY 2021. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to the issuance of a court opinion.

Filing Date	State	Court Name / Case Number / Judge	Defendant Industry	Individual Charging Party or Systemic Investigation	Result
6/30/2021	AL	USDC Northern District of Alabama 2:21-mc-00891-RDP Hon. R David Proctor	Manufacturer	Systemic Investigation	The court ordered the Respondent to comply with the subpoena, but limited its scope to one particular facility, versus nationwide. The EEOC has filed an appeal of this ruling to the 11th Circuit.

Commentary: The EEOC is currently investigating a nationwide charge of disability discrimination against the Respondent filed by EEOC Chair Charlotte Burrows. Specifically, Commissioner's Charge alleges the Respondent has been "discriminating against employees on the basis of disability with respect to qualified leave." According to the EEOC, since at least January 1, 2017, Respondent has failed to "properly categorize qualified protected absences under the ADAAA" resulting in unlawful discipline and termination. The Commissioner brought the charge on behalf of "all employees who have, have been, or might in the future be adversely affected by the[se] unlawful employment practices."

During its investigation, the EEOC issued a subpoena three times seeking the same documents and information related to its investigation. The subpoena sought electronically stored information or records identifying each employee Respondent discharged from January 1, 2018 to the present for attendance infractions and the attendance history and any disciplinary actions that led to or contributed to the employee's discharge. Specifically, the subpoena requested:

1. For each employee discharged from Respondent's locations nationwide for the period of January 1, 2018 to present, for attendance infractions, provide electronically stored information reflecting, or if no electronically stored information exists, provide records reflecting the following: each employee's name, position title, last known home and mobile phone number(s), and reason for and date of discharge.
2. For each employee discharged from Respondent's locations nationwide for the period from January 1, 2018 to present for attendance infractions, provide electronically stored information reflecting the attendance history of each employee that resulted in discharge and all disciplinary actions that led to or contributed to discharge.

Respondent has objected each time, raising numerous arguments, including that service by certified mail to its corporate office was improper, that a "courtesy copy" to its counsel was mandatory for proper service, that it was not required to timely object to the subpoena, that the subpoena exceeds the EEOC's authority, and the request is unduly burdensome. Despite repeated efforts by the EEOC investigator to obtain the requested documents voluntarily, Respondent has refused to cooperate and has refused to produce the requested documents and information. That refusal has delayed and hampered the EEOC's investigation of the charge.

On August 30, 2021, the court ordered the Respondent to comply with the subpoena, but only as it applies to one of the Respondent's facilities, versus all of its facilities. In essence, it found that the temporal scope of the subpoena—January 1, 2018 to the present—was reasonable, as was the subject-matter scope—personal information, attendance infractions, and other disciplinary actions related to each employee that Respondent discharged. But the geographic scope (nationwide) was too broad when read in conjunction with the Commissioner's Charge and Notice. "To be sure, the court is not questioning the Commissioner's ability to broaden the scope through a subsequent nationwide charge or the Commissioner's ability to bring a nationwide charge from the start. Instead, the court concludes that the Commissioner has not at this time brought a nationwide charge in this case. Neither the Charge nor the Notice of Charge indicates that the action is nationwide in its scope."

On October 18, 2021, the EEOC filed its notice of appeal of the court's order to the Eleventh Circuit.

Filing Date	State	Court Name / Case Number / Judge	Defendant Industry	Individual Charging Party or Systemic Investigation	Result
7/6/2021	OH	USDC Northern District of Ohio 1:21-mc-00035-JPC Hon. J. Philip Calabrese	Restaurant	Systemic Investigation	The parties reached a compromise, and the Respondent agreed to produce documents responsive to a more tailored request.

Commentary: The EEOC is investigating a charge of religious discrimination and other potential violations uncovered during its investigation of the initial charge. The EEOC issued a subpoena seeking documents and data related to that investigation. The EEOC claims the respondent has refused to comply, so it therefore filed an application for an order to show cause why the subpoena should not be enforced. The matter began when the charging party filed a claim with the EEOC alleging she was discriminated against on the basis of her religion when the respondent restaurant would not accommodate her request to not take the Hepatitis A vaccine, such as reassigning her to a back-of-the-house position, having her frequently wash her hands or wear gloves, or transfer to a new position or location not subject to the mandate (*i.e.*, are not Hepatitis "hot spots"). Respondent claimed it could not accommodate her without undue hardship, but also noted that it has accommodated other employees with objections to the vaccine. During its investigation the EEOC asked the respondent to provide it with a compilation of information on employees who requested not to take the vaccine, as well as deliberative documents. Specifically, the EEOC requested, for the period of January 1, 2018 through the present, for all of the respondent's locations, an electronic database of all current and/or former employees who have objected to the Hepatitis A vaccine. For each such individual, the EEOC requested their name, date of hire, location where worked, employee identification number, all positions held, religion of employee, if known, date employee notified the company of the objection, reasons provided for the objection, summary of the company's response to said objection, date the employee was removed from the work schedule, if applicable, date employee was returned to the work schedule, if applicable, date employee was transferred as a reasonable accommodation, if applicable, position employee was transferred to, date of discharge, reason for discharge, date of re-hire and position, current or last known home address, last known email address, all known telephone numbers. For each employee listed, the respondent was also asked to provide documents related to the objection. The respondent objected, but offered to provide some information relevant to one location. EEOC offered to temporarily limit the scope of its investigation to certain locations, but sought information on the so-called red zones, the company's management structure, and HRIS to attempt to limit the geographic scope of its request. The EEOC also sought to contact the company's IT representative, but the respondent declined. The respondent provided limited information in response. The EEOC claims the respondent failed to exhaust its administrative remedies and therefore waived any objections to enforce the subpoena.

In August, the EEOC and Respondent reached a compromise. Respondent agreed to identify any employees objecting to, or having requested accommodation in lieu of, obtaining the Hepatitis A vaccine at its restaurants located in the areas that were classified by Respondent as Hepatitis A "Red Zones" for the period of January 1, 2018, to the present by (a) conducting a keyword search of its electronic database with terms previously provided by EEOC, which search Respondent represents it has already conducted, and (b) telephoning or sending communication by e-mail, and making follow-up contact by phone if no response to the initial attempt at contact is received, to a current member of the restaurant's local management or Joint Venture Partner that has tenure at the restaurant, as management, dating back to the restaurant's placement in Respondent's "Red Zone" list. For each individual identified, the Respondent agreed to produce information or documents in an electronic spreadsheet that included the individual's name, contact information, position(s) held at time of request not to take vaccine, date(s) that the employee notified the company of the employee's objection to receiving the Hepatitis A vaccine or request for accommodation, any reason(s) provided by the employee concerning the employee's objection to receiving the Hepatitis A vaccine, a summary of the company's response to the employee's objection, date of discharge or removal from work schedule, if applicable, and reason for decision.

9/17/21	IN	USDC Southern District of Indiana No. 3:21-mc-9 Hon. Matthew P. Brookman	Cell Phone Retailer	Individual Charging Party	The court granted the EEOC's request to enforce the subpoena. The defendant was ordered to produce all documents requested.

Commentary: The EEOC is investigating a charge of sex discrimination and retaliation. During its investigation, the EEOC issued a subpoena seeking (1) copy of the charging party's personnel file; (2) A copy of all complaints of harassment received from the charging party; (3) A copy of Respondent's investigation of the charging party's complaint(s) of harassment; (4) A copy of all text messages sent or received between the alleged harassing supervisor and the charging party; (5) A copy of the alleged harasser's personnel file and disciplinary history; (6) Document reflecting the reason for the charging party's job termination; and (7) A copy of Respondent's position statement responding to each of the allegations identified in the charging party's EEOC charge of discrimination and retaliation. The Respondent did not respond to the subpoena, so the EEOC issued an application to show cause why the subpoena should not be enforced.

On January 12, 2022, the court granted the EEOC's request to enforce the subpoena.

Filing Date	State	Court Name / Case Number / Judge	Defendant Industry	Individual Charging Party or Systemic Investigation	Result
9/30/2021	CO	USDC Colorado No. 1:21-mc-191 Hon. S. Kato Crews	Airline Company	Systemic Investigation	The matter is pending.
Commentary: From 2016 through 2018, five female pilots and five female flight attendants filed charges of discrimination with the EEOC alleging sex and disability discrimination in connection with pregnancy, childbirth, and breastfeeding. The charges allege that the Respondent engaged in systemic, class-based discrimination against pregnant and breastfeeding flight attendants and pilots and has a pattern or practice of failing to accommodate. As part of its investigation the EEOC issued three administrative subpoenas seeking witness testimony and the production of documents and information relevant to allegations in charges of discrimination under investigation. The Respondent objected that it would not permit those management witnesses to provide statements subject to an oath to tell the truth, and also will not permit the EEOC to preserve the interviews by audio recording. The subpoenas also sought documents and information related to the charges, including : (a) a written explanation and information related to policies requiring flight attendants to provide notice of a pregnancy; (b) identification of positions subject to company policy requiring employees holding those positions to take leave "at a specific week in the pregnancy or specific time period in their pregnancy"; (c) "documents that discuss accommodations for any company flight attendant for reasons related to disability, injury, or a medical condition, including pregnancy and pregnancy-related medical conditions"; and (d) documents related to any temporary placements of employees with any "outside employer or agency due to a disability, injury, illness or medical condition, including pregnancy or pregnancy-related medical condition. The EEOC alleges that the Respondent airline has not complied with the subpoena or request to schedule the interview of two management employees. The EEOC therefore filed the instant application for an order to show cause why the subpoena should not be enforced.					
9/30/2021	NJ	USDC New Jersey No. 2:21cv17849 Hon. Leda D. Wettre	Automotive Import/Export	Systemic Investigation	The defendant voluntarily complied with the request.
Commentary: As part of its investigation into three charges of race discrimination filed against the Respondent, the EEOC requested information and documents related to these charges, but claims the Respondent's production of documents was facially incomplete and unreliable. The EEOC issued a subpoena seeking: (1) an Excel spreadsheet identifying [by several enumerated criteria] all persons employed by Respondent at any time between 2016 to the present and (2) the complete personnel files for all individuals employed by Respondent at any time between 2016 to the present. The Respondent provided information but redacted the employees' social security numbers and driver's license numbers, which the EEOC claims are important for locating potential harmed employees, comparators, and witnesses. According to the EEOC, the Respondent has failed to provide complete records sought in the subpoena, even after the EEOC addressed the Respondent's objections and offered to narrow its request to un-redacting just the social security numbers and driver's licenses, which could be provided via spreadsheet, versus redacting each file, which the Respondent alleged was unduly burdensome. The EEOC claims the Respondent would not do so without insisting on a "highly improper and unnecessary confidentiality agreement." On November 12, 2021, the defendant agreed to produce to the EEOC a spreadsheet listing the unredacted employee Social Security numbers and driver's license numbers that were previously produced to EEOC in redacted form. This spreadsheet will be marked "Confidential."					

Appendix D - FY 2021 Select Summary Judgment Decisions by Claim Type(s)

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Disability Discrimination Failure to Accommodate Joint Employment	CACI Secured Transformations, LLC	U.S. District Court for the District of Maryland Civil Action No. JKB-19-2693	2021 U.S. Dist. LEXIS 87964 (D. Md. May 7, 2021)	Defendants' Motion for Summary Judgment and EEOC's Cross-Motion for Partial Summary Judgment **Result:** Pro-EEOC The court denied the defendants' motion and granted the EEOC's cross-motion for partial summary judgment on the question of whether the defendants were the charging party's employer within the meaning of the ADA, and whether the charging party is a qualified individual with a disability.	Is the contracting entity a joint employer with the staffing agency providing the charging party's services? Are the defendants an integrated enterprise? Is the charging party a qualified individual with a disability? Did the contracting entity fail to accommodate the contract worker's injuries sustained in a car accident, and unlawfully terminate her contract?

Commentary: The charging party was employed by staffing agency Que Technology Group, but hired to work on a Middleware III (MWIII) NSA contract. The lawsuit was brought against associated corporate entities, which were the prime contractors on the MWIII contract (under the banner "CACI").

While working on the contract as a System Administrator, the charging party sustained injuries in a car accident, and was on medical leave for several months to receive treatment for chronic post-traumatic headaches and related symptoms. Her MWIII program manager and staffing agency exchanged multiple emails during this time, indicating that they would need to fill her position if she was unable to return. The charging party eventually returned to work upon doctor's clearance, but still needed certain workplace interventions to manage her ongoing symptoms. About a month after her return she was asked whether she could move to a different office temporarily. She protested for commute/childcare/personal reasons, but indicated she would try it out, but said she still needed a modified schedule to attend certain medical appointments. Email correspondence between CACI and the staffing agency referenced the workplace accommodations/restrictions, the charging party's inability to change her work schedule, and the need to replace her if she couldn't do the job. The charging party was subsequently diagnosed with a brain aneurysm. Because of challenges with the transition to a new work site, the charging party was removed from the contract. Que offered her work on two other Que contracts, but both were outside the charging party's expertise.

EEOC brought suit, alleging defendants failed to accommodate her, discharged her due to her disability, and that its contractual arrangement with Que violated Section 102 of the ADA by requiring Que, at the defendants' behest, to terminate charging party's employment based on her disability (*i.e.*, job interference). The defendant moved for summary judgment on all three counts, and the EEOC cross-moved for summary judgment on whether defendants were the charging party's employer, whether they are an integrated enterprise, and whether the charging party was a qualified individual with a disability.

The court first looked to the issue of joint employment. An entity that is not a plaintiff's formal employer may be an "employer" under the joint employment doctrine if it exercised sufficient control over the terms and conditions of plaintiff's employment. The nine-factor "hybrid" test articulated in *Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 410 (4th Cir. 2015) controls. Under this test, a court must look at the following factors with respect to a putative joint employer: (1) authority to hire and fire the individual; (2) day-to-day supervision of the individual, including employee discipline; (3) whether the putative employer furnishes the equipment used and the place of work; (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes; (5) the length of time during which the individual has worked for the putative employer; (6) whether the putative employer provides the individual with formal or informal training; (7) whether the individual's duties are akin to regular employee's duties; (8) whether the individual is assigned solely to the putative employer; and (9) whether the individual and putative employer intended to enter into an employment relationship. The first three are the most important factors.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues

Here, the defendants had significant control over hiring, as they were involved in the interview/hiring process. The charging party was hired under a "Contingent Employment Agreement," which required her to be selected as a System Administrator, and this happened only after she had interviewed with defendants. In essence, her hiring was contingent on her placement on the MWIII contract. As for firing authority, the defendant's effective ability to end the charging party's employment with the staffing agency was not clearly established, although she was let go shortly after she was removed from the MWIII project. With respect to day-to-day control, it was clear the majority of her supervision was conducted by the CACI supervisor, who managed her day-to-day work. Although defendants argued the charging party was not micro-managed by this supervisor, the court noted "the mere fact that defendants did not exercise their supervisory authority in a particular way does not attenuate the amount of control they had over the [charging party's] day-to-day work." Location of the work also favored the EEOC's claim. The remaining factors "are largely in equipoise," but the court weighed the factors, including the three most important, which weighed predominantly in favor of the plaintiff, and found that the defendants were the charging party's joint employers.

Turning to failure to accommodate claim, the court noted the plaintiff must establish four things: (1) the charging party was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of her disability; (3) that with reasonable accommodation she could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. The court found the defendant's motion for summary judgment rested on the fourth element. Defendants claimed the interactive process broke down before it was started, because the charging party did not ask to move back to the original location or request an accommodation. The court, however, said that a reasonable factfinder could conclude the charging party had "cleared the low bar for communicating the need for an accommodation of her disability." Moreover, the Fourth Circuit has made clear that an employer's responsibility to engage in the interactive process to identify a reasonable accommodation is triggered "even if the employee fails to identify a specific, reasonable accommodation. *Jacobs v. N.C. Admin. Off, of the Cts.*, 780 F.3d 562, 581 (4th Cir. 2015). Thus, the motion for summary judgment on the accommodation claim was denied.

As for discriminatory discharge, the defendants argued the plaintiff could not prove the charging party's discharge was motivated by discriminatory animus. Therefore, in order to survive summary judgment, plaintiff must establish four things: the charging party (1) was a qualified individual with a disability; (2) was discharged; (3) was fulfilling her employer's legitimate expectations at the time of discharge; and (4) the circumstances of her discharge raise a reasonable inference of unlawful discrimination. The fourth prong is again at issue. The plaintiff argued that three pieces of circumstantial evidence establish that this reason is pretextual: (1) defendants' intent to remove charging party while she was out on leave; (2) email correspondence between defendants' personnel; and (3) the "close temporal nexus" between charging party's aneurysm diagnosis and her removal. The court noted that while "thin," this evidence is more than the scintilla needed to defeat a motion for summary judgment.

With respect to the third-party interference allegation, 42 U.S.C. § 12112(b)(2) of the ADA extends the definition of "discriminat[ion] against a qualified employee on the basis of disability" to those who "participat[e] in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter." Plaintiff contends defendants violated this provision because their contractual agreement with Que meant that the charging party's removal from the MWIII project resulted in her termination by Que. However, the court noted it is not clear whether the charging party's termination from Que immediately following her removal from the MWIII contract is representative or anomalous, so questions of fact remained.

Turning to the EEOC's motion on two issues: (1) whether defendants are a joint enterprise; and (2) whether charging party is disabled within the meaning of the ADA, the defendants claimed these issues are too discrete to be resolved at the summary judgment stage. Specifically, they claimed the text and structure of Rule 56 prevent a party from seeking a "declaratory ruling on certain facts or a discreet [sic] element of a claim." Rather, they argue, such rulings can be obtained only through Rule 56(g), and only as a "mechanism to salvage some of the constructive results of the judicial efforts made in denying a proper summary judgment motion." Subdivision (g) applies when the court does not grant all the relief requested by a motion for summary judgment. It becomes relevant only after a court has applied the summary judgment standard carried forward in subdivision (a). The defendants therefore argue that because Rule 56(g) is contingent on Rule 56(a), summary judgment motions that seek Rule 56(g) orders are procedurally improper.

The court pointed out, however, that the EEOC's motion seeks to establish not only that certain facts are undisputed, but also that legal consequences flow from those facts. Specifically, the EEOC seeks judicial determination that factually distinct corporate entities may be treated as an "integrated enterprise" as a matter of law, and that the facts establish that the charging party is a qualified individual with a disability under the legal definition provided by the ADA. Because the EEOC's motion does not seek "an order stating any material fact . . . that is not genuinely in dispute," without more (Fed. R. Civ. P. 56(g)), the court found it was properly before the court.

Because defendants did not offer any substantive opposition to the argument that CACI is an integrated enterprise, the court granted this motion. As for the argument that the charging party is a qualified individual with a disability, the only substantive objection was that she was disabled under the ADA. The defendant argued the charging party could have mitigated her symptoms (*e.g.*, by taking pain medication), but under the ADAAA, this assertion is misplaced. The court applied "the mandate expressed in the ADAAA," which is to examine whether an impairment substantially limits a major life activity without regard to the ameliorative effects of mitigating measures such as medication. Given the record of the charging party's condition, the court determined she was disabled under the ADA.

Thus, the court held the following issues were established as a matter of law: (1) defendants are the charging party's joint employer; (2) defendants are an integrated enterprise; and (3) charging party is a qualified individual with a disability. The remaining issues raised in defendants' motion for summary judgment are factual issues for trial.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate	Cash Depot, LTD	U.S. District Court for the Southern District of Texas Civil Action No. 20-3343	(S.D. Tex. July 21, 2021)	Defendant's Motion for Summary Judgment **Result:** Pro-Employer The court granted the defendant's motion. The EEOC has appealed to the 5th Circuit.	Is the charging party, who suffered a stroke and has a 25lb lifting restriction, a qualified individual with a disability able to perform the essential functions of his field service technician job with or without a reasonable accommodation?

Commentary: The charging party worked as a field service technician for the defendant. After suffering a stroke, the charging party went on leave. Two months later, he provided a doctor's note indicating he could return to work with a 25lb lifting restriction. The defendant terminated the charging party's employment, stating it could not accommodate this restriction. The EEOC filed suit, and the defendant moved for summary judgment.

It was undisputed that the charging party was disabled and that he was replaced with someone who was not disabled. The issue in this case is whether the charging party was able to perform the essential functions of the job with or without a reasonable accommodation. The charging party testified he was sure he could do his job, but he had worked for only seven months at the employer, and such speculation does not create a fact issue and does not overcome the deference given to the defendant's business judgment on how the job is performed. While the EEOC noted the job description includes a 20lb lifting requirement, this fact can be considered, but is not conclusive. The court noted it can give deference to the employer's judgment, and that of the more experienced employees who claimed the job requires lifting more than 25 pounds during most of the job's activities. Although the EEOC claimed this is speculative, the court stated the Commission "confuses" its burden in this case. It must carry the burden to prove the case it brought; it is not the defendant's burden to prove it is not liable.

The EEOC articulated three possible accommodations: (1) splitting the coin removes into multiple bags; (2) scheduling other employees to help with heavy jobs; and (3) giving the charging party more unpaid leave. As to (1), the EEOC speculates that this is reasonable, while it could lead to stolen bags if left unattended. As to accommodation (2), the employer is not required to hire others to cover parts of the charging party's job. And paying someone else while he is on leave is not reasonable.

Moreover, although the EEOC claimed the employer did not engage in an interactive process to negotiate a reasonable accommodation, the EEOC did not identify a subject the employer could have reasonably considered. Moreover, the employer "does not have to discuss a reasonable accommodation . . . if one does not exist."

Therefore, the court determined the charging party was not a qualified individual with a disability under the ADA and granted the employer's motion. The EEOC has filed a notice of appeal with the Fifth Circuit.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
ADA Failure to Accommodate	Kaiser Foundation Health Plan of Georgia	U.S. District Court for the Northern District of Georgia, Atlanta Division Case No. 1:19-cv-5484-AT	2021 U.S. Dist. LEXIS 151292 (N.D. Ga. Aug. 9, 2021)	Review of Magistrate's Report and Recommendations Granting Plaintiff's Motion for Partial Summary Judgment and Denying Defendant's Motion for Summary Judgment **Result:** Pro-EEOC. The court overruled the defendant's objections and adopted the magistrate judge's Report and Recommendation as the opinion of the court.	Must a charging party show that a reasonable accommodation would enable her to perform the essential functions of the job before the employer is obligated to provide it when the accommodation relates to making existing facilities used by employees readily accessible to and usable by individuals with disabilities?

Commentary: EEOC brought suit under the ADA on behalf of the charging party who suffers from claustrophobia. It alleged the employer failed to allow her to use an alternative means of entering the workplace other than the revolving door. Although the employer eventually granted her this accommodation after it obtained a letter from the charging party's doctor about the necessity of the accommodation to perform the essential functions of her job, the EEOC claims the employer should have granted her this accommodation from the date of her initial request until it ultimately approved it, which was a six-month period. The defendant, in turn, argued that the letter from the charging party's physician did not state whether her claustrophobia affected her ability to perform her job or for how long she would need an accommodation. The EEOC countered that this interpretation "ignores the clear language of the ADA that making the workplace accessible is an accommodation under the ADA" and improperly insists that "any accommodation must relate to an employee's job function." The defendant responded that under Eleventh Circuit precedent, an employer is required to provide an employee with an accommodation under the ADA "only if it enables the employee to perform the essential functions of the job," and, as a consequence, "a failure-to-accommodate claim must be viewed through the perspective of how the requested accommodation would enable the employee to perform the job."

The magistrate evaluated these arguments, found the case law the defendant cites distinguishable from the facts at hand, and rejected the defendant's position that it wasn't obligated to provide the accommodation until it obtained further information. The magistrate explained that to establish a *prima facie* case of disability discrimination under the ADA, a plaintiff must establish that the employee (1) is disabled; (2) was a qualified individual at the relevant time, meaning she could perform the essential functions of the job in question with or without reasonable accommodation; and (3) was discriminated against by way of the defendant's failure to provide a reasonable accommodation.

In looking at the third prong, the magistrate explained that employers have "two separate reasonable accommodation obligations" under the plain language of the ADA: one is the obligation of "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" under 42 U.S.C. § 12111(9)(A), and the other is the obligation to accommodate employees through "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities" under 42 U.S.C. § 12111(9)(B).

The charging party's request implicated 42 U.S.C. § 12111(9)(A), the magistrate found, because the purpose of the accommodation was to make her workplace facility itself accessible to her as a person as well as an employee with disabilities. Moreover, as a matter of "logical necessity," the reasonableness of a request for accommodation does not always "turn upon . . . performance of the essential functions of [the] position." Thus, the employer was obligated to provide the accommodation without waiting to see whether the disability impacted her performance.

The court agreed with the magistrate's report and recommendations in all respects and found no clear error.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Constructive Discharge Race/Sex Discrimination Race/Sex Hostile Work Environment Retaliation	Jackson National Life Insurance Co.	U.S. District Court for the District of Colorado Civil Action No. 16-cv-02472-PAB-SKC	2021 U.S. Dist. LEXIS 45667 (D. Colo. Mar. 11, 2021)	Defendants' Motion for Summary Judgment **Result:** Pro-Employer The court granted the defendants' motion for summary judgment.	Should the court grant the defendant's motion for summary judgment as to the plaintiff's claims of hostile work environment based on race/sex, discrimination, retaliation, and constructive discharge?

Commentary: The EEOC brought five claims against the defendant on behalf of the charging party, a Black woman. The claims are for race- and sex-based hostile work environment, race- and sex-based discrimination, and retaliation.

With respect to the discrimination claims, the EEOC asserted that the charging party was discriminated against "in almost all terms and conditions of employment." She alleges she was denied certain promotions and sales territories based on her race/gender. According to the plaintiff, racially derogatory and sexist comments were made by those who made employment decisions, direct evidence which obviates the need for the McDonnell Douglas framework. The court disagreed, finding the charging party presented no evidence that the one who made the comments at issue was involved in any promotion decisions. "Sexist comments by those who were not decisionmakers are irrelevant to the analysis." Moreover, even if the comments were relevant, they still would be insufficient to demonstrate direct evidence. "[A] supervisor's animosity towards a protected group generally is not — on its own — direct evidence of discrimination. Rather, the plaintiff must show that the supervisor 'acted on his or her discriminatory beliefs.'" 2021 U.S. Dist. LEXIS 45667 at *14, citing *Fassbender v. Correct Care Solutions*, 890 F.3d 875, 883 (10th Cir. 2018) (quoting *Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1216 (10th Cir. 2013)).

A plaintiff who is unable to demonstrate direct evidence of discrimination may meet her burden with circumstantial evidence, per McDonnell Douglas. To make out a *prima facie* sex- or race-based discrimination case, a plaintiff must show (1) she is a member of a protected class, which the parties do not dispute in this case; (2) she suffered an adverse employment action; and (3) she was treated less favorably than similarly situated employees not in the protected class.

The bulk of the parties' dispute on this issue is whether the charging party suffered an adverse employment action. The defendant argued that the charging party suffered no such adverse action, as she was promoted and received pay raises during her tenure with the company before she tendered her resignation. The Tenth Circuit liberally defines "adverse employment action." See, *e.g.*, *Sanchez v. Denver Pub. Schs.*, 164 F.3d 527, 532 (10th Cir. 1998); *Gunnell v. Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998); *Jeffries v. Kansas*, 147 F.3d 1220, 1232 (10th Cir. 1998). An adverse employment action does not include "a mere inconvenience or an alteration of job responsibilities."

The charging party alleges two adverse employment actions: the company's failure to promote her and the discriminatory "terms and conditions" of her employment, including the company's manipulation of the territories to which she was assigned.

To advance a Title VII failure-to-promote claim, a plaintiff must make a *prima facie* case by showing that (1) she was a member of a protected class; (2) she applied for and was qualified for a position; (3) despite being qualified, she was rejected; and (4) after she was rejected, the position was filled. If the plaintiff can establish a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for its employment action. The burden then shifts back to the plaintiff to allege pretext. The court noted the parties do not seem to dispute that the charging party has made a *prima facie* case. But there was little disagreement that the defendant offered legitimate, nondiscriminatory reasons for her non-appointment to various positions.

The court looked at pretext. A plaintiff can show pretext by showing that the plaintiff's protected status, (here, race and sex), were determinative factors in the employment decisions or that a "discriminatory reason more likely motivated the employer" or the employer's explanation is "unworthy of credence." "To show that the defendant's proffered race-neutral reasons were actually a pretext for discrimination, [the Tenth Circuit] has held that the plaintiff must demonstrate that the defendant's 'proffered [race-neutral] reasons were so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude the reasons were unworthy of belief.'" 2021 U.S. Dist. LEXIS 45667 at *19, *Young v. Dillon Companies, Inc.*, 468 F.3d 1243, 1250 (10th Cir. 2006) (quoting *Stover v. Martinez*, 382 F.3d 1064, 1070 (10th Cir. 2004)). Here, the charging party alleged she was more qualified than her white, male coworkers who were promoted. The court disagreed, finding she provided no evidence that the company did not "honestly believe" others were more qualified than she.

As to the terms and conditions of employment, the court found that the charging party did not present sufficient evidence that her delayed or missed performance evaluations were adverse employment actions, as she has not established that they constituted, or resulted in, a "significant change in employment status . . . [or an action that causes] a significant change in benefits." Moreover, she ultimately agreed with her performance assessments. The court therefore found that there is no genuine dispute of material fact as to the charging party's discrimination claims and that defendant is therefore entitled to summary judgment on claims three and four in the first amended complaint in intervention.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues

Next, the court examined the retaliation allegations. To maintain a retaliation claim, a plaintiff is required to demonstrate that (1) she was engaged in opposition to Title VII discrimination; (2) she was subject to an adverse employment action; and (3) a causal connection exists between the protected activity and the adverse employment action. To be materially adverse, an action must be sufficient to "dissuade[] a reasonable worker from making or supporting a charge of discrimination." Burlington, 548 U.S. at 68 (citation omitted). This requires injury rising to a "level of seriousness." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1087 (10th Cir. 2007). Yet, what is sufficient to sustain a retaliation claim is not necessarily sufficient to sustain a discrimination claim. *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1212 (10th Cir. 2008). Rather, an employer can effectively retaliate against an employee by taking actions not directly related to the employee's employment. If a plaintiff makes this *prima facie* case, then the burden-shifting framework of McDonnell Douglas applies to Title VII retaliation claims.

The parties in this case dispute whether the charging party suffered any materially adverse employment action. Here, the court determined there is a dispute as to whether the performance improvement plan the charging party was given—and later rescinded—was a materially adverse action and whether imposition of a PIP would dissuade a reasonable worker from engaging in protected activity. She is then required to show a causal connection between the protected activity and the PIP, which the court found there was not. As to the sales territories, because the charging party could not establish she was discriminated against in the assignments, this forecloses the retaliation claim based on these allegations.

Next, the court turned to the hostile environment claims. To survive summary judgment on a hostile work environment claim, "a plaintiff must show that under the totality of the circumstances (1) the harassment was pervasive or severe enough to alter the terms, conditions, or privilege of employment," and (2) the harassment stemmed from animus. In determining whether conduct is sufficiently severe or pervasive, the Tenth Circuit considers: "(1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's work performance." *Holmes v. Regents of Univ. of Colo.*, 176 F.3d 488.

The charging party alleged a number of incidents, including a worker's mimed sexual act with a vodka bottle at a 2008 company event, an obscene message on a football thrown at the charging party shortly before she resigned, and coworkers' inappropriate language.

The court found the charging party raised a genuine dispute of fact that talk of sex on the sales desk was endemic, and male sales employees made inappropriate comments regarding female coworkers' hair, clothes, body parts, and physical appearances. However, there is no indication that the vodka bottle incident involving one employee in 2008 is related to or part of any course of conduct connected with the other incidents that the charging party cites. Considering each of these factors, therefore, the court found that the evidence that the charging party offered of the 2008 incident is not sufficient to be part of one employment practice.

Nor did the court find a genuine dispute as to the severity of the sexual comments that she experienced. For conduct to rise to the level of a hostile work environment, it must be so severe and pervasive as to unreasonably interfere with the plaintiff's work performance. The evidence proffered fell short, according to the court. The comments and the behavior of the men on the sales desk were "unprofessional, boorish, and unpleasant, yet the behavior falls short of the severity necessary to meet the hostile work environment test of intimidation, ridicule, and insult" sufficient to alter the conditions of an employee's employment. Thus, the court concludes that a reasonable jury could not find that defendant's conduct created a workplace for the charging party "permeated with discriminatory intimidation, ridicule, and insult."

Finally, the court analyzed the plaintiff's constructive discharge allegation. The Tenth Circuit applies an objective test to constructive discharge claims: Constructive discharge occurs when the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign. The conditions of employment must be objectively intolerable; the plaintiff's subjective views of the situation are irrelevant. In this case, "having failed to produce evidence raising a genuine issue of fact that she was subject to a hostile work environment, [charging party] cannot sustain the more onerous burden of proving discrimination claim premised on constructive discharge."

Therefore, the court granted the defendants' motion for summary judgment, and dismissed plaintiff's claims with prejudice.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Disparate Impact	Schuster Co.	U.S. District Court for the Northern District of Iowa Civil Action No. 19-CV-4063-LRR	2021 U.S. Dist. LEXIS 79815 (N.D. Iowa Apr. 13, 2021)	Parties' Motions for Summary Judgment **Result:** Mixed. The court granted the EEOC's motion for summary judgment on the issue of whether it established a *prima facie* case of disparate impact, but denied the motions on the remaining issues.	Did the EEOC establish a *prima facie* case of disparate impact discrimination regarding the defendant's use of an isokinetic strength test (CRT Test) in hiring? Did the defendant establish its burden to demonstrate that the CRT Test is related to safe and efficient job performance and is consistent with business necessity? Did the EEOC sufficiently demonstrate there exists an alternative selection method that has substantial validity and a less disparate impact?

Commentary: The EEOC alleged defendant's use of an isokinetic strength test had a disparate impact on female job applicants for driver positions, as the company purportedly refused to hire women who failed the pre-employment test. The EEOC pointed out that if a plaintiff demonstrates that an employer uses a selection device that has a disparate impact on women, then the employer has the burden of proving that the selection device is job-related and consistent with business necessity. According to the EEOC, its expert demonstrated that the test has a statistically significant, adverse, disparate impact on women.

The EEOC claimed the defendant cannot raise an issue of fact as to whether the test is job-related and consistent with business necessity when (1) it cannot explain how the test is scored or whether the passing score relates to the physical demands of the job; (2) the test did not accomplish its stated goals of reducing workers' compensation injuries or costs; and (3) defendant retains incumbent drivers who failed the test. According to the EEOC, a test that screens out so many women, that has no explanation for how it works, and that defendant does not require all its drivers to pass, cannot be related to or consistent with business necessity.

Defendant argued that it was entitled to summary judgment because (1) the test at issue in this case does not have a disparate impact on female applicants for the position of truck driver; (2) defendant is entitled to use a physical abilities test that has been validated; (3) defendant's use of the CRT test is job-related and consistent with business necessity; and the EEOC failed to demonstrate the existence of reasonable alternatives that would effectively serve defendant's needs while resulting in hiring more female applicants.

Generally, to show a *prima facie* case in a disparate impact case, "a plaintiff must identify . . . a facially-neutral employment practice, demonstrate a disparate impact upon the group to which he or she belongs, and prove causation." *Langlie v. Onan Corp.*, 192 F.3d 1137, 1140 (8th Cir. 1999) (quoting *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997)). In this case, the EEOC's expert showed 95% of men passed the test, while only 76.6% of women did. The defendant relied on the "4/5 Rule": "A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact." The court found, however, that the defendant "greatly overreaches" with this rule, and disregarded the next sentence of this rule: "Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on ground of race, sex, or ethnic group." Moreover, the Supreme Court and the EEOC have emphasized that courts should not treat the rule as generally decisive. Therefore, for the purposes of summary judgment, the EEOC has demonstrated a *prima facie* case of disparate impact.

As for (1) defendant's burden to demonstrate that the CRT Test is related to safe and efficient job performance and is consistent with business necessity and (2) the EEOC's demonstration of an alternative selection method that has substantial validity and a less disparate impact, the court found there are issues of fact that remain, so it denied summary judgment on those issues.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII EPA	University of Miami	U.S. District Court for the Southern District of Florida Civil Action No. 19-23131	2021 U.S. Dist. LEXIS 186479 (S.D. Fla. Sept. 29, 2021)	Cross-Motions for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion for summary judgment and granted the EEOC's motion for partial summary judgment in part and denied it in part.	Did the university employer engage in pay discrimination by paying a female professor less than her male counterpart, or did the employer have a legitimate, nondiscriminatory reason for the pay disparity that is not itself pretext for discrimination? Can the employer set forth affirmative defenses of failure to conciliate, laches, and failure to mitigate damages?

Commentary: The EEOC filed an action on behalf of a female professor, alleging the university employer discriminated against her by paying her less than a male professor. The EEOC filed a motion for partial summary judgment on the university's defenses of laches, failure to mitigate, and failure to conciliate. The university moved for summary judgment on all claims, arguing that the two professors at issue did not perform the same job, and even if they did, the differential was based on factors other than sex.

The university claimed the difference in salary resulted from the male professor's teaching experience, publication deal with a more prestigious publisher, and that he tested the market when negotiating his salary. In other words, the pay differential was due to market forces at the date of his hire. Both professors followed similar career tracks and received similar performance evaluations.

Salary studies conducted in 2016 and 2018 revealed gender pay differentials. The charging party did not believe that the university was intentionally discriminatory, but that it knowingly used hiring practices and salary determinations that perpetuated gender-based pay disparities.

The charging party filed a charge of pay discrimination with the EEOC. The EEOC issued a letter of determination finding reasonable cause to believe discrimination had occurred and included an invitation to conciliate. The parties exchanged communications about extending the conciliation deadline. The university then sent a letter requesting reconsideration of the EEOC's determination, and did not return the invitation to conciliate form. The EEOC subsequently closed the conciliation period citing the parties' inability to reach a voluntary settlement, then initiated the instant litigation.

According to the court, the crux of the dispute is whether the university discriminated against the charging party when it hired her as an associate professor at a salary of $72,000 the same year it hired her male colleague at $81,000. In addition, the EEOC claims that the fixed pay increases have perpetuated the initial discrepancy. The university claims the EPA and Title VII claims fail because the professors did not perform similar jobs, and even if they did, there is a legitimate, nondiscriminatory reason for the differential, and there is no evidence of pretext. The court, however, denied the university's motion for summary judgment.

The court found that a reasonable jury could determine that the parties' jobs were substantially similar, so the EEOC met its *prima facie* case under the EPA, which is to prove that the employer paid an employee of the opposite sex more for equal work in an equal position. 29 U.S.C. § 206(d)(1). "Whether that employee of the opposite sex—typically called a comparator—performs equal work in an equal position depends on the 'primary duties of each job,' and the inquiry emphasizes 'actual job content' over formal job titles or descriptions." *EEOC v. University of Miami*, 2021 U.S. Dist. LEXIS 186479 at *23 (S.D. Fla. Sept. 29, 2021), citing *Edwards v. Fulton Cnty., Ga.*, 509 F. App'x 882, 886 (11th Cir. 2013) (quoting *Arrington v. Cobb Cnty.*, 139 F.3d 865, 876 (11th Cir. 1998)). "The plaintiff need not prove that the job held by her . . . comparator is identical to hers; she must demonstrate only that the skill, effort and responsibility required in the performance of the jobs are 'substantially equal.'" *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992).

The burden then shifts to the university to show, by a preponderance of the evidence, that the pay disparity was caused by a seniority system, merit system, a production-quota system, or any factor other than sex. The University can meet this burden by showing the factor had no basis for the wage differential. To this end, the University pointed to the market-based nature of the salaries, reputation, publications, etc. The University also showed multiple salary analyses confirmed no link between gender and pay.

The court, however, found the market-theory argument "problematic," as the record was vague on the status of the market at the time and how the University determined this, among other issues. Thus, the court found a genuine issue of fact remained as to whether the pay differential was in fact based on factors other than sex.

Because the EEOC was able to establish a disparate pay claim under the "more rigorous" EPA standard, the court found it met its burden in showing a *prima facie* case of Title VII disparate pay. The University proffered its nondiscriminatory reasons for the differential, but the EEOC was able to provide evidence of pretext. Specifically, the University was put on notice of gender pay disparities through the multiple studies, but this did not result in the closure of the pay gap. Therefore, the court denied the university's motion for summary judgment.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
In its own motions, the EEOC claims that judgment in its favor is appropriate on three of the university's affirmative defenses: failure to conciliate, laches, and failure to mitigate. The court granted this motion with respect to the university's affirmative defenses of failure to conciliate and laches, but denied the motion with respect to the university's failure to mitigate defense. Regarding the failure to conciliate claim, the university argued that the EEOC failed in its conciliation efforts because it did not respond to the concerns raised in a letter the university sent and instead found that conciliation efforts had failed. But the EEOC did invite the university to conciliate, but the university declined to return the form. As to the laches defense, the university claimed the EEOC is required to complete its investigation within 180 days of the filed charge, but in this case the EEOC took 274 days to issue its determination letter. Then it waited four months to file the instant lawsuit. The court found, however, that this does not amount to inexcusable delay, nor was the university prejudiced by this delay. With respect to the failure to mitigate affirmative defense, the EEOC claimed this defense is not applicable under the EPA because the charging party is still employed and is not obligated to find a new position. The court found, however, that the duty to mitigate is relieved simply because she filed a claim under the EPA. Whether a party mitigated their damages is typically a question for the jury, so summary judgment on this point was denied. Notably, when this case went to trial, a jury on March 11, 2022 returned a verdict in favor of the University, finding the pay differential was not based on sex.					
Statute and Claim Type(s)	**Defendant(s)**	**Court and Case No.**	**Citation**	**Motion and Result**	**General Issues**
Title VII Laches Pregnancy Discrimination	LogistiCare Solutions LLC	U.S. District Court for the District of Arizona No. CV-20-00852-PHX-GMS	2020 U.S. Dist. LEXIS 215486 (D. Ariz. Nov. 18, 2020)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the employer's motion for summary judgment on the laches defense.	Should the court grant the defendant's motion to dismiss/ motion for summary judgment on the grounds the EEOC waited too long to file suit?
Commentary: Charging party alleges she was fired five days into a two-week training program for new hires. Both she and another employee who was fired at the same time were pregnant. Charging party alleged she was fired because of her pregnancy, as a training supervisor purportedly commented that the women would not be able to comply with the company's attendance policy. The charging party filed an EEOC charge shortly thereafter in 2013. The EEOC brought suit in 2020, seven years later. The defendant moved to dismiss and, in the alternative, for summary judgment, on a laches defense, citing the seven-year filing delay. The EEOC claimed the delay was caused by the defendant's lack of cooperation, and that the defendant was not prejudiced by any delay. A claim is barred by laches where (1) the plaintiff unreasonably delays in bringing suit and (2) the defendant is prejudiced by the delay. Determining whether delay was unreasonable and whether prejudice ensued necessarily demands "a close evaluation of all the particular facts in a case." 2020 U.S. Dist. LEXIS 215486, *3, citing *Kling v. Hallmark Cards Inc.*, 225 F.3d 1030, 1041 (9th Cir. 2000). For this reason, claims are not easily disposed of at the motion to dismiss stage based on a defense of laches. The court noted it is not possible to determine whether these elements are met based on just the complaint. According to the court, "a lengthy span of time, alone, is not enough to prove unreasonable delay." Because the complaint does not provide insight on why the delay occurred, the court denied the defendant's motion to dismiss. As for the summary judgment motion, the court addressed only whether defendant has shown prejudice under the laches standard. Prejudice is "the essential element of laches." 2020 U.S. Dist. LEXIS 215486, *5, citing *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 972 (9th Cir. 1979). In this case, the court found no evidence of prejudice. The defendant claimed it would not have proper access to witnesses, but the court disagreed. "The mere fact that [witnesses] are no longer with [a] company or in the immediate area is not sufficient" to show prejudice. 2020 U.S. Dist. LEXIS 215486, *8, citing Sandvik, 609 F.2d at 973. The defendant must show that the witnesses are unavailable and that their unavailability is a result of the EEOC's delay, which it had not done so. The court also noted the defendant showed no evidence it had tried and failed to contact the witnesses. The court therefore denied the defendant's motion for summary judgment. As for the summary judgment motion, the court addressed only whether defendant has shown prejudice under the laches standard. Prejudice is "the essential element of laches." 2020 U.S. Dist. LEXIS 215486, *5, citing *Sandvik v. Alaska Packers Ass'n*, 609 F.2d 969, 972 (9th Cir. 1979). In this case, the court found no evidence of prejudice. The defendant claimed it would not have proper access to witnesses, but the court disagreed. "The mere fact that [witnesses] are no longer with [a] company or in the immediate area is not sufficient" to show prejudice. 2020 U.S. Dist. LEXIS 215486, *8, citing Sandvik, 609 F.2d at 973. The defendant must show that the witnesses are unavailable and that their unavailability is a result of the EEOC's delay, which it had not done so. The court also noted the defendant showed no evidence it had tried and failed to contact the witnesses. The court therefore denied the defendant's motion for summary judgment.					

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Pregnancy Discrimination Sex Discrimination Retaliation	NICE Systems, Inc.	U.S. District Court for the Southern District of Florida Case No.: 20-81021-CV-MIDDLEBROOKS/Matthewman	2021 U.S. Dist. LEXIS 146834 (S.D. Fla. Aug. 5, 2021)	Defendant's Motion for Summary Judgment **Result:** Mixed. The court denied the defendant's motion as to two of the EEOC's allegations of discrimination and retaliation, but granted it as to the claim for constructive discharge.	Did the defendant discriminate and retaliate against a pregnant employee by transferring her accounts, failing to assign her new sales territory, denying her commissions, and reassigning her to new territory once she returned from maternity leave?

Commentary: The EEOC and intervenor plaintiff (charging party) alleged the defendant discriminated and retaliated against the charging party on the basis of sex/pregnancy by (1) transferring certain existing sales accounts to a newly hired employee instead of to her even though she had previously worked on at least one of those accounts; (2) refusing to assign a new sales lead in the charging party's territory to her; (3) invoking the "windfall" provision of her employment contract to cap the amount of commission she could receive on an audit/settlement, a deal that the charging party contributed to before she went on maternity leave; and (4) upon her return from maternity leave, reassigning the charging party's Canada territory to a male colleague. These actions allegedly resulted in the charging party's constructive discharge.

With respect to the disparate treatment discrimination allegations, evidence against the defendant included her supervisor's comment that he would need to assess whether the charging party "will have the bandwidth to work on this opportunity with everything else going on," and that he needed to confer with human resources about how to handle "this type of situation." During his deposition, the supervisor could not identify anything other than the charging party's pregnancy regarding "everything else going on" with the charging party or "this type of situation." Therefore, the court determined a reasonable jury could conclude that the loss of the income-producing opportunity that would result from the sales commission and delay in reassignment constituted an adverse action, and that the comments constituted direct evidence of an intent to base a disadvantageous decision regarding the charging party's employment on an impermissible factor. Thus, the court denied the defendant's motion for summary judgment as to the discrimination claim.

To establish a retaliation claim, the court noted a plaintiff must prove (1) she participated in an activity protected by Title VII; (2) she suffered from an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination; and (3) there is a causal connection between the participation in the protected activity and the action. "Protected activity" may include formal as well as informal complaints; the key inquiry is whether the employee had a "good faith, reasonable belief that the employer was engaged in unlawful employment practices." As to causation, temporal proximity by itself can establish this element; the events, however, must be "very close." Where there is no direct evidence of retaliation, a plaintiff may establish a *prima facie* case of retaliation using circumstantial evidence.

In this case, the plaintiffs claim the defendant retaliated against the charging party by paying her less commission on a sale than she was entitled to and by taking away a favorable territory (Canada) and assigning her an unfavorable territory upon her return from maternity leave. Defendant alleged that plaintiffs failed to establish the second and third prongs of the retaliation claim, *i.e.*, that she suffered an adverse action that would have dissuaded a reasonable worker from making/supporting a discrimination charge, and that there exists a causal connection between the activity and employment action.

The court disagreed, finding the loss in substantial commission can be seen as an adverse action, and that the link between the complaints of discrimination and the decision to limit the charging party's commission and territory reassignment can be attributed to the decisionmaker via the cat's paw theory—a causal connection may be inferred where the ultimate decisionmaker does not undertake an independent investigation and receives information from a biased source that is aware of the complaints of discrimination.

The plaintiffs were able to rebut the defendant's stated reasons for the adverse actions (the nature of the transaction as an audit and settlement v. sale, and the charging's party limited participation) by showing the defendant's reasons changed over time, and that in related situations the commissions were not similarly withheld. Therefore, the court denied the defendant's motion for summary judgment on the retaliation charge.

The court, however, granted the defendant's motion for summary judgment on the plaintiffs' constructive discharge claim. To establish a claim for constructive discharge, a plaintiff must demonstrate that her employer deliberately imposed conditions that were "so intolerable that a reasonable person in [the employee's position] would have been compelled to resign." The court viewed the totality of the evidence in the plaintiffs' favor, and noted their "best theory for establishing the constructive discharge claim is that from the time that [charging party] disclosed . . . that she was pregnant, [defendant] took steps to siphon off income-producing opportunities from [her] sales pipeline until her commission prospects were so diminished that she would have no choice but to resign. However, even this scenario is not enough to meet the intolerable work environment standard."

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Religious Accommodation	Bus Transportation Company	U.S. District Court for the District of Maryland Civil Action No. ELH-19-1651	2021 U.S. Dist. LEXIS 151989 (D. Md. Aug. 12, 2021)	Defendant's Motion for Summary Judgment **Result:** Pro-EEOC The court denied the defendant's motion.	Did the defendant show that accommodating a driver trainee's request to wear an abaya for religious reasons would have posed an undue safety burden? Was the denial of this accommodation sufficient grounds for a constructive dismissal?

Commentary: The EEOC filed a claim against the defendant for failing to accommodate the charging party's religion, which resulted in a constructive discharge. The charging party, who is Muslim, claimed that as a bus driver trainee, she was told she could not wear an untucked shirt or loose-fitting, floor-length garment (abaya). She subsequently withdrew from the training program.

Prior to applying to the defendant company, the charging party worked as a driver for different employer, and claimed she never had a problem operating the vehicle while wearing an abaya.

The company's appearance policy required both bus drivers and student drivers to wear a uniform, although the dress requirements for the two groups differ. According to the manager, the driver uniform has a safety function: a driver's uniform does not "hang . . . on the ground" or have any "loose ends," so no part of it "can potentially be snagged and lead to an injury. The policy notes it will attempt to make a reasonable accommodation for sincerely held religious beliefs unless it posted an undue hardship or interfered with the employee's performance of the job's essential functions.

The charging party alleges she was told by a supervisor during the interview process that she would be offered an exemption from the uniform requirement. The defendant denied doing so, saying instead the possibility of an accommodation was discussed, but that the supervisor would have to discuss it with management. The next day, there was evidence of some discussion from an instructor mentioning the charging party's dress and stating he had not discussed the uniform policy with her. HR then responded that she must wear the uniform, but they could accommodate the head covering, but not the abaya.

The charging party discussed the proposed accommodation with her husband, who she claimed was responsible for her attire under the tenets of her religion. The husband conveyed it was up to the charging party whether to accept the proposal, but that she later changed her mind, and ultimately declined the job offer on account of this issue. The EEOC alleges the employer failed to properly accommodate the charging party's religious beliefs, leading to her constructive discharge.

To prevail on a *prima facie* failure-to-accommodate claim, an employee must establish that: (1) they have a bona fide religious belief that conflicts with an employment requirement; (2) they informed the employer of this belief; and (3) they were disciplined for failure to comply with the conflicting employment requirement. The burden then shifts to the employer to show undue burden. To satisfy its burden, the employer must demonstrate either (1) that it provided the plaintiff with a reasonable accommodation for their religious observances or (2) that such accommodation was not provided because it would have caused an undue hardship—that is, it would have resulted in "more than a de minimis cost" to the employer. In essence, proving the reasonableness of the proposed accommodation or undue burden is sufficient to escape liability. If an employer persuades the court that its proposed accommodation was reasonable, the court "need not examine" the undue burden claim.

To establish a claim of constructive discharge, a claimant must prove first that she was discriminated against by her employer to the point where a reasonable person in her position would have felt compelled to resign and then show that she actually resigned. The intolerability factor is a high bar.

In this case, the defendant claimed the charging party was not constructively discharged for three reasons: she was not an employee; she failed to engage with the employer in an attempt to arrive at a mutually acceptable accommodation; and, she did not experience intolerable working conditions.

As for the employer's undue burden, the court noted that the defendant did not offer any evidence regarding the safety risk posed by loose, floor-length clothing, nor identified any undue burden that would have resulted from the charging party's wearing an untucked shirt. The EEOC, by contrast, offered the testimony of an expert on bus safety who designed bus transportation systems and standards in Dubai, where women are permitted to drive and routinely wear abayas. The court found that the evidence creates triable issues of fact as to whether the charging party's preferred accommodation would have caused a legitimate safety issue or imposed more than "a de minimis cost" on the defendant. Therefore, the court denied the employer's motion.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Retaliation	Proctor Financial, Inc.	U.S. District Court for the Eastern District of Michigan Civil Action No. 19-11911	2021 U.S. Dist. LEXIS 189562 (E.D. Mich. Sept. 30, 2021)	Parties' Motions for Summary Judgment **Result:** Mixed The court denied both parties' motions.	Did emails following the charging party's filing of a race discrimination claim with the EEOC provide direct evidence of retaliation or pretext for the defendant's discriminatory motive in suspending her?

Commentary: The EEOC claimed the defendant retaliated against a former employee by disciplining her after she filed a charge of race discrimination with the EEOC based on failure to promote. The defendant ostensibly suspended the charging party for failure to pass certain licensing exams and misleading the employer about her scores.

Title VII retaliation claims can be established "either by introducing direct evidence of retaliation or by offering circumstantial evidence that would support an inference of retaliation." Proctor Financial, Inc., 2021 U.S. Dist. LEXIS 189562, at *16 (E.D. Mich. Sept. 30, 2021), citing *Laster v. City of Kalamazoo*, 746 F.3d 714, 730 (6th Cir. 2014), quoting *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 538 (6th Cir. 2008). Direct evidence is that evidence which, if believed, requires no inferences to conclude that unlawful retaliation was a motivating factor in the employer's action. The burden then shifts to the employer to prove by a preponderance of the evidence that it would have made the same decision absent the impermissible motive. Absent direct evidence of retaliation, the plaintiff must establish a *prima facie* case of retaliation by showing: (1) she engaged in protected activity (2) that was known to the defendant, (3) the defendant thereafter took an adverse employment action against the plaintiff, and (4) a causal connection exists between the protected activity and adverse employment action. The burden then shifts to the employer to show this action was for legitimate reasons, which can then be rebuffed by the plaintiff with a showing of pretext.

In this case, the EEOC points to various emails following the charging party's EEOC filing in which her employers describe the claims as "specious" and "baseless," and evince a plan to terminate her employment or take adverse action against her in due time. Although the defendant claims this is not direct evidence of retaliation because the individuals on the email chain did not make the ultimate decision to suspend the charging party's employment, the court disagreed, finding that a reasonable jury could conclude that the individuals on the email were in a position to influence the decision maker. Even absent direct evidence, the EEOC can make out a case of circumstantial evidence, the court found. The defendant challenged the fourth prong (causal connection), as there was a four-month gap between the EEOC filing and her suspension from employment, and during that period there were intervening causes to warrant the suspension, *i.e.*, the failure to pass the required exam and her efforts to conceal her results. The court disagreed, however, noting that the emails criticizing the EEOC charge began within a month of its filing.

Although the defendant proffered legitimate reasons for its actions, the court found that a reasonable jury could find the reasons were pretextual. Notably, the email exchanges manifested a scheme to find an "opportunity" to discipline the charging party. The Sixth Circuit has "held that when an 'employer waits for a legal, legitimate reason to fortuitously materialize, then uses it to cover up his true, longstanding motivations for [taking an adverse employment action against] the employee,' the employer's actions constitute 'the very definition of pretext.'" *Hamilton v. Gen. Elec. Co.*, 556 F.3d 428, 436 (6th Cir. 2009).

Finally, the court allowed the EEOC to present to a jury whether the charging party is entitled to emotional distress damages. The defendant claimed she was not entitled to such damages because there was a lack of evidence to support such an award. The court disagreed, finding that during her deposition, the charging party discussed her physical and emotion distress symptoms, which was enough evidence to bring the matter to a jury.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Sex Discrimination Retaliation	NDI Office Furniture LLC	U.S. District Court for the Northern District of Alabama Case No.: 2:18-cv-01592-RDP	2021 U.S. Dist. LEXIS 118908 (N.D. Ala. June 25, 2021)	Defendant's Motions for Summary Judgment and to Strike Certain Exhibits **Result:** Pro-EEOC The court denied the defendant's motions.	Were there sufficient questions of fact as to whether the defendant engaged in a pattern or practice of failing to hire women, and for retaliating against the charging party who complained of such discrimination to preclude summary judgment?

Commentary: In support of its opposition to the defendant's motion for summary judgment, the EEOC presented several witness declarations and deposition testimony, which the defendant sought to strike on the grounds they constituted (1) inadmissible hearsay, (2) were irrelevant, and (3) were barred by the work-product doctrine. As an initial matter, the court denied the motion to strike.

The EEOC alleged the defendant discriminated on the basis of sex against the charging party and other female applicants because of their sex. The defendant purportedly did not hire women because they would be a distraction to the men, and did not hire any women in the company's warehouse in 2014 and 2015. The warehouse manager allegedly told the charging party that it did not hire women in the warehouse and did not consider her for an open position after she inquired about it. After receiving an application from a female applicant, the defendant suspended the job search, ostensibly because the new manager needed to get acclimated, but resumed the search without contacting the applicant and ultimately hiring a man for the position. There was a dispute regarding the skills required for the position, but the EEOC provided evidence that the charging party was qualified for it.

The EEOC also set forth two retaliation claims against the defendant. The defendant said it would hire a third-party contractor to complete the tasks to replace certain employees, including the charging party's son. Twelve days after the charging party complained about discrimination regarding the open warehouse position, the defendant fired her son, although the defendant claimed it was firing him for overtime and employee cutbacks, and later cited performance issues. There remained a dispute regarding performance issues, and the defendant hired additional workers after the son's termination.

The EEOC asserted four claims: (1) sex discrimination on behalf of the charging party and a class of female job applicants in violation of §703(a) of Title VII; (2) a pattern or practice of failing to hire female applicants because of their sex in violation of §§703(a), 707(a) of Title VII; (3) retaliation against charging party in violation of §704 of Title VII; and (4) retaliation against the charging party's son in violation of §704 of Title VII.

The court noted: "[r]arely does a court find itself with a case where there is direct evidence that the defendant categorically discriminates against women working in its facilities. This is one of those cases. And unsurprisingly, because of that direct evidence, the validity of [EEOC's] claims and Defendant's defenses and alternative explanations for its conduct is for a jury to decide, not the court on summary judgment. Further, with respect to [EEOC's] retaliation claims, there is sufficient evidence to establish a retaliation claim based on circumstantial evidence under the McDonnell Douglas framework. For the reasons discussed below, Defendant's Motion for Summary Judgment is due to be denied."

On the EEOC's pattern or practice claim, if it establishes that the defendant had a pattern or practice of discriminating against female applicants for jobs in the warehouse, "a rebuttable presumption" that each applicant was discriminated against applies, "and the burden then shifts to … [D] efendant to show by clear and convincing evidence that each employment decision was not made in furtherance of the discriminatory policy."

Moreover, the EEOC has established that the defendant retaliated against the charging party's son. Because there was a lack of direct evidence of this charge, the court must rely on the McDonnell Douglas burden-shifting framework. Because there remained disputes of fact, summary judgment was not appropriate at this time. Similarly, there remained outstanding questions for the jury regarding whether the defendant's firing of the charging party's son constituted retaliation for her complaining of discrimination. For those reasons, the defendant's motion for summary judgment was denied.

Statute and Claim Type(s)	Defendant(s)	Court and Case No.	Citation	Motion and Result	General Issues
Title VII Sex Discrimination	Stan Koch & Sons Trucking, Inc.	U.S. District Court for the District of Minnesota Civil Action No. 19-cv-2148	2021 U.S. Dist. LEXIS 168297 (D. Minn. Aug. 30, 2021)	EEOC's Motion for Summary Judgment **Result:** Pro-EEOC The court granted the EEOC's motion in its entirety.	Did the Defendant's use of a CRT physical abilities test have a disparate impact on female applicants? If so, was the use of the CRT test justified? Did the EEOC's delaying in bringing suit unduly prejudice the defendant?

Commentary: EEOC brought a Title VII enforcement action against defendant, alleging its use of a physical abilities test discriminated against female driver applicants. The matter was bifurcated between a phase one liability assessment and a phase two on damages. This matter involves the EEOC's motion for summary judgment in phase one.

Prior to 2009, drivers for defendant had to have a commercial driver's license, one to two years of driving experience, and a satisfaction completion of various pre-employment screenings, such as a criminal background check. Starting in 2009, the defendant began to also require that applicants pass a physical abilities test (CRT test) for applicants and current drivers.

The EEOC brought suit on behalf of all women drivers who failed the test between February 2013 and January 2018. The agency's expert analyzed the defendant's records and showed the use of the test disproportionately impacted women.

Under the disparate impact analysis, the plaintiff bears the burden of showing the defendant's business practice had a significant impact on a protected group. This is typically done with statistical evidence that reveals the practice in question excluded applicants due to their membership in a protected class. The defendant then must demonstrate that the challenged business practice is both job-related and consistent with business necessity. If this is shown, the plaintiff must rebut this justification by showing there are equally effective but less discriminatory practices that will achieve the same end.

In this case, the EEOC was able to show that 93.9% of CRT tests taken by male applicants resulted in a passing score, while only 52% of CRT tests taken by female applicants resulted in a passing score. The court determined that the disparities are so great that they could not have occurred by chance and the record does not support another plausible explanation.

With respect to job-relatedness, the court did not submit a validation study or expert evidence of any kind in defense of the CRT test. Moreover, the defendant does not offer any evidence—expert or lay—that the CRT test was relevant to the driver job. As for business necessity, the defendant had to show the use of the CRT test had "a manifest relationship to the employment in question," addressing a problem that is "concrete and demonstrable, not just perceived," and was "essential to eliminating the problem, not simply reasonable or designed to improve conditions." The defendant argued it used the test to reduce workers' compensation costs and improve driver safety, but offered no evidence in support of those contentions. Because the defendant could not make this showing, the disparate impact analysis stops at step two.

The defendant did assert the affirmative defense of laches, arguing the complaint was filed more than four years after the defendant first started using this test. The doctrine of laches is a proper defense in a Title VII action and may be used to bar a lawsuit where the plaintiff is guilty of (1) unreasonable and unexcused delay, (2) resulting in prejudice to the defendant. As an initial matter, however, the parties disagree as to whether the doctrine of laches can apply to a Title VII claim brought by the EEOC. The EEOC argues the doctrine of laches does not apply to actions brought by the federal government. Eighth Circuit precedent has held that the court has narrow discretion to dismiss a case where there has been an inordinate EEOC delay in filing suit, and that this delay unduly prejudiced the defendant. In this case, the court expressed no opinion on whether laches can operate to bar federal agency action, as it disposed of the case on narrower grounds. It noted, however, that many of those courts that have applied section 706(1) in dismissing dilatory agency actions have simultaneously refused to apply the laches doctrine because of its uncertain parameters. Setting the ability to raise such an affirmative defense in the first instance, the court noted that to prevail on the equitable defense of laches in a case such as this, the defendant must clearly establish that it has been substantially and unduly prejudiced in its ability to defend the lawsuit because of the EEOC's delay. The defendant failed to do so, speculating only that it might have been able to bring a stronger defense had the matter been brought sooner. This is insufficient.

Therefore, the court found the EEOC had established its *prima facie* case that the defendant's use of the physical abilities test had a disparate impact on female job applicants, and that the defendant failed to present sufficient evidence that the use of the test was justified by business necessity, or that it suffered prejudice as a result of any delay the EEOC had in bringing the case. The court granted the EEOC's motion for summary judgment in its entirety.

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