THE LITTLER REPORT

ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2013

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

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Littler™

IMPORTANT NOTICE

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

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ANNUAL REPORT ON EEOC DEVELOPMENTS: FISCAL YEAR 2013

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INTRODUCTION

Over the years, Littler has provided periodic reports on significant cases, regulatory developments and other activities involving the Equal Employment Opportunity Commission (EEOC or "the Commission"). While such guidance is intended to update employers on significant EEOC developments as they arise, we believe that employers can also benefit from an annual update and overview of key EEOC developments. This **Annual Report on EEOC Developments—Fiscal Year 2013** (hereafter "Report"), our third annual report, is designed as a comprehensive guide to significant EEOC developments over the past fiscal year.

This year's Report examines the EEOC's continued steps to implement its Strategic Enforcement Plan for Fiscal Years 2012-2016, including its focus on pursuing systemic cases. The EEOC considers "systemic cases" as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location."

At the outset, in the introductory chapter, as we approach the 50th anniversary of Title VII, we briefly look back at pivotal developments tied to the EEOC's enforcement authority, particularly the evolution of Title VII's statutory framework and key case developments tied to the growth of "pattern or practice" and class-type litigation initiated by the EEOC. Despite the agency's long history of having authority to pursue "pattern or practice" cases (*i.e.*, starting with the 1972 amendments to Title VII), numerous issues remain unsettled, including: (1) the applicable burden of proof to use in class-type litigation; (2) the damages available based on such claims, including at what stage of the litigation certain damage claims, such as punitive damages, can be considered; (3) the applicable statute of limitations to apply when the EEOC is seeking relief on behalf of a group of individuals; and (4) the nature and extent of the EEOC's duty to engage in "conciliation" prior to filing class-type suits against an employer.

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

Part One, entitled, "Reflections on Fifty Years of Title VII of the Civil Rights Act of 1964 and Unsettled Issues Involving Systemic Claims and Class-Based Litigation by the EEOC," highlights the statutory background, case developments and key issues that need to be addressed in any pattern or practice and/or class-based litigation initiated by the EEOC. A more expansive discussion of recent case developments involving key issues highlighted in this section is included in other sections of the Report.

Part Two of the Report provides an overview of EEOC charge activity, litigation and settlements over the past year, emphasizing the types and location of lawsuits filed by the Commission. Significant settlements, jury awards and judgments also are highlighted. More details on noteworthy consent decrees, conciliation agreements and judgments are summarized in Appendix A. Appellate cases involving the EEOC, either as an appellant or amicus curiae, are summarized in Appendix B.

Part Three reviews key regulatory developments in FY 2013, including the Commission's activities beyond formal rule-making efforts, and areas in which the EEOC plans to devote its attention over the coming year. For example, the Report highlights the Commission's Strategic Plan and Strategic Enforcement Plan, outlining the agency's list of priorities. Other noteworthy regulatory activities as well as current and anticipated trends are discussed in this section of the Report. References are made to more comprehensive Littler updates and/or reports for a more in-depth discussion of the topic, as applicable.

Part Four reviews EEOC investigations and subpoena enforcement actions, paying particular attention to instances in which the court granted the EEOC broad authority to conduct class-type investigations. This section highlights the decrease in subpoena enforcement actions, but also reviews key developments over the past year, including recent case authority addressing the importance of meeting key timelines in challenging EEOC subpoenas in Title VII and ADA cases. This section should be read in tandem with Appendix C to the Report, which summarizes the EEOC's litigation involving subpoena enforcement actions over the past year. Recent cases in which the courts have limited the scope of the EEOC's authority also are discussed in this section of the Report.

Part Five highlights key court cases addressing a number of topics, including: (1) pleading deficiencies raised by employers and recent EEOC attacks on employer responses to complaints; (2) unreasonable delay by the EEOC in its investigations and use of the laches defense in subsequent litigation; (3) statutes of limitations cases involving both pattern or practice and other types of claims; (4) employer challenges based on the EEOC's alleged failure to meet its conciliation obligations prior to filing suit; (5) intervention-related issues, both when the EEOC attempts to enter a case through intervention and when third parties attempt to join in as plaintiffs in litigation filed by the EEOC; (6) class discovery and general discovery issues in EEOC litigation, as filed by employers and the EEOC; (7) favorable and unfavorable summary judgment rulings and lessons learned; (8) trial-related issues; and (9) circumstances in which the courts have awarded attorneys' fees to employers after prevailing in lawsuits filed by the EEOC.

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

I. REFLECTIONS ON FIFTY YEARS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AND UNSETTLED ISSUES INVOLVING SYSTEMIC CLAIMS AND CLASS-BASED LITIGATION BY THE EEOC

Nearly 50 years ago, on the heels of passage of the Equal Pay Act of 1963,[1] President Lyndon Johnson on July 2, 1964 signed into law the Civil Rights Act of 1964,[2] which prohibits discrimination on the basis of race, color, religion, sex or national origin. Since that time, we have seen the continued expansion of protections under our country's discrimination laws to include prohibitions of employment discrimination based on age, pregnancy, disability and genetic status.[3]

There have also been pivotal events concerning the EEOC's enforcement powers worth mentioning. Prior to the 1972 amendments to Title VII, the EEOC had no enforcement authority and was merely limited to "informal methods of conference, conciliation, and persuasion."[4] The 1972 amendments to section of 706 of Title VII expanded the EEOC's enforcement powers by authorizing the EEOC to bring civil actions in federal district court against private employers reasonably suspected of violating Title VII. Prior to that time, only private parties could file individual lawsuits in support of discrimination claims.

While there has been a recent focus on systemic[5] and class-type claims,[6] the EEOC's enforcement authority to file such claims is not a new development. The EEOC has been armed with such power since the 1972 amendments when the EEOC was given authority based on section 707 of Title VII to file "pattern or practice" discrimination lawsuits in support of class-based claims.[7] Previously, such actions could be brought only by the U.S. Attorney General. As an example, *International Brotherhood of Teamsters v. United States*,[8] one of the leading pattern or practice lawsuits that serves as a guidepost in dealing with the applicable burdens of proof in pattern or practice cases, was initiated by the U.S. Attorney General.

In 1980, the U.S. Supreme Court in *General Telephone Company v. EEOC*[9] eased the EEOC's burden in bringing class-type claims. The Court held that the requirements under Rule 23 of the Federal Rules of Civil Procedure did not apply to the EEOC, thus making it easier to file class-type discrimination claims against employers.[10] As significantly, in *General Telephone,* which involved claims of sex discrimination on behalf of a group of female workers, the Court clarified that the EEOC could seek relief under section 706 of Title VII on behalf of a "person or persons aggrieved."[11] These early developments certainly could not have foreshadowed the close scrutiny the Court would place on broad-based employment discrimination claims, as best evidenced by the Court's 2011 decision in *Wal-Mart Stores, Inc. v. Dukes.*[12] Such developments undoubtedly have contributed to the EEOC's increased focus on pattern or practice and class-type litigation based on the view that the Commission is not constrained by the procedural requirements for bringing class actions as set forth in Rule 23 of the Federal Rules of Civil Procedure.[13]

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

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

3 Age Discrimination in Employment Act (ADEA), Pub. L. No. 90-202 (1967), *codified at* 29 U.S.C. § 621 *et seq.*; Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555 (1978), *codified at* 42 U.S.C. § 2000e(k); Americans With Disabilities Act (ADA), Pub. L. No. 101-336 (1990), *codified at* 42 U.S.C. §§ 12101-12213 (2000); Americans with Disabilities Act Amendments Act (ADAAA), Pub. L. No. 110-325 (2008), *codified at* 42 U.S.C. § 12101; and Title II of the Genetic Information Nondiscrimination Act (GINA), Pub. L. No. 110–233 (2008), *codified at* 42 U.S.C. §2000ff *et seq.*

4 An excellent discussion of Title VII's enforcement history is set forth in *General Telephone Company v. EEOC*, 446 U.S. 318 (1980).

5 In the EEOC's 2006 Systemic Task Report, the Commission defined systemic cases as "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location." *See* EEOC, Systemic Task Report to the Chair of the Equal Employment Opportunity Commission, *available at* http://www.eeoc.gov/eeoc/task_reports/systemic.cfm#II.

6 The EEOC's current focus on systemic investigations and related litigation is highlighted in the EEOC's current Strategic Plan and Strategic Enforcement Plan. The Strategic Plan was adopted 4-1 by the EEOC on February 22, 2012. *See* EEOC, United States Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016 (2012), *available at* http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm. The Strategic Enforcement Plan (SEP) was approved by the Commission on December 17, 2012. *See* EEOC, United States Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012) *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm. The EEOC's March 2006 Systemic Task Force, discussed at *supra* note 5, clearly led the way for the recent chain of events.

7 42 U.S.C. § 2000e-6 (*i.e.*, section 707).

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

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

10 Fed. R. Civ. P. 23 (a) imposes the prerequisites of numerosity, commonality, typicality, and adequacy of representation as requirements for certification of a lawsuit as a class action.

11 42 U.S.C. §2000e-5 (*i.e.*, section 706).

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

13 As discussed in the EEOC's 2006 Systemic Task Force Report, the Commission has also had the same authority to pursue systemic discrimination under the ADA as it does under Title VII because the ADA incorporates the powers, remedies and procedures set forth in Title VII. *See* Systemic Task Force Report at http://www.eeoc.gov/eeoc/task_reports/systemic.cfm#II. Similar provisions exist under § 207(a) of GINA. The Commission also has had authority to pursue class cases under the ADEA and the Equal Pay Act (EPA). Under these statutes, the Commission has authority to initiate "directed investigations," even without a charge of discrimination and pursue litigation, where warranted.

Recent case developments, however, demonstrate that the permissible scope of, and available relief for, class-type claims under sections 706 and 707 remain unsettled. Numerous procedural and substantive battles have been at the forefront in recent litigation with the EEOC, including: (1) the applicable burden of proof to use in class-type litigation; (2) the damages available based on such claims, including at what stage of the litigation certain damage claims, such as punitive damages, can be considered; (3) the applicable statute of limitations to employ when the EEOC is seeking relief on behalf of a group of individuals; and (4) the nature and extent of the EEOC's duty to engage in "conciliation" prior to filing suit.

For certain issues, the EEOC has attempted to blur the distinctions between sections 706 and 707 where it is more favorable to do so, and otherwise argue that the agency has far more leeway under section 707 in "pattern or practice" claims with respect to the applicable limitations periods covering potential "victims" for whom the EEOC is seeking relief.

Disparate impact claims, which involve facially neutral employment practices that have a disparate impact on individuals in a protected class, also have been subject to recent legal challenges in class-type litigation by the EEOC and thus warrant some discussion.

While this year's Report highlights many of the case developments involving these pivotal issues affecting systemic and class-based litigation by the EEOC, the discussion below previews some of the key issues that have been front and center in the courts.

A. Distinctions Between Section 706 and 707 Claims

As discussed above, Congress empowered the EEOC to challenge alleged discriminatory practices based on two separate sections in Title VII: section 706 and section 707. The courts have applied a different burden of proof for claims made under each section, depending on the nature of the claim. Notably, jury trials and compensatory and punitive damages are available under section 706, but not under section 707 of the Act.

The typical discrimination claim is brought under section 706, which authorizes the EEOC to sue an employer on behalf of a person or group of aggrieved individuals. The courts have applied the basic *McDonnell Douglas* burden-shifting framework when dealing with such actions.[14] Based on this theory, the EEOC must first establish a *prima facie* case of discrimination. The burden then shifts to the employer to offer evidence of a legitimate, nondiscriminatory reason for its actions. If the employer articulates such a reason, the burden then returns to the plaintiff to show that the employer's reason is a pretext for discrimination. Despite these shifting burdens of production, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."[15] When dealing with claims on behalf of a group of individuals, the courts have held that the EEOC "stands in the shoes of those aggrieved in the sense that it must prove all of the elements of their…claims to obtain individual relief for them."[16]

In contrast, section 707 authorizes the EEOC to file a lawsuit when it "has reasonable cause to believe that [an employer] is engaged in a pattern or practice" of unlawful discrimination.[17] The Supreme Court's 1977 *Teamsters* decision sets forth the basic standard that has withstood the test of time and holds that the EEOC must "establish by a preponderance of the evidence that …discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[18] Significantly, the EEOC cannot prevail in a section 707 action by showing "the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts."[19] These cases are typically proved based on statistical evidence, coupled with anecdotal evidence. The Supreme Court has explained that proof of a pattern or practice primarily depends on statistical evidence, perhaps supplemented with anecdotal testimony that brings the statistical evidence "convincingly to life."[20] When the *Teamsters* framework is used, the courts typically have bifurcated the proceedings into a liability phase, followed by a damages phase, in which the scope of individual relief is determined and a presumption of liability applies.[21] From an employer's perspective,

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

15 *Texas Dept't of Community Affairs v. Burdine*, 450 U.S. 248 253 (1981).

16 *See EEOC v. CRST Van Expedited, Inc.*, 611 F. Supp. 2d 918, 929 (N.D. Iowa 2009), *aff'd on other grounds*, 679 F.3d 657, 694 (8th Cir. 2012).

17 42 U.S.C. § 2000e-6(a). It is noteworthy that pattern or practice claims focus solely on "intentional discrimination" and do not apply to disparate impact claims. *See, e.g., Davis v. Coca Cola Bottling Co.*, 516 F. 3d 955, 964-65 (11th Cir. 2008) ("section 707(a) of the Civil Rights Act of 1964…entitles the Government to bring a pattern or practice claim on behalf of a class of similarly situated employees …against an ongoing act of intentional discrimination").

18 *Teamsters*, 431 U.S. at 336.

19 *Id*.

20 *Id* at 339. *See also*, Allan King, *"Gross Statistical Disparities" as Evidence of a Pattern and Practice of Discrimination: Statistical versus "Legal Significance,"* 22 The Labor Lawyer 271 (1977).

21 *Id*. at 361.

the EEOC has an advantage in proving pattern or practice claims because once the EEOC passes the threshold of demonstrating class-wide discrimination, "the burden then rests on the employer to demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."[22]

It is not uncommon for the EEOC to file "hybrid" actions involving sections 706 and 707. Based on this approach, the EEOC has argued that it can bring a "pattern or practice" claim under section 706 and rely on the broad-based *Teamsters* standard (as applied to section 707 claims) but also seek compensatory and punitive damages and jury trials, which are permissible only under section 706. The courts remain unsettled whether the EEOC is permitted to bring such "hybrid" class-based claims.

As an example, in *EEOC v. Bass Pro Outdoor World, LLC*,[23] a nationwide race discrimination claim currently pending in a Texas federal district court, the EEOC brought an action against the employer under both section 706 and 707. The district court issued a strongly worded opinion, taking the view that these statutory sections are distinct and must be treated separately.[24] In contrast, *in Serrano v. Cintas,*[25] the U.S. Court of Appeals for the Sixth Circuit reversed a district court and held that the EEOC could pursue a "pattern or practice" claim under section 706. While the courts will continue to wrestle with this issue, the significant distinctions between section 706 versus 707 are highlighted below.

B. Contrasting Rights Involving Available Damages and Jury Trials under Section 706 versus Section 707

As most readers are aware, one of the most significant developments in the Equal Employment Opportunity (EEO) field after enactment of the Civil Rights Act of 1964 was the passage of the Civil Rights Act of 1991 (CRA),[26] which not only permits jury trials in Title VII actions, but also provides for awards of compensatory and/or punitive damages of up to $300,000 for an aggrieved individual. However, based on the express provisions of the CRA, jury trials and compensatory and punitive damages were limited to claims under section 706 of Title VII.[27] Section 707 merely provides for the traditional equitable remedies available under Title VII (*e.g.* back pay, front pay, attorneys' fees and injunctive relief). Section 1981a also provides for jury trials involving such claims.

The EEOC's effort to blur the distinction between section 706 and 707 is particularly evident where punitive damages are concerned. The EEOC's approach has been to rely on the *Teamsters* method of proof, arguing that class-type cases should be bifurcated between liability and damages, but nonetheless that punitive damages should be heard during the "Phase I" proceeding involving liability.[28] In the EEOC's view, the same jury should decide liability and then determine "whether the pattern or practice was done with malice or reckless indifference to the federally protected rights" of the aggrieved group, "including an amount to be awarded to the aggrieved as punitive damages."[29] Following those determinations, a second jury should resolve the issue of compensatory damages for each individual.[30]

On the other hand, the issue of when potential punitive damages should be presented to a jury in litigation by the EEOC remains unsettled. From an employer's perspective, a compelling argument can be made that based on the Seventh Amendment and the right to a jury trial, one jury should hear all damages, rather than separating punitive and compensatory damages into "Phase I" and "Phase II" in

22 *Id*. at 362.

23 *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4:11-cv-03425, *complaint filed,* (S. D. Tex. Sept. 9, 2011).

24 *Id*., *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 8268 (S.D. Tex. May 31, 2012).

25 699 F. 3d 884 (6th Cir. 2012), *reh'g en banc*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied*, 2013 U.S. LEXIS 6874 (U.S. Oct. 7, 2013).

26 Pub. L. No. 102-166 (1991), *codified at* 42 U.S.C. § 1981 *et seq.*

27 The applicable statutory provision, 42 U.S.C. §1981a, expressly provides as follows:

> In an action brought by a complaining party under section 706 or 717 [*which involves actions against the Federal Government]* of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act, and provided that the complaining party cannot recover under section 1981 of this title [i.e. 42 U.S.C.§1981], the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

Similar relief is available under the Rehabilitation Act and ADA. *See* § 1981a(a)(2). Such relief also is available based on violations under GINA. *See generally* EEOC, Background Information for EEOC Notice of Proposed Rulemaking On Title II of the Genetic Information Nondiscrimination Act of 2008, *available at* http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html#fn1.

§1981a also provides for jury trials involving such claims.

28 *See, e,g, EEOC v. Pitre, Inc.,* 908 F. 2d 1165 (D. N. M. 2012), which highlights the cases supporting the EEOC's position as well as limiting the punitive damage inquiry to "Phase II" when other damages are considered.

29 *Id*.

30 *Id*.

reliance on *Teamsters*. The *Teamsters* decision was decided before the Civil Rights Act of 1991 at a time when only equitable damages were permissible under Title VII. Thus, the EEOC has no basis to rely on *Teamsters* in arguing that the jury should decide punitive damages in "Phase I," to the extent that bifurcation is even considered.[31] Further, bifurcation may even be subject to question, unless one jury considers both liability and damages. As explained by one court, "The Seventh Amendment entitles parties to have fact issues decided by one jury, and prohibits a second jury from reexamining those facts and issues."[32]

It is anticipated that the issue of when punitive damages may be presented to a jury in EEOC class-type litigation will continue to be debated by the courts.

C. Applicable Limitations Period under Sections 706 and 707

The basic limitations period for EEO claims based on Title VII is set forth in section 706 of the Act, which provides that discrimination claims must be brought no later than 300 days after the discriminatory action.[33] In filing "pattern or practice" claims under section 707, the EEOC is also guided by the express terms of Title VII, which provide that all actions under section 707 "shall be conducted in accordance with the procedures set forth in section 2000e-5 *[section 706]* of this title."[34] Because section 707 incorporates section 706's "procedures," there is a strong implication that the EEOC must bring pattern or practice cases within the 300-day period defined in section 706.[35] Despite this implication, the EEOC routinely takes the position that the 300-day limit associated with filing a timely charge under section 706 does not apply under section 707 when the Commission seeks relief on behalf of a class of individuals in actions triggered by another individual's timely charge. The EEOC thus attempts to add section 707 claims when pursuing class-type claims, attempting to circumvent the 300-day limitations period under section 706.

While the federal circuit courts of appeals have not yet addressed the applicable limitations period under section 707, a strong majority of district courts, especially in the last few years, have held the 300-day period applies.[36] Generally, the 300-day limitations period is triggered by the filing of a claim (the court will count back 300 days from the date of filing and require that the discriminatory act occur within that timeframe). Although by no means settled law, some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.

Employers opposing the EEOC's position and calling for the limitations period set forth in section 706 for pattern or practice claims brought by the EEOC have argued as follows: absent a clear expression by Congress, there is no reason for providing the EEOC an exception from Congress' policy favoring the filing of prompt charges and notifying employers of investigations. The alternative, posited by the EEOC in its pattern or practice matters, is to free the agency from any time limits. Although the language of the law makes clear that the 300-day requirement applies also to section 707 pattern or practice claims, the EEOC has contended—with mixed results—that such a requirement is contrary to Congress' intent for the EEOC to remedy systemic discrimination in the workplace. The EEOC argues that it does not proceed as a representative of either the individual who filed the initial charge or for any others for whom it seeks relief; rather, it proceeds primarily in the public interest. Alternatively, the EEOC argues that when it succeeds in proving an unlawful pattern or practice of unlawful discrimination, all unlawful acts that stem from that pattern or practice are actionable regardless of whether such acts occurred before the 300-day charge filing limitation. In short, the EEOC has taken the view that it should not be bound by any limitations period because it is proceeding on behalf of the public.

31 *See Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931) (Seventh Amendment must be the guide when issues of liability and damages are intertwined and cannot be tried to different juries).

32 *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 750 (5th Cir. 1996). *See also* discussion in in Defendant's Motion to Stay Discovery Pending Ruling on Summary Judgment, *EEOC v. Bass Pro Outdoor World, LLC*, Case No. 4:11-cv-03425 (S.D. Tex.), Document No. 108 at 19 (April 22, 2013), *citing Smith v. Texaco, Inc.*, 281 F. 3d 477 (5th Cir. 2002).

33 Section 706(e), 42 U.S.C § 2000e-5.

34 42 U.S. C. §2000e-6(e).

35 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.

36 *See EEOC v. U.S. 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).

The EEOC has argued in the alternative that its pattern or practice lawsuits fit within the exceptions provided by the "continuing violations" doctrine. The continuing violations doctrine allows courts to consider the cumulative effect of individual acts that, on their own, do not amount to actionable discrimination, but considered as a whole may give rise to unlawful discrimination, such as through a hostile work environment. In such a case, so long as an act contributing to the claim occurred within the 300-day period, the court may consider component acts that gave rise to the hostile work environment that occurred outside the statutory period.[37]

In general, the courts have rejected the EEOC's reliance on the "continuing violation" theory in trying to circumvent the 300-day filing requirement. Specifically, the courts have distinguished between "component acts," which cumulatively may amount to a discriminatory claim and "discrete acts" which, on their own, may amount to an adverse action. The former are actionable if at least one of the acts occurred within the 300-day statutory period, whereas the latter are time-barred if not timely filed. In short, "[t]he 'pattern or practice' alleged should not be used to allow the EEOC to seek relief on behalf of otherwise time-barred parties when the challenged practice involves discrete acts of discrimination."[38] As significantly, even when dealing with claims in which the continuing violation theory has been successful, such as hostile work environment claims, some courts have held that the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant, within the 300-day window, suffered at least one act considered to be part of the unlawful employment practice.[39]

It seems clear that the scope of the relief sought by the EEOC will continue to be debated until the courts ultimately determine on whose behalf the EEOC can seek relief and whether a limitations period applies to "pattern or practice" claims under section 707 of Title VII.

D. Unsettled Issues Involving Conciliation Obligations under Title VII

Before filing a lawsuit under Title VII based on any claims, including pattern or practice claims under section 707 or claims under section 706, the EEOC is required to investigate and then attempt to eliminate any alleged unlawful employment practice by informal methods of conciliation.[40] Thus, the EEOC must investigate and then engage in "conciliation" with an employer prior to filing a lawsuit. Only after "[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer."[41] As one court recently noted, the EEOC must "1) serve the employer with a notice of the charge, including the date, place, and circumstances of the alleged unlawful employment practice; 2) investigate the alleged unlawful employment practice; 3) determine that there is reasonable cause to believe the charged unlawful employment practice occurred; and 4) eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[42] 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.[43] In extreme cases, courts even have gone so far as to dismiss certain claims filed by the EEOC if the EEOC failed to engage in good faith conciliation.[44]

Employers have regularly challenged the sufficiency of the EEOC's conciliation efforts after the EEOC has actually filed suit, seeking dismissal based on the EEOC's purported failure to comply with its statutory conciliation obligations. Employers have specifically alleged that the EEOC's pre-litigation conciliation efforts have been insufficient on both procedural and substantive grounds. One of the most cited cases for this principle is *EEOC v. CRST Van Expedited, Inc.*,[45] a section 706 sexual harassment lawsuit, in which the appeals court affirmed the district court's finding that the EEOC's failure to identify the specific class members during conciliation barred the EEOC from seeking relief for such individuals in any subsequent lawsuit against the employer. The appeals court found that the EEOC denied the employer a meaningful opportunity to conciliate those claims. Other courts, however, have held that the EEOC was not required to identify the specific class members during conciliation. In one case involving an ADA claim, the court opined that the employer was given "a meaningful opportunity to engage in conciliation" because it was aware that the EEOC's finding pertained to a class of disabled individual and the EEOC had informed the employer that it was seeking relief for three specific types of violations.[46]

37 By contrast, discrete acts—such as failure to hire, failure to promote, or a termination—are barred as untimely if they are not raised in a discrimination charge within 300 days.

38 *EEOC v. Kaplan*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013), *citing EEOC v. Bloomberg, L.P.,* 751 F.Supp.2d 628, 648 (S.D.N.Y. 2010).

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

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

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

42 *EEOC v. Global Horizons, Inc.,* 2013 U.S. Dist. LEXIS 53282 (E.D. Wash. April 12, 2013).

43 *Global Horizons,* 2013 U.S. Dist. LEXIS 53282, at *21.

44 *See EEOC v. Bloomberg L.P.*, 751 F. Supp. 2d. 628 (S.D.N.Y. 2011)

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

46 *See EEOC v. United Road Towing, Inc.*, 2012 U.S. Dist. LEXIS 70203 (N.D. Ill., May 11, 2012).

A primary issue that remains unsettled is the applicable standard in examining the "good faith" efforts made by the EEOC in the conciliation process. The Second, Fifth, and Eleventh Circuits appear to require courts to evaluate "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."[47] Based on this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.[48] The Fourth and Sixth Circuits, on the other hand, have adopted a standard that is much more deferential to the EEOC.[49] Under this standard, a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC ... and is beyond judicial review."[50]

The most recent appeals court to address this issue is the Seventh Circuit, which issued its decision in *EEOC v Mach Mining, LLC* on December 20, 2013,[51] which the EEOC most likely will rely on to argue that it is not bound by a "good faith" standard because the conciliation process is not subject to judicial review (at least in the Seventh Circuit). Therein, the EEOC challenged the employer's "failure to conciliate" affirmative defense and moved for partial summary judgment on the issue. The EEOC relied on Title VII's conciliation language and prior Seventh Circuit decisions concluding that the EEOC's pre-suit administrative functions are not judicially reviewable by the courts. The appellate court cited, in relevant part, *EEOC v. Caterpillar, Inc.*,[52] which held that a probable cause determination by the EEOC is not judicially reviewable. In reversing the district court's decision that had relied on the decisions from other circuits permitting the employer to challenge the EEOC's approach to conciliation, the Seventh Circuit acknowledged that it was "the first circuit to reject explicitly the implied affirmative defense of failure to conciliate" and held, "The language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit."

Thus, the scope of the EEOC's conciliation obligation under Title VII remains in flux.

E. The Permissible Scope of Disparate Impact Claims

Finally, any discussion of Title VII and its evolution over the past 50 years must include both disparate treatment and disparate impact claims. Since Title VII's inception, various employment practices, neutral on their face but having a "disparate impact" on protected groups, have been subject to judicial challenge. Based on the EEOC's current Strategic Enforcement Plan (SEP), in which alleged hiring barriers are being closely examined, it is abundantly clear that disparate impact claims will be an important part of the EEOC's toolkit in challenging various employment practices. Even so, serious questions have been raised concerning the methods used in proving such claims and even the employment practices being challenged under Title VII.

The creation of the disparate impact doctrine clearly was based on a need to remedy discriminatory employment practices. In *Griggs v. Duke Power*,[53] an employer with a history of excluding African Americans from the workplace established hiring requirements—including a high school degree and passing certain aptitude tests—for unskilled positions. In striking down such practices, the Supreme Court held "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the *status quo* of prior discriminatory employment practices." The Court further explained, "The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity."[54] The Court thus held that "any given requirement must have a manifest relationship to the employment in question."[55]

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

48 *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Asplundh Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003).

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

50 *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

51 2013 U.S. App. LEXIS 25454, _F.3d_, (7th Cir. Dec. 20, 2013); *see also* 2013 U.S. Dist. LEXIS 10859 (S.D. Ill. Jan. 28, 2013), *appeal filed*, No. 13-2456 (7th Cir. July 31, 2013).

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

53 *Griggs v. Duke Power*, 401 U.S. 424 (1971).

54 *Id* at 431.

55 *Id* at 432.

Over the years, the disparate impact theory has been relied on to challenge a broad range of employment practices.[56] In 1989, the Supreme Court expanded the business necessity defense in *Wards Cove Packing Co., Inc. v. Antonio*,[57] by holding that a challenged employment practice need not be "essential" or "indispensable," but merely needs to "serve[ ], in a significant way, the legitimate interests of the employer."[58] As significantly, the Court shifted the burden of proof from the employer to the employee.

The Civil Rights Act of 1991 essentially reversed *Wards Cove* and its definition of business necessity, codifying the concept of business necessity as it existed prior to *Wards Cove*.[59]

Over the past several years, the EEOC has relied on the disparate impact theory to target alleged hiring barriers, such as reliance on an applicant's criminal or credit history to exclude a candidate from hire. The EEOC's focus on criminal and credit history received significant attention over the past fiscal year, particularly based on the EEOC's SEP, which announced that "hiring barriers" were one of the EEOC's priorities. Notwithstanding, two EEOC lawsuits implicating employers' use of credit and/or criminal history were ruled on by courts following summary judgment motions, resulting in setbacks to the EEOC's initiatives on this front.[60]

It is well settled that disparate impact cases focus on statistics. As discussed in the summary judgment opinion *EEOC v. Freeman*,[61] which involved a challenge to credit and criminal history based on the alleged disparate impact against African Americans and males,[62] the court explained, "The plaintiff bears the burden of proving discriminatory impact by showing statistical disparities between the number of protected class members in the qualified applicant group and those in the relevant segment of the workforce. Upon such a showing, the burden then shifts to the employer to prove that the allegedly discriminatory policies or practices are job-related for the position in question and consistent with business necessity."[63]

In both *Freeman* and *EEOC v Kaplan*,[64] discussed further in this Report, the district court in each case held that the EEOC failed to meet its initial burden based on effective challenges to the experts' reports relied on to show disparate impact.

More importantly, the court in *Freeman* raised a serious question about the EEOC's reliance on the disparate impact theory under our nation's discrimination laws to challenge an employer's use of criminal and credit history in the hiring process, explaining:

> By bringing actions of this nature, the EEOC has placed many employers in the "Hobson's choice" of ignoring criminal history and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers. Something more, far more, than what is relied upon by the EEOC in this case must be utilized to justify a disparate impact claim based upon criminal history and credit checks. To require less, would be to condemn the use of common sense, and this is simply not what the discrimination laws of this country require.[65]

While it is clear that the EEOC will continue to rely on the disparate impact theory to challenge hiring and other practices that it believes are improperly used as hiring barriers, it is anticipated that the courts will wrestle with this evolving area of the law, particularly in circumstances where an employer establishes that the hiring or screening tool relied on was based on legitimate business considerations completely unrelated to discrimination and the employer otherwise has a strong record of equal employment opportunity.

56 *See e.g. Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975) (discriminatory tests); *Dothard v. Rawlinso*n, 433 U.S. 321 (1977) (height and weight requirements for prison guards). *But see N.Y. City Transit Auth. v. Beazer,* 440 U.S. 468 (1979) (Court held it was permissible under Title VII to refuse to hire anyone using methadone to treat addiction to illegal drugs for "safety sensitive" positions on a city transit system). An excellent discussion of the history of the disparate impact theory is set forth in *El v. Southeastern Penn. Transp. Auth. (SEPTA)*, 479 F.3d 232 (3d Cir. 2007).

57 *Wards Cove Packing Co., Inc. v. Antonio,* 490 U.S. 642 (1989).

58 *Id* at 659.

59 42 U.S.C. § 2000e-2(k).

60 *See EEOC v. Kaplan*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013), *and EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013). The rulings have not altered the EEOC's focus on this area, as demonstrated by two lawsuits filed in July 2013 challenging criminal history practices by employers. *See* Press Release, EEOC, *EEOC Files Suit Against Two Employers for Use of Criminal Background Checks* (June 11, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm.

61 *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).

62 The EEOC initially included claims on behalf of Hispanics, but the EEOC voluntarily dismissed the portion of the lawsuit prior to the employer filing the summary judgment motion in the case.

63 *Freeman,* 2013 U.S. Dist. LEXIS 112368, at * 19.

64 *EEOC v. Kaplan*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013).

65 *Freeman,* 2013 U.S. Dist. LEXIS 112368, at **53-54.

F. Final Comments

The above discussion is intended to serve as a preview of many of the issues that are discussed in greater detail in this Annual Report on EEOC Developments. Since the EEOC has placed increased attention on systemic and class-type claims, we are hopeful that this introductory chapter will serve as a useful guide as we describe in greater detail recent EEOC developments involving systemic and related claims.

II. OVERVIEW OF EEOC CHARGE ACTIVITY, LITIGATION AND SETTLEMENTS

A. Review of Charge Activity, Backlog and Benefits Provided

On December 16, 2013, the EEOC announced the publication of its FY 2013 Performance and Accountability Report (referenced herein as the "EEOC 2013 Annual Report").[66] As discussed in the EEOC's 2013 Annual Report, during FY 2013 the Commission again received nearly 100,000 discrimination charges. Although the number of charges filed in FY 2013 was nearly 6,000 less than that filed in the prior three fiscal years, the total amount still places FY 2013 among the top five fiscal years in terms of highest number of charges received.[67] Since FY 2006, there has been a steady increase in the level of charge activity, except for a minor dip in FY 2009 and again in FY 2013, as shown by the following chart:[68]

FISCAL YEAR	NUMBER OF CHARGES
2006	75,768
2007	82,792
2008	95,402
2009	93,277
2010	99,922
2011	99,947
2012	99,412
2013	93,727

As a result of sequestration and limited resources, the Commission reported a slight increase in its inventory of charges, its charge "backlog." The EEOC reports that its inventory increased by 467 charges, from 70,312 charges in FY 2012 to 70,779 in FY 2013.[69] The Commission also resolved a total of 97,252 charges in FY 2013, a drop of nearly 14,000 resolutions from FY 2012.[70] Nevertheless, the Commission terms this "significant decrease" a "remarkable achievement given the decline in staffing and resources the agency faced in FY 2013."[71]

B. Continued Focus on Systemic Investigations and Litigation

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

The EEOC's 2013 Annual Report focuses in many respects on the Commission's new Strategic Plan for Fiscal Years 2012 through 2016 ("Strategic Plan"), approved by the Commission on February 22, 2012, which "reiterated the importance of [the] systemic enforcement program as a top agency priority."[72] The 2013 Annual Report outlines the resources devoted to strengthening the systemic program, including:

- In FY 2013, the Commission launched the Systemic Watch List, a software application designed to coordinate the investigation of multiple charges filed against the same employer involving similar issues. As designed, when a new charge is filed that matches another ongoing investigation or lawsuit, the program issues an automatic alert to staff working on the case, facilitating collaboration across the Commission and avoiding duplication of efforts;

66 The EEOC refers to the FY 2013 Performance and Accountability Report as the "PAR" for FY 2013 (herein cited as "EEOC 2013 Annual Report"). EEOC, Fiscal Year 2013 Performance and Accountability Report (Dec. 16, 2013), *available at* http://www.eeoc.gov/eeoc/plan/index.cfm; *see also* Press Release, EEOC, *EEOC Issues FY 2013 Performance Report* (Dec. 16, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/12-16-13.cfm. In this section of the Report, data from the EEOC's 2013 FY Annual Report is compared to the EEOC's 2012 FY Annual Report (herein cited as "EEOC 2012 Annual Report"). EEOC, Fiscal Year 2012 Performance and Accountability Report (Nov. 19, 2012) *available at* http://www.eeoc.gov/eeoc/plan/2012par.cfm.

67 The EEOC's FY 2013 commenced on October 1, 2012 and ended on September 30, 2013.

68 *See* EEOC 2013 Annual Report at 27.

69 *Id.* at 11.

70 *Id.*

71 *Id.*

72 EEOC 2013 Annual Report at 31.

- Expanded use of webinars to provide training on systemic investigations and litigation, including use of technology to facilitate systemic work; and
- Expanded use of the CaseWorks system, which provides a central shared source of litigation support tools that facilitate the collection and review of electronic discovery in order to support greater collaboration in development of cases for litigation. The storage capacity of CaseWorks has increased 150% and now hosts of over 30 million pages of documents.[73]

C. Systemic Investigations—Comparison Between FY 2012 and FY 2013

A review of the Commission's Annual Reports in FY's 2012 and 2013 demonstrates that although there was a significant increase in the number of systemic investigations, there was a slight decrease in terms of results achieved:[74]

SYSTEMIC INVESTIGATIONS	2013	2012
Number Completed	300	240
Settlements or Conciliation Agreements	63	65[75]
Monetary Recovery	$40 million	$36.2 million
Individuals Benefited	8,300	3,813
Reasonable Cause Findings	106	94
Percentage of "Reasonable Cause" Findings	35.3%	39.1 %
Systemic Lawsuits Filed	21	12

Although in FY 2012 the Commission underscored the impact of its systemic initiative by stating, "The $36 million recovered in systemic resolutions this year is four times the amount recovered in FY 2011," the EEOC recovered only $4 million more—for a total of $40 million in systemic monetary recovery—in FY 2013.[76]

"Reasonable cause" findings were somewhat comparable in FYs 2012 and 2013, with the EEOC reaching a "reasonable cause" finding in nearly 40% of its systemic investigations in FY 2012 and a slightly lower 35% in FY 2013. It is noteworthy that "reasonable cause" findings are typically made in less than 5% of all EEOC charges.[77]

It should also be noted that while the EEOC 2012 Annual Report stated that 12 new Commissioner charges were filed in FY 2012, the EEOC 2013 Annual Report was silent on the number of such charges filed in FY 2013.

As discussed elsewhere in this Report, in the section devoted to challenging discrimination in federal court, the Commission has continued to seek assistance from the courts during the course of various investigations, particularly systemic investigations. For FY 2013, the Commission referred to having filed 17 "subpoena enforcement and other actions."[78] This was a decrease from FY 2012 in which 33 "subpoena enforcement and other actions" were filed.[79] The decrease may stem, in part, from the EEOC's known "track record" of frequently prevailing when filing subpoena enforcement actions.

In support of its strategic initiative, the Commission reports that it maintained active relationships with a number of federal agencies, the Office of Management and Budget, and the White House.[80] Particularly noteworthy are cross-agency efforts involving the Federal Interagency Reentry Council, which comprises 20 federal agencies whose work includes working to reduce barriers to employment for

73 *Id*. at 32.

74 *Id*. *See also* EEOC 2012 Annual Report at 28.

75 According to the EEOC's 2013 Annual Report, 63 of the agency's systemic investigations were resolved through the EEOC's conciliation process. EEOC 2013 Annual Report at 32. In FY 2012, there were 46 successful conciliations of investigations and pre-determination settlements in 19 systemic investigations. EEOC 2012 Annual Report at 28.

76 EEOC 2012 Annual Report at 28; *see also* EEOC 2013 Annual Report at 32.

77 *See* EEOC, Enforcement and Litigation Statistics for all Statutes, FY 1997—FY 2012, *available at* http://eeoc.gov/eeoc/statistics/enforcement/all.cfm. See also EEOC 2011 Annual Report at 19-20.

78 EEOC 2013 Annual Report at 39.

79 *Id*. at 27.

80 *Id*. at 34.

previously incarcerated individuals, so that these individuals can compete for appropriate work opportunities.[81] The EEOC refers to its involvement as "critical to this effort" and describes itself as "a constant resource for our partner agencies on the applicability of Title VII in this area in both the private and federal sectors."[82] To that end, the EEOC reports that its enforcement and guidance on the use of arrest and conviction records remains an important model for agency partners as they take steps to ensure that constituent employers, workers, and job applicants are educated about the use of criminal records.[83] Moreover, the EEOC is exploring further collaboration with the Reentry Council with respect to joint training, presentations, and the development of related educational materials.[84]

D. EEOC Litigation and Systemic Initiative

For FY 2013, consistent with the EEOC's current focus on "strategic law enforcement," the EEOC filed 131 "merits" lawsuits, 9 more than in FY 2012, which included 89 individual suits, 21 non-systemic class suits and 21 systemic suits.[85] Until FY 2013, there had been a steady decrease in the number of merits lawsuits since FY 2005—a total of 381 suits were filed in that year.[86] Overall, however, there has been a dramatic decrease (by about 50%) in merits lawsuits filed over the past two years: 261 merits lawsuits were filed in FY 2011 compared to the 122 merits suits filed in FY 2012 and the 131 merits suits filed in FY 2013.

YEAR	INDIVIDUAL CASES	"MULTIPLE VICTIM" CASES (INCLUDING SYSTEMIC CASES)	PERCENTAGE OF MULTIPLE VICTIM LAWSUITS	TOTAL NUMBER OF EEOC "MERITS"[87] 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

Particularly noteworthy is that a vast majority of the EEOC's lawsuits are filed during the last two months of the EEOC's fiscal year. As an example, between August 1, 2013 and September 30, 2013, the EEOC filed 70 lawsuits, which was 47% of the lawsuits filed during the entire fiscal year.[88] Similarly, during FY 2012, of the 122 lawsuits filed, 69 suits (56.5%) were filed during the last two months of the fiscal year.

In reviewing all new court filings, the EEOC lawsuits included 78 Title VII claims, 51 Americans with Disabilities Act (ADA) claims, seven Age Discrimination in Employment Act (ADEA) claims, 5 Equal Pay Act (EPA) claims, and 3 Genetic Information Non-Discrimination Act (GINA) clams.[89] Based on a review of reported filings by the EEOC and Littler's tracking of all EEOC filed lawsuits, a more detailed breakdown indicates the following:

81 *Id*. at 35.

82 *Id*.

83 *Id*.

84 *Id*.

85 EEOC 2013 Annual Report at 29.

86 *See* EEOC, EEOC Litigation Statistics, FY 1997 through FY 2012, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm.

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

88 Littler monitored EEOC court filings over the past fiscal year, and the information reported on the Commission's timing for filing its lawsuits in FY 2013 is based on the firm's tracking.

89 EEOC 2013 Annual Report at 29.

CAUSES OF ACTION	NUMBER OF LAWSUITS
ADA Claims	51
Multiple Claims	31
Retaliation	32
Sex Discrimination or Related Harassment	30
Pregnancy Discrimination	8
Racial Discrimination or Related Harassment	18
Age Discrimination	7
Religious Discrimination or Related Harassment	12
National Origin Discrimination or Related Harassment	5

The top 11 states for EEOC lawsuits filed over the past fiscal year are as follows:[90]

STATE	NUMBER OF LAWSUITS
North Carolina	15
Illinois	13
Maryland	13
Texas	11
California	10
Georgia	10
Florida	8
Tennessee	6
Ohio	5
Pennsylvania	5
South Carolina	5

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

- Among the 231 lawsuits on its active docket at the end of FY 2013, 46 (20%) were non-systemic class cases and 54 (23.4%) involved challenges to systemic discrimination, thus showing that 43.4% of all pending matters involve claims on behalf of more than one purported victim.[91]
- In FY 2013, the Commission filed 21 systemic lawsuits.
- The Commission resolved 209 merits lawsuits during FY 2013 and recovered $39 million, which included 135 Title VII claims, 59 ADA claims, 16 ADEA claims, four EPA claims, and one GINA claim.[92]

Based on the EEOC's new Strategic Plan, a central aim is "combat[ing] employment discrimination through strategic law enforcement."[93] A key performance measure has been the establishment of a "baseline" by examining the proportion of systemic cases on the active docket as of September 30, 2012 and projecting future annual targets against that baseline. For FY 2012, the Commission established a baseline

90 Littler monitored EEOC court filings over the past fiscal year. The state-by-state breakdown of lawsuits filed as well as the table summarizing the types of claims filed are based upon a review of federal court filings in the United States. The EEOC does not make publicly available its data showing the breakdown of lawsuits filed on a state-by-state basis, although charge activity on a state-by-state basis has been available from the Commission's website since May 2012. *See* EEOC, FY 2009—2012 EEOC Charge Receipts by State (includes U.S. Territories) and Basis*, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges_by_state.cfm.

91 EEOC 2013 Annual Report at 29.

92 *Id.* at 30.

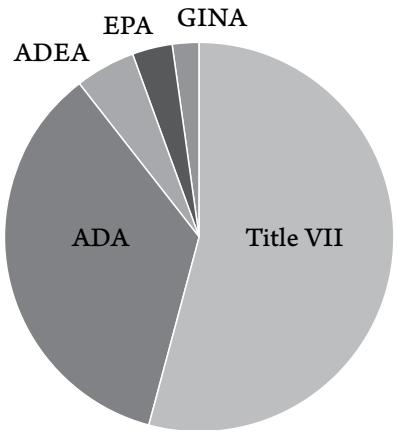
93 *Id.* at 2.

of 20%; the FY 2013 target was to increase the percentage of systemic cases on the agency's litigation docket to approximately 18-21% of all active cases.[94] In FY 2013, the EEOC "reported that 54 out of 231, or 23.4% of the cases on its litigation docket were systemic, exceeding the annual target."[95] By FY 2016, "the agency projects that 22-24% of cases on its active litigation docket will be systemic cases."[96]

E. Highlights of EEOC Litigation Statistics

As mentioned previously, for FY 2013 the Commission reported that of the 131 merit lawsuits filed, 78 of those claims implicated Title VII, 51 contained ADA claims, 7 contained ADEA claims, 5 lawsuits involved EPA claims, and 3 contained GINA claims.[97]

EEOC New Filings



As the Commission has continued its enforcement of statutes traditionally under its purview, FY 2013 marks the first time that the Commission has pursued litigation based on genetic information since the Commission issued its final regulations on GINA in 2010.[98] In all three lawsuits, the EEOC focused on the fact that the defendant companies requested family medical history when conducting physical examinations.[99] In two of the cases, physical examinations occurred after an offer of employment had been made to the candidates, whereas the remaining case involved the company requiring a mandatory physical exam as part of the employees' continued employment. Also of note, in one of the three GINA lawsuits filed by the Commission, the agency alleged pattern or practice violations by the company, which further highlights the EEOC's efforts in this new, untapped area.[100] Moreover, in all three lawsuits, the EEOC included claims of disability discrimination based on the ADA.[101]

In another aspect of the Commission's litigation efforts, in FY 2013 the Commission engaged in 13 trials.[102] Out of 11 jury cases and two bench trials, the EEOC prevailed in nine of them resulting in awards totaling more than $264 million in damages.[103] In particular, in *EEOC v. Hill Country Farms, Inc.* (S.D. Iowa), a jury found that the company had subjected 32 intellectually disabled men to verbal and physical

94 *Id*. at 15.

95 *Id.*

96 *Id*.

97 EEOC 2013 Annual Report at 29.

98 EEOC 2011 Annual Report at 5. The EEOC issued its final rule implementing the GINA employment provisions on November 9, 2010.

99 *See EEOC v. Fabricut, Inc.*, No. 4:13-cv-248 (N.D. Okla. Apr. 29, 2013); *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013); *EEOC v. All Star Seed*, No. 2:13-cv-7196 (E.D. Cal. Sept. 30, 2013).

100 *EEOC v. Founders Pavilion, Inc.*, No. 6:13-cv-6250 (W.D.N.Y. May 16, 2013).

101 *Id*.

102 EEOC 2013 Annual Report at 30.

103 *See* Press Release, EEOC, *Court Orders AA Foundries to Take Extensive Measures to Prevent Racial Harassment* (Oct. 12, 2012); Press Release, EEOC, *Jury Rules for EEOC in Sexual Harassment Case Against Finish Line* (Feb. 1, 2013); Press Release, EEOC, *Jury Awards $200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit* (Feb. 1, 2013); Press Release, EEOC, *EEOC Wins Second Victory Against RadioShack in Retaliation Case* (Feb. 28, 2013); Press Release, EEOC, *Jury Verdict for EEOC Against Western Trading Company in Disability Case* (Mar. 11, 2013); Press Release, EEOC, *Jury Awards $240 Million for Long-Term Abuse of Workers with Intellectual Disabilities* (May 1, 2013); Press Release, EEOC, *EEOC Wins Jury Verdict of More than $20 Million for Sexual Harassment and Retaliation* (May 1, 2013); Press Release, EEOC, *Jury Awards More Than $1.5 Million in EEOC Sexual Harassment and Retaliation Suit Against New Breed Logistics* (May 10, 2013); Press Release, EEOC, *Jury Awards $500,000 in EEOC Sex Discrimination Suit Against Exel, Inc.* (June 11, 2013).

harassment, harsh living conditions and other abuses for a period of two years.[104] In that case alone, prior to considering the damages cap of $300,000 under Title VII based on the Civil Rights Act of 1991, the EEOC obtained the largest award in its history—over $240 million. The following chart summarizes the jury verdicts in favor of the EEOC as follows:

STATE	CLAIMS	INDIVIDUAL VS. MULTIPLE VICTIM	TOTAL IN DAMAGES AWARDED[105]	FINAL AMOUNT AWARDED
Colorado	Retaliation	Individual	$674,938	$674,938[106]
Colorado	Disability Discrimination	Individual	$109,000	$102,240[107]
Florida	Sexual Harassment and Retaliation	Multiple Victim	$20,152,087	$8,834,033.06[108]
Georgia	Sex Discrimination	Individual	$500,000	$301,477.70[109]
Iowa	Disability Harassment	Multiple Victim	$241,300,000	$3,257,834.59[110]
North Carolina	Race Harassment	Multiple Victim	$200,000	$243,509.79[111]
Tennessee	Sexual Harassment	Multiple Victim	$30,000	$30,000
Tennessee	Sexual Harassment and Retaliation	Multiple Victim	$1,513,094	$1,132,931.67[112]
Texas	Race Harassment	Multiple Victim	$200,000	$140,000
		TOTALS:	**$264,679,119.00**	**$14,716,964.81**

F. Mediation Efforts

In its FY 2013 Annual Report, the EEOC stated that its mediation program has "continued to be a very successful program and is an integral part of the agency's work[.]"[113] Out of a total of 11,513 mediations conducted, the EEOC was able to obtain 8,890 mediated resolutions. Moreover, the Commission secured $160.9 million in benefits for complainants through its mediation program. Comparatively, the number of mediated resolutions has increased since FY 2012 in which there were a total of 8,714 mediated resolutions out of 11,380 conducted. Moreover, in FY 2012, $153.2 million was obtained through resolution. However, this figure is still smaller than that recovered in FY 2011, where the Commission obtained $170 million through its mediation program out of 9,831 resolutions.[114]

G. Significant EEOC Settlements and Jury Verdicts

There were only seven settlements involving the EEOC that reached $1 million or more over the past year, which is lower than in previous years. Three settlements in this category involved sexual harassment and retaliation claims, three involved claims of disability discrimination, and the remaining matter settled national origin discrimination claims. Appendix A of this Report includes a description of other notable settlements and consent decrees averaging $500,000 or more.[115]

104 EEOC 2013 Annual Report at 30.

105 There are limits on the amount of compensatory and punitive damages a person can recover. These limits vary depending on the size of the employer: For employers with 15-100 employees, the limit is $50,000; for employers with 101-200 employees, the limit is $100,000; for employers with 201-500 employees, the limit is $200,000; for employers with more than 500 employees, the limit is $300,000. *See* 42 U.S.C. § 1981a(b)(3).

106 *See EEOC v. RadioShack Corp.*, No. 1:10-cv-2365, slip op. at 3 (D. Colo. Mar. 1, 2013).

107 *See EEOC v. Western Trading Co.*, No. 1:10-cv-2398, slip op. at 11-12 (D. Colo. Jun. 20, 2013).

108 *See EEOC v. Four Amigos Travel, Inc.*, No. 8:11-cv-01163 (M.D. Fla. 2013) (multiple judgments).

109 *See EEOC v. Exel, Inc.*, No. 1:10-cv-03132, slip op. at 1-2 (N.D. Ga. June 13, 2013).

110 *See EEOC v. Hill Country Farms, Inc.*, No. 3:11-cv-00041, slip op. at 6-7 (S.D. Iowa Jun. 11, 2013).

111 *See EEOC v. A.C. Widenhouse*, No. 1:11-cv-00498, slip op. at 11-12 (M.D.N.C. Feb. 22, 2013).

112 *See EEOC v. New Breed Logistics*, No. 2:10-cv-02696, slip op. at 1 (W.D. Tenn. May 10, 2013).

113 EEOC 2013 Annual Report at 28.

114 EEOC 2012 Annual Report at 26.

115 Littler monitored EEOC press releases regarding settlements during FY 2013. The significant settlements as summarized in Appendix A, include settlements over $500,000 in systemic, pattern or practice and class cases, and are organized by settlement amount. Although the EEOC settled single claimant claims as well as some systemic, pattern or practice and "class" litigation for amounts well under $500,000, this report provides a snapshot of the areas where employers might be most exposed based on their policies and practices.

As discussed above, with respect to jury awards and judgments, few cases—all involving multiple plaintiffs—resulted in awards exceeding $1 million. In the majority of these lawsuits, plaintiffs set forth claims of sexual harassment and retaliation, while the highest jury award ($240 million, later reduced to $3.4 million) involved claims of intellectual disability discrimination. Notably, in one matter, the court ordered the EEOC to pay the *employer* $4.7 million in attorneys' fees and costs for pursuing "unreasonable and groundless" pattern-or-practice and individual claims against the employer.[116] Finally, in a much-publicized decision handed down by the U.S. Court of Appeals for the Sixth Circuit, the court affirmed a $752,000 attorneys' fees and costs award to the employer for similarly pursuing a baseless pattern-or-practice claim.[117]

With respect to monetary recovery for direct, indirect, and intervention lawsuits by statute, the EEOC secured $22 million in Title VII resolutions; $14 million in ADA resolutions; $2.1 million in ADEA resolutions; $235,000 in EPA resolutions, and $244,088 in resolutions involving more than one statute.

While the majority of the EEOC's litigation remains "single victim" cases, the EEOC continues its trend of filing and settling systemic, pattern or practice and "class" types of claims. Employers should consider this trend when evaluating their corporate policies or practices that may be susceptible to an EEOC challenge.

H. Appellate Cases

Analyzing the cases in which the EEOC appealed or filed an amicus brief is a good way to determine which issues and legal theories the Commission deems most important. The agency has created a searchable database on its website where it posts such amicus and appellate information.[118] According to the EEOC 2013 Annual Report, at the end of FY 2013, the Commission was handling 37 appeals in EEOC enforcement actions and participating in 17 appeals in private suits as amicus curiae.[119] In addition, a number of other significant appellate cases that were filed in prior fiscal years were decided in FY 2013.

Notably, appellate courts on more than one occasion criticized the EEOC for pursuing cases it either knew or should have known were baseless. In *EEOC v. Tricore Reference Laboratories*,[120] the EEOC had filed an action against the employer alleging it violated the ADA when it fired the employee. The district court held that the employer was entitled to summary judgment because the EEOC failed to establish that the employee could perform the essential functions of her job with or without accommodation. The district court awarded the employer its requested attorneys' fees ($140,571.62) because it determined the EEOC's claims were frivolous, unreasonable, and without foundation. On appeal, the U.S. Court of Appeals for the Tenth Circuit affirmed the district court's decision, noting that the EEOC persisted in litigating this case despite clear evidence that the employer went beyond ADA requirements in trying to oblige an employee.

Similarly, in *EEOC v. Peoplemark,*[121] the Sixth Circuit affirmed the district court's assessment of more than $750,000 in fees and costs against the EEOC for continuing to pursue an action it knew to be meritless. In that case, the EEOC brought a disparate impact discrimination lawsuit alleging the defendant discriminated against African Americans based on its purported blanket policy of not hiring applicants with a criminal record. Although this turned out not to be the case, as demonstrated by the employer during the discovery process, the EEOC elected not to amend the complaint but continued to argue that the company's policy of excluding various applicants based on criminal history had a disparate impact on African Americans. Notably, disparate impact cases rely on statistics in establishing a *prima facie* case, but the EEOC failed to timely submit an expert report with any statistical support for its claims against the company, despite three extensions being granted by the court. The employer, on the other hand, produced an expert's report, which included findings that the policy did not have a disparate impact on African Americans. After the company filed a motion for summary judgment, the EEOC agreed to voluntarily dismiss the case with prejudice. According to both the district and appellate courts, upon reviewing the discovery documents, the EEOC should have reassessed its claim when evidence pointed to the fact that a companywide policy of not hiring individuals with criminal records did not exist.

116 *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).

117 *EEOC v. Peoplemark, Inc.*, 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013).

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

119 EEOC 2013 Annual Report at 31.

120 2012 U.S. App. LEXIS 17200, 493 Fed. Appx. 955 (10th Cir. 2012).

121 *EEOC v. Peoplemark*, 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013).

The EEOC has filed appeals related to the use of background checks in two other cases, *EEOC v. Kaplan Higher Learning Education Corp*. (involving reliance on credit history)[122] and *EEOC v. Freeman* (which dealt with background checks by the employer involving both credit and criminal history).[123] The EEOC's efforts to overturn rulings in favor of the employer in background check matters indicate that this is a hot-button issue for the agency.

On the subpoena enforcement front, a noteworthy case to watch is the appeal in *EEOC v. McLane Company, Inc.*[124] In this case, the EEOC brought a subpoena enforcement action regarding its investigation into a charge of discrimination alleging gender (pregnancy) discrimination, as well as disability discrimination—although the charging party has no known disability—based on the fact all newly hired employees and all employees returning from any leave in excess of 30 days were required to take a physical capabilities evaluation designed and evaluated by a third party.[125] In pursuing this charge, the EEOC sought a host of information from potentially thousands of employees and job applicants. The district court denied the EEOC's application to enforce the overbroad portions of its administrative subpoena on the grounds that the agency did not have jurisdiction to investigate a generalized charge of disability discrimination not tied to a specific aggrieved party, and that many information requests were overbroad and irrelevant to the underlying charge of gender (pregnancy) discrimination. The EEOC appealed to the Ninth Circuit, which will determine: whether the EEOC is entitled to the names, addresses, phone numbers, and social security numbers of thousands of job applicants and employees nationwide who took a physical capability evaluation in the course of its investigation; and whether the district court abused its discretion in determining it would be unduly burdensome for the employer to manually search its paper files and question managers to provide the EEOC with the specific reasons why an employee who took the evaluation was terminated. The scope of the EEOC's subpoena enforcement abilities is at issue in this appeal, and should be watched closely.

In a matter decided in the EEOC's favor, the Sixth Circuit in *Serrano v. Cintas Corp*.[126] determined the EEOC could pursue a pattern-or-practice claim on behalf of a class of women who were allegedly denied jobs on account of their sex, even though the Commission brought the suit under section 706, reasoning that section 706 allows this type of claim and the EEOC satisfied its administrative perquisites to the suit. The lower court had denied the EEOC's motions to expand discovery and to depose the company's CEO, and ultimately dismissed the case on the grounds the EEOC failed to fulfill its conciliation obligations and prove its claims under section 706. The Sixth Circuit, however, found the EEOC had sufficiently stated a claim for pattern-or-practice liability, reversing the district court's ruling. Permitting the EEOC to pursue a pattern or practice claim under section 706 of Title VII is significant because pattern or practice claims under section 707 of Title VII do not provide for compensatory or punitive damages, whereas section 706 permits such damages. On January 15, 2013, the Sixth Circuit rejected the employer's motion to reconsider, and on October 7, 2013, the U.S. Supreme Court denied the employer's petition for certiorari.

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

122 *EEOC v. Kaplan Higher Learning Education Corp.*, 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013).

123 *EEOC v. Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).

124 *EEOC v. McLane Company, Inc.*, 2012 U.S. Dist. LEXIS 164920 (D. Ariz. Nov. 19, 2012), *appeal filed*, No. 13-15136 (9th Cir. June 3, 2013).

125 In a separate enforcement action not at issue in the appeal, the EEOC alleged also that this evaluation exam given to all employees returning to work from a medical leave violates the ADEA.

126 *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2013), *cert. denied,* 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013). The EEOC intervened in this case.

III. EEOC REGULATORY AGENCY AND RELATED DEVELOPMENTS

A. Update on the Commission

During the prior fiscal year, several of the EEOC's agenda items stalled, at least in part due to the vacancy left by the resignation of Commissioner Stuart Ishimaru in April 2012.[127] Ishimaru's departure changed the political makeup of the Commission, and the EEOC was left operating with only four members: Democrat Jacqueline Berrien as Chair, Democrat Chai Feldblum, Republican Victoria Lipnic, and Republican Constance Barker. Without a Democratic majority, the EEOC's ability to approve policy initiatives supported by President Obama and the Democrat Commissioners was hindered, effectively requiring bipartisan support for any action.[128]

On August 2, 2012, President Obama nominated Jenny R. Yang to fill the vacant Democratic Commissioner seat.[129] Senate action on her nomination, however, was temporarily stalled pending the outcome of the 2012 elections. With President Obama's reelection, Yang's nomination was finally brought to the Senate for a vote. On April 25, 2013, the Senate unanimously confirmed Yang to serve a term expiring July 1, 2017.[130] Yang's experience as a class action attorney will likely strengthen the EEOC's commitment to the enforcement and targeting of systemic discrimination[131] and may result in further support for the agency's initiatives.

Meanwhile, Commissioner Feldblum's term was set to expire on July 1, 2013.[132] On May 23, 2013 President Obama nominated her for another term, ensuring that the Commission would operate fully-seated and Democratic-controlled until at least January 1, 2014. On December 12, 2013, the Senate confirmed her nomination for a term expiring July 1, 2018. This confirmation ensures that the EEOC will operate with a full complement during the coming year. The term of the Chair, Jacqueline Berrien (D), expires on July 1, 2014. The remaining commissioners and their term expirations are as follows:

- Constance Barker (R) (July 1, 2016)
- Victoria Lipnic (R) (July 1, 2015)
- Jenny Yang (D) (July 1, 2017)

It remains to be seen whether the three Democrats on the five-member panel will take advantage of their majority status over the next six months. With a Democratic majority—at least through half of 2014—employers can expect that the EEOC will continue to pursue an aggressive agenda, including current enforcement priorities as detailed in the Strategic Enforcement Plan and more worker-friendly guidance.[133] In addition, the Obama Administration is likely to rely heavily on agencies, such as the EEOC, to advance its employment agenda.[134] With Republicans retaining control of the House of Representatives and the Democrats still short of a 60-seat filibuster-proof majority in the Senate, employment-related legislation remains stalled in Congress.[135]

B. EEOC Strategic Plan and Related Enforcement Plan

In FY 2012, the EEOC introduced its Strategic Plan,[136] which set forth its strategy for achieving its fundamental mission to stop and remedy unlawful employment discrimination, and directed the Commission to develop a Strategic Enforcement Plan (SEP) that (1) establishes priorities and (2) integrates all components of EEOC's private, public, and federal sector enforcement.[137] The purpose of the SEP is to focus and coordinate the EEOC's programs to have a sustainable impact in reducing and deterring discriminatory practices in the workplace.

127 Press Release, EEOC, *Stuart J. Ishimaru to Resign from Commission* (Apr. 11, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-11-12.cfm.

128 *See* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2012*, at 8 (2012), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2012.

129 Press Release, EEOC, *Jenny Yang Sworn in as EEOC Commissioner* (May 13, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-13-13.cfm.

130 *Id.*

131 Ben James, *New EEOC Member May Herald Worker-Friendly Guidance*, Employment Law360 (Apr. 26, 2013).

132 Ilyse Schuman, *Obama Re-Nominates NLRB General Counsel, EEOC Member*, Littler Washington D.C. Employment Law Update (May 29, 2013), http://www.littler.com/dc-employment-law-update/obama-re-nominates-nlrb-general-counsel-eeoc-member.

133 *See* EEOC, United States Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016 (2012), *available at* http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

134 Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?*, Littler ASAP (Nov. 7, 2012), *available at* http://www.littler.com/publication-press/publication/how-will-2012-election-results-impact-labor-employment-and-benefits-po.

135 *Id.*

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

137 EEOC, United States Equal Employment Opportunity Commission, Strategic Plan for Fiscal Years 2012-2016 (2012), *available at* http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm.

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

On July 18, 2012, the Commission held a public meeting to solicit input as the agency drafted the SEP.[138] The EEOC released a draft of the SEP for public comment on September 4, 2012.[139] On December 17, 2012, the EEOC approved the SEP for Fiscal Years 2013—2016 with a 3-1 vote.[140] The final SEP was revised from the draft SEP, based on more than 100 comments related to the draft SEP from individuals, organization and coalitions internal and external to the agency and from the across the nation.[141]

The SEP reaffirms the agency's objective of strategic enforcement. It is intended to promote more strategic use of agency resources to advance the EEOC's mission of stopping and remedying unlawful discrimination and focus and coordinate the EEOC's programs so they have a sustainable impact in reducing and deterring workplace discrimination.[142] The SEP identifies six priorities for nationwide enforcement in the private and public sectors, including: (1) eliminating systemic barriers in recruitment and hiring; (2) protecting immigrant, migrant and other vulnerable workers; (3) addressing emerging an developing employment discrimination issues, such as ADA Amendment Act issues, LGBT (lesbian, gay, bisexual and transgender individuals) coverage under Title VII, and accommodating pregnancy; (4) enforcing equal pay laws to target practices that discriminate based on gender; (5) preserving access to the legal system; and (6) preventing harassment through systemic enforcement and targeted outreach.[143]

As part of the initiative, the EEOC intends to focus on screening tools that may adversely impact groups protected under the law (e.g., pre-employment tests, background screens, date of birth screens in online applications).[144] The EEOC also plans to target disparate pay, job segregation, harassment, trafficking, and discriminatory language policies affecting vulnerable workers who may be unaware of their rights under the equal employment laws, or reluctant or unable to exercise them.[145]

To implement these priorities, the EEOC intends to continue prioritizing certain types of charges filed with the agency and to give preference to litigation involving SEP or EEOC District enforcement priority issues. Additionally, the SEP reaffirms the EEOC's focus on pursuing systemic cases—"pattern or practice, policy, and/or class cases where the alleged discrimination has a broad impact on an industry, occupation, business, or geographic area."[146] With respect to systemic enforcement, the SEP specifically notes the EEOC District offices are expected to coordinate with each other so as to avoid duplication and to improve efficiencies through collaboration, consultation and strategic partnerships among the offices. While the EEOC developed the SEP as a strategy for reducing discrimination, the SEP, as a whole, places more emphasis on enforcement and litigation than on prevention efforts and conciliation.

In the SEP, the Commission re-affirmed its delegation of authority to commence or intervene in litigation to the General Counsel in all cases except the following:

- Cases involving a major expenditure of resources, *e.g.*, cases involving extensive discovery or numerous expert witnesses and many systemic, pattern or practice or Commissioner's charge cases;

138 A comprehensive summary and discussion of the hearing is included in Littler's ASAP, Barry A. Hartstein, *EEOC Seeks Input on Developing Strategic Enforcement Plan*, Littler ASAP (July 19, 2012), *available at* http://www.littler.com/publication-press/publication/eeoc-seeks-input-developing-strategic-enforcement-plan.

139 EEOC, Draft For Public Release U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan (Sept. 4, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm.

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

141 For instance, the September 2012 draft SEP did not highlight enforcing equal pay laws as a national priority item, but the final SEP identifies equal pay laws as one of six priorities for nationwide enforcement.

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

143 *Id*. *See also* Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: How Will the 2012 Election Results Impact Labor, Employment and Benefits Policy?*, Littler ASAP (Nov. 7, 2012), *available at* http://www.littler.com/publication-press/publication/how-will-2012-election-results-impact-labor-employment-and-benefits-po.

144 *Id.*

145 *Id.*

146 A summary of the SEP is discussed further in the *Littler D.C. Update* at Barry A. Hartstein, *EEOC Seeks Feedback on Draft Strategic Enforcement Plan*, Littler Washington D.C. Employment Law Update (Sept. 6, 2012), *available at* http://www.littler.com/dc-employment-law-update/eeoc-seeks-feedback-draft-strategic-enforcement-plan.

- Cases that present issues in a developing area of law where the Commission has not adopted a position through regulation, policy guidance, Commission decision or compliance manuals;
- Cases that the General Counsel reasonably believes to be appropriate for submission for Commission consideration because of their likelihood of public controversy or otherwise (*e.g.*, recently modified or adopted Commission policy); and
- All recommendations in favor of Commission participation as *amicus curiae*, which shall continue to be submitted to the Commission for review and approval.[147]

Moreover, the SEP establishes that at a minimum, one litigation recommendation from each District Office will be presented to the Commission for consideration during each fiscal year.[148]

On February 20, 2013, the EEOC held a public meeting to discuss implementation of the Strategic Plan and answer questions about the SEP and each of the performance measures.[149] Details of the Commission's progress are published in the agency's 2012 Annual Report.[150] In that report, the Commission announced that it finished FY 2012 with record high monetary recoveries for victims of discrimination, as well as a significant decrease in its inventory of pending cases.[151] For FY 2013, the Commission established key deadlines for deliverables required under the SEP, including the Quality Control Plan, Federal Sector Complement Plan, District Complement Plans (15), Research and Data Plan, and Federal Sector Organization Plan.[152] In accordance with these deadlines, the Commission has made progress with respect to many of these plans. For example, on May 10, 2013, the EEOC released draft principles for the Quality Control Plan, which is intended to establish criteria for evaluating the quality of EEOC investigations and conciliations and a peer review system to conduct assessments of investigations and conciliations.[153]

The Commission also sought public comment on the Federal Sector Complement Plan in January 2013.[154] That plan is intended to determine how enforcement priorities for the federal sector will be incorporated in the case management system so that potentially discriminatory policies and practices in federal agencies can be identified and addressed.[155]

On May 22, 2013, the House Subcommittee on Workforce Protections held a hearing to examine the regulatory and enforcement actions of the EEOC.[156] In her testimony before the Subcommittee, Chair Berrien stated:

> EEOC's Strategic Plan communicates to our staff, our stakeholders and to the general public that we are committed to making the most strategic use of our resources, intensifying and enhancing our efforts to prevent unlawful discrimination in the workplace, and ensuring that we serve the public well.[157]

Chair Berrien cited as progress the EEOC's adoption of the SEP and its targeting of specific issues of discrimination where federal enforcement is needed most and will have the greatest impact. According to her testimony, the Strategic Plan and Strategic Enforcement Plan reiterate the importance of systemic enforcement of priority issues. She noted also that the EEOC is working collaboratively with other federal agencies, including the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Department of Justice's Civil Rights Division.

147 *Id.*

148 *Id.*

149 *EEOC Meeting, Report on Implementation of the EEOC's Strategic Plan for Fiscal Years 2012-2016* (Feb. 20, 2013), *available at* http://www.eeoc.gov/eeoc/meetings/2-20-13/index.cfm.

150 Press Release, EEOC, *EEOC Releases Performance and Accountability Report Under New Strategic Plan* (Nov. 19, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/11-19-12.cfm.

151 EEOC, Fiscal Year 2012 Performance and Accountability Report (Nov. 16, 2012), *available at* http://www.eeoc.gov/eeoc/plan/2012par.cfm.

152 *See* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2012* at 10 (2012), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2012.

153 Press Release, EEOC, *EEOC Seeks Public Input on Quality Control Plan for Investigations and Conciliation* (May 10, 2013), *available at* http://www1.eeoc.gov//eeoc/newsroom/release/5-10-13c.cfm?renderforprint=1; Press Release, EEOC, *U.S. Equal Employment Opportunity Commission Quality Control Plan 2013 Draft Principles* (May 10, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/quality_controlplan_2013.cfm.

154 Press Release, EEOC, *EEOC Seeks Public Comment on Federal Sector Priorities* (Jan. 14, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/1-14-13.cfm.

155 *Id.*

156 Ilyse Schuman, *House Subcommittee Questions Recent EEOC Activities,* Littler Washington D.C. Employment Law Update (May 23, 2013), http://www.littler.com/dc-employment-law-update/house-subcommittee-questions-recent-eeoc-activities.

157 Available at: http://edworkforce.house.gov/calendar/eventsingle.aspx?EventID=333594.

C. Noteworthy Regulatory Activities

1. Initial Planned Agenda and Significant Anticipated Guidance

The Commission began FY 2013 by approving a Strategic Enforcement Plan for Fiscal Years 2013—2016, which set forth its enforcement and regulatory agenda for the next four years and confirms its focus on recruitment and hiring barriers, compensation practices, and emerging workplace issues, such as pregnancy discrimination and Title VII coverage for lesbian, gay, bisexual and transgender (LGBT) individuals.[158] In addition, the EEOC continued to signal an interest in developing additional guidance regarding leaves of absence and reasonable accommodation under the Americans with Disabilities Act Amendments Act (ADAAA) and targeting practices that disproportionately affect older workers.[159]

The Commission was ultimately successful in providing additional ADA guidance by updating publications related to individuals with certain medical conditions,[160] addressing Title VII's and the ADA's application to employees or applicants who are or have been victims of domestic violence and stalking,[161] and increasing its attention on wellness programs and their compliance with the ADA and other federal equal employment opportunity laws.[162] Additionally, the Employment Non-Discrimination Act (ENDA)—which would ban workplace discrimination based on sexual orientation and gender identify—was approved by the Senate on November 7, 2013.[163] If enacted, ENDA would provide the EEOC with a more straightforward mechanism for combating workplace discrimination based on sexual orientation or gender identity.

Although the Commission was successful in executing many of its agenda items, including new guidance on the use of criminal background checks in 2012,[164] it did not ultimately update its reasonable accommodations guidance or provide additional enforcement guidance regarding the use of credit histories and other background checks in the hiring process. The EEOC also did not advance any regulatory activity related to equal pay issues or protecting older workers from age discrimination in hiring, although these issues remain a focus of the Commission.

2. ADA Guidance

The EEOC continues to offer guidance reiterating the broad scope of the ADAAA, confirming that the definition of disability should be interpreted in favor of broad coverage. On May 15, 2013, the EEOC issued enforcement guidance specifically focused on how medical conditions that are becoming more prevalent, including cancer, diabetes, epilepsy, and intellectual disabilities, "easily" fall within the purview of the ADA's protection.[165] The guidance includes extensive questions and answers regarding these conditions and their implications on the employment relationship, including the restrictions on requesting information regarding the conditions, accommodating employees, the application of the interactive process, and employers' ability to assert the direct threat defense against employees suffering from these conditions.

158 EEOC, United States Equal Employment Opportunity Commission, Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012) *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm; Jay-Anne B. Casuga, *Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation*, Daily Lab. Rep. (BNA) No. 82, at C-1 (Apr. 29, 2013).

159 Ben James, *5 Questions for EEOC General Counsel David* Lopez, Employment Law360 (Aug. 21, 2013); Jay-Anne B. Casuga, *Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation*, *supra* note 158.

160 Press Release, EEOC, *EEOC Issues Revised Publications on the Employment Rights of People with Specific Disabilities* (May 15, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-15-13.cfm.

161 Ilyse Schuman, *EEOC Provides Guidance on the Application of Employment Discrimination Laws to Instances of Domestic Violence, Stalking*, Littler Washington D.C. Employment Law Update (Oct. 29, 2012), http://www.littler.com/dc-employment-law-update/eeoc-provides-guidance-application-employment-discrimination-laws-instances.

162 Press Release, EEOC, *Employer Wellness Programs Need Guidance to Avoid Discrimination* (May 8, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm.

163 Ilyse Schuman, *Senate Passes ENDA With Amendment*, Littler Washington D.C. Employment Law Update (Nov. 7, 2013), http://www.littler.com/dc-employment-law-update/senate-passes-enda-amendment.

164 *See* Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012), *available at* http://www.littler.com/publication-press/publication/eeoc-issues-updated-criminal-record-guidance-highlights-important-stra.

165 Press Release, EEOC, *EEOC Issues Revised Publications on the Employment Rights of People with Specific Disabilities* (May 15, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-15-13.cfm.

a. Cancer

According to the EEOC, more than 12 million Americans are living with cancer, including cancer in remission.[166] The EEOC advises that cancer should generally qualify as a disability under the ADA because people suffering from the condition are substantially limited in the major life activity of normal cell growth, or would be so limited if cancer currently in remission were to recur.[167] Additionally, individuals with a history of cancer are typically covered because they "have a record" of an impairment that substantially limited a major life activity in the past. The EEOC's guidance provides the following accommodations may be reasonable for employees with cancer: providing leave for doctors' appointments and to seek or recover from treatment; periodic breaks; a modified work schedule or shift change; permission to work at home; modification of office temperature; reallocation of marginal tasks; and reassignment.[168]

b. Diabetes

An estimated 18.8 million adults in the United States suffer from diabetes with nearly two million new cases diagnosed each year.[169] The EEOC affirms diabetes should generally be found to be a disability within the meaning of the ADA because individuals who suffer from this condition are substantially limited in the major life function of endocrine function. Thus, the EEOC states the following accommodations may be reasonable to provide to employees with diabetes: a private area to test blood sugar levels or administer insulin injections; a place to rest; breaks; leave; modified work schedule or shift change; use of a stool; redistributing marginal tasks; and reassignment.[170]

c. Epilepsy

Nearly three million people in the United States have some form of epilepsy with about 200,000 new cases of seizure disorder and epilepsy diagnosed each year.[171] According to the EEOC, those who suffer from this condition qualify as disabled because they are substantially limited in neurological functions and other major life activities, such as speaking or interacting with others.[172] Accommodations that the EEOC views as reasonable include: breaks to take medication; leave; a private area to rest after having a seizure; a rubber mat or carpet to cushion a fall; work schedule adjustments; a consistent start time or a schedule change; a checklist to remember tasks; permission to bring a service animal to the workplace; someone to drive to work-related meetings and events; permission to work from home; and reassignment.[173]

d. Intellectual Disabilities

Approximately 2.5 million Americans suffer from an intellectual disability, the majority of whom are either unemployed or underemployed despite their ability, desire, and willingness to engage in meaningful work in the community.[174] An intellectual disability is characterized by significant limitations in both intellectual functioning and in adaptive behavior that affect many everyday social and practical skills.[175] An individual is generally diagnosed as having an intellectual disability when: (1) the person's intellectual functioning level (IQ) is below 70-75; (2) the person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical skills; and (3) the disability originated before the age of 18.[176] The EEOC explains that individuals who suffer from these symptoms usually meet

166 EEOC, Questions & Answers about Cancer in the Workplace and the Americans with Disabilities Act (ADA) (2013), *available at* http://www.eeoc.gov/laws/types/cancer.cfm.

167 *Id.*

168 *Id.*

169 EEOC, Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA) (2013), *available at* http://www.eeoc.gov/laws/types/diabetes.cfm.

170 *Id.*

171 EEOC, Questions & Answers about Epilepsy in the Workplace and the Americans with Disabilities Act (ADA) (2013), *available at* http://www.eeoc.gov/laws/types/epilepsy.cfm.

172 An employee bringing an ADA lawsuit must still be able to show, however, that they are able to perform the essential functions of the position. For example, in a recent case decided by the U.S. Court of Appeals for the 8th Circuit, the appellate court held that a mammography technician with epilepsy and who suffered numerous seizures at work and was subsequently put on unpaid administrative leave was not a "qualified individual" under the ADA and the MHRA. According to the court, even with the employer's attempted accommodations, including reducing the brightness of lights, eliminating mold, and rerouting strongly perfumed patients to other technicians, the employee still suffered from numerous seizures, an essential function of her job included insuring patient safety, and nothing in the record established that she could adequately perform that function during the indefinite periods in which she was incapacitated. *Olsen v. Capital Region Medical Center*, 713 F.3d 1149 (8th Cir. 2013).

173 EEOC, Questions & Answers about Diabetes in the Workplace and the Americans with Disabilities Act (ADA) (2013), *supra* note 169.

174 EEOC, Questions & answers about Persons with intellectual disabilities in the workplace and the Americans with disabilities act (ADA) (2013), *available at* http://www.eeoc.gov/laws/types/intellectual_disabilities.cfm.

175 *Id.*

176 *Id.*

the definition of disabled because they are substantially limited in brain function and other major life activities, such as learning, reading, and thinking.[177] As such, the EEOC views the following accommodations as generally reasonable: providing an interpreter; demonstrating (as opposed to just describing) job requirements; modifying tests or training; replacing written tests with an "expanded" interview; reallocating marginal tasks; providing a tape recorder to record directions; providing additional training; acquiring or modifying equipment; providing a job coach; modifying work schedules; work station placement; and reassignment.

e. Obesity

Courts, including the U.S. Court of Appeals for the Sixth Circuit, have taken the position that obesity could qualify as a physical impairment under the ADA, and potentially as a covered disability, if the condition substantially limits the employee in the performance of a major life activity.[178] In light of these decisions, many employers were left wondering whether the EEOC would revisit this topic. In an interview on September 11, 2013, however, EEOC Commissioner Chai Feldblum revealed that the EEOC currently has no plans to reexamine the issue at this time.[179]

3. Domestic Violence and Stalking

In early FY 2013, the EEOC released a question and answer fact sheet in an effort to extend Title VII and ADA protection to employees or applicants who have experienced domestic or dating violence, sexual assault, or stalking outside of the workplace.[180] The EEOC acknowledges that no federal employment statute specifically prohibits discrimination based on these categories, but it provided examples of situations in which it believes employer actions stemming from the employee's experience with sexual/domestic violence or stalking can give rise to Title VII or ADA violations.[181] For instance, according to the EEOC, an employer could be held liable under Title VII if it refuses to hire or discharges a woman who was the victim of domestic violence for fear that battered women bring unnecessary drama into the workplace.[182]

The EEOC also listed examples of situations in which an employee might be able to assert a claim under the ADA for actual or perceived impairment resulting from domestic or dating violence, sexual assault, or stalking. For example, the Commission explained that an employer cannot refuse to hire or discharge a victim of rape who received treatment for depression on the grounds that the individual might need to take a leave of absence to treat ongoing or future depressive episodes.[183] An employer may need to provide an accommodation under these circumstances—*i.e.*, provide the employee with leave to obtain treatment for depression or anxiety resulting from a sexual assault—even if such leave is not covered by the Family Medical Leave Act (FMLA) or sick or vacation time.[184]

4. Wellness Programs Under Federal EEO Laws

In light of the prevalent use of employer-sponsored wellness programs, the EEOC has indicated an interest in focusing on those programs and their compliance with federal laws, including the ADA, the Genetic Information Nondiscrimination Act (GINA), and other statutes enforced by the EEOC. The most common intersection of the wellness programs and the statutes the EEOC enforces occurs when the programs require medical exams or ask disability-related questions, both of which ordinarily give rise to a violation of the ADA.[185] The ADA strictly limits when an employer may make disability-related inquiries of employees or ask employees to take medical examinations, but creates an exception for voluntary wellness programs.[186] The EEOC takes the position that wellness programs are "voluntary" as long as an employer neither requires participation nor penalizes employees who do not participate.[187]

177 *Id.*

178 *EEOC v. Watkins Motor Lines, Inc.*, 463 F.3d 436 (6th Cir. 2006).

179 Patrick Dorrian, *EEOC Commissioner Feldblum Offers Insights on Obesity as a Disability*, Employment Discrimination Report (BNA) (Sept. 11, 2013), *available at* http://www.bna.com/eeoc-commissioner-feldblum-n17179876987/.

180 EEOC, Questions & Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking (2012), *available at* http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm.

181 Ilyse Schuman, *EEOC Provides Guidance on the Application of Employment Discrimination Laws to Instances of Domestic Violence, Stalking*, *supra* note 161.

182 *Id.*

183 *Id.*

184 *Id.*

185 Press Release, EEOC, *Employer Wellness Programs Need Guidance to Avoid Discrimination* (May 8, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm.

186 *See* 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13, 1630.14; EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

187 EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html.

The EEOC has not taken a position regarding whether a plan that provides a reward for participation, such as a waiver of an annual deductible, amounts to an obligation to participate, or whether withholding the reward amounts to a penalty thereby rendering the program involuntary under the ADA.[188] However, even with voluntary plans, where an employer requires participants to meet certain health outcomes or participate in certain activities in order to remain in the program or earn rewards, the EEOC has made clear that employers must provide reasonable accommodation to those individuals who are unable to meet the outcomes or engage in the specific activities due to a disability.[189]

For instance, in January 2013, the EEOC released a letter advising that a disease management program administered under a group health plan is a wellness program subject to the ADA.[190] In its letter, the EEOC addressed a group health plan that waived its annual deductible if the employee enrolled in a disease management program or followed a doctor's exercise and medication recommendations.[191] Failure to comply with the requirements resulted in the employee's automatic enrollment in the employer's high-deductible "standard" group health plan.[192] The EEOC determined the disease management program was a wellness program because the EEOC "assumed" a participant would be required to disclose certain medical conditions to be eligible to participate in the program, which would be a disability-related inquiry.[193] Thus, an employer may be required to provide a reasonable accommodation to any participant who could not comply with the requirements due to a disability.[194] The EEOC's opinion letter is significant because the introduction of a "reasonable accommodation" analysis to group health plans would likely obstruct the delivery of benefits under such plans by adding a disruptive "interactive dialogue" process to benefits determination and interfering with benefit plan claims and appeal procedures.[195] The EEOC declined, however, to comment regarding whether the disease management plan was "voluntary."

In the final GINA Title II regulations, the EEOC took the position that employers may offer certain kinds of financial inducements to encourage participation in health or genetic services under certain circumstances, but they may not offer an inducement for individuals to provide genetic information.[196] For example, an employer could offer incentives to employees that complete a health risk assessment that includes questions about family medical history or other genetic information so long as the employer specifically identifies those questions and makes clear the participant need not respond to those questions that request genetic information to receive the incentive.

In another sign that the EEOC will be increasing its attention to employer wellness programs, on May 8, 2013, the Commission held a meeting regarding the implications that the programs have on federal equal employment opportunity laws.[197] The panelists urged the Commission to issue enforcement guidance to assist employers in creating and administering programs in compliance with the laws.[198]

Because wellness programs can have implications on a myriad of laws enforced by the EEOC, employers should exercise caution in implementing and managing any such programs to ensure that they do not run afoul of their obligations under these laws. This is particularly important because the EEOC is likely to continue its focus on wellness programs and issue enforcement guidance and standards based on requests for guidance in this area.[199]

188 *Id.*

189 42 U.S.C. §§ 12112(b)(5)(A); 29 C.F.R. § 1630.9(a), 1630.2(o)(1)(iii); EEOC, Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the ADA (July 27, 2000), *available at* http://www.eeoc.gov/policy/docs/guidance-inquiries.html. *See also* EEOC Information Letter, *ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations* (Jan. 18, 2013), *available at* http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html.

190 EEOC Information Letter, *ADA: Voluntary Wellness Programs & Reasonable Accommodation Obligations* (Jan. 18, 2013), *available at* http://www.eeoc.gov/eeoc/foia/letters/2013/ada_wellness_programs.html. A comprehensive summary and discussion of the EEOC's letter is included in Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler ASAP (Aug. 8, 2013), *available at* http://www.littler.com/publication-press/publication/double-whammy-part-ii-eeoc-stance-and-aca-final-regulations-impose-new.

191 Russell Chapman, *Double Whammy, Part II: EEOC Stance and ACA Final Regulations Impose New Burdens on Wellness Programs*, Littler ASAP (Aug. 8, 2013), *available at* http://www.littler.com/publication-press/publication/double-whammy-part-ii-eeoc-stance-and-aca-final-regulations-impose-new.

192 *Id.*

193 *Id.*

194 *Id.*

195 *Id.*

196 Ilyse Schuman, *EEOC Issues Long-Awaited Final Regulations on the Genetic Information Nondiscrimination Act*, Littler ASAP (Nov. 11, 2010), a*vailable at* http://www.littler.com/publication-press/publication/eeoc-issues-long-awaited-final-regulations-genetic-information-nondisc.

197 EEOC Meeting, Meeting of May 8, 2013—Wellness Programs Under Federal Equal Employment Opportunity Laws (May 8, 2013), *available at* http://www.eeoc.gov/eeoc/meetings/5-8-13/index.cfm.

198 Press Release, EEOC, *Employer Wellness Programs Need Guidance to Avoid Discrimination* (May 8, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/5-8-13.cfm.

199 Abigail Rubenstein, *Lawmaker Pushes EEOC for Wellness Program Guidelines,* Employment Law360 (Sept. 25, 2013).

5. Partner Coverage Under ADEA

The EEOC appears positioned to expand coverage of the Age Discrimination in Employment Act. In two recently issued informal discussion letters dated July 25 and July 29, 2013, the EEOC explained when an accounting firm's "partner" is really an "employee" for purposes of the ADEA coverage. According to the EEOC, "it is well established that in some instances, individuals who have the job title of 'partner' may qualify as employees for purposes of EEO laws, including the ADEA" and explained this analysis hinges upon "the actual working relationship between the individual and the partnership."[200] The key question, the EEOC explained, is whether the individual acts independently and participates in managing the organization (not an employee), or whether the individual is subject to the organization's control (an employee).[201] Both letters set forth six non-exhaustive factors to consider when making this determination:

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether, and if so, to what extent, the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and
- Whether the individual shares in the profits, losses, and liabilities of the organization.[202]

The EEOC informal guidance letters are unofficial and nonbinding, but they do indicate how the agency would approach the issue if litigated and suggest that the EEOC may seek to expand the scope of the ADEA to individuals who have not been traditionally treated as "employees."

6. Rulemaking

The EEOC recently issued a new rule revising certain provisions of the Freedom of Information Act (FOIA) regulations to incorporate provisions of the Openness Promotes Effectiveness in Our National Government (OPEN Government Act), and the Electronic FOIA Act of 1996 (E-FOIA Act).[203] The final rule requires the EEOC to observe FOIA response time deadlines, even if a FOIA request is received by the wrong office and also implements, among other things, a multi-track FOIA processing procedure as permitted by the E-FOIA Act.

Other rulemaking items on the EEOC's agenda for the upcoming year include:

- **Disability:** By March 2014, the EEOC plans to issue proposed rules that would revise procedures for filing complaints or charges of employment discrimination based on disability subject to the Americans with Disabilities Act and section 504 of the Rehabilitation Act of 1973.[204]
- **EE0-1 Reports:** The EEOC still intends to issue a proposed rule that would update its race and ethnicity data collection method to conform to current reporting instructions for the EEO-1 Report, making employee self-identification the preferred method for collecting race and ethnic data on employees.[205]

7. Other Activity: Collaboration with Mexican Consulate

The EEOC has also been collaborating to provide Mexican nationals with information, guidance, and access to resources on the prevention of discrimination in the workplace regardless of immigration status. Numerous EEOC field offices, including Detroit, New Orleans, Cleveland, Birmingham, Jackson, and Dallas, have signed outreach agreements and memorandums of understanding with the

200 Ilyse Schuman, *EEOC Provides Guidance on When a "Partner" Is an Employee*, Littler Washington D.C. Employment Law Update (Aug. 21, 2013), http://www.littler.com/dc-employment-law-update/eeoc-provides-guidance-when-partner-employee.

201 *Id.*

202 *Id.*

203 29 C.F.R. § 1610; Press Release, EEOC, *EEOC Issues Final Rule Revising Freedom of Information Act Regulations* (June 19, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-19-13.cfm.

204 Ilyse Schuman and Michael Lotito, *Workplace Policy Institute: Agencies Release Spring 2013 Regulatory Agendas; Final Persuader Rule Expected in November,* Litter Workplace Policy Institute™ (July 8, 2013), *available at* http://www.littler.com/publication-press/publication/workplace-policy-institute-agencies-release-spring-2013-regulatory-age.

205 *Id.*

Mexican Consulate to further this collaboration by providing the Consulate with Spanish-language materials explaining the laws enforced by the EEOC, arranging for meetings to provide information and conducting counseling regarding employment discrimination matters to help ensure the information is communicated to workers who may not be aware of their rights.[206]

D. Current and Anticipated Trends

With the reelection of President Obama and the Democratic-controlled EEOC, the Commission can be expected to continue its aggressive agenda. The EEOC is likely to continue pursuing initiatives related to recruiting and hiring procedures and practices, ADA guidance, equal pay laws, LGBT protection under Title VII and pregnant workers. In addition, the EEOC appears to be increasing its focus on genetic bias discrimination.

1. Recruiting and Hiring Issues

For the past several years, the EEOC has focused on the impact certain hiring practices may have on protected groups, and has included eliminating systematic barriers in recruitment and hiring as an enforcement priority in the Strategic Enforcement Plan.[207] In FY 2012, the EEOC issued updated guidance regarding the use of arrest and conviction records by employers in hiring and employment decisions titled, "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964."[208]

The EEOC continues to focus on this area and has filed a number of lawsuits involving employer background check policies and reliance on criminal history. Specifically, on June 11, 2013, the EEOC filed two lawsuits in the Northern District of Illinois and the District of South Carolina challenging the employers' background check policies as having a disparate impact on African American applicants by failing to include an individualized assessment.[209] On July 24, 2013, nine state attorneys general sent a letter to the EEOC regarding these two lawsuits, criticizing the suits and the EEOC Guidance and calling on the EEOC to rescind its guidance and drop the two lawsuits. The EEOC responded on August 29, 2013, in an effort to justify the Guidance, stating the criticism by the attorneys general stemmed from a "misunderstanding" of the Guidance.[210] The EEOC contended in its response that the Guidance does not urge or require individualized assessments of all applicants and employees. Instead, the EEOC letter explains that the Guidance encourages a two-step process, with individualized assessment as the second step. According to the EEOC's explanation, first, the Guidance calls for employers to use a "targeted" screen of criminal records. Once the targeted screen has been administered, the Guidance encourages employers to provide opportunities for individualized assessment for those people who are screened out. The Texas Attorney General has now gone one step further. On November 2, 2013, the state filed a lawsuit in federal court challenging the EEOC's guidance based on Texas law, which allows certain state agencies to prohibit the hiring of convicted felons to ensure they do not hold positions of public trust. According to the lawsuit, these state laws are subject to challenge based on the EEOC's updated guidance.[211]

Employers have also had some recent success in defeating lawsuits initiated by the EEOC that challenge background check policies. On January 28, 2013, a district court judge in Ohio dismissed the case *EEOC v. Kaplan Higher Education Corp.*,[212] alleging violations of Title VII for reliance on credit records. The court held the EEOC failed to meet its threshold burden of proving that the employer's screening practices

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

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

208 *See* Barry A. Hartstein, et al., *Annual Report on EEOC Developments: Fiscal Year 2012*, at 12-13 (2012), *available at* http://www.littler.com/publication-press/publication/annual-report-eeoc-developments-fiscal-year-2012.

209 *See* Rod M. Fliegel, Barry Hartstein, and Jennifer L. Mora, *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, Littler ASAP (June 12, 2013), *available at* http://www.littler.com/publication-press/publication/two-new-eeoc-criminal-record-lawsuits-underscore-important-strategic-a.

210 Ilyse Schuman, *EEOC Clarifies Guidance on Criminal Background Checks*, Littler Washington D.C. Employment Law Update (Sept. 25, 2013), http://www.littler.com/dc-employment-law-update/eeoc-clarifies-guidance-criminal-background-checks.

211 *Texas v. EEOC, et al.*, Case No. 5:13-CV-00255 (N.D. Tex. Nov. 2, 2013) (complaint filed).

212 *Kaplan Higher Education Corp.*, 2013 U.S. Dist. LEXIS 11722 (D. N. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013).

disproportionately excluded protected class members, and relied in principal part on striking the EEOC expert's report, thus resulting in the EEOC failing to have statistical support to establish a *prima facie* case of disparate impact discrimination against the employer.[213] On August 9, 2013, a federal district court judge in Maryland also dismissed, without a trial, *EEOC v. Freeman*,[214] a Title VII suit brought by the EEOC over alleged discriminatory background checks involving both credit and criminal history based largely on fatal flaws in the EEOC's expert report.[215] The opinion acknowledges the legitimate, even "essential," business reasons for conducting criminal background checks and highlights significant challenges the EEOC faces when prosecuting such suits. Moreover, as mentioned earlier in this Report, on October 7, 2013, the U.S. Court of Appeals for the Sixth Circuit affirmed a district court's order requiring the EEOC to pay more than $750,000 in costs and legal fees in a case involving allegations that a temporary staffing company maintained a discriminatory criminal screening policy.[216] The EEOC's claims that the company screened out applicants with felony records—which allegedly had a disparate impact on African Americans—were proved unfounded.

Along with focusing on the use of arrest and conviction records in hiring and employment, the EEOC is also expected to revisit other hiring practices that may disproportionately impact certain protected groups. Based on past hearings, it is likely the EEOC will focus on the use of credit reports in hiring decisions,[217] and carefully review the impact of considering unemployment status in hiring decisions.[218] The EEOC is also expected to focus on pre-employment testing and other types of screening tools or policies that may improperly exclude individuals in protected groups from the hiring process, such as individuals covered by the ADA or individuals over 40 years of age.[219] Finally, the EEOC may also focus on the use of social media in the hiring process and its potential to reveal information related to protected group status.

2. ADA Amendments Act Issues

Since the enactment of the ADAAA, it has become easier for individuals to establish they have a disability under the Act. As a result, the focus of disability claims has shifted to the reasonable accommodation process. With these changes, the EEOC has appeared poised to issue enforcement guidance regarding the topics of leave policies, reasonable accommodations, and undue hardship under the ADA.[220] During FY 2013, the EEOC issued piecemeal publications and letters that touch upon issues that may implicate the ADA, such as certain medical conditions, domestic violence and stalking, and wellness programs.[221] The Commission did not, however, ultimately issue extensive enforcement guidance regarding reasonable accommodations as expected. Nonetheless, it is anticipated that reasonable accommodations will remain at the forefront of the Commission's agenda. The Strategic Enforcement Plan identifies ADAAA issues as part of its focus for the next several years.[222] Additionally, Commissioner Lipnic has publicly stated that the EEOC has been considering leave as a reasonable accommodation for pregnancy-related disabilities.[223] Vigorous enforcement in these areas can be expected in the coming year.

213 Rod Fliegel, Jennifer Mora, and William Simmons, *EEOC Suit Against Employer Screening Applicants Based on Credit History Information Dismissed*, Littler ASAP (Feb. 4, 2013), *available at* http://www.littler.com/publication-press/publication/eeoc-suit-against-employer-screening-applicants-based-credit-history-i.

214 *Freeman*, *2013* U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).

215 Rod Fliegel and Jennifer Mora, *Federal Court Dismisses EEOC Title VII Disparate Impact Suit Over Alleged Discriminatory Background Checks Without Trial*, Littler ASAP (Aug. 12, 2013), *available at* http://www.littler.com/publication-press/publication/federal-court-dismisses-eeoc-title-vii-disparate-impact-suit-over-alle. The EEOC filed an appeal of the *Freeman* decision in the U.S. Court of Appeals for the Fourth Circuit on November, 7, 2013.

216 *Peoplemark, Inc.*, 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013).

217 Press Release, EEOC, *EEOC Public Meeting Explores the Use of Credit Histories as Employee Selection Criteria* (Oct. 20, 2010), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-20-10b.cfm.

218 Press Release, EEOC, *Out of Work? Out of Luck: EEOC Examines Employers' Treatment of Unemployed Job Applicants at Hearing* (Feb. 16, 2011), *available at* http://www.eeoc.gov/eeoc/newsroom/release/2-16-11.cfm. Legal protection for the unemployed is a growing trend. Several jurisdictions, including the District of Columbia, New Jersey, Oregon and New York City, have enacted laws affording protections to unemployed applicants. *See* Nancy Delogu and Jennifer Thomas, *District of Columbia First in Nation to Ban Discrimination Based on (Un)Employment Status*, Littler ASAP (June 28, 2012), *available at* http://www.littler.com/publication-press/publication/district-columbia-first-nation-ban-discrimination-based-unemployment-s. During the 2013 legislation session, nine states introduced bills that would prohibit discrimination against the unemployed. *See* Discrimination Against the Unemployed, National Conference of State Legislatures (July 24, 2013), http://www.ncsl.org/issues-research/labor/discrimination-against-the-unemployed.aspx.

219 Jay-Anne B. Casuga, *Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation, supra* note 158.

220 Press Release, EEOC, *Next Commission Meeting Wednesday, April 25* (Apr. 19, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/4-19-12.cfm; EEOC Meeting, *EEOC to Examine Use of Leave as Reasonable Accommodation* (June 8, 2011), *available at* http://www.eeoc.gov/eeoc/meetings/6-8-11/index.cfm.

221 *See supra* notes 165, 180, and 185, and accompanying text.

222 *See* EEOC, United States Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016 (Dec. 17, 2012), *available a*t http://www.eeoc.gov/eeoc/plan/sep.cfm.

223 *See Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation*, *supra* note 158.

3. Increased Attention on Equal Pay Laws

In 2010, President Obama created the National Equal Pay Task Force, which brought together the EEOC, Department of Justice, U.S. Department of Labor and the Office of Personnel Management to address issues of gender pay disparities.[224] This task force came on the heels of President Obama signing the Lilly Ledbetter Fair Pay Act,[225] which focused on expanding the time limitations period applicable to pay discrimination claims. Since that time, the task force issued its report, which referred to partnering among the federal agencies on equal pay issues, and including equal pay claims as part of the EEOC's systemic initiative.[226]

In FY 2012 and 2013, the Commission continued to show interest in examining employer pay practices. To that end, the Commission requested a National Academies of Sciences study on the ability of federal agencies to collect confidential employee pay information from employers.[227] The NAS released the results of its study in August 2012, providing six recommendations for the agencies.[228] Those recommendations include preparing a comprehensive plan for using the earnings data before initiating any data collection, having an independent contractor conduct a pilot study to test the proposed collection, measuring the data quality and fitness for use, and evaluating employer costs and burden.[229] According to Commissioner Lipnic, the EEOC is currently discussing the recommendations.[230] Meanwhile, the EEOC is expected to bring more Equal Pay Act cases.

4. Sexual Orientation and Gender Identity Discrimination

Another emerging issue the EEOC has indicated that it will target in the next several years is sexual orientation and gender identity discrimination.[231] The EEOC has primarily approached this issue through efforts to apply Title VII sex discrimination provisions to lesbian, gay, bisexual and transgender individuals.

For instance, in a trailblazing departure from earlier rulings, the Commission took the position in *Macy v. Bureau of Alcohol, Tobacco, Firearms and Explosives*,[232] that discrimination against an individual because that person is transgender is discrimination because of sex. A full investigation of the plaintiff's claims was subsequently conducted. In July 2013, the EEOC issued a ruling, determining that the plaintiff's employer violated Title VII by discriminating against her because she is transgender.[233] The EEOC's focus involved "stereotyping" based on a person's gender.

The *Macy* decision has already appeared to impact the EEOC's enforcement and litigation activities. In FY 2013, a South Dakota supermarket owner entered into a conciliation agreement with the EEOC, agreeing to pay $50,000 to a former employee who was allegedly terminated for being transgender.[234]

Meanwhile, the Employment Non-Discrimination Act (ENDA)—which would ban workplace sexual orientation and gender identity discrimination—cleared the Senate, although its prospects remain uncertain.[235] If passed, ENDA would offer more consistent and reliable protection for lesbian, gay, bisexual and transgender workers than the EEOC's current strategy of relying on Title VII's sex discrimination provisions.[236]

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224 White House, National Equal Pay Task Force, http://www.whitehouse.gov/webform/national-equal-pay-task-force-submit-your-question (last visited Dec. 20, 2013).

225 Pub. L. No. 111–2 (2009).

226 See White House, Equal Pay Task Force Accomplishments (Apr. 2012), *available at* http://www.whitehouse.gov/sites/default/files/equal_pay_task_force.pdf.

227 *See Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation*, *supra* note 158.

228 Jay-Anne B. Casuga , *EEAC: Academies Report Supports Concerns About OFCCP's 2011 Pay Data Tool ANPRM*, Daily Lab. Rep. (BNA) No. 184, at A-10 (Sept. 21, 2012).

229 *Id.*

230 Lipnic Says EEOC Intends to Combat Hiring Barriers, Explore Accommodation, *supra* note 158.

231 EEOC, U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016, at 10 (Dec. 17, 2012), *available at* http://www.eeoc.gov/eeoc/plan/sep.cfm.

232 EEOC Appeal No. 0120120821 (Apr. 20, 2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

233 *Mia M. Macy v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, Agency Complaint No. ATF-2011-00751, DJ Number 187-9-149 (July 8, 2013), *available at* http://www.documentcloud.org/documents/726679-doj-decision-redacted.html#document/p1.

234 Press Release, EEOC, *Rapid City Market to Pay $50,000 to Settle EEOC Finding of Discrimination Against Transgender Employee* (Sept. 16, 2013), *available at* http://www1.eeoc.gov/eeoc/newsroom/release/9-16-13.cfm.

235 Ben James, *ENDA's Changes of Passage Better Than Ever, Lawyers Say*, Employment Law360 (Sept. 26, 2013); Ilyse Schuman, *Senate Panel Advances Employment Non-Discrimination Act (ENDA)*, Littler Washington D.C. Employment Law Update (July 10, 2013), http://www.littler.com/dc-employment-law-update/senate-panel-advances-employment-non-discrimination-act-enda.

236 *See* Ben James, *EEOC Commish Says Title VII Not Enough for LGBT Workers*, Employment Law360 (Mar. 5, 2013).

5. Genetic Discrimination

In FY 2013, the EEOC filed its first two lawsuits involving claims under the Genetic Information Nondiscrimination Act (GINA).[237] GINA went into effect on November 21, 2009 and prohibits employers from using genetic information in employment decisions, restricts acquisition of genetic information, strictly limits disclosure of genetic information, and prohibits retaliation against employees who complain of genetic discrimination.[238] GINA's prohibitions extend to the genetic information of applicants, employees, and family members of applicants and employees.[239] The EEOC's filing of the two lawsuits within 11 days of each other signals the Commission's commitment to pursuing genetic discrimination claims and suggest that GINA enforcement will be part of the EEOC's future agenda.[240]

6. National Origin Discrimination

On November 13, 2013, the EEOC held a public meeting to address the challenges to enforcing Title VII's protection against national origin discrimination.[241] The EEOC is concerned that the diversity, size and cultural individuality of different ethnic and immigrant groups presents challenges to the compliance and enforcement of Title VII's prohibition against national origin discrimination.[242] Many panelists highlighted the growing immigrant population of the United States workforce, as well as the dispersion of this immigrant population to smaller cities throughout the U.S. that have not traditionally had high immigrant populations.[243] The EEOC has implemented many tools to combat national origin discrimination, including implementing a Spanish-language website and Twitter feed, publishing fact sheets and other materials in Arabic, Chinese, Haitian-Creole, Korean, Russian, Spanish and Vietnamese, and employing bilingual employees throughout the country.[244] Other ideas suggested to combat national origin discrimination included development of training modules in a variety of languages as well as a model anti-harassment policy available on the EEOC's website. The EEOC has invited the public to submit written comments related to issues of national origin discrimination.

237 Elizabeth Tempio Clement, *EEOC Files First Genetic Discrimination Class Action Against Nursing and Rehabilitation Center*, Littler Healthcare Employment Counsel (May 21, 2013), http://www.littler.com/2013/05/21/eeoc-files-first-genetic-discrimination-class-action-against-nursing-and-rehabilitation-center; Ilyse Schuman, *EEOC Settles First Case Alleging Genetic Information Bias*, Littler Washington D.C. Employment Law Update (May 15, 2013), http://www.littler.com/dc-employment-law-update/eeoc-settles-first-case-alleging-genetic-information-bias.

238 Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110–233, 122 Stat. 881 (2008).

239 *Id.*

240 Elizabeth Tempio Clement, *EEOC Files First Genetic Discrimination Class Action Against Nursing and Rehabilitation Center, supra* note 237.

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

242 *Id.*

243 *Id.*

244 *Id.*

IV. SCOPE OF EEOC INVESTIGATIONS AND SUBPOENA ENFORCEMENT ACTIONS

As part of the investigation process, the EEOC has statutory authority to issue subpoenas and pursue subpoena enforcement actions in the event of an employer's failure or refusal to provide requested information or data or to make requested personnel available for interview.[245] The EEOC continues to exercise this option, particularly when dealing with systemic investigations.

A brief review of the scope and limits on the EEOC's investigative authority follows, including procedural rules in challenging such authority. This section addresses both federal appellate and district court decisions over the past year. Appendix C of this Report provides a detailed summary of subpoena enforcement actions filed during FY 2013. Notably, significantly fewer subpoena enforcement actions were filed in FY 2013 than were filed in FY 2012. This year, 17 such actions were filed, down from more than 30 filed in the prior year.

A. EEOC Authority to Conduct Class-Type Investigations

Systemic investigations can arise based upon any of the following: (1) an individual files a pattern or practice charge or the EEOC expands an individual charge into a pattern or practice investigation; (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.[246] 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."[247]

Title VII also authorizes the EEOC to issue charges on its own initiative (*i.e.*, Commissioner Charges),[248] 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 violations of the applicable statute.[249]

B. Scope of EEOC's Investigative Authority

The Commission's requests for information arise under Title VII, which permits it to "at all reasonable times have access to . . . any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this subchapter and is relevant to the charge under investigation."[250] The leading case interpreting this authority is the U.S. Supreme Court decision *EEOC v. Shell Oil Co.*,[251] which is frequently cited in subpoena enforcement litigation, particularly for the proposition that the EEOC is "entitled to access only evidence 'related' to the charge under investigation . . . courts have generously construed the term 'relevant' and have afforded the Commission access to virtually any material that might cast light on the allegations against the employer."[252] However, in *Shell* the Court also noted, "Congress did not eliminate the relevance requirement, and we must be careful not to construe the regulation adopted by the EEOC governing what goes into a charge in a fashion that renders that requirement a nullity."[253]

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

246 *See* 42 U.S.C. § 2000e-5(b).

247 *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).

248 *See* 42 U.S.C. § 2000-e-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").

249 *See, e.g.*, 29 U.S.C. § 626(a) of 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").

250 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.

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

252 *EEOC v. Shell Oil Co.*, 466 U.S. at 59.

253 *Id.*

Challenges to subpoena enforcement actions typically focus on two issues: (1) relevance and (2) burdensomeness. Though the relevance standard for EEOC subpoenas is interpreted broadly when compared with the standard for the admissibility of evidence, courts have refused to enforce administrative subpoenas that would result in a "fishing expedition."[254] With respect to burdensomeness, courts begin by presuming that compliance should be enforced to further the EEOC's legitimate inquiry into matters of public interest. Thus, an employer must demonstrate the demands are unduly burdensome or unreasonably broad, such as by showing that "compliance would threaten the normal operation of a respondent's business."[255] Cost of compliance is also considered, taking into account the personnel or financial burden in light of the resources the employer has at its disposal.[256]

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

An employer may be barred from challenging a subpoena in a subpoena enforcement action in circumstances where it fails to timely move to challenge or modify the subpoena.[257] The EEOC has taken an aggressive stance on the "waiver" issue over the past year when dealing with employers that have generally failed to respond to the EEOC's requests for information and subpoenas. Specifically, an employer may "waive" the right to oppose enforcement of an administrative subpoena unless it petitions the EEOC to modify or revoke the subpoena within five days of receipt of the subpoena.[258] The EEOC continues to raise this waiver argument, particularly when dealing with employers that have generally failed to respond to the EEOC's requests for information and subpoenas.[259]

A particularly noteworthy case over the past year involving the risks to an employer for failing to timely file a petition to modify or revoke a subpoena is *EEOC v Aerotek*,[260] in which a federal appeals court supported the EEOC's view that an employer waived the right to challenge a subpoena by failing to timely challenge a subpoena.

In *Aerotek*, a staffing agency was ordered to comply with a broadly worded subpoena that was pending for more than three years because the company filed objections *one day* late. The staffing company was accused of placing applicants according to the discriminatory preferences of its clients. The EEOC's subpoena sought a "broad range of demographic information, including the age, race, national origin, sex and date of birth of all internal and contract employees dating back to January 2006," in addition to information about the company's recruitment, selection, placement and termination decisions by the company and its clients.

Despite providing the EEOC with approximately 13,000 pages of documents in response to the subpoena, the agency claimed the company failed to provide additional requested information. The district court held that Aerotek filed its petition to revoke or modify the subpoena six business days after the subpoena was issued instead of the statutorily required five days. The Seventh Circuit agreed, finding that "Aerotek has provided no excuse for this procedural failing and a search of the record does not reveal one. . . We cannot say whether the Commission will ultimately be able prove the claims made in the charges here, but we conclude that EEOC may enforce its subpoena because Aerotek has waived its right to object."[261]

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

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

256 *Id.* at 653-54.

257 *See, e.g., EEOC v. Bashas', Inc.*, 2009 U.S. Dist. LEXIS 97736, at **9-29 (D. Ariz. Sept. 30, 2009) (providing a thorough discussion of the case law discussing the potential "waiver" of a right to challenge an 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).

258 *See, e.g., EEOC v. Chrome Zone LLC*, Case No. 4:13-mc-130 (S.D. Tex. February 22, 2013) (EEOC motion to compel employer's compliance with subpoena arguing waiver by failure to file a Petition to Revoke or Modify the Subpoena where employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *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 the 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 employee's 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).

259 *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 the Subpoena where employer had failed to respond to charge of discrimination or EEOC's requests for information or subpoena); *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 the 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 employee's 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).

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

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

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

D. Review of Recent Cases Involving Broad-Based Investigation by EEOC

1. Requests for Information Involving Broad Scope

As shown by the discussion above, to the extent the EEOC believes an employer's unlawful practice or policy is not limited to the facility or entity at issue in a specific charge, the Commission will frequently make requests for regional, state, or nationwide information and data. This approach is frequently supported by district courts, which routinely enforce administrative subpoenas encompassing a geographic scope well beyond what may otherwise seem reasonable under the specific allegations of the charge.

In *EEOC v. Sterling Jewelers*,[262] a former employee filed a charge alleging she suffered age and sex discrimination in connection with a promotion and was subjected to retaliatory discharge when she complained to her manager. During its investigation, the EEOC obtained an "Employee Counseling Report" issued to the charging party which stated "[a]ny discussion regarding payroll need only be made between said employee + mgr. Having inappropriate discussions only contribute [sic] to and fosters ill will amongst team members as well as being a direct violation of Sterlings [sic] code of conduct."[263] In the employee comments section of the counseling report, the charging party indicated, "I feel I'm being discriminated against being a woman in this company where men always make more money than women."[264]

Despite the employer's insistence that it actually had no policy prohibiting employees from discussing pay, the EEOC issued a subpoena seeking the Code of Conduct and any other policies prohibiting employees from discussing their pay and all discipline issued under such policies. The EEOC then filed with the district court an application for enforcement of the subpoena. The application coordinated with the timing of discovery in a class action filed in the same court by the EEOC and 19 individuals against the employer. Thus, in addition to advancing the usual arguments that nationwide information was irrelevant to the underlying charge and compliance would be unduly burdensome, the employer argued the subpoena was an end-run around discovery in the class action.

The district court dismissed each of the employer's arguments. First, it found the subpoena was issued for a legitimate purpose, and not as an end-run on the discovery process, noting the "EEOC [has] the prerogative to decide at what pace and how vigorously to pursue a given investigation."[265] The court also found the scope of the subpoena appropriate and the information sought relevant, given the charging party had been disciplined under what appeared to be a company-wide policy prohibiting employees from discussing their pay and her express concern that women working at the company made less than their male counterparts. The court found the employer's undue burden argument particularly unconvincing, observing "[i]t is difficult to understand how the subpoena, which seeks information related to Sterling's alleged policy of prohibiting employees from discussing their pay, would impose an undue burden on Sterling when they state they have no such policy."[266] Thus, the court ordered Sterling to produce the information requested.

The company proceeded to represent to the EEOC that it has no policy prohibiting employees from discussing pay and, accordingly, had not issued discipline under any such policy. Subsequently, the charging party gathered and produced to the EEOC over 100 declarations from current and former employees and managers asserting that the company does indeed maintain a policy prohibiting employees from discussing their pay. As a result, the EEOC issued a second subpoena to Sterling seeking both documents and electronically stored information ("ESI"), including: (1) all versions of the company's code of conduct, disciplinary policies, and confidentiality policies; (2) information for the individuals who signed the charging party's Employee Counseling Report; (3) the charging party's personnel file; (4) documents and training relating to the policies requested; (5) communications between Sterling and its employees concerning employee discussion of compensation; personnel files, including written discipline; (6) contact and employment information for employees disciplined either for discussing compensation or for any violation of Sterling's code of conduct; and (7) Sterling's methods of tracking and coding discipline under its employment policies.

262 *EEOC v. Sterling Jewelers Inc.*, 2011 U.S. U.S. Dist. LEXIS 126585 (W.D.N.Y. Nov. 2, 2011); 2013 U.S. Dist. LEXIS 141489 (W.D.N.Y. Sept. 23, 2013).
263 2013 U.S. Dist. LEXIS 141489 at *3.
264 *Id.* at **3-4.
265 *Id.* at *8.
266 *Id.* at *14-15.

The company produced several versions of its code of conduct, disciplinary policies, and confidentiality policies; contact information for individuals who signed the charging party's Employee Counseling Report; and the charging party's personnel file. The EEOC responded that the company's production even under these categories was incomplete, in that it failed to provide a code of conduct for the year 2011, neglected to identify the categories to which each document was responsive, and did not include any ESI. Sterling responded only that it had provided all copies of the requested policies. The court accepted the company's representation that it had produced all versions of the requested policies, but ordered it to confirm that it had performed a reasonable search of its electronically stored information and found no responsive information. The court also ordered Sterling to identify which documents were produced in response to each request.

With respect to the remaining categories of subpoenaed information, Sterling proffered several objections. First, it argued the 2012 subpoena was duplicative of the subpoena issued by the EEOC in 2010. Sterling also claimed the subpoena requested information irrelevant to the charge. Sterling again argued that the EEOC was not seeking the requested information for a legitimate purpose but, rather, to further its pending class litigation. Finally, it again asserted compliance would be unduly burdensome.

Though the court acknowledged some degree of overlap between the 2010 and 2012 subpoenas, in that each sought to assess whether the company maintained a policy prohibiting employees from discussing compensation, it held the declarations provided by the charging party cast sufficient doubt on the company's representation that it maintained no such policy to justify the EEOC's further investigation. However, the court was more receptive to the company's argument that the subpoena requested information irrelevant to the charging party's allegations. It limited each category of documents requested to those relating to employee disclosures of compensation, as opposed to, for example, all documents relating to the company's other confidentiality or disciplinary policies. Finally, as it had with respect to the 2010 subpoena, the court dismissed the company's arguments that the subpoena was not issued for a legitimate purpose and that compliance would be unduly burdensome.

Similarly, in *EEOC v. Chicago Public Schools*,[267] the court enforced enterprise-wide subpoena requests stemming from a single charge of discrimination. In *Chicago Public Schools*, the charging party, a former employee, alleged she was subjected to unlawful sexual harassment. In investigating her claim, the EEOC requested employment and contact information for all employees at the charging party's facility from 2010 to the present. The employer provided contact information for former employees, but objected to providing contact information for current employees on the basis of employee privacy and overbreadth of the information requested. The employer argued the Commission was conducting a "fishing expedition" by attempting to interview every employee at the charging party's school because they "may have" witnessed some unknown sexual harassment by the alleged offender. The EEOC responded that the information sought would assist it in determining the size and makeup of the class of employees who may have been affected by sexual harassment.

The magistrate judge was not persuaded by the employer's arguments. Specifically, the magistrate noted the Commission had not sought contact information for employees in multiple schools or over an extended period of time. The magistrate reasoned, therefore, that the requests fell within the bounds of the lenient relevance standard applicable to the Commission's investigative powers. Second, in response to the employer's argument that production of subpoenaed information would violate employee privacy, the magistrate noted the sufficiency of Commission regulations, which impose fines and imprisonment for disclosure of information provided to the Commission, and ordered the employer to comply with the subpoena. On August 29, 2013, the judge adopted the magistrate's report and recommendation in full, ordering the employer to comply fully with the administrative subpoena. [268]

In *EEOC v. Farmer's Pride, Inc.*,[269] the judge resolved similar facts and issues using the same reasoning. The charging party, a male former employee of the defendant poultry processing facility, alleged that he was subjected to sexual harassment and retaliation by his female supervisor. He alleged also that two male supervisors sexually harassed his female coworkers. The Commission served upon Farmer's Pride a subpoena seeking, among other things, facility-wide complaints of sexual harassment since 2009 and personnel and contact information for all employees at the facility. The employer refused to produce this information, arguing the subpoena was overly broad because it was not limited to the three supervisors who were named in the charge and the employees and department they supervised.

267 *EEOC v. Chicago Public Schools*, Case No. 1:13-cv-3298 (N.D. Ill. May 1, 2013).

268 *Id.*, Docket # 28.

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

The EEOC filed an enforcement action, and the employer objected on the basis of relevance. Farmer's Pride also requested, if the court enforced the subpoena, that it also issue a protective order to protect the privacy of its employees.[270] The court was not receptive to the employer's relevance arguments, reasoning that the charge and investigation both revealed complaints of harassment that went beyond the charging party and, therefore, the EEOC was entitled to investigate facility-wide misconduct. The court noted also that information about other harassment at the facility and the employer's investigation and response would reveal whether the employer permitted a hostile environment at its deboning plant.[271]

2. Requests for Information Involving Concerns about Protecting Confidential Information

Employers are frequently reluctant to produce information and documents involving their employees based upon privacy concerns. While the EEOC has long held that its internal procedures protect privacy rights, employers have found little comfort in the Commission's perspective. Courts typically side with the EEOC on the issue of employee privacy, but recent decisions show that courts will also implement additional protections where circumstances require them.

In *Farmer's Pride*,[272] discussed above, the employer requested that, in the event the court were to enforce the Commission's subpoena for contact information for all employees at its facility, the court also issue a confidentiality order to protect employees. Specifically, the employer sought to prevent the information from being provided by the EEOC to the charging party, the Friends of Farmworkers, and its attorneys, who Farmer's Pride alleged would use employee contact information for improper purposes. In support of this assertion, Farmer's Pride alleged that Friends of Farmworkers, a non-profit organization with its roots in the American Civil Liberties Union, had, in the past, accessed similar employee contact information and used it to engage in "bullying, telephone solicitation, and attorney hounding an employee at his house regarding court documents."[273] The EEOC countered, taking the view as it has in similar subpoena enforcement actions, that its regulatory and internal protections are sufficient to protect the privacy interests of Farmer's Pride employees. Given Friends of Farmworkers' past misconduct, the court was not satisfied with this rote response. Thus, the court decided to issue a protective order. In so holding, the court cited *EEOC v. Bashas', Inc.*,[274] in which a protective order was deemed necessary given the existence of pending private litigation covering the same operative facts as the Commission's investigation. The court determined Farmer's Pride presented similar considerations and, therefore, warranted extra protective measures.

3. Additional Noteworthy Developments Involving Subpoena Enforcement Actions

a. Subpoenas Concerning Protected Categories of Which the Charging Party is Not a Member

One noteworthy recent decision demonstrates that some courts have begun to limit the scope of permissible inquiries by the EEOC, and may closely look at both the EEOC's and employer's conduct (and even the plausibility of a charge) in determining whether it will enforce a subpoena enforcement action. In *EEOC v. Homenurse*,[275] the EEOC sought to enforce an employer-wide subpoena for information relating to age, disability, race, and genetic discrimination. However, the charging party, a former staffing coordinator for the defendant employer, was Caucasian, under age 40, and had no genetic condition or disability. Nonetheless, when she was terminated, she filed a charge alleging that individuals with disabilities, individuals in the protected age group, and individuals with pre-existing genetic conditions were subjected to discrimination in hiring on a class-wide basis. The charging party also alleged that Homenurse's refusal to hire individuals based on conviction records adversely affected African Americans as a class. The charging party claimed she was fired by Homenurse for opposing these unlawful discriminatory practices.

The EEOC investigated not only the charging party's retaliation claim, but also the class-wide allegations in the charge. Of particular note, however, was the EEOC's approach to the investigation. First, the Commission conducted a raid on Homenurse's office "as if it were the FBI executing a criminal search warrant."[276] It arrived unannounced, with subpoenas in hand, and commenced rifling through Homenurse's confidential personnel and patient files. Later, despite the fact the class allegations related to applicants who were not hired, the EEOC

270 The court's analysis of the employer's privacy arguments is discussed *infra*, in the next subsection.

271 2012 U.S. Dist. LEXIS 156484, at **14-15.

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

273 2012 U.S. Dist. LEXIS 165484, at *23.

274 *EEOC v. Bashas', Inc.*, 2011 U.S. Dist. LEXIS 141644 (D. Ariz. Dec. 8, 2011).

275 *EEOC v. Homenurse*, Case No. 1:13-cv-02927, 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013).

276 *Id.*, Docket # 8.

requested application and employment information for all applicants and employees. The employer made every effort to meet with the EEOC to streamline the investigation and resolve the charge. The parties had a conference call in which they agreed to the production of certain information. Despite this agreement, the EEOC nevertheless issued a subpoena for the documents the employer had agreed to produce. Because it believed the subpoena was unnecessary in light of the agreement, Homenurse objected to it. The next day, the Commission issued a second subpoena it claimed conformed to the agreement, but which was actually more expansive than the first. Homenurse moved to revoke or modify the subpoena, at the same time producing the information discussed during the conference call, including over 13,000 pages of documents concerning over 2,500 individuals. Unsatisfied that Homenurse provided only "applications," (per the agreement as confirmed by the EEOC representative in a follow-up email), rather than "applicant packets," the EEOC issued a third subpoena for "applicant packets." Homenurse provided some of the information requested in the third subpoena, but refused to provide motor vehicle report authorization forms, personal reference forms, and reference letter evaluation forms. Homenurse argued that the charge alleged only discrimination in hiring, and that current employee files and information were irrelevant. The EEOC then issued a fourth subpoena seeking all previously requested documents to the present date, which it ultimately sought to have enforced by the district court, claiming Homenurse's failure to provide it with all the information requested "delayed and hampered" its investigation.[277]

In the enforcement action, Homenurse argued the EEOC had no authority to investigate the charging party's class allegations because she was not an aggrieved party under the governing statutes. The court agreed, noting that the charging party was an "aggrieved party" with respect to her retaliation claims, but that she lacked standing to assert claims on behalf of individuals denied hire based on race (African American), age (over 40), disability, or genetic condition. The court relied, in relevant part, on *McLane II*,[278] a recent decision by the District of Arizona involving a female charging party who alleged both sex and disability discrimination based on the defendant employer's use of a physical capabilities exam. In *McLane II*, the court enforced the EEOC's subpoena with respect to information concerning sex discrimination, but found the EEOC had no jurisdiction to investigate an alleged ADA violation because the charging party was not disabled. Likewise, the judge in *Homenurse* found the EEOC could not investigate class allegations against Homenurse relating to age (over 40), disability, genetic condition, and race (African American) where the charging party did not belong to any of the purportedly wronged classifications. The court further noted that there was no basis to distinguish *McLane II* based on information uncovered through the investigation, as the EEOC had not uncovered even a single aggrieved individual through its months of investigation of Homenurse. Thus, the court denied the EEOC's enforcement application and quashed the pending subpoena.

In addition, the court found that documents relating to the hire of Homenurse's employees were irrelevant to the EEOC's investigation of alleged discriminatory refusal to hire, which would presumably relate only to non-employees (applicants who were denied hire). The court likewise held motor vehicle request forms, personal reference request forms, and reference letter authorization forms were irrelevant to the issues of failure to hire on the basis of age, race, disability, or genetic condition.

Finally, the court held the EEOC's demands were unduly burdensome. Specifically, the court noted the employer had already produced to the EEOC over 37,000 pages of documents, incurring over $100,000 in expense. In light of Homenurse's prior cooperation and expense in attempting to comply with reasonable requests for information and subpoenas, the court held further production would be unduly burdensome to Homenurse's small business operations.

b. Nonresponsive Employers and the Issue of Contempt

In *EEOC v. Midwest Health*,[279] the EEOC petitioned the magistrate judge for an order to hold the defendant employer in contempt of court for failing to comply with the court's order commanding the defendant to comply with the pending administrative subpoena. The court initially ordered the defendant to show cause on or before September 13, 2012 why the administrative subpoena should not be enforced. The defendant failed to respond to the show cause order, and the EEOC moved to compel compliance with the administrative subpoena. On December 2, 2012, the court ordered Midwest Health to comply with the administrative subpoena by December 20, 2012. However, the employer did not comply with the subpoena, and the EEOC filed a motion for contempt.

277 *Id*. at 22.

278 *EEOC v. McLane Co.*, Case No. CV-12-02469, 2012 U.S. Dist. LEXIS 164920 (D. Ariz. Nov. 19, 2012).

279 *EEOC v. Midwest Health Inc.*, Case No. 12-MC-240, 2013 U.S. Dist. LEXIS 52155 (D. Kan. April 11, 2013).

The magistrate judge assessed the EEOC's request in light of his limited statutory authority to certify facts to the district judge in support of a contempt order.[280] Before a magistrate may certify facts supporting civil or criminal contempt, the magistrate determines the court must find "clear and convincing evidence" the actor disobeyed a known, valid court order. Though the EEOC asserted in its motion that the company failed to comply with the court's order, it failed to submit any declaration, affidavit, or other evidence to establish noncompliance. Thus, the magistrate found insufficient evidence on which to certify facts to the district judge, or even to issue an order to the defendant to show cause why it should not be held in contempt.

c. International Employers and Requests for Information Concerning Non-U.S. Citizens

Employers with global operations also need to be mindful of the geographic reach of the EEOC and those protected under its provisions. While this will continue to be an evolving area of the law, one recent decision provides a glimpse of the types of issues that may arise.

In *EEOC v. Royal Caribbean*,[281] the court was forced to decide, in the context of determining an administrative subpoena's enforceability, whether the Commission's investigative powers extend to non-U.S. citizens. In that case, the underlying charge of disability discrimination was filed by an Argentinean foreign national employed as an assistant waiter on a cruise ship operated by the employer. In its investigation of the charge, the EEOC issued a subpoena seeking information concerning other employees discharged from shipboard duty due to medical reasons because they were found unfit for sea under the Bahamas Maritime Authority regulations governing medical and eyesight standards for seafarers. Royal Caribbean provided information for employees who were U.S. citizens, but refused to provide information about applicants or employees who were foreign nationals.

The EEOC filed an Application for an Order to Show Cause why the subpoena should not be enforced in the Northern District of Georgia. The court issued an order to show cause. Concurrently, the employer filed a motion to dismiss the subpoena enforcement action based on lack of jurisdiction and improper venue or, in the alternative, to transfer the action to the Southern District of Florida, where the employer maintained U.S. operations. The Northern District of Georgia granted the employer's motion to transfer to the action to the Southern District of Florida.

Royal Caribbean then opposed enforcement of the portions of the subpoena that required information pertaining to foreign nationals, arguing the ADA does not apply to foreign nationals, and also arguing the subpoena was overbroad and unduly burdensome. The EEOC contended it did, indeed, have jurisdiction over foreign nationals in this context and, moreover, the information requested was relevant to its investigation of the charge. With respect to jurisdiction, the Commission argued the charging party's ship made port in Miami and, thus, at least some of the charging party's work occurred while the ship was in U.S. waters. It also relied on Royal Caribbean's admission it conducts substantial business in the U.S. Given there was no controlling precedent that squarely established whether the EEOC has jurisdiction over claims of disability discrimination by foreign crew members on foreign-flagged ships, the magistrate determined the EEOC had at least met its burden, in the subpoena enforcement arena, of making a plausible argument for jurisdiction. Thus, it rejected Royal Caribbean's jurisdictional arguments.

With respect to the employer's relevance arguments, the magistrate observed neither the charge nor the investigation indicated any employee other than the charging party had been subjected to disability discrimination. Additionally, the EEOC conceded at a hearing on the matter it could bring a Commissioner's charge alleging a pattern and practice of disability discrimination and then investigate that allegation. Thus, the magistrate decided the subpoenaed information was not relevant to the EEOC's investigation of the charge and recommended the court refuse to enforce the subpoena.[282] The court adopted the magistrate's report and recommendations on June 7, 2013. As of the time of this publication, the Commission's appeal of the court's decision was pending before the U.S. Court of Appeals for the Eleventh Circuit.

280 *See Id.* at *3, citing 28 U.S.C. § 636(b).

281 *EEOC v. Royal Caribbean Cruises, Ltd.*, Case No. 1:12-mc-22014, Docket # 8 (S.D. Fla. May 30, 2012).

282 Case No. 1:12-mc-22014, Docket # 34.

V. REVIEW OF NOTEWORTHY EEOC LITIGATION AND COURT OPINIONS

A. Pleadings

1. Attacking Complaint Based on Lack of Specificity

In FY 2013, employers continued to challenge discrimination complaints brought by the EEOC for lack of specificity under the standard enunciated in *Twombly* and *Iqbal*.[283] Even where federal courts initially grant employers' motions to dismiss, however, the EEOC typically has been successful in articulating legally sufficient claims in amended pleadings.

After a federal district court in Texas dismissed the EEOC's nationwide failure-to-hire claims in *EEOC v. Bass Pro Outdoor World, LLC*,[284] the EEOC successfully amended the complaint. The court concluded that the EEOC met the pleading standard to assert claims under section 706 on behalf of unsuccessful job applicants by listing almost 200 potential claimants, and that the agency was not required to meet the elements of a *prima facie* case to withstand a motion to dismiss.[285] Moreover, the court held the combination of numeric and anecdotal evidence included in the amended complaint was sufficient to state a pattern-or-practice claim under section 707.[286]

In *EEOC v. Pioneer Hotel*,[287] the federal district court in Nevada cited favorably to the *Bass Pro* case and held "while an action pursuant to section 706 without a single identified plaintiff will not lie, the EEOC is not required to identify every aggrieved individual comprising the class."[288] Where the complaint identified the protected class, the applicable timeframe, and the departments in which the named and unnamed employees worked, the EEOC had alleged factual allegations sufficient to identify an aggrieved class and survive a motion to dismiss.

In the EEOC's human trafficking case filed in Hawaii, *EEOC v. Global Horizons, Inc.*,[289] the EEOC's third amended complaint contained sufficient facts to state plausible claims for relief against the company for a pattern or practice of discriminatory treatment, hostile work environment and constructive discharge, discriminatory terms and conditions of employment, and retaliation. Although most of the EEOC's claims against the individual farm defendants were sufficiently pled as well, the court dismissed the retaliation and hostile work environment claims against several farm defendants for failing to allege required elements. Notably, because the court had stated that the third amended complaint would be the EEOC's last opportunity to cure its pleading deficiencies, the claims were dismissed without leave to amend.[290]

Where the EEOC's pattern or practice discrimination and retaliation complaint was "pure conclusory boilerplate," with "no recitation of any factual basis, plausible or otherwise, for the 'pattern and practice' claims alleged, whether based on anecdotal, testimonial, documentary or statistical foundation," the EEOC was ordered to file an amended complaint.[291] However, the court declined to dismiss the case because the employer did not move to dismiss until over three years after the lawsuit was filed.

In a significant reversal, a Chicago federal court withdrew its earlier decision dismissing a putative ADA class case challenging United Parcel Service's (UPS) leave policies.[292] On reconsideration, the court distinguished between individual and class ADA claims and decided the EEOC had alleged sufficient factual allegations relating to unnamed class members, holding that "*Iqbal* and *Twombly* do not require plaintiffs, including EEOC, to plead detailed factual allegations supporting the individual claims of every potential member of a class."[293] Instead, the content merely must be sufficient for the court to reasonably infer that UPS discriminated against other "qualified individuals" when it enforced its leave policy.[294] The court granted the EEOC's motion for leave to file a second amended complaint, which the court also had denied previously.

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

284 *EEOC v. Bass Pro Outdoor World, LLC*, 2012 U.S. Dist. LEXIS 8268 (S.D. Tex. May 31, 2012).

285 *EEOC v. Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 36711, **6-17 (S.D. Tex. Mar. 18, 2013). In contrast, the earlier complaint failed to identify a single plaintiff. *Bass Pro*, 2012 U.S. Dist. LEXIS 8268, at *50.

286 *Bass Pro,* 2013 U.S. Dist. LEXIS 36711, at **27-34.

287 *EEOC v. Pioneer Hotel*, 2013 U.S. Dist. LEXIS 98350 (D. Nev. July 12, 2013).

288 *Pioneer Hotel*, 2013 U.S. Dist. LEXIS 98350, at *7.

289 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 16072, at **16-29 (D. Haw. Nov. 8, 2012).

290 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 146968, at *51 (D. Haw. Oct. 9, 2012).

291 *EEOC v. Ruby Tuesday, Inc.*, 2013 U.S. Dist. LEXIS 8268, at *13 (W.D. Pa. Jan. 22, 2013).

292 *EEOC v. United Parcel Service, Inc.*, 2013 U.S. Dist. LEXIS 4462 (N.D. Ill. Jan. 11, 2013) (overruling *EEOC v. United Parcel Service, Inc.*, 2012 U.S. Dist. LEXIS 92994, at *5 (N.D. Ill. July 3, 2012)).

293 *UPS*, 2013 U.S. Dist. LEXIS 4462, at *18.

294 *Id.* at *19.

In a single plaintiff ADA case, the EEOC sufficiently pled claims the employee was discriminated against based on his disability by identifying the impairment and the major life activity, without specifically describing how the impairment limited his ability to perform the life activity.[295] The EEOC also sufficiently pled a "regarded as" disabled claim based on the major life activity of working, where the complaint was sufficient to permit a plausible inference that the employer regarded the plaintiff as substantially limited in his ability to perform a broad range or class of jobs.[296] The court granted the employer's motion to dismiss the EEOC's retaliation claim, because the complaint contained no facts showing a nexus between the person to whom the employee complained and the medical personnel who determined the employee was not qualified for the position.[297] However, the EEOC's amended complaint contained additional facts sufficient to show this nexus and survived the employer's motion to dismiss.[298]

2. Key Issues in Class-Related Allegations

Courts continue to grapple with the distinctions between the EEOC's authority to bring lawsuits on behalf of individual claimants under section 706 and to file pattern or practice actions under section 707.[299] In 2012, the Sixth Circuit, the only appellate court to address the issue, held the EEOC may bring a civil action on a pattern or practice theory under section 706.[300] This holding is significant because it provides the EEOC with two avenues for pursuit of claims under section 706: (a) presenting circumstantial evidence under *McDonnell Douglas*'s[301] familiar burden-shifting analysis; or (b) meeting a heightened *prima facie* case standard to establish pattern or practice of discrimination under *International Brotherhood of Teamsters v. United States*.[302] In addition, permitting a "pattern or practice" claim under section 706 allows the EEOC potentially to recover compensatory and punitive damages, which are not available for pattern or practice claims under section 707 of Title VII.

In *EEOC v. Pitre, Inc.*,[303] the federal district court in New Mexico adopted the Sixth Circuit's reasoning, allowing the EEOC to pursue a pattern or practice case under section 706, and bifurcating the trial. The court was faced with the unique issue of how to hold a trial on pattern or practice sexual harassment claims, which could not fit squarely into the *Teamsters* model because each aggrieved individual had to make the subjective showing that the harassment was unwelcome.[304] Among other issues, Pitre challenged the EEOC's authority to simultaneously bring a claim of a pattern or practice of discrimination and seek punitive damages during Phase I of the trial.

The court ultimately held that in the first phase of trial, the jury would decide whether the employer maintained a pattern or practice of condoning a sexually harassing hostile work environment, whether the employer had a policy of retaliating against those who complained of the environment, and whether the employer did so with malice or reckless disregard of the aggrieved employee's federally protected rights. During Phase I, the EEOC would be required to prove the elements of its hostile work environment and retaliation claims, as well as that the unlawful employment practice was the company's "standard operating procedure," as required by *Teamsters*. If the EEOC is successful, the jury would be entitled to impose prospective relief against the defendant during Phase I.

The second phase of trial would determine individual relief. During Phase II, a presumption would apply that each individual within the relevant time period satisfied the objective elements of his claims, but each aggrieved individual would bear the burden to prove that he was subjected to unwelcome workplace harassment.[305]

295 *EEOC v. Burlington Northern Santa Fe Railroad*, 2013 U.S. Dist. LEXIS 49504, at *18-23 (D. Kan. Apr. 5, 2013).

296 *Burlington Northern,* 2013 U.S. Dist. LEXIS 49504, at **11-13.

297 *Id*. at **24-31.

298 *EEOC v. Burlington Northern Santa Fe Railroad*, 2013 U.S. Dist. LEXIS 116204 (D. Kan. Aug. 16, 2013).

299 *See* 42 U.S.C. § 2000e-5.

300 *Serrano v. Cintas Corp.*, 699 F.3d 884 (6th Cir. 2012), *reh'g en banc denied*, *Serrano v. Cintas Corp.*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied by Cintas Corp. v. EEOC,* 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013). In contrast, the Southern District of Texas has reached the opposite conclusion. *EEOC v. Bass Pro Outdoor, LLC*, 2012 U.S. Dist. LEXIS 75597, at **29-30, 39-41 (S.D. Tex. May 31, 2012) (pattern or practice claims must be brought under section 707, not section 706).

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

302 431 U.S. 324 (1977).

303 *EEOC v. Pitre, Inc.*, 908 F. Supp. 2d 1165, 1173-75 (D.N.M. 2012).

304 *Pitre,* 908 F. Supp. 2d at 1176-77.

305 *Id*. at 1178-79.

The federal district courts also are split about whether the EEOC's complaint must affirmatively state whether it is proceeding under section 706 and/or section 707.[306]

3. Unique Developments in ADA Cases

In *EEOC v. Rexnord Industries*,[307] the federal court in Wisconsin dealt with the unique ADA issue of whether an employee's pursuit of Social Security Disability Insurance (SSDI) benefits, in which she stated she was unable to work, refuted her status as a "qualified individual" under the ADA, which would require her to be able to perform the essential functions of her job. The court found the application for SSDI did not estop the employee from pursuing an ADA claim, but the employee was required to proffer a sufficient explanation for the apparent contradiction. In this case, the employee's application for SSDI benefits was rejected, and the employee offered a sufficient explanation of the apparent inconsistency to defeat a motion for summary judgment.

4. Who is the Employer?

In FY 2013 employers continued to challenge whether the EEOC sufficiently pled an employment relationship between the employer and the employee(s) alleged to be aggrieved, under several different legal theories. Although the EEOC's pleadings generally withstood these challenges, a federal district court in Texas dismissed the parent company from the EEOC's *Bass Pro* nationwide failure-to hire case for lack of personal jurisdiction.[308] The court held that the EEOC had not set forth sufficient facts to establish the parent corporation exerted "such dominion and control over its subsidiary" that it was the "alter ego" of the subsidiary.[309] Although the parent and subsidiary were owned by one individual, shared the same president, and shared board members, the evidence did not establish the parent exercised day-to-day control over the subsidiary and there was no allegation the companies shared financial assets.[310] Thus, the court did not have personal jurisdiction over the parent.

In contrast, where the EEOC adequately pled an employer fraudulently created a separate business entity for the purpose of avoiding liability for pending EEOC charges, and alleged plausible grounds for successor liability, the employer's motion to dismiss was denied.[311] Likewise, where the parent company had notice of the EEOC charge, the company handbook said ultimate decision-making authority rested with the parent, and the companies shared the same corporate address and ownership, the EEOC sufficiently pled two corporate entities operated as a single employer and/or integrated enterprise.[312] Similarly, where the three defendant companies failed to observe corporate formalities, piercing the corporate veil was appropriate and the three defendants could be considered a single employer and incur successor liability.[313]

5. EEOC Motions

The EEOC continued to seek dismissal of employers' defenses and affirmative defenses prior to trial during FY 2013, with mixed results. In *EEOC v. Kanbar Property Management*,[314] the Oklahoma federal court granted summary judgment to the EEOC on the employer's failure to mitigate defense. Under the Tenth Circuit's standard, the defendant was required to prove there were suitable positions available that plaintiff could have discovered and for which he was qualified. Because the employer produced no evidence on that score, the EEOC was entitled to summary judgment.

306 *Compare EEOC v. Pioneer Hotel*, 2013 U.S. Dist. LEXIS 3344, at **10-11 (D. Nev. Jan. 8, 2013) (requiring the EEOC to affirmatively state whether it was proceeding under section 706 and/or section 707, because the elements and proof for the claims differ) *with Pitre*, 908 F. Supp. 2d at 1175 (denying motion to dismiss and holding EEOC is not required to specifically plead that it will rely on the pattern or practice method of proof). *See also EEOC v Bass Pro Outdoor World, LLD*, 884 F. Supp. 2d 499 at *520 (S.D. Tex. May 31, 2012) ("[T]he EEOC cannot bring a hybrid pattern or practice claim that meld the respective frameworks of §706 and §707. Rather, the Court interprets § 706 to not provide a vehicle for pattern or practice claims. Likewise, the Court believes §707 only permits equitable relief.")

307 *EEOC v. Rexnord Industries, Inc.*, 2013 U.S. Dist. LEXIS 124525, at **26-29 (E.D. Wis. Aug. 30, 2013).

308 *EEOC v. Bass Pro Outdoor World, LLC*, 884 F. Supp. 2d 499, 2012 U.S. Dist. LEXIS 151918 (S.D. Tex. Oct. 19, 2012).

309 *Bass Pro,* 884 F. Supp. 2d at 531-32.

310 *Id.* at 532-34.

311 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 146968, at *13-18 (D. Haw. Oct. 9, 2012).

312 *EEOC v. Care Centers Management Consulting, Inc.*, 2013 U.S. Dist. LEXIS 62996 (E.D. Tenn. Apr. 29, 2013).

313 *EEOC v. Northern Star Hospitality*, 2013 U.S. Dist. LEXIS 117638 (W.D. Wis. Aug. 20, 2013).

314 *EEOC v. Kanbar Property Management*, 2013 U.S. Dist. LEXIS 120051, at **16-17 (N.D. Ok. Aug. 23, 2013).

Where it was undisputed that the EEOC made an attempt at conciliation, and the employer had not sought a stay in order to conduct conciliation, the EEOC was entitled to summary judgment on the employer's failure to conciliate defense.[315] In contrast, a federal district court in Illinois denied the EEOC's motion for judgment on the pleadings on the employer's failure to conciliate defense, because the pleadings did not indisputably establish that the EEOC made a good faith effort to conciliate the claim.[316] The EEOC's conciliation obligation is discussed in more detail in section V.D of this Report.[317]

Courts viewed with disfavor the EEOC's untimely motions to amend its complaints during FY 2013. In the *Global Horizons* human trafficking case brought in the federal district court in Hawaii, the court denied the EEOC's motion to amend its third amended complaint to add additional defendants.[318] The court found the EEOC knew or should have known the relevant facts supporting the amendment for several years, and the proposed defendants would have been prejudiced in their ability to defend the case if added to the case only four months before trial. Likewise, an Illinois federal court did not permit the EEOC to amend its complaint to add claims on behalf of additional plaintiffs after the deadline for amending pleadings, because the EEOC had the relevant facts prior to that deadline.[319]

In a North Carolina federal court, the EEOC successfully moved for an employer to file an answer containing a more definite statement explaining why it believed the plaintiff did not satisfy the conditions for bringing the lawsuit.[320] In the same case, the court struck all exhibits and references to plaintiff's arrest from the employer's answer as unduly prejudicial.[321]

6. Miscellaneous

Employers raised various other unique pleading issues during FY 2013. In *EEOC v. Original Honeybaked Ham Co.*,[322] the employer successfully limited the EEOC's claims of sex discrimination and retaliation to the conduct of one manager, because the EEOC never put the employer on notice during its investigation and pre-litigation conciliation that it sought relief for any other manager's conduct. However, the EEOC was not limited to seeking relief for the nine employees identified in the pre-litigation process, because the employer was on sufficient notice of all individuals potentially aggrieved by the conduct of the particular manager.[323]

In the *Global Horizons* case pending in federal court in Washington, certain defendants moved for dismissal for lack of subject matter jurisdiction based on the EEOC's failure to satisfy the Title VII statutory investigation and conciliation requirements with respect to certain aggrieved individuals.[324] The court denied the motion, finding that the court's subject matter jurisdiction was not dependent on the EEOC's satisfaction of pre-lawsuit administrative requirements. Instead, the court found these allegations would be more appropriately addressed on a Rule 12(b)(6) motion for failure to state a claim or a motion for summary judgment.[325] The federal court in Nevada held also the EEOC's conciliation obligation was not jurisdictional, and denied the employer's 12(b)(6) motion to dismiss for failure to conciliate.[326] The court held there was no failure to conciliate where the employer never made a counter-offer to the EEOC's settlement demand.

Not surprisingly, an employer was not permitted to add an untimely failure to mitigate defense eight months after it had obtained the relevant evidence, and after briefing already had occurred, on a motion for summary judgment related to its other affirmative defenses.[327]

315 *EEOC v. Beverage Distributors Co., LLC*, 2012 U.S. Dist. LEXIS 177351, at *9 (D. Colo. Dec. 14, 2012). The court also granted summary judgment to the EEOC on the employer's bifurcation of punitive damages defense, finding it was not an affirmative defense and the court would not decide the issue absent a motion for bifurcation. *Id.* at **14-16. However, the court denied the EEOC's motion for summary judgment on the employer's laches defense, because the EEOC had not explained why there was an over three-year delay from the time the EEOC began its investigation until it filed its lawsuit. *Id.* at **10-13.

316 *EEOC v. St. Alexius Medical Center*, 2012 U.S. Dist. LEXIS 178866, at **6-8 (N.D. Ill. Dec. 18, 2012).

317 *See., e.g., EEOC v. Mach Mining, LLC*, 2013 U.S. Dist. LEXIS 10859 (S.D. Ill. Jan. 28, 2013), *appeal filed*, No. 13-2456 (7th Cir. July 31, 2013) (Issue on appeal was whether a court could review the EEOC's conciliation efforts and if so, whether the reviewing court should apply a deferential or heightened scrutiny of review). It should be noted that on December 20, 2013, the district court's opinion was reversed by the Seventh Circuit, thus questioning further use of the failure to conciliate affirmative defense, at least in the Seventh Circuit. *See EEOC v Mach Mining*, 2013 U.S. App. LEXIS 25454, __F.3d__ (7th Cir., Dec. 20, 2013).

318 *EEOC v. Global Horizons, Inc.*, 2013 U.S. Dist. LEXIS 130807, at **8-13 (D. Haw. Sept. 9, 2013).

319 *EEOC v. Trinity Medical Center*, 2013 U.S. Dist. LEXIS 127085, at **6-7 (C.D. Ill. Sept. 6, 2013).

320 *EEOC v. Bo-Cherry, Inc.*, 2013 U.S. Dist. LEXIS 74627, at **4-5 (W.D.N.C. May 28, 2013).

321 *Bo-Cherry, Inc.*, 2013 U.S. Dist. LEXIS 74627, at **5-10.

322 *EEOC v. Original Honeybaked Ham Co. of Georgia, Inc.*, 918 F. Supp. 2d 1171, 2013 U.S. Dist. LEXIS 5817, at **13-19 (D. Colo. 2013).

323 *Original Honeybaked Ham,* 2013 U.S. Dist. LEXIS 5817 at **24-25.

324 *EEOC v. Global Horizons, Inc.*, 2013 U.S. Dist. LEXIS 53282, at **3-4 (E.D. Wash. Apr. 12, 2013).

325 *Id.* at **27-28.

326 *EEOC v. Wedco, Inc.*, 2013 U.S. Dist. LEXIS 338800, at **5-6, **10-14 (D. Nev. Mar. 11, 2013).

327 *EEOC v. Landau Uniforms, Inc.*, 2013 U.S. Dist. LEXIS 5332 (N.D. Miss. Jan. 9, 2013).

7. Venue

In a nationwide ADEA discrimination case, a federal district court in Massachusetts denied the employer's motion for a change of venue to its home forum.[328] Noting the plaintiff's choice of forum is ordinarily afforded great weight, the court distinguished this case from class claims where plaintiffs from different forums could join the suit, because when the EEOC files an ADEA claim, it terminates the right of individuals to file suit privately.[329] Moreover, even if the EEOC was not entitled to as much deference as a private plaintiff, it was entitled to some deference, and it would be burdensome for the EEOC to transfer the case to a different office.[330] Convenience of the witnesses did not weigh heavily in the employer's favor where the identified witnesses were employees of the company and there was no showing they were unwilling or unable to appear in Massachusetts or it would be unduly burdensome to produce them.[331] Finally, the identified class members resided all over the country.[332]

B. Laches Defense

The EEOC is not required to complete its pre-suit investigation within a certain time period. However, dismissal may be an appropriate remedy when the EEOC's delay in bringing suit is unreasonable and results in undue prejudice to the employer's ability to defend against the lawsuit.[333]

Though the elements of the laches defense are not easy to prove, the defense should not be ignored. In *EEOC v. Propak Logistics*,[334] nearly seven years passed between the charge filing date and the date the EEOC filed suit. The defendant moved to dismiss and asserted the defense of laches.[335] The court denied the motion without prejudice.[336] The court then ordered the parties to engage in limited discovery on the issue of whether the defendant experienced undue prejudice as a result of the EEOC's delay.[337] After the discovery period ended, the defendant filed a motion for summary judgment. The court held the EEOC's delay was unreasonable and caused the defendant material prejudice.[338] As a result, the court granted the defendant's summary judgment motion. [339]

However, the summary judgment ruling did not end the proceedings. The defendant moved for attorneys' fees and costs. The court granted the defendant's request for attorneys' fees, but denied its request for copying costs and costs associated with the expedited production of a deposition transcript. Because the defendant successfully asserted the defense of laches, the court awarded $189,113.50, the full amount of fees defense counsel requested.[340] The defendant also requested reimbursement for $1,406.13 in litigation costs. The court found the defendant failed to provide evidence to support much of this request, so the court limited the litigation cost award to $61.20.[341]

The defense of laches may also be a useful tool to limit the number of participants in an EEOC-initiated class action. In *EEOC v. Evans Fruit Co., Inc.*,[342] the EEOC alleged hostile environment sexual harassment on behalf of specific charging parties and a class of similarly-situated female employees.[343] The EEOC filed its First Amended Complaint on November 29, 2011, identifying three additional class members who had given statements to the EEOC.[344] A year later, these three individuals and one other putative class member could not be

328 *EEOC v. Texas Roadhouse, Inc.*, 2012 U.S. Dist. LEXIS 172070 (D. Mass. Nov. 9, 2012).
329 *Texas Roadhouse,* 2012 U.S. Dist. LEXIS 172070, at **2-3.
330 *Id.* at **3-5.
331 *Id.* at **5-6.
332 *Id.* at **6-7.
333 *EEOC v. Propak Logistics, Inc.*, 2013 U.S. Dist. LEXIS 43511, (W.D.N.C. Mar. 27, 2013).
334 *Propak Logistics*, 2013 U.S. Dist. LEXIS 435111, at *5.
335 *Id.* at *2-3.
336 *Id.* at *3.
337 *Id.* at *4.
338 *Id.* at *5.
339 *Id.*
340 *Id.* at *16.
341 *Id.* at *21.
342 *EEOC v. Evans Fruit Co., Inc.*, 2012 U.S. Dist. LEXIS 169006 (E.D. Wash. Nov. 27, 2012).
343 *Evans Fruit*, 2012 U.S. Dist. LEXIS 169006, at *2.
344 *Id.* at *3.

located.[345] The EEOC agreed to make the individuals available for deposition prior to the trial that was scheduled to begin in less than four months. The court determined it would be "inequitable and prejudicial" to the defendant to allow the individuals to remain as class members and dismissed them from the class.[346]

As laches is an affirmative defense, it is always the defendant who bears the burden of pleading and proving the EEOC's delay was unreasonable and caused the defendant unfair prejudice. However, the 2013 cases teach us that if the evidence is strong, the defendant should not hesitate to take on the burden of proof when opposing EEOC claims that began several years prior to the date the EEOC filed suit.

C. Statute of Limitations

In FY 2013, the EEOC continued its focus on litigating higher-impact class claims pursuant to section 707, which allows the Commission to investigate and act on cases involving a pattern or practice of discrimination in accordance with the procedures set forth in section 706.[347] Section 707 incorporates section 706's procedures, raising the implication that the EEOC must bring pattern or practice cases within the 300-day period defined in section 706.[348] While the federal circuit courts of appeals have not yet addressed this issue, a strong majority of district courts, especially in the last few years, have held the 300-day period applies.[349] Perhaps emboldened by the handful of cases with contrary holdings, the EEOC persists in arguing the 300-day limit associated with filing a timely charge under section 706 does not apply under section 707 when the Commission seeks relief on behalf of a class of individuals in actions triggered by another individual's timely charge.[350] Thus, employers must still be prepared to rebut this argument and, in doing so, should consider citing *EEOC v. Global Horizons, Inc.*,[351] where the District Court of Hawaii reconsidered and reversed its earlier decision holding the 300-day limit inapplicable in light of recent case law and found that cases holding the 300-day limit inapplicable have done so "in spite of the statute's plain language".[352]

Generally, the 300-day limitations period is triggered by the filing of a claim (the court will count back 300 days from the date of filing and require that the discriminatory act occur within that time frame). Although by no means settled law, some courts have held that, for the purposes of "expanded claims" (charges initially involving only one charging party that are broadened to include others during the EEOC's investigation), the trigger for the 300-day period occurs when the EEOC notifies the defendant that it is expanding its investigation to other claimants.[353] This is helpful to employers because it shortens the time period for which the EEOC can reach back to draw in additional claimants.

While acknowledging the applicability of the 300-day statute of limitations, district courts in FY 2013 decisions underscored that the limitations period is not jurisdictional and the requirement can be defeated by certain defenses, such as waiver, estoppel, and equitable tolling.[354] For example, in *Sony Electronics*,[355] the EEOC successfully invoked the rule that the limitations period for a federal lawsuit does not begin to run until the plaintiff discovers or, if diligent, should have discovered, both the injury that gives rise to his claim and the identity of the injurer. In this case, the accrual of the 300-day limitations period was delayed until the EEOC discovered Sony was a potential defendant. In *Sony Electronics*, a temporary staffing agency assigned the charging party to work on Sony products at a warehouse owned by a logistics firm.[356] The charging party was removed from her assignment and then filed a disability discrimination charge against the temporary staffing

345 *Id*.

346 *Id*. at *4.

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

348 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. For a detailed discussion of the distinctions between a section 706 and section 707 claim, *see* Section I of this Report.

349 *See EEOC v. United States Steel Corp.*, 2012 U.S. Dist. LEXIS 101872, at **13-16 (W.D. Pa. July 23, 2012) (noting lack of circuit court decisions on point and citing cases evidencing the split of authority in federal district courts); *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012) ("spate" of recent decisions applying 300-day limitations period).

350 *EEOC v. Global Horizons, Inc.,* 904 F. Supp. 2d 1074, 1091 (D. Haw. Nov. 8, 2012); *EEOC v. Swissport Fueling, Inc.,* 916 F. Supp. 2d 1005, 1032-1034 (D. Ariz. Jan. 7, 2013).

351 *Global Horizons,* 904 F. Supp.2d 1074 (D. Haw. Nov. 8, 2012).

352 *Id*. at 1093.

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

354 *Global Horizons,* 904 F. Supp. 2d at 1093, n.5 (D. Haw. Nov. 8, 2012); *EEOC v. Evans Fruit Co.,* 2012 U.S. Dist. LEXIS 169006, at *8 (E.D. Wash. Nov. 12, 2012); *EEOC v. Pitre, Inc.,* 2012 U.S. Dist. LEXIS 179145, at *3 (D.N.M. Nov. 30, 2012).

355 *EEOC v. Sony Elecs., Inc.,* 2013 U.S. Dist. LEXIS 100988, *6 (N.D. Ill. July 19, 2013).

356 *Sony*, 2013 U.S. Dist. LEXIS 100988, at ** 2-3.

agency. During its pre-suit investigation, the EEOC initially believed the logistics firm had made the decision to remove the charging party; however, it was eventually reported that Sony had made this request.[357] The EEOC informed the charging party, who then filed her charge against Sony, more than 300 days after her termination. Even though the EEOC was aware the charging party was working on nothing but Sony products, the EEOC argued it was unaware of Sony's potential involvement in the decision to remove the charging party from the project until it conducted interviews of the logistics firm employees, at which time the 300-day limit had expired.[358] The court held that the EEOC, "severely understaffed [and] overworked", was reasonably diligent and, thus, the accrual of the limitations period was delayed.[359]

In an effort to resurrect cases barred by the 300-day statute of limitations applicable to section 706 and 707 lawsuits, the EEOC often turns to an alternative argument based on the continuing violation doctrine, which allows a timely claim to be expanded to reach additional violations outside the 300-day period. To counter the EEOC's reliance on the continuing violation doctrine to salvage untimely claims, employers can rely on federal court decisions (including decisions in FY 2013), that hold the continuing violation doctrine does not apply to discrete acts of discrimination, such as terminations of employment.[360] Moreover, some courts have held that, even in the context of an "unlawful employment practice" claim, such as hostile work environment, the doctrine cannot be used to expand the scope of the claim to add new claimants unless each claimant suffered at least one act considered to be part of the unlawful employment practice, within the "300-day window."[361] In other words, where the EEOC seeks to enlarge the number of individuals entitled to recover rather than the claims a single individual may bring, the employer has a strong argument that the continuing violation doctrine does not apply.

Case developments in the past few years have provided employers with a strong argument that the EEOC should not be permitted to add claimants whose claims would otherwise be outside the 300-day window based on the continuing violations doctrine and, before district courts at least, an even stronger argument that the statute of limitations set forth in section 706 must be applied to section 707 claims. There is still a possibility that a circuit court will weigh in on the 300-day limit's applicability given the conflict on this issue among district courts. Either way, employers can expect the EEOC to increase its reliance on equitable defenses, such as estoppel.

D. Investigation and Conciliation Obligations

Before filing a lawsuit under Title VII based on pattern or practice claims under section 707, or "class" claims under section 706, the EEOC is required to investigate and then attempt to eliminate any alleged unlawful employment practice by informal methods of conciliation.[362] Thus, the EEOC must investigate and then engage in "conciliation" with an employer prior to filing a lawsuit. Only after "[t]hese informal efforts do not work [may the EEOC] then bring a civil action against the employer."[363] As one court recently noted, the EEOC must "1) serve the employer with a notice of the charge, including the date, place, and circumstances of the alleged unlawful employment practice; 2) investigate the alleged unlawful employment practice; 3) determine that there is reasonable cause to believe the charged unlawful employment practice occurred; and 4) eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[364] 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.[365]

Employers continue to challenge the sufficiency of the EEOC's investigation and conciliation efforts with mixed results. Below is a discussion of cases from FY 2013 that address employer challenges to claimed failures by the EEOC to investigate and conciliate in good faith, the meaning of "good faith" conciliation, the EEOC's obligations regarding disclosure of the identities of class members and the substance of their claims in conciliation, the impact of EEOC misconduct during conciliation, and "traps for the unwary" regarding the EEOC's own attacks against employers regarding their use of the EEOC's failure to conciliate as an affirmative defense.

357 *Id.* at ** 5-6.

358 *Id.* at ** 2-5.

359 *Id.* at ** 7-8.

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

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

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

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

364 *EEOC v. Global Horizons, Inc.*, 2013 U.S. Dist. LEXIS 53282 (E.D. Wash. April 12, 2013).

365 *Global Horizons,* 2013 U.S. Dist. LEXIS 53282, at *21.

1. Challenging Failure to Conciliate in Litigation

Employers have regularly challenged the sufficiency of the EEOC's conciliation efforts after the EEOC has actually filed suit, seeking dismissal based on the EEOC's purported failure to comply with its statutory conciliation obligations. Employers have specifically alleged the EEOC's pre-litigation conciliation efforts have been insufficient on both procedural and substantive grounds. Employers also have recently argued that a failure to conciliate in good faith by the EEOC prevents a federal court from even having subject matter jurisdiction to adjudicate a lawsuit. The "lack of subject matter jurisdiction" theory is not readily accepted by most courts. For example, in *EEOC v. Global Horizons, Inc.*, an employer attempted to dismiss a national origin discrimination lawsuit by claiming the court did not have subject matter jurisdiction over the EEOC's lawsuit because the EEOC had not satisfied its conciliation obligations.[366] The court disagreed, holding the EEOC's pre-suit requirements (*i.e.*, notice, investigation, reasonable-cause determination, and conciliation) are not subject matter jurisdiction requirements, but rather elements of the EEOC's claim.[367] The court in *Global Horizons* held that where the EEOC has failed to satisfy its pre-suit requirements, the proper avenue for challenging this failure is through a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, or a Rule 56 motion for summary judgment.[368]

Similarly, in *EEOC v. Pioneer Hotel*, an employer moved to dismiss the EEOC's lawsuit pursuant to Federal Rule of Civil Procedure 12(b)(1), arguing the court was without subject matter jurisdiction to even "hear the present Title VII action because the EEOC failed to engage in a good faith attempt at conciliation pursuant to 42 U.S.C. § 2000e-5(b)."[369] The district court, like other courts that have rejected this argument,[370] held the conciliation requirement was not a jurisdictional prerequisite to the Commission filing a lawsuit.[371] The court noted that prior to 2006, a finding of good faith conciliation was a "jurisdictional condition precedent to suit by the EEOC."[372] However, because the U.S. Supreme Court issued an opinion in *Arbaugh v. Y&H Corp.*[373] evaluating several provisions of Title VII and holding that those provisions were "claim elements" instead of jurisdictional requirements, most courts now hold the requirement to conciliate is merely an element of an EEOC claim, not a jurisdictional requirement. As such, jurisdictional attacks for failure to conciliate have proved ineffective.

In *EEOC v. Wedco, Inc.*,[374] the employer contended that the EEOC failed to conciliate in good faith, and thus sought a dismissal for failure to state a claim or, alternatively, a stay of the case. The court declined to dismiss or stay the case, noting that despite the EEOC's alleged unreasonable conciliation demand, the employer's total failure to make even a "token" counteroffer prevented the court from holding the EEOC failed to conciliate in good faith.[375] Similarly, in *EEOC v. Beverage Distributors Co.*,[376] the court denied an employer summary judgment regarding its affirmative defense alleging the EEOC failed to conciliate in good faith, because the EEOC "made an attempt at conciliation" by holding an in-person conciliation meeting attended by the employer's CFO, human resources director, and its counsel.

2. The Meaning of "Good Faith Conciliation"

As discussed below, while numerous court will examine the EEOC "good faith" efforts to conciliate, the Seventh Circuit, has set itself apart from other circuits in holding that based on the conciliation language in Title VII and related decisions in the Seventh Circuit, the EEOC's approach to conciliation is not even judicially reviewable.[377] No other court has adopted this view. Rather, as discussed in our prior Annual Reports, courts typically require that the EEOC engage in "good faith" efforts during the conciliation process, but do not presently agree on a uniform standard to be applied in examining such efforts. Specifically, the Second, Fifth, and Eleventh Circuit Courts of Appeals

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

367 *Global Horizons,* 2013 U.S. Dist. LEXIS 53282, at *24-26.

368 *Global Horizons,* 2013 U.S. Dist. LEXIS 53282, at *28.

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

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

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

372 *Id.* at *7.

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

374 *EEOC v. Wedco, Inc.,* 2013 U.S. Dist. LEXIS 33880, at *2.

375 *Id.* at *13.

376 *EEOC v. Beverage Distributors Co.*, 2012 U.S. Dist. LEXIS 177351 (D. Colo. Dec. 14, 2012).

377 *See EEOC v Mach Mining, LLC*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

appear to require courts to evaluate "the reasonableness and responsiveness of the EEOC's conduct under all the circumstances."[378] Based on this standard, the EEOC must at least: (1) outline to the employer the reasonable cause for its belief that a violation of the law occurred; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer.[379]

The Fourth and Sixth Circuit Courts of Appeals, on the other hand, have adopted a standard that is much more deferential to the EEOC.[380] Under this standard, a court "should only determine whether the EEOC made an attempt at conciliation. The form and the substance of those conciliations is within the discretion of the EEOC ... and is beyond judicial review."[381] For example, in *EEOC v. New Breed Logistics*,[382] the Sixth Circuit denied the employer's argument on summary judgment that the EEOC had failed to fulfill its obligation to investigate or conciliate where the EEOC added a retaliation claim in litigation on behalf of one of the plaintiffs that had not previously been investigated or conciliated. The court reasoned that under the so-called "single filing rule," the threshold question of whether the EEOC made "an attempt at conciliation" applied to claims like the one present in that case, where the retaliation claim added in litigation could reasonably be expected to grow out of the investigation and conciliation efforts taken prior to the filing of the lawsuit.[383] Thus, rather than examine the form and substance of the EEOC's conciliation efforts, the court's inquiry was limited solely to whether the retaliation claim was reasonably related to the original claims negotiated at conciliation.

In the Tenth Circuit, no clear standard has been adopted to define the meaning of "good faith" conciliation.[384] For example, in *EEOC v. Zia Co.*, the Tenth Circuit took the position that "a court should not examine the details of the offers and counteroffers between the parties, nor impose its [own] notions of what the agreement should provide."[385] However, in *EEOC v. Prudential Federal Savings & Loan Association*, the Tenth Circuit noted that conciliation involved two parties and the EEOC's conciliation efforts would be acceptable, "so long as [the EEOC] makes a sincere and reasonable effort to negotiate by providing the defendant an adequate opportunity to respond to all charges and negotiate possible settlements."[386] The position taken by the Tenth Circuit in *Prudential* seems more akin to the "reasonableness and responsiveness" standard from the Second, Fifth, and Eleventh Circuits.

Most of the cases reported in FY 2013 came out of circuits that have not yet adopted a standard regarding the analysis of the EEOC's good faith conciliation requirement. While the First, Third, Eighth, Ninth, and D.C. Circuit Courts of Appeals have not yet ruled on a standard, some district courts within those circuits appear to regularly apply a particular standard.[387] For example, in the Ninth Circuit, recent cases have held, as in previous years, that the EEOC should be given wide deference in conciliation. In *EEOC v. Wedco, Inc.*, the U.S. District Court for the District of Nevada acknowledged that the Ninth Circuit has not adopted a standard as to what constitutes "good faith" conciliation, but noted that courts in that district have generally deferred to the EEOC "so long as any colorable attempt at conciliation was made."[388] Thus, while the EEOC's only evidence in response to the employer's motion to dismiss in *Wedco* was conclusory allegations that it made good faith attempts at conciliation, the court's decision denying the motion turned on the fact the employer failed to make any counteroffer (even a "token" one) in response to the EEOC's initial demand: "Defendant's continued refusal to make any counteroffer when repeatedly solicited for one makes it impossible for the Court to determine that the EEOC was not prepared to conciliate in good faith."[389]

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

379 *EEOC v. Johnson & Higgins, Inc.*, 91 F.3d 1529, 1534 (2d Cir. 1996); *EEOC v. Klinger Elec. Corp.*, 636 F.2d 104, 107 (5th Cir. 1981); *EEOC v. Asplundh Expert Co.*, 340 F.3d 1256, 1259 (11th Cir. 2003).

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

381 *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 183 (4th Cir. 1979); *EEOC v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

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

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

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

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

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

387 The following states and territories are encompassed by the First, Third, Eighth and Ninth Circuits: Maine, New Hampshire, Rhode Island, Massachusetts, Puerto Rico (First Circuit); Pennsylvania, New Jersey, Delaware, U.S. Virgin Islands (Third Circuit); North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Missouri, Arkansas (Eighth Circuit); California, Nevada, Arizona, Washington, Oregon, Idaho, Montana, Alaska, Hawaii, Guam, Northern Mariana Islands (Ninth Circuit).

388 *EEOC v. Wedco, Inc.*, 2013 U.S. Dist. LEXIS 33880, at *7 (D. Nev. Mar. 12, 2013).

389 *Wedco*, 2013 U.S. Dist. LEXIS 33880, at *14.

In another case, the District Court for the Northern District of California acknowledged the split on the issue of "good faith" conciliation efforts, but held that the court need not decide what standard should apply in the Ninth Circuit because the EEOC satisfied both the strict and deferential standards espoused by other circuits.[390] In its cross-motion for partial summary judgment, the employer argued the EEOC failed to conciliate in good faith because, among other things, it provided exclusive updates or advance notice to the charging party and her counsel regarding conciliation efforts, it blind copied charging party's counsel on all communications between the EEOC and employer's counsel, it took an all-or-nothing approach to settlement with 11 excessive demands, and it ended conciliation abruptly without explanation.[391] The court disagreed and held that at most, the company had proved "that the parties took different positions on the scope of appropriate relief."[392]

One district court in the Eighth Circuit rejected the employer's argument at summary judgment that the EEOC had failed to conciliate in good faith, citing to the stricter approach used in the Eleventh Circuit. In *EEOC v. JBS USA, LLC*, the U.S. District Court for the District of Nebraska cited to the three-part test used in the Second, Fifth, and Eleventh Circuits to find the EEOC had shown "reasonableness and responsiveness ... under all circumstances" in negotiating a religious accommodation plan with an employer charged with failing to accommodate Muslim employees' prayer schedules.[393] The court rejected the employer's argument that because the EEOC failed to identify a discriminatory policy or practice, or identify a specific accommodation that would have been possible at the facility, that the EEOC did not conciliate in good faith.[394]

In at least one case in FY 2013, the EEOC was sternly reproached for failing to conciliate in good faith. In *EEOC v. Ruby Tuesday*, the U.S. District Court for the Western District of Pennsylvania stayed the litigation and ordered the EEOC to re-open conciliation negotiations, noting the EEOC's conciliation efforts did not meet "even the low standard" applied in some circuits.[395] In that case, the EEOC denied the employer an extension to respond to the invitation to conciliate, instead requiring the employer to respond to a nearly $6.5 million demand with its "best offer" within nine days.[396] After the employer responded with a counteroffer and expressed willingness to engage in further negotiations, the EEOC responded in less than a week with a Notice of Failure to Conciliate.[397] In finding the EEOC's actions bore no indication of a meaningful desire to conciliate, the court held: "By any measure, a demand for the payment of more than $6 million dollars, coupled with nine (9) days to either say 'yes' or to make a 'best and final' response in these circumstances ... is so devoid of reasonableness as to lead this Court to the conclusion that it was not a meaningful, good faith conciliation effort."[398]

In *EEOC v. Bloomberg L.P.*,[399] a district court in New York granted the employer's summary judgment motion with respect to pregnancy discrimination and retaliation claims brought by non-intervening claimants, on the grounds that the EEOC failed to exhaust its conciliation efforts. In this case, the court found that the EEOC: (1) pursued a patter-or-practice claim based on the allegations of three identified individuals and on behalf of an unidentified number of potential class members; (2) refused to disclose to the defendant the identity of any potential class members; (3) identified approximately 78 members of the class after commencing litigation; (4) pursued 32 individual claims only after dismissal of its class-wide claims; and (5) failed to show that the narrowing of the number of claims did not result from bootstrapping its investigation to discovery. Thus, the court held that the EEOC failed to satisfy its pre-litigation obligations so that Bloomberg did not have a reasonable opportunity to conciliate. In addition, the court prevented the litigation from moving forward because doing so would further prejudice Bloomberg, and would serve as a proper sanction against the EEOC for its conciliation deficiencies.

In the same line of cases examining the EEOC's "good faith" conciliation efforts, at least two courts examined whether the EEOC satisfied its obligation to conciliate where the scope of the resulting litigation exceeded the scope of the allegations presented to the employer during the conciliation process. In *EEOC v. American Samoa Government*, for example, the U.S. District Court for the District of Hawaii

390 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 125628, at **20-21 (N.D. Cal. Sept. 3, 2013).
391 *Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 125628, at *21.
392 *Id.* at *22.
393 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 53354, at *46 (D. Neb. Apr. 12, 2013).
394 *JBS,* 2013 U.S. Dist. LEXIS 53354, at *45-46.
395 *EEOC v. Ruby Tuesday, Inc.*, 2013 U.S. Dist. LEXIS 8268, at *27 (W.D. Pa. Jan. 22, 2013).
396 *Id.* at *6.
397 *Id.* at *7.
398 *Id.* at **21-22.
399 *EEOC v. Bloomberg L.P.*, 2013 U.S. Dist. LEXIS 128385 (S.D.N.Y. Sept. 9, 2013).

agreed with the defendant that the EEOC could not be permitted to expand class allegations to all employees of the American Samoa Government where the underlying investigation and conciliation process was limited solely to employees at the government's Department of Human Resources.[400] In finding that "the scope of permissible claims in a civil action is limited by what an EEOC investigation uncovers and what the EEOC conciliates," the court concluded that there was no affirmative indication during the conciliation process that the EEOC was seeking remedies on behalf of any employees outside of the Department of Human Resources.[401]

Similarly, in *EEOC v. The Original HoneyBaked Ham Company of Georgia, Inc.*, the U.S. District Court for the District of Colorado ruled that while the EEOC was not limited to suing on behalf of only those individuals specifically identified in conciliation, the EEOC could not expand the scope of its claims in litigation to alleged conduct that was not disclosed to the employer in conciliation.[402] Specifically, in litigation, the EEOC attempted to sue on behalf of additional individuals who were not identified in the conciliation process, and also attempted to expand the scope of its sexual harassment allegations beyond the sole manager identified during conciliation.[403] The employer moved to dismiss, arguing that the EEOC did not give it adequate notice of allegations of sexual harassment by managers other than the one manager identified in the pre-litigation process, and that the EEOC should be precluded from adding eight additional individuals to the lawsuit who were not previously identified.[404] The court denied the EEOC's attempt to expand the scope of the lawsuit to include alleged harassment by other managers and supervisors, holding that disclosure of the alleged unlawful conduct during conciliation was essential, as "[o]nly with knowledge of the alleged unlawful conduct can the employer meaningfully engage in pre-litigation conciliation...."[405] However, the court also held that the "greater the specificity in describing the alleged unlawful conduct, the less important it becomes to specifically identify aggrieved persons."[406] Thus, because the EEOC put the employer on sufficient notice of facts that would enable the company to foresee the inclusion of the eight additional plaintiffs (all of whom alleged they were harassed by the one manager identified in the pre-litigation process), the court held that the EEOC could pursue remedies for those individuals in litigation even though they were not identified at conciliation.[407]

The above line of decisions need to be juxtaposed against the Seventh Circuit's recent decision in *EEOC v Mach Mining, LLC.*,[408] which held that the EEOC's conciliation efforts are not judicially reviewable and thus Title VII does not impose any "good faith" requirement on the EEOC regarding its conciliation efforts. In this case, the EEOC filed a lawsuit against defendant Mach Mining, claiming that it had discriminated against women since 2006 by "never hir[ing] a single female for a mining related position" and because the defendant "did not even have a women's bathroom on its mining premises."[409] When the defendant asserted the affirmative defense that the EEOC did not conciliate in good faith, the EEOC moved for summary judgment and argued that based on *EEOC v. Caterpillar, Inc.*,[410] the EEOC's conciliation process was not subject to *any* judicial review.[411] The district court rejected the EEOC's argument, held that *Caterpillar* did not prevent judicial review of the conciliation process, and opined that while circuits are split "at least some level of judicial review" exists for the EEOC's conciliation process.[412]

On appeal, the Seventh Circuit reversed the district court's decision.[413] In its ruling, the appeals court focused on five factors. First, the court reviewed the text of Title VII, noted the absence of any language suggesting that the EEOC's approach to conciliation was reviewable, and highlighted the "express statutory language making clear that conciliation is an informal process entrusted solely to the EEOC's expert

400 *EEOC v. Am. Samoa Gov't Dep't of Human Resources*, 2012 U.S. Dist. LEXIS 144324 (D. Haw. Oct. 5, 2012).

401 *Id.* at **18-25.

402 *EEOC v. The Original HoneyBaked Ham Company of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Colo. Jan. 15, 2013).

403 *Id.* at 1175.

404 *Id.* at 1173.

405 *Id.* at 1179.

406 *Id.* at 1180.

407 *Id.* at 1180.

408 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

409 *EEOC v. Mach Mining, Inc.*, 2013 U.S. Dist. LEXIS 10859 (S.D. Ill. January 28, 2013), *rev'd*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013).

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

411 *Mach Mining*, 2013 U.S. Dist. LEXIS 10859, at *2.

412 *Id.* at *6.

413 The Seventh Circuit virtually adopted the arguments made by the EEOC in its brief to the appeals court. *See* Brief for Appellant, *EEOC v Mach Mining, LLC,* (7th Cir. July 31, 2013) (No. 13-2456).

judgment and that the process is to remain confidential."[414] The court next concluded that the statute provides no standard for review of the conciliation process and implicitly criticized the decisions of other courts, noting that the courts "applying a failure to conciliate defense have varied widely in what evidence they consider and what actions they require of the EEOC."[415] The court distinguished the standard employed under the National Labor Relations Act (NLRA), which is frequently relied on for guidance, by pointing out that the NLRA contains "an explicit statutory command" to negotiate in "good faith,"[416] whereas Title VII contains no such provision regarding conciliation. As a third basis for its ruling, the Seventh Circuit asserted that the conciliation defense "tempts employers to turn what was meant to be an informal negotiations into the subject of endless disputes over whether the EEOC did enough before going to court."[417] Next, the appeals court relied on other decisions issued in the Seventh Circuit, including the *Caterpillar* decision, in concluding the pre-suit administrative procedures by the EEOC are not subject to judicial review. Finally, the court acknowledged that it was "the first circuit to reject explicitly the implied defense of failure to conciliate," and further asserted, "Because the courts of appeals already stand divided over the level of scrutiny to apply in reviewing conciliation, our holding may complicate an existing circuit split more than it creates one, but we have proceeded as if we are creating a circuit split."[418]

Finally, the *Mach Mining* ruling should be contrasted with a recent district court ruling (issued prior to the Seventh Circuit decision) in which the EEOC argued—without success—that its conciliation efforts are not judicially reviewable provided the EEOC has engaged in conciliation of some kind.[419] In *EEOC v. Bass Pro Outdoor World, LLC*, the EEOC sought summary judgment about "an issue of law" under the Commission's theory that "[w]hether the EEOC attempted conciliation is judicially reviewable, but *how* the EEOC conducted conciliation is not."[420] The Southern District of Texas flatly rejected the EEOC's argument, noting that the Fifth Circuit has regularly held that lower courts "'remain free' to scrutinize the EEOC's conciliation attempts."[421] Moreover, the court admonished the EEOC for making this "unusual argument," particularly because the legislative history cited by the EEOC actually revealed that the final version of 42 U.S.C. §2000e-2(f) intentionally omitted language which could have prevented courts from being able to review the conciliation process.[422] As such, the Southern District of Texas denied the EEOC's motion for summary judgment, and held conciliation is indeed reviewable by federal courts.

3. Failure to Identify Class Members

It is undisputed the EEOC must provide some information to employers to satisfy its investigation and conciliation obligations prior to filing a lawsuit. The nature and breadth of the information to be provided by the EEOC regarding any anticipated class, however, remains a hotly contested issue. While employers have continued to have success in challenging the EEOC's investigation and conciliation efforts in cases in which the Commission failed to identify the members of the class on whose behalf the EEOC had sued, several decisions in FY 2013 indicate that the federal courts still are not in accord on the issue.

In *EEOC v. CRST Van Expedited, Inc.* ("*CRST*"), a case decided in FY 2012, the U.S. Court of Appeals for the Eighth Circuit held the EEOC had not reasonably investigated class allegations of sexual harassment in the context of a section 706 class action because it failed to investigate the specific allegations of any of the allegedly aggrieved "class" members prior to filing suit.[423] The Eighth Circuit's decision in *CRST* highlighted the importance for employers defending EEOC class claims of continually requesting investigative findings from the EEOC, making reasonable and meaningful conciliation efforts as to class allegations, and pushing the Commission to meet its obligations

414 The court focused on the words "endeavor to eliminate" discriminatory practices "by informal methods of conference, conciliation, and persuasion." §2000e-5(b). The court also underscored that the statute further provides that if the EEOC is "unable to secure from the respondent a conciliation agreement acceptable to the Commission," the agency may then sue." §2000e-5(f)(1). Finally, the court relied on the statutory provision that the conciliation process is to remain "strictly confidential," citing§2000e5(b).

415 *Id*.

416 *See* 29 U.S.C. § 158(d).

417 In its appellate brief, the EEOC pointed to extensive conciliation-related discovery (*i.e.*, 696 Requests for Admission), but objected to responses to any merits-based discovery because the "EEOC failed to investigate, reach a determination upon and/or conciliate." *See* Brief for Appellant at 3-4, *EEOC v. Mach Mining*, (7th Cir. July 31, 2013) (No. 13-2456).

418 *Id*. The three-judge panel issuing the decision expressly noted that it had circulated the decision to other members of the Seventh Circuit, and explained, "No judge favored a rehearing *en banc* on the question of rejecting the implied affirmative defense for failure to conciliate."

419 *EEOC v. Bass Pro Outdoor World, LLC*, 2013 U.S. Dist. LEXIS 142796 (S.D. Tex. October 2, 2013).

420 *Bass Pro,* 2013 U.S. Dist. LEXIS 142796, at **1-2 (Emphasis added).

421 *Id*.at *8.

422 *Id*. at *15.

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

to conciliate in good faith by soliciting estimates of the size and scope of any purported class. The district courts addressing the issue since *CRST*, however, have not always agreed with the Eighth Circuit.[424] Indeed, while several decisions from FY 2013 reflect that employers continue to have success in challenging the Commission's failure or refusal to identify the members of a class supporting a section 706 claim, not all federal district courts agree the EEOC must specifically identify all aggrieved individuals.

In *EEOC v. American Samoa Government*, the District of Hawaii, citing the Eighth Circuit's decision in *CRST*, held the EEOC failed to investigate or conciliate its claims of age discrimination on behalf of a purported class of approximately 5,000 employees of the American Samoa Government where it had limited the scope of its investigation and conciliation efforts to a single governmental department.[425] There, the EEOC filed a complaint alleging the government discriminated against two identified individuals, both of whom worked in the government's Department of Human Resources, on the basis of their age.[426] While the EEOC investigated only the Department of Human Resources and sought monetary relief on behalf of only the two individuals identified in its complaint, the EEOC sought information in discovery regarding all American Samoa Government employees across the government's 33 departments.[427] In holding that the limited scope of the EEOC's investigation and conciliation efforts necessarily limited the scope of the lawsuit, the court reasoned that there was no "affirmative indication" given by the EEOC that its allegations might result in government-wide claims.[428] Indeed, because the EEOC focused on a single governmental department and never indicated that it was challenging a government-wide policy, the court reasoned the American Samoa Government had been provided insufficient notice of potential government-wide claims.[429] As a result, the EEOC's class claims were limited to the single department which had been the subject of the EEOC's investigation and conciliation.[430]

In *EEOC v. Swissport Fueling*, the District of Arizona dismissed the EEOC's claims brought on behalf of 21 employees who were not identified prior to the time the EEOC filed its lawsuit.[431] There, the EEOC brought suit alleging Swissport had subjected airline fuelers from a number of African countries to harassment, disparate treatment, and retaliation because of their race.[432] The EEOC investigated the allegations of discrimination for nearly three years prior to filing suit and, in June 2010, it issued letters of determination as to 18 individuals for whom the Commission found it had reasonable cause to believe had been subjected to discrimination.[433] When conciliation efforts failed as to the identified claimants, the EEOC filed suit and thereafter identified an additional 21 purportedly aggrieved individuals who were not identified prior to the filing of the lawsuit.[434] The court dismissed the EEOC's claims as to each of the individuals it failed to identify prior to filing suit, holding that the EEOC had "entirely failed to fulfill its pre-litigation obligations" as to those claimants.[435] In so holding, the court noted the EEOC "had obtained the contact information for all potential claimants at the beginning of its investigation in 2007, but chose to wait until after filing suit to begin contacting them."[436] As a result, the court reasoned, the EEOC failed to provide the employer with a meaningful opportunity to "confront all of the issues" and make an informed decision regarding settlement during conciliation."[437]

In another case, the district court granted a motion to limit the EEOC's claims that employees were subjected to a sexually hostile work environment to a single supervisor identified during conciliation, but declined to impose a bright-line rule obligating the EEOC to identify all potential class members prior to filing suit.[438] There, the EEOC sought monetary relief during conciliation on behalf of the charging party and eight other aggrieved individuals it contended were subjected to a hostile work environment due to the conduct of a single supervisor.[439]

424 *See EEOC v. United Road Towing, Inc.*, 2012 U.S. Dist. LEXIS 70203 (N.D. Ill. May 11, 2012); *EEOC v. PBM Graphics, Inc.*, 2012 U.S. Dist. LEXIS 89309 (M.D.N.C. June 28, 2012) (finding EEOC is under no obligation to identify all particular class members during conciliation).

425 *EEOC v. Am. Samoa Gov't Dep't of Human Resources*, 2012 U.S. Dist. LEXIS 144324 (D. Haw. Oct. 5, 2012).

426 *Am. Samoa Gov't Dep't of Human Resources,* 2012 U.S. Dist. LEXIS 144324, at *12.

427 *Id.* at *13

428 *Id.* at *24.

429 *Id.* at *24.

430 *Id.* at *32.

431 *EEOC v. Swissport Fueling*, 916 F. Supp. 2d 105, 2013 U.S. Dist. LEXIS 2054 (D. Ariz. Jan. 7, 2013).

432 *Swissport Fueling*, 2013 U.S. Dist. LEXIS 2054, at **4-5.

433 *Id.*

434 *Id.*

435 *Id.* at *80.

436 *Id.* at *81.

437 *Id.*

438 *EEOC v. The Original HoneyBaked Ham Company of Georgia, Inc.*, 918 F. Supp. 2d 1171 (D. Colo. Jan. 15, 2013).

439 *Original HoneyBaked Ham,* 918 F. Supp. 2d at 1174-75.

While the EEOC advised that it was likely to discover more aggrieved individuals if the case proceeded to litigation, it refused to provide any more information about the purported class or the basis of its claims for damages.[440] After filing suit, the EEOC indicated that its claims were based on the conduct of other managers and the total number of aggrieved individuals could fall within the range of 40 to 45.[441] In limiting the scope of the EEOC's claims to the conduct of the single supervisor identified in conciliation, the court noted that it understood and agreed with the court's position in *CRST* as to the "general recognition that the EEOC can bring an enforcement action only with regard to unlawful conduct that was discovered and disclosed in the pre-litigation process."[442] Nevertheless, the court opined that "there can be a meaningful difference between the significance of pre-litigation disclosure of the alleged unlawful conduct and pre-litigation disclosure of the specific identities and number of aggrieved persons."[443] Accordingly, the court suggested that "the greater the specificity in describing the alleged unlawful conduct, the less important it becomes to specifically identify aggrieved persons."[444] The court further reasoned that when the employer "understands the nature, extent, location, time period, and persons involved in the alleged unlawful conduct, it may be able to reasonably estimate the number and identities of persons who may have been impacted."[445] As a result, the court rejected a categorical interpretation of *CRST* to limit the EEOC's remedy to aggrieved individuals identified in the pre-litigation process.

Finally, in *EEOC v. Multilink, Inc.*, the Northern District of Ohio summarily dismissed the employer's motion for partial summary judgment on the EEOC's class claims on the grounds that the EEOC had failed to identify any class member other than the charging party.[446] There, the EEOC filed a complaint alleging the employer had subjected the charging party and a class of similarly situated individuals to a sexually hostile work environment.[447] During its pre-suit investigation of the charging party's claims and at the time it filed suit, however, the EEOC did not identify any allegedly aggrieved individual other than the charging party.[448] Nevertheless, the court held the employer "had notice that the EEOC was seeking to assert, and to conciliate, individual and class-wide claims, even though specific employees went unnamed."[449] In so holding, the court noted the EEOC had made a conciliation proposal, with monetary and non-monetary components, on behalf of "class members to be identified," and as a result, the employer "could not dispute that the EEOC sought to conciliate class-wide claims."[450]

The foregoing decisions continue to suggest that while employers cannot assume the Commission's failure or refusal to identify the members of a class supporting a section 706 claim will preclude those claims, employers can and should continually request investigative findings from the EEOC, make reasonable and meaningful conciliation efforts as to class allegations, and urge the Commission to meet its obligation to conciliate in good faith by soliciting estimates of the size and scope (temporally, geographically, or otherwise) of any purported class.

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

In the past, the EEOC has taken the position that where employers assert a defense based on deficiencies in the Commission's conciliation efforts, the employer waives confidentiality of the pre-lawsuit conciliation process and negotiations. In FY 2013, there were no reported cases involving a challenge by the EEOC against an employer that asserts a good faith conciliation defense; however, in recent years, the EEOC has attempted to turn the tables on employers who plead good faith conciliation as an affirmative defense. For example, in 2012, in *EEOC v. McPherson Companies, Inc.*, the district court took a harsh approach in ruling on the EEOC's motion to depose the employer's in-house counsel.[451] The company asserted a failure to conciliate affirmative defense and conceded in litigation that its in-house counsel was the sole representative for the company during the conciliation process. In response to the EEOC's motion to take the employer's in-

440 *Id*. at 1175.
441 *Id*. at 1175.
442 *Id*. at 1179.
443 *Id*.
444 *Id*. at 1180.
445 *Id*.
446 *EEOC v. Multilink, Inc*., 2013 U.S. Dist. LEXIS 40097 (N.D. Ohio Mar. 12, 2013).
447 *Multilink, Inc*., 2013 U.S. Dist. LEXIS 40097, at *1.
448 *Id*.at *2.
449 *Id*. at **4-5.
450 *Id*. at *4.
451 *EEOC v. McPherson Companies, Inc*., 2012 U.S. Dist. LEXIS 56530, at *2 (N.D. Ala. Apr. 19, 2012).

house counsel's deposition, the court conditioned the denial of the motion on the company making one of two of the following choices: (1) withdraw its affirmative defense that the EEOC did not engage in good faith conciliation; or (2) disqualify its in-house counsel from participation in the litigation under ethics rules barring lawyers from also serving as witnesses.

In contrast, another district court in 2012 took up a discovery dispute in which the employer objected to discovery requests served by the EEOC regarding the good faith conciliation defense and ruled favorably for the employer.[452] In that case, the EEOC argued the employer waived the confidential nature of the conciliation process by asserting a failure to conciliate defense. In examining whether the company had consented to waive the confidentiality of the conciliation process, the court noted that merely pleading failure to conciliate in good faith is not sufficient to establish waiver of the confidentiality of conciliation.[453] Further, the court found it persuasive that the company had done nothing to place the conciliation process into public view, such as filing a dispositive motion detailing the conciliation process or attaching documents that would reveal details of the parties' negotiations.[454] The court denied the Commission's motion, indicating the EEOC was not prejudiced in that it could re-file its motion if circumstances in the ligation changed.

Although these cases demonstrate that the EEOC's attempts to prejudice an employer that asserts a good faith conciliation affirmative defense are not always successful, the decision in *McPherson*, for example, serves to remind employers to be careful in keeping information regarding the conciliation process confidential (and ideally, only file such information under seal). Employers should also remain careful in choosing whom they select to represent the company during conciliation with the EEOC.

E. Intervention

It has been said that the role of an intervenor falls "somewhere in the gray area between spectator and participant."[455] As an intervenor, the EEOC often assumes the role of the boisterous spectator cheering for the cause championed by private plaintiffs. At the same time, the EEOC actively participates, often by asserting claims and positions in addition to the claims already brought by private plaintiffs or by seeking remedies beyond those already sought by private plaintiffs. No matter what its role, intervention by the EEOC (or any other government agency) in a private lawsuit intensifies the litigation considerably.

This section examines intervention by the EEOC, as well as the more common phenomenon of intervention by private plaintiffs, and the standards courts apply to determine whether motions to intervene should be granted. This section also examines intervention-related issues decided by the courts in FY 2013, including the extent of private plaintiffs' permitted role in EEOC "class" claims, discovery disputes involving private plaintiffs or claimants, and recovery of fees by intervenor attorneys.

1. EEOC Intervention in Private Litigation

As the primary federal agency charged with enforcing federal antidiscrimination laws, the EEOC is empowered to intervene in private discrimination lawsuits. This may occur even in instances in which the EEOC has previously investigated and decided not to initiate litigation. Yet, some cases caution against using intervention as a vehicle to bypass the agency's duties to investigate and conciliate claims.

In deciding whether to intervene, the EEOC's paramount concern is whether the case is of "general public importance."[456] Indeed, before it is allowed to intervene in a Title VII or ADA case, the EEOC must, among other things, certify that its intervention is of general public importance.[457] "Normally, to be considered of 'general public importance,' a case should directly affect a large number of aggrieved individuals, involve a discriminatory policy or practice requiring injunctive relief, or have potential for addressing significant legal issues."[458] Private discrimination class actions are especially vulnerable to EEOC intervention because, by their nature, they generally involve large numbers of employees, applicants, or former employees and alleged discriminatory policies or practices.

452 *EEOC v. Mach Mining, LLC*, 2012 U.S. Dist. LEXIS 96844, at **2-3 (S.D. Ill. July 13, 2012).

453 *Mach Mining, LLC*, 2012 U.S. Dist. LEXIS 96844, at *4.

454 *Id*. at *6.

455 *Harris v. Amoco Prod. Co*., 768 F.2d 669, 675 (5th Cir. 1985).

456 *See* EEOC, Regional Attorney's Manual, Part 2, § IV.D, *available at* http://www.eeoc.gov/eeoc/litigation/manual/index.cfm. Limiting intervention to matters of "general public importance" is based on the express terms of Title VII. 42 U.S.C. §§ 2000e-5(f)(1).

457 EEOC, Regional Attorney's Manual ("Certifications are not required for interventions in ADEA and EPA [Equal Pay Act] cases, but those cases should generally meet the same public importance standard.")

458 EEOC, Regional Attorney's Manual, Part 2, § IV.D.

Among other factors the EEOC considers in deciding whether to intervene in a case, are the following:

- **The EEOC's potential contribution, in both personnel and financial resources, to the success of the litigation:**[459] The EEOC describes this factor as the most important. Although the EEOC Manual states the EEOC should never intervene principally to fund a case, the Manual encourages intervention if the EEOC believes that its participation will result in a successful resolution of the case. In such cases, the Manual notes, "[t]he work of Commission attorneys on the case must be substantial both in time spent and in the importance of their tasks. Where a trial occurs, Commission attorneys should have significant roles in the courtroom."[460]
- **Private counsel's ability to litigate the case effectively without the EEOC's participation:** In assessing this factor, which correlates with the first factor described above, the EEOC evaluates the general competence of the plaintiff's counsel, his or her related litigation experience, and financial resources. Even when private counsel is highly skilled and able to fund the case adequately, the EEOC will consider intervening if, as described above, it believes intervention will significantly increase the likelihood of success in an important case. The EEOC describes "important cases" as those that are particularly large or complex, or in which the EEOC perceives a need for injunctive relief in addition to the relief sought by the private plaintiff(s).[461] The EEOC also considers intervention in circumstances in which involvement in one case may encourage such private litigation.
- **Timeliness of the Motion:** The EEOC also will take into account whether the motion will be considered timely by the court — but underscores that this should not be an issue if the determination is made that the EEOC's involvement is important to the success of the litigation, because intervention normally will occur early in such cases. Regardless of the EEOC's view, as shown below, the courts consider timeliness of the motion to be an important consideration.

Section 706(f)(1) of Title VII essentially provides for "permissive intervention" by the EEOC in a private lawsuit at the court's discretion, explaining that: "[u]pon timely application, the court may, in its discretion, permit the Commission . . . to intervene in such civil action upon certification that the case is of general public importance."[462] The same approach is followed in dealing with intervention in an ADA action.[463]

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

> Permissive Intervention. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact in common.
>
> ***
>
> In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.[464]

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

- whether the EEOC has certified that the action is of general importance; and
- whether the request is timely.[465]

459 Based on the EEOC's Strategic Enforcement Plan and the increased level of monitoring by the Commission, it also is anticipated that the Commission may weigh in on cases that may involve a significant investment of time and resources by the Commission.

460 EEOC, Regional Attorney's Manual, Part 2, § IV.D.

461 EEOC, Regional Attorney's Manual, Part 2, § IV.D.

462 42 U.S.C. § 2000e-5(f)(1). Courts generally accord a great deal of deference to the EEOC's determination that a matter is of "general importance" and usually will not require any proof of public importance beyond the EEOC's conclusory declaration. *See Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991, at *6 n.4 (N.D. Ga. Jan. 31, 2001); *Wurz v. Bill Ewing's Serv. Ctr., Inc.*, 129 F.R.D. 175, 176 (D. Kan. 1989).

463 42 U.S.C. § 12117.

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

465 *See Ramirez v. Cintas Corp.*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005) (Order Granting EEOC's Motion for Leave to Intervene *citing EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1292-93 (7th Cir. 1993) and *Mills v. Bartenders Int'l Union*, 1975 U.S. Dist. LEXIS 11320, at *4 (N.D. Cal. 1975)); *see also Harris v. Amoco Prod. Co.*, 768 F. 2d 669, 676 (8th Cir. 1985). In *Wilfong v. Rent-A-Center, Inc.*, 2001 U.S. Dist. LEXIS 1958, at *5 (S.D. Ill. May 11, 2001), the district court integrated the requirements of Fed. R. Civ. P. 24(b)(2) and stated that "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."

In dealing with the timeliness of proposed intervention, courts generally have focused on the following factors:

- length of time the intervenor knew or should have known of its interest in the case;
- prejudice to the original parties caused by any delay;
- prejudice to the intervenor, if intervention is denied; and
- any unusual circumstances.[466]

Although courts have allowed the EEOC to intervene in numerous cases in which they have sought to do so,[467] courts have also denied motions to intervene. For example, in *Reid v. Lockheed Martin Aeronautics Co.*,[468] the court denied the EEOC's motion to intervene in two consolidated Title VII class actions seven months after the lawsuits were filed, finding the EEOC's delay in seeking to intervene caused "more than minimal prejudice" to the defendants.[469] In this regard, the court focused on the fact the EEOC had contemplated intervening in the cases at the outset, but had delayed doing so while it engaged in unmonitored communications with potential class members. If the EEOC had intervened earlier, when it first contemplated doing so, it would have been subject to the same restrictions the court placed on the original parties regarding communications with potential class members.[470] The trial court also found the EEOC's intervention would have delayed adjudication of the rights of the original parties.[471] As to this point, the court noted that most of the named parties' depositions had already taken place and over a million documents had been produced by the defendants. The EEOC's intervention, with the concomitant additional lawyers, was bound to prolong the case and raise even more discovery disputes.[472]

Finally, the court determined the EEOC's intervention would improperly broaden the scope of the case, causing undue prejudice to the defendants. Although the original plaintiffs sought a nationwide class, it was uncertain they would achieve this result because they would have to satisfy the rigorous requirements of Rule 23. On the other hand, the court noted, the EEOC, which is not subject to the restrictions of Rule 23, would likely pursue nationwide claims that would even encompass "pattern and practice" claims by named plaintiffs — even though it had not previously issued a cause finding in a majority of the EEOC charges brought by the named plaintiffs.[473]

As in *Reid*, the court in *Molthan v. Temple University*[474] also denied the EEOC's motion to intervene on the grounds the EEOC's intervention would expand the case by adding additional issues and further delay a case the court believed had already progressed too slowly. At the time of the EEOC's motion to intervene in *Molthan*, the case had been pending for more than six years, a number of claims had been dismissed on summary judgment, the complaint had been amended, the class had been certified, substantial discovery on the merits had been completed, and significant discovery disputes had been resolved. EEOC intervention at this stage, the court explained, could serve only to prolong a case that "finally, after years of dilatory behavior on both sides, seems to be moving toward trial."[475]

These instances should be contrasted with cases in which the courts have not considered the EEOC's delay in filing an intervention motion to have prejudiced the parties. For example, in *Ramirez v. Cintas Corp.*,[476] although over a year had passed from the filing of the complaint until the intervention motion was filed, initial disclosures had not been filed as of the date of the ruling on the intervention motion

466 *Wilfong*, 2001 U.S. Dist. LEXIS 16958, at *5; *Reid*, 2001 U.S. Dist. LEXIS 991, at *6. In *Ramirez v. Cintas*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005), the district court referred to three factors in deciding whether the EEOC's intervention action was timely: (1) the stage of the proceeding at which the EEOC seeks to intervene; (2) possible prejudice to other parties; and (3) the reason for and length of any delay in seeking intervention.

467 *See, e.g., Brennan v. McDonnell Douglas Corp.*, 519 F.2d 718, 720 (8th Cir. 1975); *Colindres v. Quietflex Mfg. Co., L.P.*, 2002 U.S. Dist. LEXIS 27781 (S.D. Tex. Dec. 4, 2002); *Wilfong*, 2001 U.S. Dist. LEXIS 16958; *Evans v. Mitsubishi Motor Mfg., Inc.*, 1996 U.S. Dist. LEXIS 20993 (C.D. Ill. Dec. 12, 1996); *Billouin v. Monsanto Co.*, 162 F.R.D. 351, 352 (E.D. Mo. 1995); *White v. City of Hannibal*, 158 F.R.D. 150, 151 (E.D. Mo. 1994); *Tsuji v. Taco Bell Corp.*, 61 Fair Empl. Prac. Cas. (BNA) 373, 375 (D. Minn. 1993); *Bauman v. Jacobs Suchard, Inc.*, 1990 U.S. Dist. LEXIS 3159 (N.D. Ill. Mar. 20, 1990); *Wurz*, 129 F.R.D. at 176; *Meyer v. Macmillian Publ'g Co.*, 85 F.R.D. 149, 152 (S.D.N.Y. 1980).

468 *Reid v. Lockheed Martin Aeronautics Co.*, 2001 U.S. Dist. LEXIS 991 (N.D. Ga. Jan. 29, 2001).

469 *Reid*, 2001 U.S. Dist. LEXIS 991, at *8.

470 *Id*.

471 *Id*.

472 *Reid*, 2001 U.S. Dist. LEXIS 991, at *8.

473 *Id* at *8.

474 *Molthan v. Temple University*, 93 F.R.D. 585 (E.D. Pa. 1982).

475 *Molthan*, 93 F.R.D. 585.

476 *Ramirez v. Cintas Corp.*, No. 3:04-CV-00281-JSW (N.D. Cal. Apr. 26, 2005).

and neither the plaintiffs nor the employer had identified any prejudice that would result from the intervention. Similarly, in *Colindres v. Quietflex Manufacturing Co.*,[477] the intervention motion was not filed until approximately one year after the initial lawsuit was filed. The court rejected the employer's reliance on *Reid*, discussed above, and underscored that the employer had not yet responded to written discovery requests or produced documents other than during the EEOC investigation, no depositions had been taken in the case, and the discovery cutoff was still seven months away.

In some cases, courts have addressed concerns about delay and the potential for expansion of the scope of the case by conditioning the EEOC's intervention on the compliance with certain conditions, such as abiding by previously set scheduling orders, not duplicating discovery already taken, or agreeing not to seek expansion of the case beyond the allegations of the complaint filed by the plaintiffs.[478]

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

During the past year, motions to intervene were most frequently filed by charging parties, not the EEOC.[479] A charging party intervenes in a lawsuit to preserve his or her opportunity to pursue individual relief separately if, at any point in the litigation, the EEOC and the charging party's interests diverge.

Under 42 U.S.C. § 2000e-5(f)(1), the charging party may intervene in the EEOC's Title VII or ADA lawsuit.[480] If the EEOC pursues a lawsuit under the ADEA or EPA before the charging party, however, the charging party's right to intervene or commence a lawsuit terminates.[481]

It is the EEOC's practice to notify charging parties by telephone of Commission suits before they are filed.[482] Within a week of filing suit in Title VII and ADA cases, the EEOC sends a letter to the charging party, enclosing a copy of the complaint and explaining the statutory right to intervene in the action.[483] The EEOC does not encourage charging parties to intervene, but informs them that if they do intervene, they will be able to pursue individual relief separately if their interests later diverge.[484]

Rule 24 sets forth the legal construct by which a charging party, or a similarly situated employee, may move to intervene in a lawsuit filed by the EEOC. Under Rule 24, intervention is either a matter of right or permissive. Most courts analyze a charging party's motion to intervene under Rule 24(a), unless pendent clams are involved and then those claims are analyzed under Rule 24(b), which, as discussed above, governs permissive intervention.[485] Rule 24(b) may also apply if the movant is not aggrieved by the practices challenged in the EEOC's lawsuit[486] or the movant is a governmental entity other than the EEOC.[487]

Rule 24(a) provides:

> **(a) Intervention of Right.** On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

477 *Colindres v. Quietflex Manufacturing Co.*, 2002 U.S. Dist. LEXIS 27781 (S.D. Tex. Dec. 4, 2002).

478 *See, e.g., Tsuji*, 61 Fair Empl. Prac. Cas. (BNA) at 374 (EEOC's intervention limited to claims already in the original lawsuit and conditioned on its abiding by discovery orders already in place); *Bauman*, 1990 U.S. Dist. LEXIS 3159 (EEOC to coordinate discovery with the original parties and complete discovery within the time period fixed by the court).

479 *See, e.g., EEOC v. Stone Pony Pizza, Inc.*, 2013 U.S. Dist. LEXIS 112605 (N.D. Miss. Aug. 9, 2013); *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).

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

481 *See* 29 U.S.C. § 626(c)(1).

482 EEOC, Regional Attorney's Manual, Part 2, § II.E.

483 *Id.*

484 *Id.*

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

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

487 *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)).

Courts are split over whether a charging party has an unconditional right to intervene as set forth in Rule 24(a)(1). Some courts have concluded that an unconditional right exists under Title VII.[488] Other courts have concluded that an unconditional right does not exist and/or for other reasons, analyze motions to intervene under Rule 24(a)(2).[489]

Timely-filed motions to intervene by a charging party are generally granted, as are motions to intervene by individuals who are similarly situated parties. In *EEOC v. Stone Pony Pizza*,[490] the EEOC filed a lawsuit alleging the defendant employer failed to hire the three movant intervenors and other qualified African American applicants because of their race. The movant intervenors sought to intervene both as a matter of right under 42 U.S.C. §2000e-5(f)(1) and under Fed. R. Civ. P. 24(b)(1)(B) (allowing for permissive intervention), alleging their claims share common questions of law or fact with this civil action.

One party timely filed an individual charge of discrimination alleging race discrimination based on the employer's failure to hire her (while the other two did not). In its reasonable cause determination, the EEOC indicated there was reasonable cause to believe the first party's claims had merit, and also stated the employer had denied two other African America applicants—the two other movant intervenors—the opportunity to work in server positions because of their race. During the conciliation process, the EEOC presented the employer with settlement demands for all three movant intervenors.

The court held that the first movant interventor was an aggrieved person based on the plain language of 42 U.S.C. §2000e-5(f)(1). The court held the remaining two were also aggrieved persons under the statute because (1) the scope of the EEOC's investigation included their claims; (2) the EEOC filed the lawsuit to obtain relief for them; and (3) they were individually identified in the EEOC's lawsuit.

The court held that each of the movant intervenors also met the test for permissive intervention under Fed. R. Civ. P. 24(b)(1)(B) because the allegations in their proposed complaint were almost identical to the EEOC's complaint.

The defendant employer argued that allowing intervention of the other two movant intervenors would be futile because they had failed to file timely charges of discrimination and, thus, had not exhausted their administrative remedies. The court held that the movant intervenors could avail themselves of the "single filing rule" and could "piggyback" on the first movant intervenor's timely filed charge because (1) they were similarly situated to her; (2) the EEOC and defendant employer were aware of all three movant intervenors' claims during the conciliation stage; and (3) defendant employer had failed to present evidence that their claims were time-barred at the time the first movant intervenor filed her charge.

In *EEOC v. Comprehensive Behavioral Health Center of St. Clair County, Inc.*,[491] the charging party sought to intervene pursuant to Fed. R. Civ. P. 24 and 42 U.S.C. §2000e-5(f)(1). The defendant did not object to intervention. The court granted the charging party's motion to intervene with little analysis, finding the charging party was an aggrieved party with an unconditional right to intervene under 42 U.S.C. §2000e-5(f))(1) and finding the charging party's interest would not be adequately protected by the EEOC in the action if she were not permitted to intervene.

While charging party motions to intervene are often granted, such motions may be denied when the intervenor does not fall within the category of persons on whose behalf the EEOC's lawsuit was originally filed. For example, in one case,[492] the EEOC brought suit on behalf of a former employee—the original charging party—and other aggrieved individuals based on alleged sexual harassment on the part of a particular employee. After the EEOC filed the instant lawsuit, another former employee filed a charge of discrimination alleging sexual harassment by a different employee. Thereafter, the second complainant terminated the administrative proceedings before the EEOC without obtaining a right to sue. She then sought to intervene, arguing that she was an aggrieved party under 42 U.S.C. §2000e-5(f)(1) and had an unconditional right to intervene. In response to the employer's argument that the court did not have subject matter jurisdiction over her claims because she had failed to exhaust her administrative remedies, the employee claimed that she had a right to "piggyback" on the

488 *WirelessComm*, 2012 U.S. Dist. LEXIS 67835, at **3-4 (citing 42 U.S.C. § 2000e-5(f)(1) and *EEOC v. Occidental Life Inc. Co. of Cal.*, 535 F.2d 533, 542 (9th Cir. 1976); *EEOC v. Foley Products Co.*, 2012 U.S. Dist. LEXIS 11153, at *2 (M.D. Ala. Jan. 31, 2012).

489 *EEOC v. Air Express Int'l USA, Inc.*, 2011 U.S. Dist. LEXIS 146715, at *8 (N.D. Texas Dec. 21, 2011) ("While Title VII grants the charging or aggrieved party a right to intervene, such right is not absolute or unconditional. "[T]he 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." 42 U.S.C. § 2000e-5(f)(1). As Defendant is not such an entity, Movants do not have an unconditional right to intervene").

490 *EEOC v. Stone Pony Pizza, Inc.*, No. 4:13CV00092, 2013 U.S. Dist. LEXIS 112605 (N.D. Miss. Aug. 9, 2013).

491 *EEOC v. Comprehensive Behavioral Health Center of St. Clair County, Inc.*, No. 12-CV-1031, 2012 U.S. Dist. LEXIS 182564 (S.D. Ill. Dec. 28, 2012).

492 *EEOC v. The Original Honeybaked Ham Company of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 14804 (D. Colo. Feb. 4, 2013).

first complainant's claims. The court held to the contrary, finding that the second employee could not avail herself of the "single filing rule" because she was not "subject to similar discrimination by the same actors during the same time frame as the charging parties." Accordingly, the court held it lacked subject matter jurisdiction over her claims because she had not exhausted her administrative remedies.

a. Adding Pendent Claims

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

As stated above, Rule 24(b)(1)(B) allows the court, in its discretion, to permit intervention by a person "who has a claim or defense that shares with the main action a common question of law or fact."[493] In exercising its discretion, the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights."[494] This standard is commonly used for analyzing pendent claims.

b. Extent of Permitted Role in EEOC "Class" Claims

An individual's right to intervene in a Title VII suit brought by the EEOC does not include the right to participate in all claims asserted in the suit and, consistent with the Federal Rules of Civil Procedure, the individual's role in "class" discovery may be limited.

The distinction between section 706 and section 707 claims is critical in these instances. Section 706 allows the EEOC Commissioner to file a charge on behalf of one or more individual complainants when such individual(s) may be reluctant to file a charge due to fear of retaliation.[495] Section 707 allows a Commissioner to file a claim when the Commissioner has reason to believe an employer has engaged in a "pattern or practice" of discriminatory conduct.[496] An individual cannot initiate a charge or file a civil suit for a section 707 claim.[497] In addition, while litigants in section 706 claims may be awarded equitable and/or legal damages, section 707 litigants are limited to equitable relief only.

In *EEOC v. JBS USA, LLC*,[498] the EEOC alleged the defendant employer engaged in a pattern or practice of discriminating against Somali Muslim employees. The EEOC and defendant employer entered into a bifurcation agreement dividing discovery and trial into two phases: (1) related to pattern or practice claims to be addressed using the *Teamsters v. United States* framework for analyzing claims when the government seeks to remedy systematic practices of discrimination; and (2) individual claims and relief. The magistrate judge subsequently adopted the parties' agreement. A group of individuals then sought to intervene in Phase I of the action. The court held the intervenors were individuals asserting "private, non-class" Title VII actions that were not subject to the *Teamsters* framework and thus, under the parties' bifurcation agreement, had no statutory right to participate as parties in Phase I of the proceedings.

3. Miscellaneous Discovery-Related Issues in Intervention Proceedings

During the past year, courts have addressed some discovery issues raised in intervention proceedings. Discovery motions need not be filed jointly by the EEOC and charging party-intervenors.

In *EEOC v. Trinity Home Health Services*,[499] the charging party intervenor moved to compel the defendant employer to produce personnel documents related to alleged comparators. After the charging party intervenor filed her motion to compel, she and the defendant employer agreed to a limited production of comparator personnel documents subject to a protective order requiring, among other things, that the documents related to the nonparty comparators, and their contents, not be disclosed to individuals other than the parties and their counsel. The EEOC refused to agree to the proposed protective order that purported to apply to "all discovery by any party to this action." The court found good cause existed for the issuance of the protective order because the nonparty personnel documents contained highly personal information. The court overruled the EEOC's objections to the protective order and entered it as proposed.

493 *DiMare Ruskin, Inc.*, 2011 U.S. Dist. LEXIS 136846, at *8.
494 *Id*.
495 *See* 42 U.S.C. § 2000e-5.
496 *See* 42 U.S.C. § 2000e-6.
497 *Id*.
498 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
499 *EEOC v. Trinity Home Health Services*, 2013 U.S. Dist. LEXIS 47273 (E.D. Mich. Apr. 2, 2013).

4. Effect of Trial on Individual Intervenors' Claims Against Employers and Individual Defendants

The trial outcome of severed claims can directly impact any remaining claims of individual intervenors. In *EEOC v. Evans Fruit Co., Inc.*,[500] the court severed the plaintiffs' Washington Law Against Discrimination ("WLAD") claims against the alleged harasser and intervenor defendant from the plaintiffs' claims against their employer. At the trial of the plaintiffs' claims against the employer, the jury returned a verdict in favor of the employer and specifically found (on a special verdict form) that the plaintiffs had not been subject to a sexually hostile work environment while employed. The individual defendant subsequently moved to dismiss the plaintiffs' claims against him on the basis of claim and/or issue preclusion. The court agreed with the individual defendant, finding that the individual defendant was in privity with the defendant employer and that the evidence the plaintiffs presented at trial against the defendant employer is precisely the same as what they would present at trial against the individual defendant.

5. Attorneys' Fees to Intervenor Attorneys—Applicable Standard

An intervenor attorney may be awarded attorneys' fees in a Title VII case.[501] Courts have wide discretion in determining whether an award of attorneys' fees is warranted. In making a determination, courts have an affirmative obligation to understand the division of labor between the EEOC and counsel for the intervenors.[502]

In *EEOC v. AutoZone, Inc.*,[503] following a settlement and consent decree between the EEOC and the defendants, which specifically provided that the intervenor plaintiff be awarded reasonable attorneys' fees and costs, the intervenor plaintiff filed a motion seeking $222,978.65 in fees and costs. The defendants argued that the fees requested by the intervenor plaintiff were unreasonable for several reasons. First, the defendants argued that the work performed by the EEOC and the intervenor plaintiff's personal attorneys was duplicative. The court relied on the unconditional right to intervene under 42 U.S.C. §2000e-5(f)(1) in finding the intervenor plaintiff was a separate "prevailing party" from the EEOC entitled to recover his own attorneys' fees. However, the court held that this right to recover fees did not entitle the intervenor plaintiff to fees for "clearly duplicative work," and deducted a total of 134.95 hours from the requested hours. Next, the defendants argued the intervenor plaintiff's request for fees for time spent on general supervision of attorneys and in conference with each other and the EEOC's attorneys was not reasonable. The court agreed and deducted an additional 19.5 hours. The court also deducted 3.2 hours for time spent counseling the intervenor plaintiff and others on how to handle media inquiries. The court deducted another 22.9 hours for time spent by counsel on dealing with threats to intervenor plaintiff and securing an accommodation to allow intervenor plaintiff to carry a kirpan (ceremonial weapon traditionally borne by observers of Sikhism) into the courthouse. Finally, the court deducted one-half of the requested hours expended on non-legal tasks, for another 19.5-hour deduction. Additionally, the court found the rate claimed by one of the intervenor plaintiff's individual attorneys excessive. In total, the court reduced the intervenor plaintiff's requested fee award by nearly one half — to $122,822.75 in fees in costs.

F. Discovery in Class-Related Disputes

As the EEOC increases the proportion of systemic cases in its litigation dockets, it is imperative for employers to be cognizant of the discovery tactics utilized by the EEOC in the prosecution of these large-scale cases and how the courts are handling the same. Close scrutiny of the EEOC's investigative procedures, particularly the timing thereof, can be an important tool for employers in defeating these cases.[504]

1. Applicable Procedures

Section 706 claims use the familiar *McDonnell-Douglas* burden-shifting method of proof, the same framework used in individual discrimination claims.[505] Section 707 claims, however, have a markedly different framework, which was first articulated by the U.S. Supreme Court in the *Teamsters* case.[506] In a section 707 claim, the EEOC must first demonstrate that unlawful discrimination has been a regular procedure or practice followed by an employer (*i.e.*, Phase I of the trial). If the EEOC meets this burden, the employer can defend itself by

500 *EEOC v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 102677 (E.D. Wash. July 22, 2013).

501 *EEOC v. Conn-X, LLC*, 2012 U.S. Dist. LEXIS 16316, at *5 (D. Md. Feb. 9, 2012).

502 *Conn-X, LLC*, 2012 U.S. Dist. LEXIS 16316 (*citing EEOC v. Nutri/System, Inc.*, 685 F. Supp. 568, 575 (E.D. Va. 1988) (quoting *Furtado v. Bishop*, 635 F.2d 915, 922 (1st Cir. 1980)) ("Indeed, where, as here, intervenor's counsel works closely with EEOC's attorneys the time should be discounted unless there is a 'convincing description of the division of labor [accompanying] reports of contemporaneous or identical work performed by several attorneys.'").

503 *EEOC v. AutoZone, Inc.*, 2013 U.S. Dist. LEXIS 45720 (D. Mass. Mar. 29, 2013).

504 *EEOC v. Propak Logistics, Inc.*, 2013 U.S. Dist. LEXIS 43511 (W.D.N.C. Mar. 26, 2013).

505 For a detailed discussion of the distinctions between a section 706 and section 707 claim, *see* Section I of this Report.

506 *See* section V.A.2 of this Report.

rebutting the EEOC's proof or by providing a legitimate, non-discriminatory reason for its procedures. If the employer cannot meet this burden, the court can conclude that a widespread violation of the law has occurred. The EEOC is then entitled to a legal presumption that all of the members of the class are victims of that violation (often referred to as the "*Teamsters* presumption"). An employer may then rebut individual claims and/or challenge the award of damages to individual claimants in Phase II of the trial.

Similar to the bifurcated approach to trial mandated by *Teamsters*, a common litigation tactic used by the EEOC in section 707 cases is to seek bifurcated discovery, with discovery regarding individual damages coming after the liability phase of the trial (Phase I). As support for this strategy, the EEOC often argues that individual damages related to discovery should come later in the litigation because such discovery is costly and time-consuming. This approach can also be beneficial for employers, who can move for summary judgment at the close of Phase I, thereby limiting their exposure and costs for Phase II, if not eliminating the need for Phase II entirely. In *EEOC v. JBS USA, LLC*,[507] the parties negotiated a bifurcation agreement, which divided discovery and the trial into two phases, with Phase I to address the pattern or practice claims and Phase II to adjudicate the individual claims and relief. At the close of Phase I, the defendant succeeded in obtaining summary judgment on the EEOC's retaliation and unlawful termination pattern-or-practice claim, with the court holding that, as a matter of law, a single mass termination is insufficient to establish a pattern or practice of unlawful termination or retaliation.[508]

The court, however, denied summary judgment on the individual claims, holding that to the extent the workers' beliefs varied, JBS could present such evidence during Phase I of the trial as part of its hardship defense.[509]

2. Identification and Size of Class

The EEOC's heightened focus on prosecuting "pattern and practice" cases means that its attorneys will continue attempting to expand single plaintiff cases into class actions or large multi-plaintiffs actions. Recent cases demonstrate that the Commission's attempts to bring cases based on a charge investigation relating to a single complainant can sometimes backfire, particularly when its zeal to find new class members results in a failure to adhere to court deadlines and its own procedural requirements.

Courts have also not supported the EEOC's efforts to withhold the identification of new class members. In *EEOC v. Global Horizons, Inc.*,[510] the defendants filed a motion to compel production of the claimants' names. In granting the defendants' motion to compel, the court noted the EEOC had provided no evidence, such as a claimant's declaration or evidence of retaliation by the defendants, to support its argument that the claimants were at greater risk of deportation and/or physical or financial harm if their names were disclosed to defendants' counsel. The court ordered the EEOC to disclose the claimants' marital status, use of other names while employed with the defendants, and business or social relationships with any potential non-claimant witness or current or former employee of defendants; however, the court did deny the defendants' request for disclosure of whether claimants applied for a visa and/or their visa status, finding that such disclosure may be appropriate but was unnecessary at that stage.

The *Global Horizons* dispute over information related to the claimants' immigration status after they ceased working for defendant was subsequently revived by the EEOC's motion for a protective order for information directly relating to immigration status, such as passport numbers, visa numbers, other immigration document numbers, and social security numbers.[511] The defendant argued that the immigration-related information was necessary to enable the defendants to determine whether claimants left their employment due to their immigration status and not due to constructive discharge, was relevant to potential damages, and was relevant to the claimants' credibility. The court, however, raised concerns regarding the possible chilling and prejudicial effect of the requested disclosure and determined that in this particular case, such concerns outweighed the potential value that immigration status information might hold.

In another recent case, *EEOC v. Original HoneyBaked Ham Co. of Georgia, Inc.*,[512] the EEOC had a court-mandated deadline by which to identify each aggrieved individual, on whose behalf the EEOC sought relief. The EEOC identified four individuals after the deadline, stating that although it was aware of the individuals' existence by the deadline, it was unable to communicate with them until after the deadline. In denying without prejudice the defendant's motion to strike the four individuals, the court concluded the defendant's motion essentially sought to prevent the EEOC from presenting evidence about the four individuals at trial, and was therefore premature.

507 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 53354 (D. Neb. Apr. 12, 2013).

508 *JBS*, 2013 U.S. Dist. LEXIS 53354, at **63-64.

509 *Id.* at **47-48, 50.

510 *EEOC v. Global Horizons, Inc.*, 2012 U.S. Dist. LEXIS 182021 (E.D. Wash. Dec. 21, 2012).

511 *Id.*

512 *EEOC v. Original HoneyBaked Ham Co. of Georgia, Inc.*, 2013 U.S. Dist. LEXIS 19273 (D. Colo. Feb. 13, 2013).

Courts have also given the EEOC additional tools to identify potential claimants. In *EEOC v. Ruby Tuesday, Inc.*,[513] the court ordered the EEOC to definitively identify the claimants it would be representing in the action. To facilitate the EEOC's identification of all potential claimants, the defendant agreed to bear the expense of an advertisement about the case placed in newspapers; however, the parties disagreed as to the content and placement of the ads. In denying the defendant's request that certain language be included in the advertisement and for certain advertisement placement, the court noted, "[t]he EEOC would appear to be within its rights to run [truthful] ads, albeit at its own expense."[514]

3. Communication With Class

Another issue that frequently arises around the issue of identifying class members is whether the EEOC's communications with class members and potential class members are privileged. A New Jersey federal district court refused to define when the EEOC enters into an attorney-client relationship with members of the class it seeks to represent, noting conflicting opinions among federal district judges.[515] The court examined whether *ex parte* interviews conducted by a private investigator hired by the defendant were improper. The court determined that although the claimants interviewed were not current employees of the defendant, which weighed against finding an attorney-client relationship, declarations filed by the interviewed claimants indicated that the private investigator did not attempt to determine whether an attorney-client relationship existed between the claimants and the EEOC prior to engaging in the *ex parte* communication, nor did the private investigator stop the interview when the claimants stated they were represented by counsel.[516]

4. Control Over Communications Between Class Members

Recent cases also demonstrate that public and semi-public communications between class members can be an effective discovery tool for employers. For example, in *EEOC v. Original HoneyBaked Ham Co.*,[517] the defendants sought an order compelling the claimants to turn over their social media communications, including text messages. The crux of the defendant's argument was that the claimants' use of electronic media to discuss their employment with and separation from the defendant, as well as the lawsuit, opened such media to discovery. Specifically, the defendants established that one claimant posted on Facebook her financial expectations in the lawsuit, a photograph of herself wearing the very term she claimed was offensive and used pejoratively against her, musings about her emotional state, actions she engaged in as a supervisor with the defendant, sexually charged communications with other class members, and her post-termination employment and financial condition.[518] The court allowed the discovery and ordered the parties to create a questionnaire to be given to all claimants in order to identify all potential sources of discoverable information and draft instructions for a Special Master defining the parameters of the information he was to collect.[519]

5. Scope of Discovery

In general, the EEOC has challenged employer attempts to gain information about class members in the early stages of litigation. On balance, in cases over the past year, the courts generally have supported an employer's right to such information.

a. Scope of Discovery by Employers

The EEOC has been subject to challenge by the courts in withholding information from employers. As an initial example, employers received several favorable rulings in *EEOC v. Original HoneyBaked Ham Co.*,[520] wherein the court sanctioned the EEOC for failing to provide social media discovery and for causing unnecessary delays in the electronic discovery process. In the case, the EEOC filed a lawsuit alleging that a general manager at one store in Highlands Ranch, Colorado had subjected the plaintiff interveners to sexual harassment and a hostile work environment.

513 *EEOC v. Ruby Tuesday, Inc.*, 2013 U.S. Dist. LEXIS 29783 (W.D. Pa. Mar. 5, 2013).
514 *Ruby Tuesday*, 2013 U.S. Dist. LEXIS 29783, at *8.
515 *EEOC v. FAPS, Inc.*, 2013 U.S. Dist. LEXIS 128717, at **6-7 (D.N.J. Sept. 9, 2013).
516 *FAPS*, 2013 U.S. Dist. LEXIS 128717, at **12-13.
517 *EEOC v. Original HoneyBaked Ham Co.*, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012).
518 *Original HoneyBaked Ham*, 2012 U.S. Dist. LEXIS 160285, at *5.
519 *Id.* at **7-9.
520 *EEOC v. Original HoneyBaked Ham Co.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).

As discussed above, the EEOC and class members were ordered to produce certain social media and other electronic discovery. However, as noted above, the EEOC refused to provide the requested discovery, which led to the employer filing a motion to compel production. The defendant's motion was granted in November 2012.[521] Even after receiving the court's directive to produce the requested discovery, the EEOC and class members refused to make all of the required production, resulting in the defendant filing a motion for sanctions against the EEOC.[522]

The court granted the motion. The court found the EEOC's conduct caused unnecessary expense and delay. In the court's view, the EEOC was negligent with its discovery obligations, dilatory in cooperating with defense counsel, and cavalier in its responsibility to the court.[523] While the court determined that the conduct was not sanctionable under Rule 11 because there was no showing that the EEOC acted in bad faith,[524] the court nevertheless held the EEOC accountable for its actions and still imposed a form of sanctions against the EEOC. The court referred to Rule 16(f)(1) of the Federal Rules of Civil Procedure, which allows for sanctions arising out of conduct concerning scheduling, which the Tenth Circuit had broadened to apply to conduct that delays the trial of a case.[525] Citing this rule, the court found that the EEOC's behavior created an unnecessary burden on the court's management and on the defendant and relied on this provision to sanction the EEOC for the cost of the defendant's fees in prosecuting the motion.

In another recent case, *EEOC v. DHL Express (USA) Inc.*,[526] the defendant sought an order compelling the EEOC to make all 94 claimants available for deposition. In *DHL Express*, the EEOC claimed that the defendant discriminated against its African American workers based on their race by giving them less desirable, more difficult, and more dangerous assignments than their Caucasian counterparts, and by assigning African American drivers to routes in predominately African American areas.[527] The defendant had deposed 34 of the 94 claimants, revealing a wide variety of subjective standards as to what constituted a predominately African American area, inconsistent definitions of what made an assignment dangerous, and different standards as to what made an assignment undesirable.[528] In granting the defendant's motion to compel, the court found that the deposition of each claimant was necessary because, since the case was not being pursued as a class action, "each claimant must prove liability and damages, [and] the parties could not rely on the testimony or experience of someone else."[529] The court also determined the interrogatory responses in lieu of deposition was not acceptable because that would deny defendants the opportunity to cross examine the claimant on his or her claims, and the deposition of each claimant was necessary to explore the relevant factual allegations.[530]

Similarly, in Nebraska, a court ordered the EEOC to disclose the claimants' last known business address, finding that such information was relevant to disprove the claimants' constructive discharge claims, and to disclose documents that the EEOC received from, and had communications with, a community center with which the claimants shared information about the lawsuit.[531] The court held also that the EEOC's discovery responses were a "long list of general, boilerplate objections [that] did not further 'the just, speedy, and inexpensive determination' of this lawsuit,"[532] and levied a sanction of $1,000.00 against the EEOC. In March 2013, the court denied the EEOC's motion for reconsideration and upheld its imposition of sanctions, finding the sanctions were "necessary to emphasize to the EEOC that it must fully satisfy its discovery obligations."[533] Further, the court concluded that because the EEOC continued to assert discovery objections that the court had previously indicated were not asserted in good faith and continued to fail to respond to the defendant's discovery requests, in addition to the $1,000.00 sanction, the EEOC was also ordered to reimburse the defendant for the attorneys' fees and costs incurred in opposing the EEOC's motion for reconsideration.[534]

521 *Original HoneyBaked Ham*, 2012 U.S. Dist. LEXIS 160285 (D. Colo. Nov. 7, 2012). For further discussion, see Section 4, above.
522 *Original HoneyBaked Ham,* 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).
523 *Id.* at *3.
524 *Id.* at **4-5.
525 *Id.* at **7-8.
526 *EEOC v. DHL Express (USA) Inc.*, 2012 U.S. Dist. LEXIS 155722 (N.D. Ill. Oct. 31, 2012).
527 *Id.*
528 *Id.* at *4.
529 *Id.*
530 *Id.* at **13-15.
531 *EEOC v. Global Horizons, Inc.*, 2013 U.S. Dist. LEXIS 11423 (D. Neb. Jan. 24, 2013).
532 *Global Horizons*, 2013 U.S. Dist. LEXIS 11423, at *8.
533 *Id.*
534 *Id.* at **9-10.

b. Scope of Discovery by the EEOC

Recently, courts also have indicated that they are prepared to impose limits on the scope of the EEOC's discovery and geographical reach. For example, in *Original HoneyBaked Ham*, the EEOC sought to expand the scope of the case to other of the defendant's stores through discovery despite only having plaintiff interveners from a single store.[535] In May 2012, the court denied the EEOC's request for discovery for stores other than those in which the aggrieved individuals worked, crediting the defendant's argument that the EEOC sought to avoid adherence to the exhaustion-of-remedies doctrine that requires the EEOC to investigate, issue a reasonable cause determination, and conciliate claims before a federal lawsuit can be filed.[536] Noting the discovery process "should not be the means by which the EEOC uncovers additional violations,"[537] the court limited the EEOC's case to those aggrieved persons identified by the deadline set in the court's case management order, and expressly refused to allow the EEOC to use civil discovery to uncover additional violations.[538]

On the other hand, a Nebraska district court permitted the EEOC to take the deposition of the defendant's former President and CEO.[539] The defendant invoked the "apex" deposition rule, which aims to protect high-level executives who lack unique or personal knowledge of the relevant facts, to seek a protective order. The court granted the motion to compel on the grounds that a previously deposed high-level employee of defendant testified that the President and CEO was briefed about the events at issue in the litigation and might have offered his opinion about the situation. Thus, the court concluded, "[i]t seems very likely that [the CEO] would have relevant information regarding [the disputes at issue].)[540]

Finally, it should be noted that one court in FY 2013 chastised both the EEOC and the employer alike for continuing to engage in discovery beyond the close of fact discovery as set forth in the court's Case Management Order. As a result, both parties were ordered to immediately cease all fact discovery and were prohibited from engaging in any future discovery.[541]

G. General Discovery by Employer

Employment litigation based on federal statutes such as Title VII, the ADA and the ADEA involves proceedings before courts in various jurisdictions and utilization of the Federal Rules of Civil Procedure and Evidence. There is, however, a notable difference when the litigation is being prosecuted by the EEOC as opposed to private counsel. The prosecution by a government agency removes some of the normal considerations of litigation, including personal involvement by the claimant and financial concerns of the claimant and counsel. The EEOC also may take a more expansive view of the Commission's entitlement to discovery from the employer, coupled with the stance that only limited discovery by the employer is permitted. The courts of late have frequently taken the view that the EEOC has many of the same obligations as other plaintiffs' counsel. The primary dispute focuses on the scope of the "deliberative process privilege," which is frequently asserted by the EEOC.

1. Deposition of EEOC Personnel

Fiscal Year 2013 saw a series of cases examining the extent to which the EEOC can assert the deliberative process privilege during depositions of EEOC personnel. These cases reflect the general trend that the deliberative process privilege is limited to those matters involving the EEOC's internal analysis and basis for legal conclusions, rather than factual and administrative matters.

For example, during a Rule 30(b)(6) deposition, counsel for the EEOC in one case this year instructed the EEOC's representative to not answer five specific questions because they sought information protected by the work-product and deliberative process privileges. In *EEOC v. Freeman*,[542] the court refused to issue sanctions, finding that the EEOC made colorable objections, did not intend to disrupt the deposition proceedings, and while the instruction not to answer was partially improper, the EEOC had a basis for its objections. Instead, the court limited the EEOC's attempt to assert the deliberative process and attorney work-product privileges to questions related to the Uniform Guidelines upon which it relied in reaching its investigative conclusions. The court held that privileges limited questioning to internal information rendered during the formulation of the guidelines, but did not limit questioning regarding identification of the regulations themselves.[543]

535 *EEOC v. Original HoneyBaked Ham Co.*, 2012 U.S. Dist. LEXIS 72970 (D. Colo. May 25, 2012).
536 *Original HoneyBaked Ham*, 2012 U.S. Dist. LEXIS 72970, at **2-3.
537 *Id.* at *5.
538 *Original HoneyBaked Ham*, 2012 U.S. Dist. LEXIS 72970.
539 *EEOC v. JBS USA, LCC*, 2012 U.S. Dist. LEXIS 154791 (D. Neb. Oct. 29, 2012).
540 *JBS*, 2012 U.S. Dist. LEXIS 154791, at *7.
541 *Original HoneyBaked Ham*, 2012 U.S. Dist. LEXIS 72970.
542 *Freeman*, 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).
543 *Id.*

Further ruling that factual information is not subject to the deliberative process privilege, the court in *EEOC v. Grane Healthcare, Co.*[544] permitted the Rule 30(b)(6) deposition of EEOC personnel for the limited purpose of determining whether an investigation had occurred at the administrative level.

2. Discovery of EEOC-Related Documents

The EEOC's expansive view regarding the appropriate breadth and scope of discovery continues to remain an area of concern for employers. Specifically, many cases over the past several years have revealed a trend among some district courts to allow the Commission to obtain as much employer information as possible, even if it required the employer to respond to extremely broad requests for production. Recent cases demonstrate that although many courts continue to side with the EEOC in its efforts to expand the scope of discovery, courts are also willing to grant similar latitude to employers.

In *EEOC v. Fair Oaks Dairy Farms, LLC*,[545] an employer sought information on the claimant's immigration status, resume, educational transcripts and attendance records on the grounds that it related to the employer's assertion of the after-acquired evidence defense. The court denied the employer's request for information related to claimant's immigration status but compelled production of information related to claimant's educational background.

In that same case, the EEOC sought to compel responses to written discovery related to other individuals supervised by the alleged harasser. The court granted the motion, reasoning that such information is relevant because there may be other persons who were harassed and/or additional factual information related to the case of which the employer was not aware. Accordingly, the employer's Rule 26(a)(1) initial disclosures did not suffice in lieu of responding to written discovery.[546]

3. Third Party Subpoenas

The balance between a defendant's right to discovery and a claimant's privacy continues to be at the forefront of discovery motions in FY 2013.

Generally, courts appear more willing to accept arguments concerning a claimant's privacy and embarrassment in the context of subpoenas requesting information from a claimant's current employer. However, that employment records may contain private or confidential information appears to be insufficient, on its own, to support a motion to quash. In *EEOC v. Original Honeybaked Ham Co.*,[547] the court refused to quash the defendant's subpoena to the claimant's former and current employers. The court rejected the EEOC's argument that the subpoenas were overbroad and that the employment records contained private and confidential information, holding the EEOC had no standing to quash the subpoenas except on claims of privilege or privacy. The court did, however, reduce the time period of the subpoenas from a period of 14 to eight years.

Third-party subpoenas to entities other than a claimant's former or current employers also frequently result in discovery motions practice. In *EEOC v. JBS USA, LLC*,[548] the employer subpoenaed a former staff attorney for the Council on American-Islamic Relations. In denying the motion to quash, the court held that the employer was not prevented from deposing the former staff attorney because he may have non-privileged, factual information relevant to the events giving rise to the lawsuit. However, the court limited the scope of inquiry to those topics expressly identified in Rule 26(a). In a similar ruling, the court in *EEOC v. Global Horizons*[549] held that the employer's subpoena to a nonparty was proper as the employer was entitled to information related to alternative "stressors" that may bear on emotional distress damages and complainants' credibility and that such information was non-privileged. Further, the court held that the employer was entitled to communications, including documents, between the EEOC and the nonparty regarding mistreatment because the EEOC relied upon those communications in filing the lawsuit.[550]

544 *EEOC v. Grane Healthcare, Co.*, 2013 U.S. Dist. LEXIS 35869 (W.D. Pa. Mar. 15, 2013).
545 *EEOC v. Fair Oaks Dairy Farms, LLC*, 2012 U.S. Dist. LEXIS 154570 (N.D. Ind. Oct. 29, 2012).
546 *Id.*
547 *EEOC v. Original Honeybaked Ham Co.*, 2012 U.S. Dist. LEXIS 37107 (D. Colo. Mar. 19, 2012).
548 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 91965 (D. Colo. Oct. 5, 2012).
549 *EEOC v. Global Horizons*, 2013 U.S. Dist. LEXIS 2812 (C.D. Cal. Jan. 4, 2013).
550 *Id.*

4. Unique Issues

With respect to requests to re-open discovery, courts seem hesitant to grant additional discovery for unlimited purposes. In *EEOC v. Product Fabricators, Inc.*,[551] the court granted the employer's request to re-open discovery only to permit the EEOC to produce documents previously ordered for production. The court, however, denied the employer's request to re-open discovery to permit additional deposition of the claimant and expert discovery, despite the fact that the claimant only disclosed an alleged shoulder injury five days prior to the close of discovery.

In the credibility context, in *Holmes & Holmes Industrial, Inc.*,[552] the court analyzed the distinction between credibility and perjury. During their depositions, the claimants testified they were not "friends" with the alleged harassers. The employer argued this testimony was contradicted by evidence the claimants and alleged harassers had interaction outside of work and that other witnesses testified the claimants were "friendly" with the alleged harassers. The court concluded that the terms "personal relationship" and "friends" cannot serve as the foundation for perjury and that such subjective terms merely created a witness credibility issue.

Additionally, a claimant's immigration status remains a sensitive issue in discovery matters. In *EEOC v. Signal International*,[553] the court entered a protective order precluding the defendant from inquiring as to the claimants' immigration status, reasoning that even if immigration status were relevant to the claims asserted by the EEOC, discovery of such information would have an intimidating effect on an employee's willingness to assert workplace rights and subject them to potential deportation.[554] In countering defendant's argument that immigration status bears on credibility, the court noted that credibility alone does not warrant an inquiry into the subject of immigration status when such examination would impose an undue burden on private enforcement of employment discrimination laws.[555]

5. Experts

In *EEOC v. JBS USA, LLC*,[556] an employer sought leave to designate three additional experts after the expiration of the expert witness disclosure deadline. In reviewing the request, the court determined that in light of the EEOC's untimely supplemental responses to written discovery, it would have been impossible for the employer's experts to fully analyze the claims at issue. Therefore, the court granted leave for the employer's previously-identified experts to prepare supplemental reports, but found there was insufficient cause to allow the employer to designate additional witnesses.

The court further constrained expert discovery in striking the EEOC's expert rebuttal report in the same matter.[557] In finding that the EEOC's rebuttal expert report exceeded the boundaries of the topics identified by the employer's expert, the court concluded the EEOC failed to comply with Rule 26(a) and, as a penalty, struck the EEOC's rebuttal expert report.

H. General Discovery by EEOC/Intervenor

1. Document Discovery

a. Scope of Discovery

Lawsuits filed by the EEOC generate unique challenges for employers. Although EEOC lawsuits aim to secure monetary and injunctive relief for individuals, the EEOC also uses litigation as a vehicle for publicizing particular issues or practices that are the focus of its national litigation strategy. That difference in perspective has important consequences for employers defending a lawsuit filed by the EEOC. One such consequence is that during the discovery phase of the case, the Commission often asks for broader and more costly and burdensome information.

The EEOC applied such a tactic in *EEOC v. Southern Haulers, LLC*.[558] Specifically, in *Southern Haulers*, the EEOC moved to compel the production of applications and employment records for persons hired at two locations outside of the facility where the claimant sought

551 *EEOC v. Product Fabricators, Inc.*, 2012 U.S. Dist. LEXIS 161663 (D. Minn. Nov. 7, 2012).
552 *Holmes & Holmes Industrial, Inc.*, 2012 US. Dist. LEXIS 146707 (D. Utah Oct. 10, 2012).
553 *EEOC v. Signal International*, 2013 U.S. Dist. LEXIS 128990 (E.D. La. Sept. 10, 2013).
554 *Id.*
555 *Id.*
556 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 91965 (D. Colo. July 1, 2013).
557 *Id.*
558 *EEOC v. Southern Haulers, LLC*, 2012 U.S. Dist. LEXIS 166103 (S.D. Ala. Nov. 20, 2012).

employment. In granting the EEOC's motion, the court reasoned that because the decision maker with respect to the claimant's hire had made the final hiring decisions at all three employing units, the hiring decisions made by that decision maker, irrespective of the location, may lead to admissible evidence concerning the hiring decisions made at the location where the claimant applied.[559]

In contrast, the district court in Michigan, following a line of cases from FY 2012, rejected the EEOC's expansive approach to discovery. In *The WW Group, Inc.*,[560] the EEOC filed a claim of gender (pregnancy) discrimination on behalf of a pregnant woman who claimed that Weight Watchers discriminated against her by refusing to hire her based on its goal weight policy. In the midst of discovery, Weight Watchers moved for summary judgment arguing that the EEOC could not establish a *prima facie* case of discrimination because it was undisputed that the claimant was not objectively qualified to be hired based on the objective goal weight policy. The EEOC argued that Weight Watchers' motion should be deferred so it could conduct discovery. The EEOC moved to compel discovery, including discovery pertaining to Weight Watchers' treatment of pregnant staff/employees under its staff goal weight policy, including whether and under what circumstances Weight Watchers makes exceptions to its policy for pregnant women. The EEOC argued that such information regarding employees is relevant to Weight Watchers' argument that the claimant was not qualified for employment at the time she applied for the job, because she was over her goal weight and because it was relevant to whether Weight Watchers' defense is "mere pretext to hide the bad actor's decision" to not hire the charging party because she was pregnant.

The magistrate judge denied the EEOC's request to conduct discovery regarding the application of the goal weight policy to employees on the ground that Weight Watchers' treatment of its hired staff of pregnant employees was not relevant to the EEOC's complaint allegations. In affirming magistrate judge's ruling on the EEOC's Rule 72 objections, the district court judge held that "since [the claimant] was never a [Weight Watchers] employee, and therefore never subject to the staff goal weight policy, and because the EEOC [was] not challenging the goal weight policy itself, nor its impact on pregnant women as a group, [the magistrate judge] appropriately denied the EEOC's Rule 56(d) motion to conduct discovery into WW's treatment of its employees under the staff goal policy."

Decisions such as *The WW Group, Inc.*, show that the courts have been placing limits on the scope of the EEOC's discovery, focusing on the specific claims set forth in the complaint.

b. Financial Information

In EEOC-initiated lawsuits, the EEOC may pursue compensatory as well as punitive damages. Because the financial position of the employer is traditionally admissible as a measure of the amount of punitive damages that may be awarded, the EEOC often seeks financial information from the defendant employer during discovery. In FY 2012, there were numerous district court opinions addressing motions to compel the disclosure of financial information. The courts appear to be split regarding their treatment of this issue—*i.e.*, three district courts readily granted the EEOC's motions to compel the employers' financial information and three courts refused to order the defendants to disclose the information until the EEOC demonstrated potential entitlement to punitive damages. In the one opinion addressing this issue in FY 2013, the court erred on the side of liberally allowing discovery of the financial information sought by the EEOC.[561] Specifically, in *EEOC v. Northwest Motorsport, Inc.*, the EEOC, dissatisfied with the defendant's production of its 2009 and 2010 tax returns, filed a motion to compel additional financial information. In responding to the EEOC's motion, Northwest pointed to the tax returns it previously produced and argued that "the parties [had] conferred and agreed to a narrow scope and alternative timing of the requested information."[562] Ignoring the existence of any sort of agreement to narrow the scope of discovery, the EEOC argued that Northwest did not object to the discovery requested and had therefore waived any objections.[563] The EEOC further asserted that to the extent Northwest was requesting a protective order, it failed to follow the federal or local rules and failed to make the proper showing. The court agreed with the EEOC and granted its motion, holding the EEOC was entitled to the requested discovery. The court also denied Northwest's request for a protective order related to its financial information on the grounds that it failed to file a motion as required by the local rules, failed to show "good cause," or failed to identify the documents for which it sought the protective order.

559 *Southern Haulers, LLC*, 2012 U.S. Dist. LEXIS 166103, at **4-5.

560 *EEOC v. The WW Group, Inc., d/b/a Weight Watchers*, 2013 U.S. Dist. LEXIS 101599 (E.D. Mich. July 22, 2013).

561 *EEOC v. Northwest Motorsport, Inc.*, 2013 U.S. Dist. LEXIS 88512 (W.D. Wash. June 24, 2013).

562 *Northwest Motorsport*, 2013 U.S. Dist. LEXIS 88512, at *3.

563 *Id.* at *5.

2. Expert Witnesses

In *EEOC v. Rexnord Industries, LLC*,[564] the claimant was diagnosed with an active seizure disorder. She had numerous seizures at work, some of which required calling an ambulance to take her for emergency treatment. She also complained of blackouts and vomiting. Ultimately, the employer sent the claimant to a physician for a "fitness for duty" examination. The employer's physician determined the employee had an active seizure disorder that posed a "direct threat" to herself and others and that she should not return to work until her medical condition was stabilized. The employee was fired the next day. The EEOC sued, alleging the employer fired the employee either because of her disability (migraines) or because it regarded her as disabled (by a seizure disorder). To rebut the diagnosis of the employer's physician, the EEOC offered the expert medical opinion of a neurologist who found that the employer's physician failed to rely upon the "most current medical knowledge and/or the best available objective evidence."[565] The employer moved to exclude the EEOC's expert witness' report and testimony on three grounds, including that the expert witness' opinion consisted of speculation, lacked foundation in reliable methodology or evidence, lacked reliability, and would not assist the trier of fact. The court rejected each of the employer's arguments. Denying the employer's motion *in limine*, the court held that the EEOC's expert witness' report and testimony met the standard of admissibility under Fed. R. Evid. 702 and *Daubert*.[566]

3. Spoliation

One recent case demonstrates the need to take care in dealing with potential spoliation of potentially relevant employment records when faced with EEO claims.

In *EEOC v. Ventura Corp.*,[567] the EEOC challenged unlawful employment practices on behalf of a male employee and a class of other potential male job applicants. The male employee first complained in July 2007 that he was denied a sales position on the basis of gender because Ventura hired only women for those positions. Ultimately, the employee filed three discrimination charges, and the EEOC sent the employer a notice to preserve evidence with each charge, beginning in July 2007. The employer's primary defense was that no qualified males had ever applied for the high-level managerial positions that the employee sought. Establishing that defense, however, proved to be challenging, because despite numerous warnings by the EEOC to preserve information relevant to the case, discovery revealed that applicant résumés were shredded or moved to a warehouse—and subsequently lost—during an office restructuring in 2009. Further, electronic files, including résumés sent by job applicants to the company via email, were lost in a 2010 company-wide software migration. As a result, the Commission sought sanctions for destruction of relevant records on the ground that the employer's conduct hindered the EEOC's ability to prosecute the claim.

The district court sanctioned the employer for spoliation of relevant evidence, finding the EEOC's ability to prosecute the case was hindered because documents that had been in the employer's possession were lost, destroyed, or shredded while under an obligation to preserve relevant evidence based on reasonably anticipated litigation.[568] As a remedy, the court excluded all testimonial evidence offered by the company regarding the number of men who had applied for the sales positions and ordered an adverse inference instruction, permitting the jury to infer that the lost emails would have been favorable to the plaintiff.[569] Arguing that such a punishment was too harsh, the employer claimed that there had been no evidence that the documents were destroyed to gain an advantage in the litigation. The court held that even if the employer had not acted in bad faith or with a comparable bad motive, sanctions were warranted because under First Circuit precedent, bad faith was not necessary for purposes of imposing sanctions "if such evidence is mishandled through carelessness."[570] Not only did the court exclude the employer's testimony showing hiring practices, the court also instructed the jury that it could infer that the lost emails were damaging to the defense's case.

The above case underscores the importance of developing and implementing a records management process, and training and instilling the importance of compliance among staff and attorneys overseeing employment matters.

564 *EEOC v. Rexnord Industries, LLC*, 2013 U.S. Dist. LEXIS 124524 (E.D. Wis. Aug. 30, 2013).

565 *Rexnord Industries,* 2013 U.S. Dist. LEXIS 124524, at *9.

566 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

567 *See EEOC v Ventura Corp.*, 2013 U.S. Dist. LEXIS 19662 (D.P.R. Feb. 12, 2013).

568 *Ventura Corp.*, 2013 U.S. Dist. LEXIS 19662, at *18.

569 *Id.* at *20.

570 *Id.* at *19.

4. Protective Order

As discussed above, the EEOC often seeks and may gain access to all kinds of private information, some of which may only remotely relate to the claimant's discrimination claims. Once the EEOC has the information, the Commission may seek to use it for their own purposes unrelated to the litigation. Employers, therefore, often seek protective orders from the court to limit or protect information before producing it to the EEOC. The defendant in *EEOC v. Trinity Home Health Services* took such cautionary measures with a favorable result.[571]

Specifically, in *Trinity Home*, the plaintiff intervenor and employer agreed the employer would provide personnel files for three comparators, including social security numbers and personal information, subject to a protective order. The need for a protective order stemmed from the employer's concerns about the privacy rights of nonparty employees. The EEOC refused to agree to the proposed protective order, arguing that it was too broad as it prohibited the parties from discussing or revealing information contained in the discovery materials with others unless the individual were a regular employee of the firm assisting in the prosecution of the action. Relying on Sixth Circuit precedent, the court held that defendant employers have a valid interest in the privacy of nonparty personnel files. The court also found, because the protective order permitted parties, experts, investigators, and witnesses to use the information subject to the protective order, the order was not overly broad. Accordingly, the court agreed to enter the order proposed by the plaintiff intervenor and defendant employer.

While the courts are willing to enter orders to protect confidential information in EEOC-initiated suits, courts are nevertheless unwilling to give the parties blanket authority to designate documents to be filed under seal.[572] As in litigation between private parties, courts will also decline to retain jurisdiction over the enforcement of a stipulated protective order after the litigation terminates.[573]

5. Attorneys' Fees to EEOC

As discussed in the Annual Report on EEOC Developments: Fiscal Year 2012, there has been a detectable increase in the number of cases in which the Commission has sought and obtained sanctions in discovery-related disputes. Two 2013 cases reveal this trend is continuing. In *EEOC v. McCormick & Schmick's Seafood Restaurants*,[574] the EEOC alleged the defendant provided incomplete answers to interrogatories, propounded frivolous and conclusory objections, made disingenuous representations, and agreed to produce materials but then did not produce them. The court granted the EEOC's motion to compel, and the defendant paid attorneys' fees as a sanction. Similarly, in *EEOC v. Help At Home, Inc.*,[575] the defendant provided defense counsel's law firm with the addresses and telephone numbers of several current and former employees, who were identified as likely having discoverable information. The EEOC demanded the defendant supplement its responses, yet it failed to do so. The defendant also failed to request an extension of time to respond. The EEOC filed a motion to compel, which prompted the defendant to supplement its responses to state that the information was not readily available and that it was in the process of obtaining the requested information. The court found that the defendant did not request an extension of time to respond, which necessitated the EEOC's filing of a motion to compel, and that it was only after the motion was filed that defendant supplemented its responses.[576] As a remedy, the court agreed to award the EEOC reasonable attorneys' fees incurred in connection with its motion to compel as a sanction.

I. Summary Judgment

Fiscal year 2013 was filled to the brim with significant summary judgment wins for both the EEOC and employers. Neither side did significantly better than the other in terms of win or loss rates. Several noticeable themes, however, developed. First, both parties in a number of suits sought summary judgment on the EEOC's conciliation efforts. Second, the EEOC's increased focus on religious discrimination and accommodation claims resulted in victory for a meat packing plant claiming the requested accommodation raised safety concerns and mixed results for the EEOC in the retail context. Third, the EEOC's background check agenda backfired in many instances due to the lack of statistical support.

571 *EEOC v. Trinity Home Health Services*, 2013 U.S. Dist. LEXIS 47273 (E.D. Mich. Apr. 2, 2013).

572 *EEOC v. Pace Solano*, 2013 U.S. Dist. LEXIS 83536 (E.D. Cal. June 12, 2013).

573 *Pace Solano*, 2013 U.S. Dist. LEXIS 83536, at *4

574 *EEOC v. McCormick & Schmick's Seafood Restaurants*, 2012 U.S. Dist. LEXIS 161511 (D. Md. Nov. 8, 2012).

575 *EEOC v. Help At Home, Inc.*, 2013 U.S. Dist. LEXIS 63321 (E.D. Mo. May 3, 2013).

576 *Help At Home*, 2013 U.S. Dist. LEXIS 63321, at *4.

1. Summary Judgment on The EEOC's Failure to Conciliate

As described in subsection D of this Report, employers are increasingly demanding that the EEOC make a good faith effort to conciliate their claims. Employers are insisting also that those efforts amount to more than a "take-it-or-leave-it" offer from the EEOC. Not to be left out of the game, the EEOC claimed this year that courts could not review its conciliation efforts and, to the extent they could, its conciliation efforts were without blemish. Numerous summary judgment decisions issued in FY 2013 address these divergent viewpoints.[577] These cases do not provide employers with a clear game plan on how to dismiss cases based on the EEOC's failure to conciliate. However, they do strongly suggest that employers may want to consider the option of a motion to dismiss and/or stay in circumstances where the employer believes the EEOC filed suit prematurely without engaging in good faith conciliation discussions.

2. A Focus on Religious Discrimination

Religious discrimination and accommodation cases also dominated the 2013 fiscal year landscape, including several high profile cases involving meat packing plants and retailers.

For example, in *EEOC v. JBS USA LLC*, the EEOC alleged that the defendant engaged in a pattern of religious discrimination and failure to accommodate 200 to 300 Somali Muslims when it failed to provide unscheduled prayer breaks or a mass prayer break to slaughterhouse employees during Ramadan. The employer sought summary judgment, which was denied by the district court.

First, the employer claimed that religious accommodation claims are inappropriate for pattern-or-practice treatment because in order to show unlawful discrimination occurred, the EEOC must make an individualized showing that the plaintiff had a sincerely held religious brief. The court, however, found that the *Teamsters* framework was appropriate and this evidence could be proven during trial. Second, the employer sought summary judgment because the EEOC did not submit statistical evidence. While noting the lack of statistical evidence, the court concluded that disposal of the EEOC's claim on that basis alone was inappropriate at the summary judgment phase when the EEOC could present evidence through deposition testimony. Third, the employer argued that the EEOC cannot base a religious accommodation pattern-or-practice claim on changes to a meal break time, show that unscheduled prayer breaks were reasonable, and/or show that unscheduled prayer breaks would not pose an undue hardship. The court, however, found that numerous issues of material fact precluded summary judgment on these issues.

In FY 2013, the district court held a bench trial on whether additional break time constituted an undue hardship. Finding for the employer, the district court explained that the extra meal breaks could adversely affect food safety because the remaining employees on the slaughter and fabrication lines would have to speed up their work to dangerous levels or the company would have to slow down or stop the lines, "increasing the risk of contamination or adulteration" of the product. It further noted that the accommodation of extra breaks would have imposed more than a *de minimis* burden on non-Muslim co-workers forced to work harder and faster under potentially dangerous conditions. Still further, the breaks could result in the cattle becoming "distressed," with a resulting financial loss to the defendant.

Also of particular note are several related cases brought by the EEOC against a clothing retailer.

In the first case, the EEOC alleged that the employer discriminated against and failed to accommodate Muslim applicants who wore a hijab (headscarf) because the hijab was inconsistent with the company's image. Applying the burden-shifting framework set forth in *McDonnell Douglas* to the EEOC's disparate treatment claim, the court found that although the employer produced sufficient evidence to establish a legitimate, non-discriminatory justification for not hiring the applicant, the EEOC raised a triable issue of fact as to whether such justification was a mere pretext for discrimination.[578]

In the second case,[579] the EEOC alleged that the employer discriminated against and failed to accommodate Muslim employees who wore a hijab. The employer did not dispute that the complainant could establish a *prima facie* case of failure to accommodate her religious beliefs. Instead, the employer relied on its affirmative defenses of "undue burden" and the right to commercial free speech. With respect to undue burden, the employer emphasized that it need not show economic harm to prove undue hardship, and argued that the clothing

577 *See, .e.g., EEOC v. Mach Mining*, 2013 U.S. Dist. LEXIS 10859 (S.D. Ill. Jan. 28, 2013), *rev'd*, 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013); *EEOC v. Ruby Tuesday*, 919 F. Supp.2d 587 (D.W. Pa. 2013); *EEOC v. Beverage Distributors, Co.*, 2012 U.S. Dist. LEXIS 177351 (D. Colo. 2013). These cases are discussed in greater detail in Section V.D of this Report.

578 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 51905 (N.D. Cal. 2013).

579 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. Dist. LEXIS 125628 (N.D. Cal. 2013).

store's "Look Policy" was critical to the employer's success and that non-compliance with the policy would detract from customers' in-store experiences and negatively affect the brand. The court rejected the employer's argument, as well as the contention that appearance should be protected as commercial speech.

In the most recent case, the EEOC made a similar argument claiming that an applicant for the position of "Model" was not hired because she wore a hijab. The complainant interviewed for the position in one of the employer's stores. Prior to the interview, she had asked a friend of hers who worked for the employer whether wearing her hijab would be a problem. Her friend told her that it would not. When the complainant interviewed for the Model position, she did not say that she was Muslim and never indicated that she wore the hijab for religious reasons. The assistant manager who interviewed the claimant did not know whether the hijab was consistent with the employer's "Look" policy, and thus consulted with a regional manager who indicated that the claimant should not be hired because she wears a hijab which was inconsistent with the policy. On appeal, the U.S. Court of Appeals for the Tenth Circuit[580] held that the district court erred in denying summary judgment for the employer because the claimant never informed the employer, prior to its hiring decision, that her practice of wearing a hijab was based on her religious beliefs or that she would need an accommodation for the practice because of a conflict between her religious beliefs and the employer's look policy.

These cases are significant both because they show an increased interest in religious discrimination and accommodation cases by the EEOC, and because they establish that a demonstration of undue burden requires more than an employer's subjective beliefs about its sales.

3. Background Checks

The EEOC's focus on criminal and credit history clearly was front and center during FY 2013. Aside from the EEOC's Strategic Enforcement Plan, in which it announced that "hiring barriers" were one of the EEOC's priorities, two EEOC lawsuits in this area were ruled on by courts following summary judgment motions, which resulted in setbacks to the EEOC's initiatives in this area.[581]

In *EEOC v. Kaplan Higher Education Corp.,*[582] in which the EEOC challenged the employer's reliance on credit history as part of the hiring process and alleged that the practice had an unlawful discriminatory impact on African Americans, a federal district court in Ohio granted Kaplan's motion to strike the EEOC's expert report and its motion for summary judgment. The district court held the EEOC failed to meet its threshold burden as the plaintiff to prove that Kaplan's screening practices disproportionately excluded class members because of their race. In doing so, the court determined that the EEOC had failed to provide reliable statistical evidence of discrimination, and, therefore, failed to satisfy its threshold burden of proving that Kaplan's use of credit history information resulted in a disparate impact on protected class members. The EEOC has appealed the *Kaplan* decision to the Sixth Circuit. A decision can be expected sometime next year.

EEOC v. Freeman[583] built on the *Kaplan* foundation. In *Freeman*, a Maryland district court granted summary judgment for the employer on its use of credit and criminal history in the hiring process. While acknowledging that "because of the higher rate of incarceration of African-Americans than Caucasians, indiscriminate use of criminal history information might have the predictable result of excluding African-Americans at a higher rate than Caucasians," the court held that "[c]areful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States." Accordingly, the EEOC must make a carefully focused showing that a specific practice has a disparate impact because of a prohibited factor. This requires reliable and accurate analysis performed by a qualified expert. Because the EEOC's expert failed to conduct a reliable and accurate expert analysis, the court struck the expert report. The court then granted summary judgment because the EEOC lacked any reliable expert testimony and statistical analysis demonstrating disparate impact. The EEOC has similarly appealed this decision.

These opinions are significant for employers because they demonstrate: (1) the subject of background checks remains high on the EEOC's agenda; (2) strong statistical evidence is required to establish disparate impact; and (3) the EEOC may face more hurdles than it expected in proving disparate impact.

The remaining notable summary judgment cases are outlined according to claim type in Appendix D.

580 *EEOC v. Abercrombie & Fitch Stores, Inc.*, 2013 U.S. App. LEXIS 20028. (10th Cir. 2013). The EEOC has filed a petition for a rehearing *en banc*.

581 The rulings have not altered the EEOC's focus on this area, as demonstrated by two lawsuits filed in July 2013 challenging criminal history practices by employers. *See* Press Release, EEOC, *EEOC Files Suit Against Two Employers for Use of Criminal Background Checks* (June 11, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm.

582 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013).

583 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).

J. Trial

1. Trial Spotlight

The EEOC has made it clear in recent years that the ADA is a top enforcement priority. The Commission has also paid very close attention to harassment cases, especially harassment cases that could be expanded to include systemic or class-wide allegations. The EEOC tried cases in each of these focus areas during the 2013 fiscal year.[584]

In *EEOC v. Evergreen Alliance Golf Limited, LP*,[585] the EEOC alleged discrimination and retaliation on behalf of an employee with cerebral palsy. The court dismissed the discrimination claim prior to trial; the parties tried the retaliation claim in a bench trial.[586] At trial, the EEOC attempted to prove the defendant retaliated against the employee by: (1) placing him on a Performance Improvement Plan (PIP); (2) changing his compensation structure; (3) terminating him; (4) designating him as ineligible for rehire; and (5) failing to pay him severance at termination.[587] The court concluded that each of these actions constituted an adverse employment action.[588]

However, the court ruled for the defendant, finding no retaliation because the employee had not engaged in protected activity.[589] The employee complained to human resources about a single comment his supervisor made during a team meeting. The employee acknowledged the comment was not directed at the employee or his medical condition. The court concluded the isolated comment was not severe or pervasive enough for a reasonable person to believe a hostile work environment was created. Therefore, the employee did not have a reasonable belief that the comment violated the ADA.[590]

The EEOC also failed to prove the employee's complaint was the "but-for" cause of the adverse employment actions.[591] The evidence presented at trial supported the defendant's legitimate, non-retaliatory explanation for each action. The defendant demonstrated it changed the employee's compensation structure as part of an effort to bring consistency to the compensation structures of all individuals who held the same position.[592] The employee's substandard performance justified the PIP; the evidence showed the defendant had treated other poor performers in the same way.[593] The employee's poor performance was also a legitimate, non-retaliatory reason for terminating him, refusing severance, and designating him as ineligible for rehire.[594]

The EEOC successfully sued *The Finish Line, Inc.* on behalf of three women who contended they experienced sexual harassment from their former supervisor.[595] A jury found the women experienced a sexually hostile work environment, retaliation, and constructive discharge.[596] It awarded each woman $10,000 in compensatory damages but did not award punitive damages.[597]

After entry of the jury's verdict, the EEOC moved for judgment as a matter of law, or, in the alternative, a new trial on one plaintiff's constructive discharge claim. The EEOC also moved for a new trial on damages.[598]

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584 The EEOC been particularly aggressive in pursuing racial harassment cases through trial, even against medium- and smaller-sized companies, in demonstrating smaller employers are not immune from litigation in this area. The EEOC also has publicized its success in this area. *See, e.g.,* Press Release, EEOC, *Court Orders AA Foundries to Take Extensive Measures to Prevent Racial Harassment* (Oct. 12, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-12-12.cfm ; Press Release, EEOC, *Jury Says AA Foundries Must Pay $200,000 for Creating Racially Hostile Work Environment* (Sept. 27, 2012), *available at* http://www.eeoc.gov/eeoc/newsroom/release/9-27-12g.cfm; Press Release, EEOC, *EEOC Wins Rare Partial Summary Judgment Ruling in Racial Harassment Case* (Oct. 16, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-16-12.cfm; and Press Release, EEOC, *Jury Awards $200,000 in Damages Against A.C. Widenhouse in EEOC Race Harassment Suit* (Feb. 1, 2013), *available at* http://www.eeoc.gov/eeoc/newsroom/release/2-1-13.cfm.

585 *EEOC v. Evergreen Alliance Golf Limited, LP*, 2013 U.S. Dist. LEXIS 118805 (D. Ariz. Aug. 21, 2013).

586 *Evergreen Alliance Golf Limited*, 2013 U.S. Dist. LEXIS 118805, at *2.

587 *Id.* at *2.

588 *Id.* at **27-28.

589 *Id.* at **25-26.

590 *Id.*

591 *Id.* at *28-29.

592 *Id.* at **29-31.

593 *Id.* at **31-34.

594 *Id.* at *34.

595 *EEOC v. The Finish Line, Inc.*, 2013 U.S. Dist. LEXIS 56793 (M.D. Tenn. Apr. 19, 2013).

596 *The Finish Line, Inc.*, 2013 U.S. Dist. LEXIS 56793, at *2.

597 *Id.* at *2.

598 *Id.*

The court first reviewed the EEOC's motion for judgment as a matter of law or a new trial. Constructive discharge may occur only when a reasonable person in the same circumstance would have felt compelled to resign.[599] In the Sixth Circuit, the constructive discharge inquiry focuses on the employer's intent as well as the employee's actions.[600] The employer will be deemed to have had the requisite intent if the evidence demonstrates that the employee's decision to quit was "a foreseeable consequence of the employer's actions."[601] In this case, the evidence established that one plaintiff experienced more severe sexual harassment than the other two women and quit work to avoid the continued harassment.[602] The court determined quitting was a foreseeable response because the plaintiff was a minor with emotional maturity issues, the harasser was her supervisor who was 28 years her senior, and the physical part of the harassment left the plaintiff with an "incurable sexually transmitted disease."[603] For these reasons, the court held the jury's verdict was against the clear weight of the evidence on the employee's constructive discharge claim and ordered a new trial on that claim.[604]

The court also granted the EEOC's motion for a new trial on the issue of damages.[605] After comparing the alleged harassment of each woman, the court concluded the jury's identical compensatory damage award was reasonable for two of the three women. With respect to the minor plaintiff, however, the jury's decision went against the clear weight of the evidence because the harasser's conduct was significantly more egregious.[606] Instead of hugs or other inappropriate touching, the harasser subjected the plaintiff to oral and vaginal sex and gave her a sexually transmitted disease.[607] The court also concluded the harasser's conduct toward the plaintiff exhibited a reckless disregard for her rights.[608] Accordingly, the jury's decision not to award punitive damages to this plaintiff was against the clear weight of the evidence.[609]

The EEOC also sought a new trial in *EEOC v. Evans Fruit Co., Inc.*[610] The EEOC alleged fourteen female employees experienced a sexually hostile work environment. The jury entered a complete defense verdict, finding that none of the women experienced actionable sexual harassment in the workplace. [611]

As in *The Finish Line, Inc.*, the EEOC moved for a new trial, contending the jury's verdict was against the clear weight of the evidence.[612] The court rejected the EEOC's contention.[613] The court noted credibility determinations are the province of the jury and evidence was introduced during trial to call into question the credibility of each female.[614] There was also evidence calling into question the credibility of the alleged harasser and other former supervisory employees who testified at the trial. The jury could have reached a number of conclusions based on the evidence. However, nothing in the record left the court with "the definite and firm conviction" that the jury reached the wrong conclusion.[615]

The EEOC also argued a new trial was appropriate because the defendant violated the court's *in limine* rulings.[616] Prior to trial, the court prohibited the defendant from presenting specific evidence related to its investigation of harassment charges filed with the EEOC in 2006 and 2008.[617] However, some of the employer's witnesses testified that the defendant's legal counsel interviewed witnesses after the employer received a third harassment charge in 2008. It was not clear from the testimony whether these interviews were conducted before

599 *Id.* at *7.

600 *EEOC v. The Finish Line, Inc.*, 2013 U.S. Dist. LEXIS 56793, at *9 (citing *Moore v. Kuka Welding Sys.*, 171 F.3d 10743, 1080 (6th Cir. 1999); *Smith v. Henderson*, 376 F.3d 529, 533-34 (6th Cir. 2004) (internal quotation omitted)).

601 *EEOC v. The Finish Line, Inc.*, 2013 U.S. Dist. LEXIS 56793, at *10, *quoting Moore*, 171 F.3d at 1080.

602 *Id.* at *4-5.

603 *Id.* at *10.

604 *Id.* at *11.

605 *Id.* at *18.

606 *Id.* at **14-15.

607 *Id.* at **15-16.

608 *Id.* at *17.

609 *Id.*

610 *EEOC, et al. v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 102676 (E.D. Wash. July 22, 2013).

611 *Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 102676, at **2-3.

612 *Id.* at *3.

613 *Id.* at *5.

614 *Id.* at *6.

615 *Id.* at *7.

616 *Id.* at *11.

617 *Id.* at **11-12; **16-17.

or after the EEOC filed its lawsuit in 2010.[618] The court ruled that to the extent the defendant violated the *in limine* rulings, the EEOC did not suffer prejudice. The post-suit investigation was outside the scope of the EEOC's motion *in limine*.[619] Furthermore, the defendant's pre-suit investigations were not relevant because the jury did not rule in favor of the defendant on the basis the defendant proved the *Ellerth/Faragher* defense.[620]

In a separate *in limine* ruling, the court allowed the women to testify about similar acts of harassment of which they were aware.[621] Defense counsel repeatedly raised hearsay objections to one woman's testimony on this topic.[622] The court sustained some of the objections prior to affirming its pre-trial ruling to allow such testimony. The court denied the EEOC's request for a new trial, holding the EEOC was not prejudiced by the court sustaining defense counsel's objections. The court held also the EEOC failed to take advantage of an opportunity to cure any prejudice because the EEOC did not request permission to recall the woman whose testimony had drawn the objections. [623]

The court ruled the jury's verdict was not against the clear weight of the evidence, based on false or perjurous testimony and did not represent a miscarriage of justice. For these reasons, the court denied the EEOC's motion for a new trial.

2. Evidentiary Issues

Before cases reach a judge or jury, the parties often must sort out evidentiary issues. Two of the most commonly litigated evidentiary issues are motions *in limine* and the destruction of evidence.

a. Motions *in Limine*

Both parties frequently file motions *in limine* to determine whether specific evidence will be deemed admissible or inadmissible. In *EEOC v. Holmes & Holmes Industrial, Inc.*,[624] the EEOC alleged the defendant[625] subjected the claimants to a racially hostile work environment because the highest ranking on-site supervisor used racial epithets on a daily basis. In an effort to prove the claimants were not offended by the epithets, all defendants asked the court to admit music lyrics and music videos created by two of the claimants. The lyrics and videos included the repeated use of the word "nigga."[626]

The court denied the defendants' motion.[627] It held the claimants' use of the word in a creative context outside of the workplace was irrelevant to whether they experienced a hostile work environment.[628] Moreover, nothing about the claimants' music lyrics or videos meant they were not offended by their white supervisor's repeated use of a racial epithet to address them.[629] Furthermore, the court held the slight probative value, if any, of the music lyrics and videos was far outweighed by the danger of unfair prejudice and confusion pursuant to Rule 403 of the Federal Rules of Evidence.[630] The court noted that rap lyrics are often crude, and there was no evidence the claimants used crude or offensive language at work. Therefore, to introduce the music lyrics and videos may make the case about rap music, not about the conduct the claimants experienced in the workplace.[631] In addition, admission of this evidence would prejudice a third claimant who had nothing to do with the rap music of the other two claimants.[632]

In *EEOC v. CRST Van Expedited, Inc.*,[633] the defendant filed a 14-paragraph motion *in limine*, seeking to bar the EEOC from introducing selected evidence and making certain arguments.[634] The case started with a pattern-or-practice claim and individual claims on behalf of

618 *Id.* at *12.
619 *Id.* at *18.
620 *Id.* at **12-13.
621 *Id.* at **18-19.
622 *Id.* at *18.
623 *Id.* at *20.
624 *EEOC v. Holmes & Holmes Industrial, Inc.*, 2012 U.S. Dist. LEXIS 146707 (C.D. Utah Oct. 10, 2012).
625 After the EEOC initiated the suit against Holmes & Holmes Industrial, Inc., two claimants intervened and named two additional entities and three individuals as defendants.
626 *Holmes & Holmes Industrial, Inc.*, 2012 U.S. Dist. LEXIS 146707, at *49.
627 *Id.* at **52-53.
628 *Id.* at *49.
629 *Id.* at *50.
630 *Id.* at *52.
631 *Id.*
632 *Id.*
633 *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 10739 (N.D. Iowa Jan. 28, 2013).
634 *CRST Van Expedited,* 2013 U.S. Dist. LEXIS 10739, at **5-6.

multiple claimants alleging inappropriate activities by different harassers. By the time of trial, the court had rejected the pattern-or-practice claim, and only one claimant's allegations against one harasser remained at issue. The extensive motion *in limine* is thus illustrative of the multitude of issues that may arise in the trial of sexual harassment claims, including proposed "me too" evidence involving testimony of others, to prove the underlying claim of the alleged victim involved in the trial.

In the first paragraph, the defendant asked the court to prohibit the EEOC from calling a witness whom the EEOC did not identify in its initial disclosures.[635] The court denied the request but permitted the defendant to depose the witness prior to trial.[636] In paragraph two, the defendant moved to bar the EEOC from introducing evidence that would only be admissible through an expert because the EEOC did not disclose any experts.[637] The court denied the motion, noting the defendant would still be permitted to object to specific evidence during trial.[638]

In paragraph three, the defendant asked the court to bar the EEOC from introducing evidence of damages stemming from the actions of one particular harasser.[639] The defendant understood the EEOC had previously agreed to drop all claims stemming from that individual's conduct. The EEOC had the same understanding, so the court denied the paragraph three request as moot.[640]

The defendant devoted its next paragraph to arguing the EEOC's claim was subject to the statutory damages cap.[641] The court denied the defendant's motion after the parties agreed, during the final pre-trial conference, to allow the EEOC to argue for higher damages with the understanding that any award in excess of the statutory cap would be reduced to the cap.[642]

In paragraph five, the defendant argued the EEOC could not seek monetary damages on behalf of an individual who was judicially estopped from pursuing that remedy as an individual.[643] Relying on the Supreme Court's decision in *EEOC v. Waffle House, Inc.*,[644] the court denied this part of the motion, ruling the EEOC could seek specific relief on behalf of the individual.[645]

The defendant devoted paragraph six of its motion to arguing the EEOC should not be permitted to present evidence or arguments inconsistent with: (1) the court's previous dismissal of the EEOC's pattern or practice claim; (2) the determination that the defendant's lead drivers were not supervisors; and (3) the court's prior ruling that the defendant could not be liable for sexual harassment it could not stop and that had already ended by the time the defendant was made aware of it.[646] In addressing this three-part request, the court first ruled that its previous dismissal of the EEOC's pattern or practice claim did not preclude the EEOC from introducing evidence that the defendant's response to the remaining claimant's sexual harassment complaint was deficient.[647] Next, the EEOC represented it did not intend to argue that the defendant's lead drivers were supervisors, so the court granted the defendant's motion as to the second point in paragraph six.[648] Finally, the court denied the third part of paragraph six, stating that its previous ruling did not preclude the EEOC from presenting evidence concerning the defendant's knowledge of sexual harassment of the claimant and response to that harassment.[649]

In paragraph seven of its motion, the defendant asked the court to bar the EEOC from arguing the defendant's policies were deficient based on the court's previous rejection of the EEOC's pattern or practice claim.[650] The court held the EEOC could present evidence specific to the defendant's response to the remaining claimant's harassment allegation. It also held the EEOC could not present evidence inconsistent with its prior holding that the defendant did not engage in pattern or practice of harassment.[651]

635 *Id.* at *8.
636 *Id.* at *9.
637 *Id.*
638 *Id.*
639 *Id.*
640 *Id.* at *10.
641 *Id.*
642 *Id.*
643 *Id.*
644 *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002).
645 *CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 10739, at **12-13.
646 *Id.* at **14-17.
647 *Id.*at *15.
648 *Id.* at **15-16.
649 *Id.* at *17.
650 *Id.* at *18.
651 *Id.*

The court denied paragraph eight of defendant's motion as overbroad.[652] The defendant requested that the court bar the EEOC from arguing defendant was negligent for assigning the remaining harasser as the remaining claimant's lead driver because the defendant did not know the alleged harasser would harass female drivers.[653]

In paragraph nine of its motion, the defendant asked the court to bar the EEOC from introducing evidence concerning the sexual harassment complaints of other female drivers and the defendant's responses to those complaints.[654] The defendant argued that the evidence was not relevant to the merits of the remaining claimant's claim.[655] The EEOC argued that the evidence was relevant to bolster the remaining claimant's credibility, to support punitive damages, and to demonstrate the employer's discriminatory motive. The court separately analyzed the potential testimony of each witness.[656] It excluded all of the testimony because the witnesses alleged different types of harassment, identified different harassers, and reported the conduct to different dispatchers.[657] With respect to each potential witness, the court found that any probative value the witnesses' testimony might have for any of the points the EEOC wanted to prove was outweighed by the potential prejudice to the defendant.[658]

The court granted the defendant's request, in paragraph 10 of its motion, to bar evidence of the alleged harasser's unrelated disciplinary investigations and safety records.[659] The court also granted paragraph 11 of the defendant's motion and barred introduction of evidence concerning the defendant's net worth and finances until the EEOC established liability.[660] The court also granted paragraph 12 of defendant's motion and precluded the EEOC from commenting on the defendant's failure to call witnesses outside of the defendant's control. However, the court stated the parties would be allowed to object at trial if a dispute arose concerning control of a particular witness.[661] The EEOC conceded it would not compare this case to other EEOC cases. As a result, the court granted paragraph 13 of defendant's motion.[662] The court also granted paragraph 14 of defendant's motion because the EEOC conceded it was not going to argue that the defendant should have required the alleged harasser and claimant to take lie detector tests.[663]

In *EEOC v. New Breed Logistics*,[664] the defendant moved to bar the EEOC from introducing evidence concerning post-employment conduct of the alleged harasser.[665] The court ruled the EEOC could not use the evidence to prove how the alleged harasser acted while working for the defendant.[666] However, the court ruled the EEOC could use evidence of the alleged harasser's inconsistent statements to impeach him. The court also ruled the EEOC could introduce specific examples of misrepresentations and omissions on employment applications the alleged harasser completed after leaving the defendant's employ to attack his character for truthfulness.[667]

The court issued a separate opinion to address the defendant's motion to exclude evidence regarding emotional distress damages beyond standard emotional distress damages. Specifically, the defendant asked the court to bar the EEOC from presenting evidence that any of the claimants experienced a physical or mental ailment due to the defendant's actions.[668] The court rejected the defendant's argument, stating the EEOC did not need to present expert medical testimony to prove the claimants experienced physical manifestations of emotional distress.[669] Instead, the claimants' testimony about their own medical condition is relevant to garden variety emotional distress damages.[670] The court also found the claimants' testimony would not be prejudicial or confusing.[671]

652 *Id.* at *19.
653 *Id.*
654 *Id.* at *21.
655 *Id.*
656 *Id.* at *25.
657 *Id.* at **25-71.
658 *Id.* at **22-72.
659 *Id.* at **73-74.
660 *Id.* at *74.
661 *Id.* at *75.
662 *Id.* at **75-76.
663 *Id.* at *76.
664 *EEOC v. New Breed Logistics*, 2013 U.S. Dist. LEXIS 56956 (W.D. Tenn. Apr. 22, 2013).
665 *New Breed Logistics*, 2013 U.S. Dist. LEXIS 56956, at *1.
666 *Id.* at *2.
667 *Id.* at **2-3.
668 *Id.* at *3.
669 *Id.* at **3-4.
670 *Id.* at *4.
671 *Id.*

In *EEOC v. JBS USA, LLC,*[672] the parties filed competing motions *in limine*.[673] The EEOC sought to exclude four of the defendant's experts and certain evidence from the first phase of the proceedings. The defendant also sought to exclude certain expert testimony.[674] The court ruled both parties could present expert testimony concerning Muslim religious beliefs and practices.[675] It concluded the defendant's labor law expert could not testify concerning legal requirements or the ultimate issue of whether the defendant complied with the law.[676] However, the expert could offer relevant testimony about customs and practices in the industry.[677] The court held the defendant's business analyst could not testify as an expert because the defendant did not timely disclose her as an expert witness. The witness could testify as a fact witness.[678] The court declined to preclude, *in limine*, the defendant from calling a rebuttal expert, deciding instead to address the EEOC's objections at trial.[679] The court made the same ruling on the defendant's motion to preclude two of the EEOC's experts; the court did not need to act as a gatekeeper because no jury would hear Phase I of the proceedings.[680] The court denied the EEOC's motion to exclude certain evidence from Phase I of the proceedings without prejudice to the EEOC raising the same objections at the time of trial.[681]

In *EEOC v. Western Trading Company, Inc.*,[682] the EEOC and individual plaintiff moved to exclude evidence of the plaintiff's (1) receipt of Social Security benefits; (2) receipt of other governmental benefits; (3) drug and alcohol use; (4) failure to take his epilepsy medication; and (5) prior criminal conviction.[683] The defendant moved the court to exclude the testimony of three witnesses.[684]

The EEOC sought to exclude the plaintiff's receipt of Social Security benefits and other governmental benefits under the collateral source rule.[685] The collateral source rule provides that third-party benefits obtained by an injured plaintiff should not be deducted from the liability of a party that committed a tort against the plaintiff.[686] Colorado law makes clear the collateral source rule applies to Social Security benefits.[687] As such, the court concluded that evidence concerning the plaintiff's receipt of governmental benefits was barred by the collateral source rule.[688] In addition, the court found the evidence would be minimally relevant but could be significantly prejudicial because it could allow a juror to conclude the plaintiff did not deserve additional compensation.[689]

The court found that evidence of the plaintiff's drug and alcohol use was minimally relevant under Rule 401.[690] The evidence was only tangential to the issues in the litigation, but could be highly prejudicial. Accordingly, the court concluded that the limited probative value of the evidence would be substantially outweighed by its potential prejudicial effect.[691] For that reason, the court granted the EEOC's motion to exclude evidence of the prior drug and alcohol use.[692]

The court denied the EEOC's motion to preclude evidence of the plaintiff's compliance with taking his epilepsy medication.[693] The court found the evidence relevant. The central issue of the case was whether the plaintiff could perform the essential functions of

672 *EEOC v. JBS USA, LLC*, 2013 U.S. Dist. LEXIS 50833 (D. Neb. Apr. 9, 2013).
673 *JBS*, 2013 U.S. Dist. LEXIS 50833, at **4-5.
674 *Id.* at *4-5.
675 *Id.* at *8.
676 *Id.*
677 *Id.*
678 *Id.* at *13.
679 *Id.* at *14.
680 *Id.*
681 *Id.* at *15.
682 *EEOC v. Western Trading Co., Inc.*, 2013 U.S. Dist. LEXIS 22077 (D. Colo. Feb. 19, 2013).
683 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *2.
684 *Id.* at *1.
685 *Id.* at *2.
686 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *2 (quoting *Volunteers of Am. Colo. Branch v. Gardenswartz*, 242 P.3d 1080, 1082-83 (Colo. 2010)).
687 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *3 (citing *Barnett v. Am. Family Mut. Ins. Co.*, 843 P.2d 1302, 1309 (Colo. 1993)).
688 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *3.
689 *Id.* at *4.
690 *Id.* at *5.
691 *Id.* at *6.
692 *Id.*
693 *Id.* at *7.

the position. Accordingly, whether the plaintiff took the medication he was prescribed to control his seizure disorder was also relevant.[694] Moreover, the court concluded any prejudice to the plaintiff would not be unfair and would not substantially outweigh the probative value of the evidence.[695]

The defendant represented it did not intend to use the plaintiff's criminal history at trial. Therefore, the court deemed the EEOC's motion to exclude evidence of the plaintiff's criminal history to be moot.[696] Likewise, the court denied the defendant's motion to exclude a witness as moot based on the defendant's representations at the final trial preparation conference.[697]

The court denied the defendant's motion to exclude the testimony of two of the plaintiff's other witnesses.[698] The defendant argued plaintiff failed to timely disclose these witnesses, of which there was no dispute.[699] As such, the court evaluated the potential prejudice to the defendant, the ability of the defendant to cure the prejudice, the extent to which the evidence would disrupt the trial, and the plaintiff's bad faith or willfulness.[700] The defendant knew of both witnesses before the discovery period closed, and the plaintiff repeatedly offered to make both witnesses available for deposition.[701] Therefore, to the extent the untimely disclosure prejudiced the defendant, it had an opportunity to cure the prejudice. The trial had not yet started, so allowing the testimony of the witnesses would not disrupt the trial. Moreover, the defendant did not allege any bad faith or willfulness on the part of the plaintiff. Each factor weighed in favor of allowing the witnesses to testify.[702]

b. Sanctions

During the 2013 fiscal year, the EEOC sought sanctions where it believed an employer destroyed evidence or failed to produce relevant evidence. In *EEOC v. Spitzer Management, Inc.*,[703] the defendant used witness statements at trial that were different from the copies that had been provided to the plaintiffs. The court requested an explanation for the difference. The defendant could not answer immediately. The following day, the defendant explained it removed fax headers from witness statements when it cleaned exhibits for trial.[704] The fax headers were critical as they were the only way to identify the time frame of the statements.[705] The court ordered the defendant to produce the original of every document requested during discovery.[706] In response to the court's order, the defendant produced several documents for the first time.[707] The court declared a mistrial and considered what other sanction would be appropriate.[708]

The court evaluated the withheld evidence, the employer's explanation for failing to produce the evidence, and the prejudice stemming from the defendant's failure.[709] The defendant had no reasonable explanation for withholding material evidence. The defendant's conduct resulted in significant prejudice to the plaintiffs.[710] As a result, the court had no doubt the defendant's conduct warranted sanctions.[711] The court considered entering a default judgment. However, the court feared a windfall for some of the plaintiffs if it imposed that sanction. As a result, the court ordered the corporate defendant and its counsel to pay $313,215 in attorneys' fees to the EEOC and the individual plaintiffs.[712]

694 *Id.*
695 *Id.*
696 *Id.* at *8.
697 *Id.* at **8-9.
698 *Id.* at *11.
699 *Id.* at *8.
700 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *9 (citing *Woodworker's Supply, Inc. v. Principal Mut. Life Ins.*, 170 F.3d 985, 993 (10th Cir. 1999)).
701 *Western Trading*, 2013 U.S. Dist. LEXIS 22077, at *10.
702 *Id.* at *11.
703 *EEOC v. Spitzer Management, Inc.*, 2013 U.S. Dist. LEXIS 73150 (N.D. Ohio May 22, 2013).
704 *Spitzer Management*, 2013 U.S. Dist. LEXIS 73150, at *5.
705 *Id.*
706 *Id.* at *6.
707 *Id.* at *7.
708 *Id.*
709 *Id.* at *10.
710 *Id.* at **10-27.
711 *Id.* at *27.
712 *Id.* at **29-31.

3. Bifurcation

Parties to litigation often request cases to be tried in phases. A trial may be broken down into a liability phase and a damages phase. The separation of trial phases is known as bifurcation.

In *EEOC v. Pitre, Inc.*,[713] the EEOC alleged the defendant maintained a pattern or practice of tolerating and encouraging sexual harassment.[714] The defendant moved to dismiss the EEOC's pattern-or-practice claims, or in the alternative, to bifurcate the EEOC's pattern-or—practice claims from the rest of the lawsuit.[715] The defendant argued the EEOC did not plead a separate claim under section 707 and failed to identify a specific policy or practice to tie the company's decisions into a systemic procedure.[716] For its part, the EEOC requested bifurcation of discovery and the trial into two parts. The EEOC requested one phase to resolve the pattern-or-practice claim and punitive damages and a second phase to address the individual claims with a rebuttable presumption of discrimination if the EEOC proved its pattern-or-practice claim.[717]

As previously discussed, the EEOC sues under section 706 of Title VII to remedy the wrongs of an aggrieved person. The EEOC sues under section 707 of Title VII on behalf of the public interest. Under section 706, the EEOC must prove all of the elements of the aggrieved individual's claim. Under section 707, the EEOC must prove the unlawful employment action was the standard operating procedure of the defendant.[718] Despite these differences, the court concluded that these two sections of Title VII overlap and allow the EEOC multiple routes to remedy unlawful discrimination.[719] Due in part to this overlap, the court held that section 706 does not preclude the EEOC from seeking relief for specific individuals and pursuing a pattern-or-practice theory on behalf of the general public.[720] Even more, the EEOC is not obligated to plead the evidentiary framework on which it intends to rely. It is required only to set forth sufficient facts to render its claim for relief plausible.[721]

After the court held the EEOC could pursue both its pattern-or-practice claims and claims for individual relief, it turned to the proper method for trying the case. The court evaluated methods for trying pattern-or-practice harassment cases and the issue of punitive damages. In the end, the court concluded that during Phase I of the trial, the trier of fact would decide whether the defendant had a pattern or practice of condoning sexual harassment, whether the defendant had a policy of retaliating against those who complained of sexual harassment, and whether the defendant's conduct warranted punitive damages.[722] During Phase II of the trial, the trier of fact would determine the availability and extent of individual relief. Each aggrieved person would benefit from a presumption that the objective elements of harassment had been proven, but each would have to prove he was subject to unwelcome harassment and retaliation.[723] The court did not make a final determination about whether separate juries would be used at separate phases of the trial.[724]

The issue of bifurcation also arose in *EEOC v. Celadon Trucking Services, Inc.*[725] The EEOC alleged the defendant engaged in a pattern or practice of making disability-related inquiries and conducting pre-offer medical examinations of applicants.[726] The EEOC asked the court to bifurcate the trial and discovery into two stages—the liability and punitive damages stage and the remedial and compensatory damages stage.[727]

713 *EEOC v. Pitre, Inc.*, 908 F. Supp. 2d 1165 (D.N.M. Nov. 30, 2012).

714 *Pitre,* 908 F. Supp. 2d at 1170.

715 *Id*.

716 *Pitre,* 908 F. Supp. 2d at 1170.

717 *Id*.

718 *Id*. at 1171-72. As discussed previously, the lines are sometimes blurred between section 706 and section 707 of Title VII because the EEOC has been trying to pursue pattern or practice claims under section 706. *See e.g. Serrano v Cintas Corp*., 699 F. 3d 884 (6th Cir. 2012*), reh'g en banc denied*, 2013 U.S. App. LEXIS 1684 (6th Cir. Jan. 15, 2013), *cert. denied by Cintas Corp. v. EEOC*, 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013). *But see EEOC v Bass Pro Outdoor, LLC,* 2012 U.S. Dist. LEXIS 75597 (S.D. Tex. May 31, 2012).

719 *Pitre*, 908 F. Supp. 2d at 1173-74.

720 *Id*. at 1174.

721 *Id*. at 1175-76.

722 *Id*. at 1178.

723 *Id*. at 1179.

724 *Id*. at 1179.

725 *EEOC v. Celadon Trucking Services, Inc.*, 2013 U.S. Dist. LEXIS 55506 (S.D. Ind. Apr. 18, 2013).

726 *Celadon Trucking Services,* 2013 U.S. Dist. LEXIS 55506, at *1.

727 *Id.*

The court granted the EEOC's motion to bifurcate because doing so served the interest of judicial economy.[728] The court also concluded sufficient prejudice did not exist to overcome bifurcation because the defendant did not need to conduct liability discovery on the entire class.[729] Though the court agreed the trial should proceed in two stages, it made a very significant ruling regarding punitive damages rejected the EEOC's standard contention that punitive damages evaluation should come during the first stage.[730] Instead, the court concluded that punitive damages would be determined at the second stage, after proof of liability to individual claimants.[731]

In *EEOC v. JBS USA, LLC,*[732] the parties agreed to bifurcate discovery and trial into two phases—the first being the pattern-or-practice phase and the second relating to individual claims for relief.[733] Subsequently, the court granted the defendant's motion to preclude the intervening plaintiffs from participating as parties during Phase I.[734] The EEOC filed an objection, which the intervenors joined.[735] The court concluded the intervening plaintiffs had no statutory or contractual right to participate in the Phase I proceedings as parties because their claims were private, non-class Title VII actions that had to proceed pursuant to the *McDonnell Douglas* burden shifting framework.[736]

In *EEOC v. Evans Fruit Co., Inc.*,[737] an individual defendant who had intervened moved to have state law claims against him individually severed from the class allegations against the defendant.[738] The court granted his motion. It found that the individual defendant may be prejudiced if the jury heard the evidence against the employer in addition to the evidence against him.[739] The court noted it would be impossible for a jury not to consider all of the evidence, and the confusion could not be remedied by special jury instructions.[740]

4. Expert Witnesses

The inclusion or preclusion of expert witness testimony can also be a hot button topic in advance of trial. The two most noteworthy cases involved *EEOC v Kaplan Higher Learning Corp*,[741] and *EEOC v Freeman*,[742] in which the expert reports were pivotal and proved to be fatal to the EEOC's claims in both cases based on the summary judgment rulings in favor of the employer in each case.

In *Kaplan,* the EEOC alleged the defendants' use of credit reports in the hiring process had a disparate impact on African American applicants.[743] Defendants moved for complete summary judgment. The EEOC moved for partial summary judgment. Each party moved to exclude the expert report of the opposing party.[744] The defendants sought to exclude the EEOC's expert on the grounds that his method for determining race was scientifically unsound and his sample was not representative of the applicant pool.[745] The EEOC's expert used a team of individuals, "race raters", to determine applicant races by reviewing drivers' license photos.[746] The court held the EEOC failed to present evidence that the use of the "race raters" was reliable.[747] Therefore, the court excluded the report and testimony of the EEOC's expert.[748] The court did not reach the EEOC's motion to exclude the defendants' expert. The motion became moot because the EEOC failed to state a *prima facie* case of discrimination.[749]

728 *Id.* at *5.
729 *Id.* at *6.
730 *Id.* at *7.
731 *Id.* at *8.
732 *EEOC v. JBS USA, LLC*, 2012 U.S. Dist. LEXIS 167117 (D. Neb. Nov. 26, 2012).
733 *JBS*, 2012 U.S. Dist. LEXIS 167117, at *5.
734 *Id.*
735 *Id.*
736 *Id.* at **9-10.
737 *EEOC v. Evans Fruit Co., Inc., et al.*, 2013 U.S. Dist. LEXIS 24624 (E.D. Wash. Feb. 20, 2013).
738 *Evans Fruit*, 2013 U.S. Dist. LEXIS 24624, at **2-3.
739 *Id.* at **3-4.
740 *Evans Fruit*, 2013 U.S. Dist. LEXIS 24624, at *4.
741 *Kaplan,* 2013 U.S. Dist. LEXIS 11722 (N.D. Ohio 2013), *appeal filed*, No. 13-3408 (6th Cir. Aug. 5, 2013).
742 *Freeman,* 2013 U.S. Dist. LEXIS 112368 (D. Md. Aug. 9, 2013), *appeal filed*, No. 13-2365 (4th Cir. Nov. 7, 2013).
743 *Kaplan*, 2013 U.S. Dist. LEXIS 11722, at *3.
744 *Id.* at *2.
745 *Id.* at *13.
746 *Id.* at *14.
747 *Id.* at *20.
748 *Id.*
749 *Id.* at *35.

In *EEOC v. Freeman,* which involved the defendant's use of both credit and criminal history reports in the hiring process, the EEOC alleged the employer engaged in a "pattern or practice" of discrimination against African American job applicants by using credit checks in hiring, and against African American, Hispanic, and male job applicants by using criminal history as a hiring criterion. In support of these allegations, the EEOC submitted two expert reports, which the Maryland federal district court judge eviscerated. The court noted that while some specific uses of criminal and credit background checks could ultimately be deemed discriminatory, "the EEOC bears the burden of supplying reliable expert testimony and statistical analysis that demonstrates disparate impact stemming from a specific employment practice before such a violation can be found."[750] In this case, the court found the expert reports lacking, and thus granted the employer's motions to preclude the expert testimony, and for summary judgment on the ground that the EEOC could not present any reliable statistical evidence of disparate impact.

Among other deficiencies in the EEOC's expert reports, the employer claimed—and the court agreed—that the experts' conclusions were "based on unreliable data and are rife with analytical errors, in addition to being untimely, and thus are inadmissible to demonstrate the existence of disparate impact."[751] The experts failed to "isolate and identify which aspect of Defendant's credit and criminal record check processes allegedly causes the disparate impact, thereby failing to make out a *prima facie* case under Title VII."[752] Specifically, the court determined that one expert's "inaccurate database renders his conclusions unreliable,"[753] that he had access to, but failed to use materials "necessary to create an unbiased, accurate testing database,"[754] and that his analysis was faulty because it was not based on a "random sample of accurate data from the relevant applicant pool and time period."[755] Because the database did not cover the time period identified in the EEOC's complaint, the court found that it "represents only a distorted fraction of the time period relevant in this case." The court pointed also to other "egregious" examples of "scientific dishonesty," including evidence that the expert cherry-picked individuals to include in his database, and did not include data from all of the employer's branch offices. According to the court, the "mind-boggling number of errors contained in [the expert's] database could alone render his disparate impact conclusions worthless."[756]

However, challenges involving experts were raised by both the EEOC and defendants in other cases over the past year with mixed results.

In *EEOC v. Exxon Mobile Corporation*,[757] the EEOC alleged the company's policy of prohibiting its pilots from flying corporate aircraft after they turned 60—a policy that mirrors the Federal Aviation Administration's rule applicable to commercial airline pilots—violated the ADEA.[758] The employer argued that three of the EEOC's "experts" were not qualified to offer opinions, and sought to strike their testimony.[759] The crux of the employer's argument was that the "experts" were pilots and did not have any education, experience, training, or skill in medicine or science. Moreover, the employer contended that the pilots' opinions were "not based on recognized reasoning or methodology, and their personal interest in the FAA's age-based rule makes their opinions unreliable."[760]

The court rejected the defendant's arguments. It noted the identified experts had significant relevant experience; therefore, their opinions were relevant to the core issue of the case, whether the defendant's age-based rule was a *bona fide* occupational qualification.[761]

The court likewise denied the EEOC's efforts to exclude the testimony of the defendant's experts.[762] The EEOC argued that the employer's expert, a doctor, had "no knowledge, skill, experience, training, or education in any of the subjects relevant to this litigation," and did not "possess any education or experience on the effects of aging on cognition, cardiovascular function, or general abilities, operations

750 *Freeman*, 2013 U.S. Dist. LEXIS 112368 at *4.
751 *Id*. at *20.
752 *Id*.
753 *Id*. at *23.
754 *Id*. at *24.
755 *Id*.
756 *Id*. at *31.
757 *EEOC v. Exxon Mobile Corp.*, 2012 U.S. Dist. LEXIS 183101 (N.D. Tex. Dec. 19, 2012).
758 *Exxon*, 2012 U.S. Dist. LEXIS 183101, at *1.
759 *Id*. at *7.
760 *Id*.
761 *Id*. at *8.
762 *Id*. at **10-11.

and medical testing of pilots."[763] The EEOC admitted the proposed expert was familiar with the study of safety in the workplace.[764] The court concluded the defendant had demonstrated that the expert's training, knowledge, and education allowed him to perform a statistical analysis relevant to an issue in the case.[765] The EEOC challenged the defendant's second expert as unqualified to testify on the specific aviation medical issue in the case.[766] The court concluded the EEOC's challenges went to the weight of the expert's report and testimony, not the admissibility.[767] The court also concluded the expert's experience qualified him to testify about matters relevant to a central issue of the litigation.[768]

In *EEOC v. Western Trading Co., Inc.*,[769] the EEOC moved to exclude the testimony and report of the defendant's expert witness who had been retained to look generally at the claimant's ability to work.[770] The defendant expected the expert to opine that: (1) the claimant could continue to do the work he had historically performed; (2) the claimant could have made more of an effort to find work after his separation; and (3) the claimant could have remained in the jobs he obtained with other employers after his separation.[771] The EEOC moved to exclude her testimony because her opinions were not reliable, the topics on which she would testify did not require expert testimony, and her opinions were prejudicial and confusing.[772] The court concluded the EEOC's arguments went to the weight of the expert's testimony, not its admissibility.[773] The court found the expert was qualified and would provide testimony that would help the trier of fact resolve the issue of whether the claimant's job search was reasonable.[774] As such, her testimony was admissible.[775]

The defendant designated a physician who specialized in neurology as its second expert.[776] The EEOC did not challenge the expert's ability to testify about the claimant's medical condition. Instead, it challenged the expert's opinion that the defendant acted appropriately when it requested multiple medical releases indicating the claimant could climb ladders.[777] The court rejected the EEOC's argument. The court instructed the EEOC that it was free to cross-examine the expert and point out his understanding of what is appropriate and reasonable may be different from the ADA's requirements.[778]

In *EEOC v. LHC Group, Inc.*,[779] the EEOC alleged the defendant violated the ADA by failing to accommodate and terminating a registered nurse who suffered from epilepsy.[780] The defendant identified a neurologist and economist as experts.[781] The EEOC objected to both.[782] The EEOC did not question the neurologist's qualifications.[783] Instead, the EEOC alleged the neurologist did not have sufficient knowledge of the employee's working conditions. The court rejected the argument.[784] It held the expert was qualified to assess the employee's medical records and form an opinion from that review.[785] The court found the expert qualified to testify that, in her opinion, the claimant's epilepsy disabled him. This opinion concerned issues relevant to the case; therefore, the court denied the EEOC's motion.[786]

763 *Id.* at *9.
764 *Id.*
765 *Id.*
766 *Id.* at *10.
767 *Id.* at *11.
768 *Id.*
769 *EEOC v. Western Trading Co., Inc.*, 2013 U.S. Dist. LEXIS 22078 (D. Colo. Feb. 19, 2013).
770 *Western Trading*, 2013 U.S. Dist. LEXIS 22078, at *1.
771 *Id.* at *3.
772 *Id.*
773 *Id.*
774 *Id.* at *4.
775 *Id.* at *4.
776 *Id.* at *6.
777 *Id.*
778 *Id.* at **7-8.
779 *EEOC v. LHC Group, Inc.*, 2013 U.S. Dist. LEXIS 72604 (S.D. Miss. May 22, 2013).
780 *LHC Group*, 2013 U.S. Dist. LEXIS 72604, at *2.
781 *Id.*
782 *Id.*
783 *Id.* at *3.
784 *Id.* at **6-7.
785 *Id.* at *7.
786 *Id.* at *8.

The court also denied the EEOC's motion to exclude the economist.[787] The EEOC did not challenge his qualifications or calculations. It simply argued that his expert opinion was not necessary.[788] The court concluded the expert's opinion would likely assist the trier of fact in calculating lost wage damages. As a result, the court allowed his testimony.[789]

5. Miscellaneous

In addition to the claims discussed above, the *Evans Fruit* litigation involved issues of supplemental jurisdiction over state law claims against an individual defendant, payment for an interpreter during trial, and a post-trial jury challenge.[790] As previously discussed, in *Evans Fruit*, a jury ultimately entered a complete defense verdict in a sexual harassment lawsuit in which the EEOC alleged the 14 female employees experienced a sexually hostile work environment.[791]

The court addressed the issue of supplemental jurisdiction in March 2013.[792] Individual plaintiff intervenors asked the court to decline supplemental jurisdiction over their state law claims against the individual defendant, or in the alternative, to stay the trial of those claims.[793] The court denied the motion in part and granted it in part.[794] The court denied the request to forego supplemental jurisdiction over the state law claims. The court concluded it would be inconvenient and unfair to the individual defendant.[795] However, the court granted the request to stay trial of the state law claims. The court anticipated the case would be appealed to the Ninth Circuit, and determined the outcome of the inevitable appeal to the Ninth Circuit might impact the necessity of trial on the state law claims.[796]

In May 2013, the court denied the EEOC's motion to have the court absorb the cost of an interpreter during trial.[797] The court denied the motion because it found no authority, requirement, or practice that required the court to expend its resources to underwrite the costs of the EEOC's litigation efforts.[798]

In July 2013, the court in *Evans Fruit* also denied the intervening plaintiffs' motion for a new trial and post-trial discovery.[799] The court noted the Jury Selection and Service Act of 1968 (JSSA)[800] requires any concern about the composition of a jury to be brought to the court's attention before a jury is empaneled to decide a case.[801] The intervening plaintiffs knew the composition of the jury prior to *voir dire*. They could have filed a pre-trial motion for discovery and a stay. However, they did not.[802] The court held that because the intervening plaintiffs did not comply with the timeliness requirement of the JSSA, they were foreclosed from challenging the jury and engaging in discovery to make such a challenge.[803]

K. Remedies

1. Duty to Mitigate

Plaintiffs have a duty to mitigate their lost wages by searching for comparable employment. This duty to mitigate does not extend to a plaintiff's emotional damages. In *EEOC v. Fred Meyer Stores, Inc.*,[804] the defendant pled failure to mitigate as an affirmative defense. The defendant alleged the claimant failed to mitigate his lost wage damages and emotional distress damages. The EEOC asked the district court

787 *Id*. at *9.

788 *Id*. at *8.

789 *Id*. at *9.

790 *EEOC v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 40842 (E.D. Wash. Mar. 22, 2013); *EEOC v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 70666, at *4 (E.D. Wash. May 15, 2013); *EEOC v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 102675, at *2 (E.D. Wash. July 22, 2013).

791 See section V.J.I. for a more complete discussion of the case.

792 *Evans Fruit*, 2013 U.S. Dist. LEXIS 40842 (E.D. Wash. Mar. 22, 2013).

793 *Id*. at *2.

794 *Id*. at *9.

795 *Id*. at *6.

796 *Id*. at **8-9.

797 *Evans Fruit*, 2013 U.S. Dist. LEXIS 70666, at *4 (E.D. Wash. May 15, 2013).

798 *Id*.

799 *EEOC v. Evans Fruit Co., Inc.*, 2013 U.S. Dist. LEXIS 102675, at *2 (E.D. Wash. July 22, 2013).

800 28 U.S.C. §§ 1861, *et seq*.

801 *Evans Fruit*, 2013 U.S. Dist. LEXIS 102675, at *4.

802 *Id*. at **7-8.

803 *Id*. at *12.

804 *EEOC v. Fred Meyer Stores, Inc.*, 2013 U.S. Dist. LEXIS 134089 (D. Or. Sept. 19, 2013).

to reconsider its decision denying the EEOC's motion for summary judgment on the defendant's affirmative defense because that denial had effectively created an affirmative defense requiring the mitigation of emotional damages.[805] The EEOC claimed the court's ruling was manifestly unjust.[806]

The court granted the EEOC's motion, finding it erred previously by failing to consider Congress' statutory purpose in drafting Title VII.[807] Congress explicitly created a statutory duty to mitigate back pay losses. The court concluded there was nothing in the statutory language suggesting Congress intended to create a duty to mitigate compensatory damages.[808] The court held its prior decision was a clear error of law because it relied on common law rather than the clear language of Title VII. It also explicitly held Title VII plaintiffs do not have a duty to mitigate emotional damages.[809]

In *EEOC v. Western Trading Co., Inc.*,[810] the jury found the employer subjected the claimant to disparate treatment because of his disability. However, it ruled for the employer with respect to the claimant's failure to accommodate and violation of medical record confidentiality claims.[811] The jury awarded the claimant $24,000 in backpay, $20,000 in compensatory damages, and $65,000 in punitive damages.[812] The compensatory damages and punitive damages awarded exceeded the applicable damages cap. To bring the damages within the applicable cap, the court reduced the combined value of the punitive damages and compensatory damages to $50,000.[813]

Following trial, the EEOC moved for judgment as a matter of law on the issue of whether the claimant failed to mitigate his damages.[814] The court had instructed the jury concerning the claimant's duty to mitigate over the EEOC's objection.[815] Although the EEOC did not make a pre-verdict Rule 50(a) motion, the court ruled the EEOC preserved the right to bring the post-trial motion by arguing that the evidence did not warrant the mitigation instruction.[816] The defendant argued the evidence warranted the instruction because the claimant voluntarily left the employment he held immediately following his termination.[817] The EEOC countered that the employee's subsequent employment was not "substantially comparable," so the jury should not have reduced the claimant's backpay award. [818] The court agreed. The court found the positions were not comparable because the subsequent position had irregular work hours, no benefits, and the work was unstable, which made the overall compensation less.[819] Because the parties stipulated to the amount of backpay before trial, the court did not order a new trial. Instead, it ordered judgment in favor of the EEOC and claimant in the amount of mitigated back pay.[820]

The EEOC also sought pre-judgment interest.[821] The court found such an award would be compensatory and not punitive because it would put the claimant in the position he would have been had he not been terminated.[822] The court noted also the normal position is that pre-judgment interest should be awarded to plaintiffs who successfully pursue federal claims.[823] Therefore, such an award would be equitable in this case.[824] The EEOC requested pre-judgment interest at the rate of 8%. The defendant requested .5%, the federal post-judgment interest rate.[825] The court chose to apply the IRS underpayment rate in 26 U.S.C. § 6621, which is the federal short term rate plus 3%.[826] Using this formula, the court applied an interest rate of 3.18%, which amounted to $5,817.80.[827]

805 *Fred Meyer Stores*, 2013 U.S. Dist. LEXIS 134089, at *1.
806 *Id.* at *2.
807 *Id.* at *5.
808 *Id.*
809 *Id.*
810 *EEOC v. Western Trading Co.*, 2013 U.S. Dist. LEXIS 86788 (D. Colo. June 20, 2013).
811 *Western Trading*, 2013 U.S. Dist. LEXIS 86788, at *1.
812 *Id.*
813 *Id.* at *2.
814 *Id.* at *3.
815 *Id.* at **3-4.
816 *Id.* at *6.
817 *Id.* at **8-9.
818 *Id.* at *9.
819 *Id.* at **9-10
820 *Id.* at *11.
821 *Id.* at *12.
822 *Id.* at *13.
823 *EEOC v. Western Trading Co.*, 2013 U.S. Dist. LEXIS 86788, at **13-14, *citing United Phosphorus Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1236 (10th Cir. 2000).
824 *Western Trading Co.*, 2013 U.S. Dist. LEXIS 86788, at **13-14.
825 *Id.* at *14.
826 *Id.* at *15.
827 *Id.* at *16

2. Monetary Relief and Injunctive Relief

In *EEOC v. RadioShack Corp.,*[828] the EEOC alleged the defendant violated the ADEA and retaliated against an employee who complained of age discrimination.[829] The jury found the defendant retaliated against the employee and, in doing so, willfully violated the ADEA.[830] The jury awarded $187,706 and a lifetime discount card to the employee.[831] The EEOC subsequently filed a motion requesting liquidated damages, the discount card, front pay, a tax penalty offset, and injunctive relief.[832]

The defendant did not dispute the propriety of the liquidated damages award.[833] The court found the requested discount card was not money, or the classic form of legal relief.[834] As such, the discount card was equitable relief that was within the court's, not the jury's, discretion to award.[835] The EEOC did not support its request of the discount card award with any legal authority. As such, the court declined to award the discount card to the employee.[836]

The court next held the plaintiff was not entitled to reinstatement, but was entitled to front pay.[837] The parties agreed reinstatement was not appropriate. The defendant argued the employee was not entitled to front pay because the jury found he had failed to mitigate his damages.[838] The court disagreed with the defendant's reading of the authority on which the defendant based its argument.[839] Based on its reading of the applicable authorities, the court concluded the question of whether to award front pay (and in what amount) when a plaintiff did not mitigate damages was a factual matter that still needed to be decided.[840] The court next addressed the EEOC's request for an amount to offset the increased tax penalty applicable to any front pay award.[841] The court granted the request. The court noted that the applicable cases relied on the award recipient's ability to reduce the tax penalty through income-averaging provisions that were eliminated from the Tax Code in 1986.[842] Because the employee would not have the option of spreading the front pay award over a multi-year period, the court deemed the tax penalty offset award was necessary to make the employee whole.[843]

Finally, the court considered the EEOC's request for non-monetary relief. The EEOC asked the court to enjoin the defendant from retaliating. It also asked for an order requiring the defendant to implement remedial measures, post notices advising employees of their ADEA rights, monitor internal complaints of discrimination and retaliation, and provide quarterly reports to the EEOC summarizing all complaints or investigations for a two-year period.[844] The defendant objected to the request. The court agreed because the EEOC failed to show there was a "cognizable danger of recurrent violations."[845] The case was about a single act of retaliation by a single supervisor. There was no evidence the defendant had an unlawful employment policy or practice.[846]

In *EEOC v. A.C. Widenhouse, Inc.*,[847] the EEOC sued for hostile work environment on behalf of two plaintiffs, and for discriminatory and retaliatory discharge on behalf of one.[848] The jury awarded $20,000 in compensatory damages and $75,000 in punitive damages to the first plaintiff. It awarded $30,000 in compensatory damages and $75,000 in punitive damages to the second who also claimed retaliatory discharge.[849]

828 *EEOC v. RadioShack Corp.*, 2013 U.S. Dist. LEXIS 173846 (D. Colo. Dec. 6, 2012).
829 *RadioShack*, 2013 U.S. Dist. LEXIS 173846, at *1.
830 *Id.* at *2.
831 *Id.*
832 *Id.* at **2-3.
833 *Id.* at *3.
834 *Id.* at *4.
835 *Id.* at *5.
836 *Id.* at *6.
837 *Id.*
838 *Id.* at *7.
839 *Id.* at *11.
840 *Id.* at **11-12.
841 *Id.* at *12.
842 *Id.* at *1.
843 *Id.* at *15.
844 *Id.* at **15-16.
845 *EEOC v. RadioShack Corp.*, 2013 U.S. Dist. LEXIS 173846, at *16 (quoting *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1565 (10th Cir. 1989) (internal citation omitted)).
846 *RadioShack,* 2013 U.S. Dist. LEXIS 173846, at *17.
847 *EEOC v. A.C. Widenshouse, Inc.*, 2013 U.S. Dist. LEXIS 24351 (M.D.N.C. Feb. 22, 2013).
848 *A.C. Widenshouse*, 2013 U.S. Dist. LEXIS 24351, at **1-2.
849 *Id.*

Post-trial, the defendant moved to reduce the damages award to conform to the applicable statutory cap.[850] The court granted the motion and reduced the EEOC's recovery to $50,000.[851] Still pending before the court was one plaintiff's back pay award.[852] The court found no evidence the plaintiff failed to mitigate his damages. As a result, the court ordered that he receive full back pay, which amounted to $71,662.82.[853] The plaintiff sought an award of prejudgment interest.[854] He argued for an interest rate of 8% and to have the interest compounded annually. The court noted the determination of the applicable interest rate and whether to compound the interest rate annually were decisions for the court.[855] The court held the plaintiff should receive prejudgment interest at the rate of 8%. It also held the interest should be compounded annually due to the "make whole" principle of Title VII.[856] Based on the plaintiff's calculation, the court awarded him $16,847.15 in prejudgment interest, raising his total back pay award to $88,509.79.[857]

The plaintiff moved also for an order of attachment or seizure of the defendant's assets.[858] He argued the defendant was dissipating its assets to avoid paying him. The plaintiff based his argument on the defendant's federal tax returns.[859] The court noted attachment is appropriate when a corporation acts with the intent to defraud its creditors, including removing property from the state or assigning, disposing of, or secreting property.[860] The court found the plaintiff did not meet the necessary burden to seize the defendant's property.[861]

In addition to the plaintiff's individual requests for relief, the EEOC asked for injunctive relief.[862] The court noted the evidence reflected the defendant's discriminatory practices continued after the plaintiff filed his charge in 2008. Indeed, the other plaintiff testified such conduct continued through February 2010.[863] Moreover, one of the alleged harassers remained employed without discipline through the time of trial and that there was no evidence the defendant had an antidiscrimination policy or reporting procedures.[864] Based on the evidence, the court found injunctive relief appropriate.[865] The court entered the following injunction: (1) defendant could not engage in further discriminatory conduct; (2) defendant was required to remove references of the events leading to the finding of unlawful conduct from the plaintiffs' files; (3) defendant was required to adopt an antidiscrimination policy and reporting procedures and post the policy; (4) defendant was required to impose reasonable training and reporting requirements; and (5) defendant was required to record all complaints of potentially illegal racial behavior and allow the EEOC to monitor compliance.[866]

The EEOC appealed a district court's denial of injunctive relief in *EEOC v. KarenKim, Inc.*[867] The parties tried the case to a jury. The jury found the employer subjected a class of female employees to a sexually hostile work environment and sexually harassed three specific females who intervened in the lawsuit.[868] The jury awarded compensatory and punitive damages.[869] During trial, the EEOC presented evidence the store manager subjected a number of female employees to verbal and physical harassment. The harasser and the store owner were engaged to be married. As a result, the store owner dismissed the numerous complaints she received about the store manager's behavior as false.[870] The jury awarded the class members a total of $10,080 in compensatory damages and $1.25 million in punitive damages.[871] The amount of damages awarded over the applicable $50,000 cap was reallocated to state law claims so the class members received the full punitive damages award.[872]

850 *Id.* at **2-3.
851 *Id.* at *3.
852 *Id.*
853 *Id.* at *4.
854 *Id.*
855 *Id.* at *5.
856 *Id.* at **6-7.
857 *Id.* at *7.
858 *Id.*
859 *Id.* at *8.
860 *Id.* at *9.
861 *Id.* at *10.
862 *Id.*
863 *Id.* at *12.
864 *Id.*
865 *Id.* at *12.
866 *Id.* at **12-13.
867 *EEOC v. KarenKim, Inc.*, 698 F.3d 92 (2d Cir. 2012).
868 *KarenKim,* 698 F.3d at 94.
869 *Id.*
870 *Id.* at 94-97.
871 *Id.* at 97.
872 *Id.* at 97, n. 1.

Following trial, the EEOC moved for broad injunctive relief, contending such relief was necessary because the defendant had not adopted the kind of procedures necessary to ensure similar harassment did not recur.[873] The EEOC requested a 10-year injunction requiring the defendant to: (1) not create or maintain a hostile work environment or retaliate against employees in violation of Title VII; (2) not employ or compensate the harasser in any way: (3) not allow the harasser to enter the store; (4) produce and distribute copies of a notice indicating the harasser was barred from the store along with a picture of the harasser; (5) pay for an independent monitor to continually review its employment practices and investigate potential sexual harassment; (6) conduct annual sexual harassment training for its employees; (7) amend its nondiscrimination and anti-harassment policy and post the policy; and (8) cooperate in bi-annual EEOC compliance reviews.[874]

The district court denied the EEOC's request. It held the injunction was overly burdensome because the injunction would last 10 years, require the defendant to alter drastically its employment practices, and hire an independent monitor to critique its employment practices.[875] The district court held also the injunction was unnecessary because the record suggested the harassment was a series of isolated instances involving a manager whom the defendant no longer employed.[876]

The Second Circuit held the district court abused its discretion.[877] The court noted this was not the ordinary case where termination of the harasser eliminated a cognizable danger of continued harassment.[878] The harasser remained in a romantic relationship with the store owner, and absent an injunction, nothing prevented the store owner from rehiring the harasser as an employee. Moreover, as the store owner's fiancé, the harasser was likely to maintain a presence at the store.[879] The court found also that as long as the harasser remained in a romantic relationship with the store owner, the store owner was not likely to take complaints about the harasser's conduct seriously.[880] Accordingly, the Second Circuit held the EEOC was entitled to injunctive relief specifically directed toward ensuring the harasser was no longer in a position to sexually harass store employees.[881] Specifically, the court held the district court exceeded its discretion in denying the EEOC's request for injunctive relief to: (1) prohibit the store from directly employing the harasser in the future, and (2) prohibit the harasser from entering the store's premises in the future.[882]

3. Garnishment

In *EEOC v. 5042 Holdings Limited*,[883] the parties entered a consent decree to resolve pending litigation. Among other terms, the consent decree required distribution of $85,000 to four individuals. Two individuals who were officers and shareholders of 5042 Holdings Limited personally guaranteed the money.[884] On April 18, 2012, the court entered a judgment for $85,000 against one of the individuals. On May 15, 2012, the court issued a Writ of Continuing Garnishment against an insurance policy in which the EEOC believed the individual defendant had an interest.[885] Following an amendment of the judgment amount, the individual officer and shareholder filed a Claim for Exemption Form and Request for Hearing, claiming an exemption for any unmatured life insurance contract other than a credit insurance contract.[886]

The Claim for Exemption Form and Request for Hearing raised six objections: (1) the EEOC did not comply with the consent decree; (2) the individual defendant was not a judgment debtor; (3 & 4) the court lacked jurisdiction over him; (5) the garnishment of his personal property was unlawful; and (6) the court did not have *in rem* jurisdiction over him.[887] The court overruled each objection.[888] It held the EEOC did not have an obligation to provide notice to the individual guarantor of non-compliance with the consent decree prior to filing the Writ of Garnishment.[889] It also held that pursuant to U.S. Supreme Court and Fourth Circuit precedent, a consent decree is a final judgment.

873 *Id.*at 98.
874 *Id.*
875 *Id.* at 99.
876 *Id.*
877 *Id* at 100.
878 *Id.*
879 *Id* at 101.
880 *Id.*
881 *Id.*
882 *Id.*
883 *EEOC v. 5042 Holdings Limited*, 2013 U.S. Dist. LEXIS 53943 (N.D. W. Va. Apr. 16, 2013).
884 *5042 Holdings Limited*, 2013 U.S. Dist. LEXIS 53943, at *4.
885 *Id.* at **4-5.
886 *Id.* at *6.
887 *Id.* at **6-23.
888 *Id.* at *22.
889 *Id.* at *8.

Therefore, the individual defendant was a judgment debtor.[890] The court held it had ancillary jurisdiction over the matter because the matter arose from a federal question and the court entered the consent decree.[891] As to the individual defendant's fifth objection, the court held he provided no specific evidence to support his contention the garnishment was unlawful. Moreover, the consent decree was valid and there was no obvious reason why the garnishment of the individual's personal property would be unlawful.[892] Finally, the court held that the individual failed to point to any property over which the court did not have *in rem* jurisdiction.[893] In addition, the district court found there was no justifiable reason to transfer the case to the U.S. District Court for the District of Columbia.[894]

After ruling on the individual defendant's objections, the court addressed his motion to exempt his life insurance policy.[895] The court found two exemptions for unmatured life insurance policies.[896] One has been interpreted to address term insurance contracts with no cash surrender value. Such contracts are completely exempt. The second exemption is applicable to insurance contracts possessing present value to the owner that does not exceed $11,525.[897] The individual's insurance policy had a cash surrender value. Relying on applicable case law, the court determined the individual guarantor might be able to claim an exemption pursuant to D.C. Code Ann. § 31-4716(a).[898] To gain the benefit of this exemption, he had to satisfy three criteria. The court found he met this burden.[899] Specifically, his insurance policy was exempt from garnishment because: (1) the policy was on his life to benefit his mother and wife; (2) the individual defendant's mother and wife have an insurance interest in the individual defendant's life; (3) the cash surrender value is a proceed.[900]

L. Recovery of Attorneys' Fees by Employers

Courts are not reluctant to award attorneys' fees against the EEOC where: (a) the Commission's litigation strategy was questioned by the court, or (b) the Commission pursued claims that in the court's view clearly lacked merit. To conclude the litigation of *EEOC v. CRST Van Expedited, Inc.*,[901] a federal judge in Iowa ordered the EEOC to pay the defendant $4.7 million in attorneys' fees and costs as a sanction for pursuing "unreasonable or groundless" "pattern-or-practice" and individual claims on behalf of more than 100 claimants.[902]

The district court had initially awarded attorneys' fees and costs to the defendant after finding that the agency's actions in pursuing the lawsuit were "unreasonable, contrary to the procedure outlined by Title VII, and imposed an unnecessary burden upon CRST and the court."[903] The EEOC appealed to the Eighth Circuit, contending the district court abused its discretion.[904] The Eighth Circuit vacated the award of over $4.5 million in attorneys' fees and costs against the EEOC because it determined that CRST was no longer a "prevailing" defendant because the EEOC still had live claims against CRST.[905]

On remand, the EEOC withdrew its remaining claims on behalf of one of the two plaintiffs left in the case. CRST settled with the last plaintiff for $50,000.[906] Accordingly, in March 2013, CRST filed a Bill of Costs and a Motion for Attorneys' Fees.[907] The district court granted the motion, concluding that: (1) CRST was a prevailing party pursuant to 42 U.S.C. § 2000e-5(k); (2) the EEOC's claims were frivolous, unreasonable, and without foundation; and (3) the amount of attorneys' fees sought by CRST was reasonable, with minor exceptions.[908] The district court awarded CRST $4.7 million in attorneys' fees, costs, and out-of-pocket expenses.[909]

890 *Id.* at *11.
891 *Id.* at **12-13.
892 *Id.* at *14.
893 *Id.*
894 *Id.* at **16-17.
895 *Id.* at *18.
896 *Id.* at *19.
897 *Id.*
898 *Id.* at *20.
899 *Id.* at *22
900 *Id.*
901 *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013).
902 *CRST Van Expedited*, 2013 U.S. Dist. LEXIS 107822, at **56-69.
903 *EEOC v. CRST Van Expedited, Inc.*, 2010 U.S. Dist. LEXIS 11125, at *26 (N.D. Iowa Feb. 9, 2010).
904 *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657, 694 (8th Cir. 2012).
905 *CRST Van Expedited*, 679 F.3d at 694-95.
906 *CRST Van Expedited,* 2013 U.S. Dist. LEXIS 107822, at **21-22 (N.D. Iowa Aug. 1, 2013).
907 *Id.* at *22.
908 *Id.* at **38, 48, 58-59.
909 *Id.* at **68-69.

Courts have also analyzed the propriety of awarding attorneys' fees against the EEOC as sanctions for delaying discovery during litigation and pursuant to the Equal Access to Justice Act (the EAJA).[910] The EAJA allows qualifying corporations, generally those with a net worth of less than $7 million and fewer than 500 employees at the time of filing, to collect attorneys' fees incurred in government litigation absent a showing by the government that its position was substantially justified.[911]

Moreover, courts have provided clarification as to when a party can achieve the "prevailing party" status necessary for recovery of attorneys' fees under Title VII.

In *EEOC v. The Original Honeybaked Ham Co. of Ga., Inc.*,[912] the district court sanctioned the EEOC for delaying the discovery of text messages and social media account information from a group of female employees who alleged they experienced sexual harassment.[913] The court had entered an order requiring the EEOC to provide a special master with all the social media communications and cell phones used to send text messages during the relevant time in dispute. It also ordered the EEOC to provide the defendant with access to email accounts and website—or cloud-based storage used to post communications or pictures. The EEOC did not comply with the order.[914] The defendant moved for sanctions.[915]

The court granted the defendant's motion for sanctions in part, finding the EEOC's conduct made discovery "more time-consuming, laborious and adversarial than it should have been."[916] The court noted "[i]n certain respects, the EEOC had been negligent in its discovery obligations, dilatory in cooperating with defense counsel, and somewhat cavalier in its responsibility to the United States District Court."[917] The court explained some of the delays stemmed from promises made by the EEOC that were later reneged upon, apparently as a result of disagreement between the government's "line attorneys" handling the case in Colorado and "higher-ups" at the EEOC in Washington, D.C.[918] Despite the EEOC's questionable conduct, the court held the EEOC did not act in bad faith.[919]

The court ordered the EEOC to cover the defendant's fees in prosecuting the motion for sanctions.[920] The court held "a district court should impose only so much of a sanction as is necessary to ensure that the offending conduct stop[s]," and the court "believe[s] that awarding defendant its reasonable fees in prosecuting this Motion will suffice for that purpose."[921]

Interestingly, the court granted the defendant's request under an unusual rule—Rule 16(f) of the Federal Rules of Civil Procedure.[922] The importance of the court's reliance on Rule 16(f) to sanction the EEOC rests on the fact that it was not required to make a finding of bad faith.[923] Rather, Rule 16(f) allowed the court to sanction the EEOC's unreasonable and obstreperous conduct that delayed the case.[924]

In *EEOC v. Memphis Health Center, Inc.*,[925] the Sixth Circuit held that a prevailing ADEA defendant can recover its attorneys' fees against the EEOC under the EAJA.

In *Memphis Health Center*, the EEOC brought suit against the defendant asserting claims for age discrimination and retaliation.[926] The district court granted summary judgment for the defendant on both claims.[927] Following summary judgment, the defendant requested

910 28 U.S.C. § 2412.
911 *See* 42 U.S.C. § 2412.
912 *EEOC v. Original Honeybaked Ham Co. of Ga.*, 2013 U.S. Dist. LEXIS 26887 (D. Colo. Feb. 27, 2013).
913 *Original Honeybaked Ham*, 2013 U.S. Dist. LEXIS 26887, at *2.
914 *Id.* at **3-4.
915 *Id.* at *4.
916 *Id.* at **2-3.
917 *Id.* at *3.
918 *Id.* at *3.
919 *Id.* at *5.
920 *Id.* at *13.
921 *Id.* at *12.
922 *Id.* at **7-12.
923 *Id.* at *12.
924 *Id.* at **7-12.
925 *EEOC v. Memphis Health Center, Inc.*, 2013 U.S. App. LEXIS 10259 (6th Cir. May 17, 2013).
926 *Memphis Health Center,* 2013 U.S. App. LEXIS 10259 at *4.
927 *Id.*

attorneys' fees and costs totaling $70,389.83.[928] The magistrate reviewed each of the EEOC's claims and found only the age discrimination claim substantially justified. As a result, the magistrate recommended the EEOC be required to pay 50% of defendant's attorneys' fees.[929] The district court adopted the magistrate's recommendation, and the EEOC appealed.[930]

On appeal, the EEOC argued that because the ADEA contains its own fee-shifting rule, the EAJA did not apply.[931] The Sixth Circuit rejected the EEOC's argument, and found because the ADEA is silent on the issue of fee awards to prevailing defendants, the EAJA "fills the void" in the ADEA and provides prevailing defendants with a statutory right to attorneys' fees.[932] However, the Sixth Circuit determined the district court erred by conducting a claim-by-claim analysis that segmented the substantial justification determination.[933] The EAJA requires a "holistic determination" of the government's case.[934] Accordingly, the Sixth Circuit remanded the case so the district court could assess whether the EEOC's position, as a whole, was substantially justified. It noted that if the two claims are distinct, the district court should assess which claim was more prominent in driving the case. If claims are sufficiently intertwined, the district court may find that an insubstantial justification as to one renders the EEOC's overall position unjustified.[935]

In *EEOC v. Global Horizons, Inc.*,[936] the EEOC maintained it was unencumbered by the 300-day statute of limitations in section 706 of Title VII because that period applied only to private litigants.[937] The EEOC argued also it could sue an employer for alleged violations going back to the start of the allegedly discriminatory pattern or practice, irrespective of the date when a charging party filed his or her EEOC administrative charge.[938]

The court disagreed and granted the defendant employers' motion for summary judgment.[939] As a result, the defendants asked the court to find that they were the prevailing party and to award them reasonable attorneys' fees under 42 U.S.C. §2000e5(k).[940] The EEOC argued (1) the defendants were not prevailing parties, (2) the defendants failed to sufficiently meet and confer, and (3) the EEOC's position on the summary judgment issue was not frivolous, unreasonable, without foundation or in bad faith.[941]

The court found the defendants sufficiently met and conferred in order to provide the EEOC with an opportunity to identify the claimants before they filed the summary judgment motion. The court found also the defendants met and conferred before filing their motion for attorneys' fees. However, the court denied the defendants' motion because the summary judgment ruling did not dispose of any EEOC claim.[942] Rather, the summary judgment order restricted the individuals on whose behalf the EEOC could seek relief and narrowed the window of conduct against which the defendants had to defend.[943] Accordingly, the court held the relief granted to the defendants in the summary judgment order did not qualify them as a prevailing party, and it was premature for the court to assess whether the EEOC's injunctive relief claims were frivolous or brought in bad faith.[944]

The Sixth Circuit affirmed a $751,942.48 fee and cost award against the EEOC in *EEOC v. Peoplemark, Inc.*[945] In September 2008, the EEOC filed a disparate impact claim against the defendant, a temporary employment agency. The EEOC claimed the defendant maintained a policy prohibiting the hiring of any person with a criminal record.[946] The defendant provided the EEOC with records indicating (1)

928 *Id.* at *6.
929 *Id.* at *5.
930 *Id.* at *6.
931 *Id.* at **8-9.
932 *Id.* at **9-10.
933 *Id.* at **13-14.
934 *Id.* at *14.
935 *Id.* at **14-15.
936 *EEOC v. Global Horizons, Inc.*, 2013 U.S. Dist. LEXIS 107676 (E.D. Wash. July 31, 2013).
937 *Global Horizons,* 2013 U.S. Dist. LEXIS 107676, at **23-24.
938 *Id.* at *24.
939 *Id.*
940 *Id.*at **19-21.
941 *Id.* at *21.
942 *Id.* at **26-28.
943 *Id.* at *28.
944 *Id.* at **28-29.
945 *EEOC v. Peoplemark*, 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013).
946 *Peoplemark*, 2013 U.S. App. LEXIS 20408, at *1-2.

some of the identified class members did not have felony convictions, and (2) other of the identified class members should not be in the class because the defendant had actually hired them despite their criminal records.[947] Subsequently, in July 2009, the defendant provided the EEOC with its e-database, which confirmed the defendant did not have a company-wide policy of rejecting all applicants with a felony conviction.[948] In September 2009, the EEOC moved to extend the deadline to file expert reports contending its statistical expert needed until February 2010 to finalize her report.[949] As part of a subsequent brief supporting its motion, the EEOC disavowed its previous theory that the defendant maintained a discriminatory categorical companywide policy.[950] In March 2010, the parties agreed to voluntarily dismiss the case with prejudice. As a condition of the dismissal, the parties agreed the defendant would be the prevailing party entitled to fees under section 706(k) of Title VII.[951]

After the district court formally dismissed the case, the defendant moved for attorneys' fees, expert fees, sanctions and costs.[952] The magistrate recommended that the defendant receive $751,942.48 in fees, including $219,350.70 in attorneys' fees, $526,172.00 in expert fees, and $6,419.78 in other expenses.[953] The district court adopted the magistrate's report and recommendation. The EEOC appealed, arguing the defendant was not entitled to any fees, and that the district court abused its discretion when it: (1) fixed an October 1, 2009, award date for attorneys' fees; (2) imposed the entirety of the expert fees; (3) failed to find the defendant's expert's documentation inadequate; and (4) did not find the defendant's expert fees excessive.[954]

On appeal, the Sixth Circuit affirmed the district court's conclusion that an award of attorneys' fees was appropriate because the EEOC could not prove the case it pled.[955] The court noted the EEOC relied entirely on the fact that the defendant maintained a companywide policy of denying employment to felons to maintain its disparate impact claim.[956] Because the policy did not exist, the EEOC's claim was groundless.[957] Although the EEOC had a basis to file its lawsuit, the EEOC should have realized the unreasonableness of its position when discovery revealed the facts did not support its original basis for filing suit.[958] Moreover, an award of attorneys' fees was appropriate because the EEOC could not establish a *prima facie* case, the defendant never offered to settle case, and the court dismissed the case upon joint motion of the parties.[959]

The Sixth Circuit also affirmed the district court's award of expert fees.[960] It first concluded the district court correctly ordered the EEOC pay the defendant's expert fees from October 1, 2009, through the end of the lawsuit.[961] As of October 1, 2009, the EEOC knew it could not prove its claim as pled.[962] Despite this undisputed fact, the EEOC argued the award was an abuse of discretion because: (1) the district court considered the EEOC's failure to file an expert report; (2) the district court erred in considering the statement of the defendant's expert about the possible time frame for completion of an expert report; and (3) the EEOC could have amended its complaint.[963] The Sixth Circuit rejected each argument. The first two arguments did not undermine the district court's conclusion that an award of attorneys' fees was appropriate.[964] The third argument was irrelevant because the EEOC could not prove the claims in the complaint it filed, and it never moved to amend its complaint.[965] Unmoved by the EEOC's arguments, the court affirmed the award of expert fees from October 1, 2009 to the end of litigation.[966]

947 *Id.* at **3-4.
948 *Id.* at *6.
949 *Id.*
950 *Id.* at **6-7.
951 *Id.* at **7-8.
952 *Id.* at *8.
953 *Id.*
954 *Id.* at *11.
955 *Id.* at *14.
956 *Id.* at **14-15.
957 *Id.* at *15.
958 *Id.* at *15.
959 *Peoplemark*, 2013 U.S. App. LEXIS 20408, at **16-17, *citing Balmer v. HCA, Inc.*, 423 F.3d 606, 615-16 (6th Cir. 2005).
960 *Peoplemark*, 2013 U.S. App. LEXIS 20408, at *18.
961 *Id.* at *19.
962 *Id.*
963 *Id.* at *20.
964 *Id.* at **20-21.
965 *Id.* at *21.
966 *Id.*

The court also affirmed the district court's award of pre-October 1, 2009, expert fees.[967] Initially, the court concluded that the statutory language of Title VII does not require expert fees and attorneys' fees awards to cover the same time period.[968] Moreover, experts and attorneys often do not operate on the same schedule during a case. Experts must do the work that is necessary to prepare a report until a court dismisses a case or the parties agree to voluntary dismissal.[969] The Sixth Circuit concluded that if the prevailing party "acted reasonably in hiring the expert, the fees incurred were reasonable, the work conducted was reasonable, and the standard from *Christianburg*[970] permits an award of expert fees," the award of expert fees should not be subject to the limitations on the award of attorneys' fees.[971] In this case, the district court correctly concluded that the defendant's expert was necessary to its defense, the expert's fees were reasonable, and the award of expert fees was permitted under *Christianburg*.[972] The Sixth Circuit also agreed the expert's submission of his total bill was sufficient documentation and the facts supported the difference in cost between the EEOC's expert and the defendant's expert.[973]

In sum, the Sixth Circuit determined that the district court was correct in concluding the EEOC had subjected the defendant to groundless litigation. The defendant was entitled to attorneys' fees, expert fees, and other costs totaling more than $750,000.

967 *Id.* at *24.
968 *Id.* at *22.
969 *Id.* at *23.
970 *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).
971 *Peoplemark*, 2013 U.S. App. LEXIS 20408, at *23-24.
972 *Id.* at *24.
973 *Id.* at *24-26.

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APPENDIX A—EEOC CONSENT DECREES, CONCILIATION AGREEMENTS AND JUDGMENTS[1]

Select EEOC Settlements in FY 2013

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$21.3 million	Race Discrimination	According to the EEOC, an employer engaged in a range of racially discriminatory practices, including harassment, denial of promotions, and unfavorable job assignments, against a class of African American employees. The agreement stems from a systemic investigation launched after 78 charges were filed with the EEOC, and will provide relief to over 200 individuals. Under the terms of the conciliation agreement, the employer will provide $21.3 million to the class of employees. In addition, the agreement requires the employer to establish a personnel system that will post future vacancies and promotional opportunities, and to implement a new HR database system to track applicant data. The agreement also requires the company to appoint an EEO coordinator to oversee the creation and distribution of new anti-discrimination policies, ensure that any future discrimination complaints be properly investigated internally, and conduct EEOC-approved training to all management and staff members.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	No press release was issued. The EEOC references this settlement on pages 32-33 of the EEOC 2013 Annual Report.
$4.85 million	Disability Discrimination	According to the EEOC, company policies violated the ADA. Under the company's "maximum leave policy," hundreds of employees were denied reasonable accommodation and were fired pursuant to the policy, which required employees be automatically terminated if they required more than 12 weeks of leave. Per the EEOC, the company did not determine whether it would be reasonable to provide additional leave as an accommodation. The company also refused to make exceptions to its "no restrictions policy," under which the company refused to allow employees to return to work and failed to determine if there were reasonable accommodations that allowed employees to return to work with restrictions. The consent decree applies to approximately 427 aggrieved individuals employed from January 1, 2007 to the present who were not accommodated or who were fired in lieu of accommodation.	U.S.D.C. District of Colorado	11/9/2012
$2.5 million	Sexual Harassment and Retaliation	According to the EEOC, the company discriminated against 89 female employees across the country, many of whom were teenagers, by exposing them to egregious sexual harassment at locations throughout the Midwest, Southeast, and Northeast. Per the EEOC, the harassment ranged from obscene comments, jokes, and propositions, to unwanted touching, exposing of genitalia, strip searches, stalking, and rape, actions perpetrated by managers in a majority of cases. According to the EEOC, the company retaliated against some women by cutting hours, manufacturing discipline against them, or firing them, while it forced more women to quit because harassment made working conditions intolerable. As part of the two-year decree, the employer is required to institute a number of training and anti-harassment procedures for all stores. In addition, the company must accord departing employees the opportunity to fill out written exit interview forms, and create a compliance hotline and dedicated email address for complaints. Each claimant receives approximately $28,000.	U.S.D.C. Northern District of New York	1/10/2013
$2.3 million	Disability Discrimination	According to the EEOC, a major retail establishment denied reasonable accommodations to a class of 76 employees. The employer agreed to pay $2.3 million to the class. Under the terms of the agreement, the employer agreed to make significant changes to its reasonable accommodation policies and practices nationwide; to conduct issue-specific training for employees on the ADA and reasonable accommodations; and to provide reports to the EEOC so that its compliance with the ADA can be monitored over the three-year period of the agreement.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	No press release was issued. The EEOC references this settlement on page 32 of the EEOC 2013 Annual Report.

1 Littler monitored EEOC press releases regarding settlements, jury verdicts, and judgments entered in EEOC-related litigation during FY 2013. The significant settlements and judgments summarized in Appendix A include those amounting to $500,000 or more. The settlements are organized by settlement amount. In FY 2013, the EEOC settled far fewer cases with settlement amounts exceeding $1 million than it did in FY 2012. We therefore expanded our selected cases to include the lower settlement threshold. Notable conciliation agreements are included in the shaded boxes. Appendix A also includes significant jury verdicts and judgments awarding more than $1 million to plaintiffs and more than $750,000 to defendants.

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$2 million	Disability Discrimination	According to the EEOC, company policy and practice required all employees to disclose personal and confidential medical information to be approved for sick leave. The EEOC also alleged the company violated the ADA when it terminated a class of employees nationwide for taking sick leave beyond the maximum amount allowed. The three-year decree applies generally to facilities nationwide. Among other terms of the decree, the employer is required to retain an EEO consultant with ADA experience, and create policies and procedures to comply with the ADA and the ADAAA.	U.S.D.C. Southern District of California	12/18/2012
$1 million	Sexual Harassment	According to the EEOC, a restaurant manager sexually harassed women, including teenagers. The sexually offensive conduct included sexual comments, innuendo, and unwanted touching. Some female employees quit their jobs because of the harassment and/or due to the employer's failure to provide them preventive or remedial relief. This settlement applies to all of the defendant's restaurants in two counties that are owned and operated by one individual. The employer cannot condition the settlement on maintaining confidentiality, waiving the right to file an EEO charge, or promising not to reapply. More than 22 class members were involved.	U.S.D.C. District of New Mexico	11/13/2012
$1 million	Sexual Harassment	According to the EEOC, an employer sexually harassed a class of female employees. The conciliation agreement requires the employer to pay $1 million in damages to four employees who filed charges with the EEOC, and approximately 25 additional class members. The agreement also requires the employer to conduct issue-specific training for employees on preventing sexual harassment in the workplace, and institute procedural/practice changes regarding how it responds to complaints of sexual harassment. Finally, the agreement provides that the EEOC will monitor the employer's compliance with federal laws prohibiting sexual harassment.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	No press release was issued. The EEOC references this settlement on page 33 of the EEOC 2013 Annual Report.
$920,000	Pattern and Practice of Race, Color, National Origin, Age, and/ or Disability Discrimination	According to the EEOC, the employer staffing firm engaged in a pattern and practice of classifying and failing to refer job applicants based on their race, color, sex, national origin, age or disability. The settlement resolves six EEOC discrimination charges filed between 2007 and 2009. The employer entered into the conciliation agreement without admitting liability. Terms of the conciliation agreement include $400,000 in back pay to class members; job placement for those who had not been referred prior to the EEOC's findings; resume assistance to class members; changes in the staffing firm's practices and procedures; training for employees; and EEOC monitoring of the company's employment actions for the duration of the agreement. The settlement also includes a class fund for currently unidentified victims who also suffered similar discrimination during the relevant time period.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	10/22/2013
$900,000	Sex Discrimination and Retaliation	According to the EEOC, a matchmaking/dating service company refused to hire men as dating directors and inside sales representatives. Per the EEOC, the company also terminated its human resources director in retaliation for opposing these sex-based hiring practices. The EEOC alleged also that the dating service fired its human resources director in retaliation for her opposition to the company's alleged sex-based hiring practices. Under the terms of the consent decree, the company will pay approximately $900,000, $130,369 of which will be awarded to the human resources director. The remaining settlement funds will be paid into an account that will be distributed to a class of qualified male job applicants who applied for—but were not hired as—dating director or inside sales representatives with the company from 2007 to the present. The agreement also requires the company to implement a detailed applicant tracking system, provide training to managers, human resources personnel and employees, and provide quarterly hiring reports to EEOC for three years.	U.S.D.C. Southern District of Florida	7/19/2013

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$750,000	Racial Discrimination and Retaliation	According to the EEOC, a Caucasian supervisor regularly subjected African American employees to racial slurs and other racially offensive comments. Per the EEOC, the company also terminated one employee in retaliation for lodging complaints of racial harassment with the supervisor and the company's president of marketing. The two-year decree applies only to one location. Among other training and reporting activities, the decree stipulates that the employer maintain and distribute written EEO and complaint policies to current and new employees, and require supervisors, managers, or human resources personnel who observe or obtain information regarding harassment to report such instances to the VP of human resources.	U.S.D.C. Western District of Tennessee	9/23/2013
$700,000	Sex Discrimination and Harassment	According to the EEOC, there existed widespread discrimination against women who applied to work at one or more of the defendant's three plants. In addition, the company allegedly consistently passed over female applicants in favor of less qualified males for entry-level positions at all plants. Women who were hired were harassed. For example, they allegedly were told they should not be working at plant; called "dumb b***h"; had degrading photos drawn of them; and were subject to suggestions that they should open their uniform tops to have their photos taken. The EEOC alleged also that the employer, a federal contractor, failed to keep applications and other employee data as required under federal law. The class involved more than 40 claimants. The three-year decree applies to all three of the employer's plants. The employer is required to preserve all applications and application materials received by the employer/staffing agency, as well as communications between employer and staffing agency. The employer is also required to create and maintain job descriptions for all laborer and operative positions, maintain applicant flow logs, and make a good faith effort to find female candidates for at-issue positions.	U.S.D.C. Northern District of Ohio	4/30/2013
$650,000	Sexual Harassment and Retaliation	According to the EEOC, a supervisor repeatedly demanded sexual favors from a female laborer in order for her to keep her job, and took advantage of the isolated workspace to physically grab her and demand sex on a weekly basis for seven years. The EEOC also alleged that when coworkers raised complaints about sexual harassment to management, they were fired or forced out of their jobs. Under the terms of the consent decree, the employer will pay $650,000 to five workers and issue EEO policies in English and Spanish to employees throughout eastern Washington and South Dakota, institute changes to ensure that its complaint procedures are accessible, and train its management and to hold supervisors accountable for any discrimination, harassment or retaliation under their watch. The employer also agrees to report harassment complaints to the EEOC for four years, and will not rehire the alleged harasser in any capacity.	U.S.D.C. Eastern District of Washington	5/15/2013
$600,000	Sexual Harassment and Retaliation	According to the EEOC, 22 male waiters were subjected to harassment by male managers over an eight-year period. The manager allegedly groped backsides, made lewd comments, and attempted to touch the waiters' genitals. Many waiters complained to other managers and owners, but the harassment did not stop. Some suffered retaliation for complaining by being given more difficult assignments and/or being suspended. Among other terms of the decree, the employer is required to provide the manager with six hours of one-on-one training.	U.S.D.C. Southern District of New York	11/15/2012

SETTLEMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$500,000	Racial Harassment	According to the EEOC, a class of African American employees was subjected to violent, racist graffiti. Employees saw hangman's nooses displayed at the paper mill. Several employees were referred to by racist slurs. One, who filed a discrimination charge, was called "N*****" by a supervisor, and later discovered a noose at his work station. He alleged officials repeatedly ignored complaints of racist graffiti even after it was reported to management on multiple occasions, including at monthly labor-management meetings. Under the terms of the consent decree, the employer will pay $500,000 to 14 employees, and conduct annual anti-harassment and anti-discrimination training. In addition, the company will implement an anti-graffiti policy, which requires the company to conduct weekly monitoring of its facilities and to also discipline any employee found to have created graffiti.	U.S.D.C. Northern District of Texas	12/3/2012
$500,000	Race and National Origin Discrimination	According to the EEOC, the company unlawfully engaged in a pattern of discriminating against American workers by firing virtually all American workers while retaining workers from Mexico during the 2009, 2010, and 2011 growing seasons. The EEOC alleged also the company fired at least 16 African American workers in 2009 based on race and/or national origin and the terminations were coupled with race-based comments by a management official. The EEOC also alleged the company provided fewer job opportunities to American workers by assigning them to pick vegetables in fields that had already been picked by foreign workers, resulting in American workers earning less pay than Mexican workers. Although the judgment is for $500,000, a provision provides that if any defendants file for bankruptcy, they agree to schedule $1.5 million as a liquidated, non-contingent, undisputed claim owed to plaintiffs, intervenors, and counsel. The court can enter default for that amount, plus pre-judgment interest from default date to entry date. In addition, defendants consented to lifting any bankruptcy automatic stay for purposes of the judgment being entered by the court. Under the terms of the decree, the employer must seek to achieve a goal of offering and retaining employment of African Americans each of the five years the decree is in effect. In addition, the employer must make reasonable efforts to extend rehire offers to all former non-H-2A workers who were employed for any portion of 2009-2012 growing seasons or who were terminated for reasons other than those the decree states is legitimate.	U.S.D.C. Middle District of Georgia	12/10/2012
$500,000	Retaliation	According to the EEOC, the company retaliated against a longtime employee by firing him because he informed the employer he did not want to be bound to a "last-chance agreement" that prohibited him from filing charges of discrimination with the EEOC, even for events that had not yet occurred. The EEOC alleged also that the company retaliated against five other employees by forcing them to make a similarly illegal choice: *i.e.*, sign the last chance agreement or face termination. As part of the two-year decree, the employer agrees not to maintain a "last chance employment agreement" or other agreement deterring or interfering with right to file an EEOC or FEP charge. Any unclaimed amounts from the decree will become part of the cy pres fund to be distributed to The Employment Opportunity Project of The Chicago Council of Lawyers.	U.S.D.C. Central District of Illinois	1/28/2013
$500,000	Disability Discrimination	According to the EEOC, the company's policies failed to abide by the ADA and provide a reasonable accommodation to employees who missed work due to a serious medical condition. The employer is required to implement policy changes that strengthen processes for addressing reasonable accommodations for employees who must be absent due to serious medical conditions.	* This settlement was reached during conciliation before the EEOC filed a lawsuit on the merits.	8/23/2013

Select EEOC Jury Awards or Judgments in FY 2013[2]

JURY OR JUDGMENT AMOUNT	CLAIM	DESCRIPTION	COURT	EEOC PRESS RELEASE
$240 million	Disability Discrimination	In *EEOC v. Hill Country Farms*, Case No. 3:11-cv-0004 CRW-TJS, a jury awarded the EEOC damages totaling $240 million for allegedly subjecting a group of 32 men with intellectual disabilities to severe abuse and discrimination between 2007 and 2009, after 20 years of similar mistreatment. Each plaintiff was awarded $2 million in punitive damages and $5.5 million in compensatory damages. Based on the damage caps under the ADA, the award was reduced to $1.6 million. Ultimately, the court ordered payment of $3.4 million for 32 class members.	U.S.D.C. Southern District of Iowa	5/1/2013
$20 million	Sexual Harassment & Retaliation	In *EEOC v. Four Amigos Travel, Inc. /Top Dog Travel, Inc.*, Case No.: 8:11-cv-1163-RAL-MAP, a jury awarded $20,251,963 to eight former travel agency employees who allegedly were subjected to unwanted sexual advances, physical touching and repeated propositions for sex in a work environment filled with sexual banter, abuse of power and disrespect for women. The EEOC also alleged that the company fired a manager in retaliation for bringing forth the plaintiff's complaints. The jury awarded $2.5 million in compensatory damages and $10 million in punitive damages to the five former employees, as well as $99,876 in back pay. The jury also awarded two former female employees and the former manager $1.25 million in compensatory damages and $6 million in punitive damages, as well as an additional $402,087 in back pay. The trial was limited to damages as the defendants defaulted and presented no evidence or defense at the hearing. The EEOC's verdicts on behalf of the female class members were reduced to the $200,000 cap on compensatory and punitive damages under Title VII based on the size of the entity.	U.S.D.C. Middle District of Florida	5/1/2013
$4.7 million	Sexual Harassment	In *EEOC v. CRST Van Expedited, Inc.*, 2013 U.S. Dist. LEXIS 107822 (N.D. Iowa Aug. 1, 2013), a federal judge in Iowa ordered the EEOC to pay the defendant $4.7 million in attorneys' fees and costs as a sanction for pursuing "unreasonable or groundless" "pattern-or-practice" and individual claims on behalf of more than 100 claimants.	U.S.D.C. Northern District of Iowa	
$1.5 million	Sexual Harassment & Retaliation	In *EEOC v. New Breed Logistics*, 2013 U.S. Dist. LEXIS 40086 (W.D. Tenn. Mar. 22, 2013), plaintiffs alleged that the company sexually harassed three female employees, and retaliated against three female and one male employee who opposed the harassment. The verdict followed a seven-day trial. The award included $177,094 in back pay, $486,000 in compensatory damages and $850,000 in punitive damages for the discrimination victims.	U.S.D.C. Western District of Tennessee, at Memphis	5/10/2013
$752,000	Disparate Impact Race Discrimination	In *EEOC v. Peoplemark, Inc.*, 2013 U.S. APP. LEXIS 20408 (6th Cir. Oct. 7, 2013), the 6th Circuit affirmed a $751,942.48 fee and cost award against the EEOC for pursuing a disparate impact race discrimination case against an employer when the EEOC had sufficient evidence to indicate the claim was groundless. The EEOC had claimed the employer maintained a policy of excluding applicants based on their criminal histories, which allegedly had a disparate impact on minorities. The employer provided the EEOC with voluminous discovery to indicate it maintained no such policy, and the parties eventually agreed to dismiss the case with prejudice.	U.S. Court of Appeals for the 6th Circuit	

2 Fees and costs awarded to defendants are shaded.

APPENDIX B—FY 2013 EEOC AMICUS AND APPELLANT ACTIVITY [1]

FY 2013—Appellate Cases Where the EEOC Filed an Amicus Brief

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Adams v. Festival Fun Parks	U.S. Court of Appeals 2d Circuit No. 13-1183	8/21/2013	ADA, Title VII	Disability and Sexual Harassment Constructive Discharge Pending	**Background**: Plaintiff claims he was constructively discharged after co-workers repeatedly harassed him on the basis of his learning disability and made sexually crude comments to him. Additionally, plaintiff claims that the employer paid him less than his peers due to his alleged disability. The district court granted summary judgment for the defendant, holding that plaintiff was not disabled under the ADA, the alleged harassment was not sufficiently severe or pervasive, and plaintiff was not constructively discharged. **Issue EEOC is Addressing as Amicus:** (1) Whether plaintiff's learning disability qualified as a disability under the ADA; (2) Whether the alleged harassment was severe or pervasive; (3) If the employer knew or should have known about the harassment; and (4) Whether there was sufficient evidence for a jury to find the employer had constructively discharged the plaintiff. **EEOC's Amicus Brief:** First, the Commission argued the district court made an error of law when it relied on case law defining a "disability" under the pre-2008 amendments to the ADA. The Commission also argued that plaintiff had a record of disability with his special education records and that the employer treated him as disabled when it paid him less than his co-workers. Second, the Commission contended that plaintiff's claims that co-workers would throw objects at him, call him stupid, ridicule his work product, and joke about his sexuality was sufficient evidence of severe or pervasive harassment. Third, the Commission argued the employer either knew or should have known about this harassment and negligently failed to respond since plaintiff alleged that he complained to his supervisor and human resources, and the employer had no clear process for reporting harassment. Fourth, the Commission argued that plaintiff's allegations of harassment, ridicule, and unequal pay was sufficient for a reasonable jury to find he was constructively discharged. **Court's Decision**: The court has not yet scheduled oral arguments.

1 The information included in Appendix B, including the *"FY 2013 Appellate Cases Where the EEOC Filed an Amicus Brief"* and *"FY 2013—Appellate Cases Where the EEOC Filed as the Appellant"* were pulled from the EEOC's publicly available database of appellate activity available at http://www1.eeoc.gov/eeoc/litigation/briefs.cfm. Appendix B includes select cases from this database.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Neviaser v. Mazel Tec, Inc.	U.S. Court of Appeals 2d Circuit No. 12-3948	1/15/2013	FLSA	Retaliation Pro Employer—Appeal withdrawn	**Background**: The district court held that the plaintiff's internal complaints cannot constitute protected activity under the Fair Labor Standards Act (FLSA). **Issue EEOC is Addressing as Amicus:** (1) Whether an employee's internal complaints constitute protected activity under the FLSA. **EEOC's Amicus Brief:** The EEOC argued that the district court erred in granting the defendant summary judgment holding that internal complaints regarding an employer's wage practices are not protected under the FLSA's anti-retaliation provisions. Specifically, the Commission argued that the United States Supreme Court's decision in *Katsen v. Saint-Gobian Plastics*, 131 S.C. 1325 (2011), which held that oral complaints are sufficient to fall under the FLSA's anti-retaliation provision, indicates that internal complaints are protected activity. Although the Commission recognized that *Katsen* did not specifically discuss internal complaints, the Commission stressed that a majority of courts have held that internal complaints are protected activity under the FLSA in light of the *Katsen* reasoning. **Court's Decision**: On March 25, 2013 the parties stipulated a withdrawal of the appeal.
Ellis v. Ethicon, Inc.	U.S. Court of Appeals 3d Circuit Nos. 10-1919 & 12-1361 2013 U.S. App. LEXIS 14014 (3d Cir. July 9, 2013)	12/21/12	ADA	Reinstatement Pro EEOC	**Background**: After a jury found the defendant liable for violating the ADA, the district court ordered the plaintiff reinstated, despite the defendant's position that reinstatement was inappropriate given the plaintiff's failure to mitigate her damages. **Issues on Appeal**: Whether the district court erred in refusing to consider the plaintiff's failure to mitigate damages when it ordered defendant to reinstate her to her position. **EEOC's Amicus Brief:** The EEOC argued the district court's order for reinstatement should be affirmed. The Commission argued that a plaintiff's failure to mitigate damages in no way interferes with the court's statutory authority under the ADA to award reinstatement. Specifically, the Commission contended that reinstatement should be assessed on a case-by-case basis and while a failure to mitigate may limit a plaintiff's monetary rewards it does not, in itself, preclude a plaintiff the right to reinstatement. **Court's Decision**: On August 1, 2013 the U.S. Court of Appeals for the 3d Circuit affirmed the district court's reinstatement order without discussion.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Hildebrand v. Allegheny County	U.S. Court of Appeals 3d Circuit No. 13-1321	5/13/13	ADEA	Sufficient Pleadings/ Statute of Limitations Pending	**Background**: District court dismissed the plaintiff's ADEA claim for failing to plead sufficient facts showing that he had exhausted his administrative remedies. Additionally, the district court held that the plaintiff's amended complaint was also insufficient because it failed to demonstrate he filed his claim within 300 days of the alleged discrimination. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding plaintiff's complaint failed to sufficiently allege he exhausted his administrative remedies; and (2) Whether the district court erred in dismissing plaintiff's complaint for failing to show he timely filed a charge when he submitted his timely-filed intake questionnaire. **EEOC's Amicus Brief:** The EEOC argued that the district court erred in holding the plaintiff needed to plead the actual dates of his administrative charge in order to satisfy the pleading requirements under *Iqbal*[2] and *Twombly*.[3] The Commission also contended that the district court erred in holding that the plaintiff needed to plead the specific date he received his right-to-sue notice, verifying that he filed suit within 90 days. Specifically, the Commission argued that the plaintiff's pleadings of conditions precedent are allowed to be pled generally. Additionally, the Commission argued that the district court erred when it did not consider the plaintiff's intake questionnaire form attached to his Amended Complaint, which constituted a charge and was timely filed. **Court's Decision**: The court has not yet scheduled oral arguments.
Johnson v. Maestri-Murrell Property Management	U.S. Court of Appeals 5th Circuit No. 12-31175	4/26/13	Title VII	Race Discrimination/ After Acquired Evidence Pending	**Background**: The district court granted the defendant's motion for summary judgment on the grounds that the plaintiff failed to establish a *prima facie* case of racial discrimination. The district court also allowed after-acquired evidence of misconduct in refuting the plaintiff's *prima facie* case. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding the plaintiff had to prove she was "qualified" to establish her *prima facie* case; and (2) Whether the district court erred in relying on evidence of the plaintiff's alleged dishonesty in assessing her *prima facie* case. **EEOC's Amicus Brief:** The EEOC argued that the district court erred in granting the defendant summary judgment because the *McDonnell Douglas* framework did not require plaintiff to prove she was "qualified" for her position in order to establish a *prima facie* case. Specifically, the Commission argued the district court erred when requiring the plaintiff at the *prima facie* stage to prove she was qualified as an assistant manager, stressing Title VII affords protections against race discrimination for all employees and applicants, not merely those who are "qualified" for a particular position. The Commission also argued that the district court relied on the after-acquired-evidence doctrine, which should apply only to assessing back pay awards, when deciding whether the plaintiff was qualified for the position. **Court's Decision**: Oral argument was held on December 4, 2013.

2 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Bailey v. Real Time Staffing Services, Inc.	U.S. Court of Appeals 6th Circuit No. 13-5221 2013 U.S. App. LEXIS 22294; 2013 FED App. 0927N (6th Cir. Oct. 29, 2013)	2/20/2013	ADA	Disability Pro Employer	**Background:** The employee was an HIV positive male who took medication which may have caused a false positive workplace drug test. The district court granted summary judgment in favor of the employer because it did not know the employee was HIV positive. **Issue EEOC is Addressing as Amicus: W**hether the termination of the employee was in violation of the ADAAA when the employee was HIV positive and took medications which could create false positives on a workplace drug test. **EEOC's Amicus Brief:** The EEOC argued that discriminating against an employee for the consequences, manifestations, or symptoms of a disability known to be caused by a disability is discrimination under the ADA. The EEOC argued that the ADAAA's new definition of "regarded as" coverage now proscribes discrimination because of an impairment (including any physiological disorder or condition) is also prohibited. The EEOC's position was that, because the false positive was caused by a medication for HIV, a reasonable jury could conclude that the employer violated the ADAAA. **Court's Decision:** In an unpublished opinion, the 6th Circuit affirmed the district court's decision.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Bates, et al v. Dura Automotive Systems, Inc.	U.S Court of Appeals 6th Circuit No. 11-6088	9/29/2011	ADA	Disability Pending	**Background:** The employer in this matter initially required employees to undergo testing for illegal drug use upon their initial hiring and after their involvement in a workplace accident that resulted in an injury. Following a series of drug-related incidents, the employer adopted a new substance abuse policy, and tested all of its employees. If an employee tested positive on an initial test, the employee was placed on a 30 day leave of absence and not allowed to return unless the employee passed a retest. Employees involved in the suit all tested positive due to the lawful use of prescription medication and were not allowed to return to their positions. At trial, the district court determined, as a matter of law, that the employer's testing regime was a medical examination, and the jury had to determine whether it was job-related and consistent with business necessity. The court rejected the employer's renewed motions for judgment as a matter of law and for a new trial, and the employer's contention that because the employees were not individuals with disabilities, they could not recover under the ADA. **Issue EEOC is Addressing as Amicus:** Whether the district court correctly concluded that the employer's testing was a medical exam under the ADA and that plaintiffs were protected by the ADA's medical examination/inquiries provisions, whether or not they are disabled. **EEOC's Amicus Brief:** The EEOC argued that for purposes of the ADA, a disability-related medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health and, though Congress excluded testing for illegal drug use from the definition of medical exams, this exception was intentionally made small. The EEOC argued that the district court correctly determined that the employer's testing was a medical exam, in part because it was intended to uncover employees' lawful use of prescription drugs. The EEOC also argued that the ADA allows non-disabled individuals to recover for violations of the ADA's medical examination limitation. The EEOC noted that the protection from improper medical exams is not limited to qualified individuals with disabilities. Moreover, the EEOC argued that the ADA's remedial provision states that the remedies are available to "any person," not qualified individuals with disabilities. **Court's Decision:** Oral argument was held on March 7, 2013, but no decision has been issued to date.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Latowski v. Northwoods Nursing Center	U.S. Court of Appeals 6th Circuit No. 12-2408 2013 U.S. App. LEXIS 25738 (6th Cir. Dec. 23, 2013)	10/25/2012	Title VII, Pregnancy Discrimination Act	Sex, Pregnancy Pro EEOC—summary judgment with respect to pregnancy discrimination claim reversed Pro Employer—summary judgment with respect to ADA and FMLA interference claims affirmed	**Background:** The employee filed a lawsuit alleging that the employer's policy of requiring employees who had a non-work related condition, including pregnancy, to receive a full release from a doctor before returning to work was discrimination on the basis of pregnancy in violation of Title VII. On September 27, 2012, the district court granted the employer's motion for summary judgment holding, in part, that the policy in question was pregnancy blind and was not direct evidence of discrimination. **Issue EEOC is Addressing as Amicus:** (1) Whether a reasonable juror could find the employer's policy of requiring pregnant certified nurses' aides to obtain a doctor's clearance to work without restrictions in order to avoid termination constitutes discrimination on the basis of sex and pregnancy; and (2) Whether a reasonable juror could find that the employer's assertion for a "no restrictions policy" for certified nursing assistants (CNAs) to work was a pretext for pregnancy discrimination in violation of Title VII. **EEOC's Amicus Brief:** The EEOC argued that the employer's unwritten policy in question is not "pregnancy blind" and, in fact, singles out pregnant women by requiring them to obtain a note stating that they could work free from restrictions in order to continue their jobs. The EEOC further argued that a reasonable juror could determine it was discriminatory because it was applied to pregnant employees but not to other employees, unless they had a medical condition that required a leave or an accommodation. As applied, the policy led to the termination of each and every employee who did not receive this clearance. The EEOC further argued that the "no restrictions" policy was pretext for discrimination. **Court's Decision:** In an unpublished decision issued on December 23, 2013, the 6th Circuit reversed the district court's grant of summary judgment in the employer's favor with respect to the pregnancy discrimination claims. The court affirmed the lower court's grant of summary judgment in the employer's favor as to the employee's ADA and FMLA interference claims.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
McKinley v. Skyline Chili, Inc.	U.S. Court of Appeals 6th Circuit No. 12-4064 2013 U.S. App. LEXIS 17641; 2013 FED App. 0776N (6th Cir. Aug. 21, 2013)	9/6/2012	Title VII and ADEA	Sex, Age Pro Employer—Affirmed Grant of Summary Judgment	**Background:** The employee in this matter was provided with negative performance reviews. The employee complained that she was being discriminated against and treated differently. The employee was eventually fired for "ongoing performance problems." The district court granted summary judgment and held that the employee's complaint was too vague to constitute protected opposition to employer conduct and concluded that the employer showed that there was not a genuine dispute whether the employee was terminated for engaging in protected activity. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in holding the employee did not engage in protected activity; (2) Whether the district court erred in not submitting the employee's retaliation claim to the jury; and (3) Whether the district court erred in holding the employee did not create a triable issue of pretext. **EEOC's Amicus Brief:** The EEOC argued that the 6th Circuit should reverse the district court's grant of summary judgment because the employee's complaint was sufficiently specific to fall within Title VII and the ADEA's anti-retaliation provisions and that the district court erred in determining that the employee did not present a triable issue of pretext. With respect to the issue of the employee's complaint, the EEOC argued that it was sufficiently specific under Title VII and the ADEA because complaints are protected where they identify a discriminatory practice and implicate the protected category on which it is based. With respect to pretext, the EEOC argued that the facts presented sufficient evidence that a reasonable fact-finder could deduce a causal connection between the employee's complaint and termination. **Court's Decision:** On August 21, 2013, the 6th Circuit affirmed the district court's decision, holding that the employee did not show a genuine dispute of a material fact (rather, the employee only showed differing opinions regarding her performance and, as a result, she was unable to show pretext).

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Waldo v. Consumers Energy	U.S. Court of Appeals 6th Circuit No. 12-1518 726 F.3d 802 (6th Cir. 2013)	4/30/2012	Title VII	Sex Pro EEOC—Affirmed on all counts	**Background:** The employee in this matter was awarded $400,000 in compensatory damages and $7.5 million in punitive damages (though this was reduced to $300,000 via the statutory cap). The employer appealed and argues, in relevant part, that the district court erred because the employee failed to provide sufficient evidence to establish that the harassment was severe or pervasive. **Issue EEOC is Addressing as Amicus:** Whether a plaintiff alleging a hostile work environment under Title VII has to prove that the harassment unreasonably interfered with her work. **EEOC's Amicus Brief:** The EEOC argued that a plaintiff alleging a hostile work environment under Title VII does not have to prove that the harassment unreasonably interfered with the employee's work performance. Rather, the EEOC argued, the employee need only demonstrate that the harassing conduct has the purpose or effect of unreasonably interfering with the individual's work performance, or creating an intimidating, hostile or offensive working environment. The EEOC went on to argue that in the past, the 6th Circuit inconsistently, and incorrectly, required an employee to demonstrate unreasonable interference. As a result, though the court may not have been required to address this issue in this matter, the EEOC urged the court to clarify its law on this point. **Court's Decision:** On August 9, 2013, the court filed its final opinion and affirmed the judgment of the district court on all grounds. In doing so, the court noted that whether the conduct is sufficiently severe or pervasive to establish a hostile work environment requires a court to look at all of the circumstances, including whether it unreasonably interferes with an employee's work performance.
Ames v. Nationwide Mutual Insurance	U.S. Court of Appeals 8th Circuit No. 12-3780	1/30/2013	Title VII	Sex Discrimination Pending	**Background**: The district court granted summary judgment for the defendant after finding that no reasonable jury could find evidence of sex discrimination and alternatively, that the plaintiff resigned and was not subject to an adverse employment action. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court erred in finding no direct evidence of sex discrimination and (2) Whether the district court erred in finding no evidence of constructive discharge. **EEOC's Amicus Brief:** The EEOC argued that the district court erred in granting the defendant summary judgment because a reasonable jury could find in the employee's favor. Specifically, the Commission argued allegations that the plaintiff's supervisor stated "I think it's best that you just go home to be with your babies" shortly before the plaintiff's resignation is direct evidence of sexual discrimination. The Commission also argued that there were sufficient allegations that defendant intentionally shortened the plaintiff's maternity leave and did not afford access to a lactation room. Moreover, the Commission contended that these allegations were sufficient evidence of constructive discharge to survive summary judgment. **Court's Decision**: Oral arguments were held on November 19, 2013.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Ashbey v. Archstone Property Management	U.S. Court of Appeals 9th Circuit No. 12-55912	11/28/2012	ADA; Title VII	Arbitration Pending	**Background:** The employee filed a lawsuit against his employer alleging various wage and hour violations, as well as retaliation in violation of Title VII and wrongful termination. The employer moved to compel arbitration under its dispute resolution policy. On April 16, 2012, the district court entered an order denying the employer's motion to compel arbitration finding there was no valid arbitration agreement between the parties. The employer appealed. **Issue EEOC is Addressing as Amicus:** (1) Whether the district court correctly denied the employer's motion to compel arbitration because the employer failed to prove that it offered, and the employee accepted, a contractual agreement to arbitrate employment disputes; and (2) Whether the district court correctly denied the employer's motion to compel arbitration because the employee did not knowingly waive a judicial forum for his Title VII claim of retaliation. **EEOC's Amicus Brief:** The EEOC argued the employer's arbitration agreement contained in its employee manual was unenforceable because the employer never made an offer to the employee concerning arbitration. Specifically, the acknowledgement the employee signed stated the manual "does not . . . create any contractual rights." Therefore, the district court did not err in construing this disclaimer as applying to the entire employee manual, including the policy on arbitration. The EEOC also argued that the employee's signature on the acknowledgement of receipt of the employee manual did not constitute a "knowing" consent on the employee's part to waive a judicial forum for his federal statutory civil rights claim because the acknowledgment did not mention arbitration. **Court's Decision:** This appeal is currently pending and the court has not yet scheduled oral arguments.
Schulman v. Wynn Las Vegas	U.S. Court of Appeals 9th Circuit No. 12-17561	7/22/13	ADA	Disability Charge Processing Statute of Limitations Pending	**Background**: The district court dismissed plaintiff's lawsuit due to his failure to file his complaint within 90 days from receiving the notice of right to sue letter from the EEOC. The district court used the presumption that the plaintiff received the right to sue letter three days after it was mailed. **Issue EEOC is Addressing as Amicus:** Whether the district court erred in dismissing the plaintiff's complaint for failing to file suit within 90 days even though the plaintiff presented a sworn statement that he received the right-to-sue notice ninety days before he filed the lawsuit. **EEOC's Amicus Brief:** The EEOC argued the district court erred in dismissing this lawsuit on the ground that the plaintiff failed to file his complaint within 90 days of receiving his right to sue notice from the EEOC. The EEOC argued that the three day mailing presumption should not apply when the plaintiff has personal knowledge of the date on which he received the right to sue notice. Specifically, the plaintiff included an affidavit and a hand-written note with his response to the motion to dismiss that stated he received the right to sue letter six days after it was mailed. The EEOC claimed the district court erred by disregarding this evidence as self-serving. **Court's Decision**: The appeal is currently pending.

FY 2013—Appellate Cases Where the EEOC Filed as the Appellant

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Freeman	U.S. Court of Appeals 4th Circuit No. 13-2365	11/07/2013	Title VII	Patterns and Practice, Race Discrimination Based on Criminal and Credit Background Checks Pending	**Background:** The employer used different types of background checks for different company positions, including a criminal check and Social Security Number verification for certain positions, and a credit check for "credit sensitive" positions. The company's job application included the following question about prior convictions: "What you were convicted of, the circumstances surrounding the conviction and how long ago the conviction occurred are important considerations in determining your eligibility. Give all the facts, so that a fair decision can be made." The application noted that "conviction does not automatically mean you will not be offered a job." The EEOC filed suit, claiming that the employer engaged in an ongoing pattern and practice of discriminating against African Americans, Hispanics, and male applicants by examining their criminal reports and against African Americans by examining their credit histories for employment purposes. On August 9, 2013, a federal district court judge in Maryland dismissed, without a trial, the EEOC's Title VII suit, based largely on fatal flaws in the EEOC's expert report. The opinion acknowledges the legitimate, even "essential," business reasons for conducting criminal background checks and highlights significant challenges the EEOC faces when prosecuting such suits. **Issues on Appeal:** At the time of publication, the EEOC's appellant brief was not yet available.
EEOC v. Propak Logistics, Inc.	U.S. Court of Appeals 4th Circuit No. 13-1687	8/21/2013	Title VII	Attorneys' Fees Pending	**Background**: Former employee brought a Title VII suit claiming he was terminated because he was non-Hispanic. The employee ultimately obtained a right to sue letter from the EEOC, filed a complaint in the U.S. district court, and eventually settled with the employer. The EEOC, however, notified the employer that it would continue its own investigation into the employer's alleged discrimination. Years later, the EEOC filed a Title VII suit against the employer on behalf non-Hispanic employees. The district court dismissed the complaint based on laches and ordered the EEOC to pay the employer's reasonable attorney's fees. **Issues on Appeal**: Whether the district court erred in awarding defendant employer attorney's fees after finding the EEOC unfairly and prejudicially delayed in perusing its Title VII claims. **EEOC's Position on Appeal**: The EEOC argued that the defense of laches does not apply to a sovereign that sues to enforce the public interest. The EEOC also argued that even if laches applied, the employer had not demonstrated that the delay was in any way prejudicial or impaired its ability to defend against the EEOC's claims. Lastly, the EEOC contended that even if laches was an appropriate defense, there was no evidence to support the district court's holding that the EEOC's opposition to the laches defense and pursuit of the claim was unreasonable as to award the employer attorney's fees. **Court's Decision**: Oral argument is scheduled for January 28, 2014.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. AA Foundries, Inc.	U.S. Court of Appeals 5th Circuit 12-51103	7/03/2013	Title VII	Harassment, Race Pending	**Background**: The EEOC filed suit alleging that the employer subjected five claimants to a hostile work environment base upon race. The jury found for three of the plaintiffs from which both parties timely appealed. In relevant part, the EEOC alleged that the employees' supervisor hung racially degrading materials in the break room, used racial epithets, referred to African American males as "boy", and that another employee hung a noose in the workplace. Additionally, the EEOC submitted jury instructions stating there is no requirement that the conduct be directed at the claimants, or that the conduct be psychologically injurious to the claimants. **Issues on Appeal**: The EEOC addressed two issues as appellees: (1) whether the district court properly exercised its discretion in admitting testimony about the noose hung at AA Foundries; and (2) if the district court committed error in admitting testimony relating to the noose, whether this was harmless error. On cross appeal, the EEOC addressed two issues: (1) whether the district court committed reversible error in refusing to adopt the EEOC's instruction that direct harassment was not required to show a hostile work environment based on race; and (2) whether a deficient jury charge is grounds for reversal where it allows the jury to overlook an aspect of the liability determination. **EEOC's Position on Cross-Appeal**: The EEOC argues that the district court was well within its discretion to admit the testimony about the noose because it was relevant and highly probative. Even if the admittance of the evidence regarding the noose was reversible error, the EEOC presented sufficient evidence for the jury to conclude that there was a racially harassing environment. The EEOC argued that district court's failure to provide the proper instruction was reversible error and led the jury to improperly conclude that one claimant was not subjected to a racially hostile work environment. Rather, the EEOC argued that an employee's witnessing of discriminatory and/or harassing conduct is sufficient to support a claim of a hostile work environment. **Court's Decision**: The appeal is currently pending.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Exxon Mobil Corp.	U.S. Court of Appeals 5th Circuit 13-10164	2/09/13	ADEA	Age Pending	**Background**: Until 2007, the Federal Aviation Administration had a mandatory retirement age of 60 for certain commercial pilots, which was known as the Age 60 Rule. The Age 60 Rule was repealed in 2007. The FAA never applied the Age 60 Rule to company pilots. The employer, however, applied this Rule to its company pilots and asserted that it was necessary because the duties of its pilots were congruent with those commercial pilots covered by the FAA. The district court concluded that the employer's pilots' duties were congruent with commercial pilots, but did not allow discovery relating to whether the employer's mandatory retirement for pilots was bona fide occupational qualification. **Issues on Appeal**: the EEOC addressed three issues in this appeal: (1) whether the district court erred in deciding that the FAA's regulations compel a conclusion that the employer's mandatory retirement age for corporate pilots was a BFOQ under the ADEA; (2) whether the district court erred in deciding that the work of commercial air pilots is sufficiently similar to that of the employer's pilots to establish congruity; and (3) whether the district court improperly weighted evidence and assessed the credibility of experts in deciding that the employer met its burden of proving that individualized testing of pilots was impossible. **EEOC's Position on Appeal**: The EEOC argued that the district court improperly disregarded FAA regulations which have concluded that commercial pilots and company pilots do not have congruent duties. The EEOC further argued that the district court failed to apply the correct standard in assessing the evidence relating to congruency. Finally, the EEOC argued that the district court improperly resolved disputed expert testimony relating to whether the employer could test individual pilots for the possibility of a sudden incapacity. **Court's Decision**: Oral argument has been tentatively calendared for the week of February 3, 2014.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
Serrano v. Cintas Corp.	U.S. Court of Appeals 6th Circuit No. 11-2057 699 F.3d 884 (6th Cir. 2012) U.S. Supreme Court No. 12-1347, *cert. denied* Oct. 7, 2013 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013)	10/25/2011	Title VII	Sex, Charge Processing, Attorneys Fees Pro EEOC—district court's ruling reversed and remanded (*en banc* rehearing requested by the employer) U.S. Supreme Court declined to review	**Background**: The Commission represented a class of women who were denied jobs as the result of a pattern or practice of sex discrimination and filed suit under section 706 of Title VII. The Commission's complaint was dismissed after the district court refused to allow the Commission to amend their complaint to plead a section 707 claim against the defendant. The Commission could not prove its claims under section 706 and, therefore, its complaint was dismissed as to the alleged section 706 claims. **Issues on Appeal**: The Commission raised the following four issues in this appeal: (1) Whether the Commission acted frivolously, unreasonably, or without foundation when it filed the complaint in this matter alleging a pattern-or-practice of discrimination under section 706? (2) Whether the district court inappropriately rejected the Commission's proposed amendment to the complaint which sought to add section 707 claims? (3) Whether the district court properly considered the Commission's ability to investigate and litigate claims when it rejected the Commission's offer to prove discrimination against individual claimants? (4) Whether the district court's reliance on the Commission's motion practice, including its failure to have rulings issued in its favor, was appropriately considered as part of the fee award? **EEOC's Position on Appeal:** In appealing the district court's order on the employer's summary judgment motion and fee award against it the Commission's argument was fourfold: (1) The EEOC's action was not frivolous, unreasonable, or without foundation. Thus, this was not the rare, egregious case where fees are appropriate. In filing the complaint in this matter, the Commission relied upon established 6th Circuit precedent[4] allowing pattern-or-practice claims under section 706. As a result, because of this precedent, and even if the district court did not improperly fail to apply binding precedent, the EEOC's actions were not sufficient to support the award of attorney's fees. (2) The district court inappropriately rejected the EEOC's amendment to the complaint (to add section 707 claims) and, therefore, the award of fees was not appropriate. Upon learning that the district court rejected 6th Circuit precedent allowing the EEOC to bring a pattern-or-practice claim under section 706, the Commission sought to amend its complaint to add section 707 claims, without substantively changing the allegations against the defendant. The EEOC argued that the district court's rejection of this amendment was an abuse of discretion and, as a result, the award of fees was inappropriate. (3) The district court inappropriately rejected the EEOC's attempt to prove discrimination against individual claimants. The district court allegedly did not have the appropriate view of the Commission's authority to investigate and litigate claims of discrimination. Specifically, the district court incorrectly determined that, when it investigated systematic practices, the EEOC did not also investigate individual discrimination claims. The Commission argued that the district court's misunderstanding of the EEOC's authority was not sufficient to support an award of fees.

4 *See EEOC v. Monarch Machine Tool Co.*, 737 F.2d 1444 (6th Cir. 1980).

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
					(4) In awarding fees, the district court cited the EEOC's motion practice as part of the evidence supporting the fees award. The Commission asserted that the district court's misplaced reliance upon the EEOC's motion practice, and the EEOC's failure to have rulings issued in its favor, did not make the Commissions actions frivolous or support its award of fees. **Appellate Court's Decision**: The 6th Circuit reversed and remanded this matter, including the award of fees, to the district court. The 6th Circuit determined the EEOC could pursue a pattern-or-practice claim because section 706 allows this type of claim and the EEOC satisfied its administrative perquisites to the suit. 2012 U.S. App. LEXIS 23132 (6th Cir. Nov. 9, 2012) *en banc rehearing requested.* On January 15, 2013, the 6th Circuit rejected the employer's motion to reconsider its ruling. **Supreme Court Action:** On October 7, 2013, the Supreme Court denied the employer's petition for *certiorari.* 2013 U.S. LEXIS 6873 (U.S. Oct. 7, 2013)
EEOC v. Ford Motors	U.S. Court of Appeals 6th Circuit Nos. 12-6236; 12-2484	11/13/2012	ADA	Disability/Reasonable Accommodation, Telecommuting, Pending	**Background**: The district court granted summary judgment in favor of the employer. The court held that although the employee—who suffered from irritable bowel syndrome—had "basically" been told that her position was eligible for telecommuting, she could not successfully perform the functions of her position from home. The district court further observed that, in general, courts have found that working at home is rarely a reasonable accommodation. **Issues on Appeal**: (1) Whether a reasonable jury could find that regular attendance was not an essential function of the employee's job and that a flexible telecommuting arrangement was not a reasonable accommodation for her irritable bowel syndrome; and (2) Whether a reasonable jury could find that the employee was terminated in retaliation for filing a charge of discrimination. **EEOC's Position on Appeal**: The EEOC challenged the district court's grant of summary judgment in favor of the employer. In doing so, the EEOC argued that the court wrongly accepted the employer's characterization of the position in question, especially given the employer's policy allows for telecommuting and because the employee did not need to telecommute for four days a week. Further, if attendance at meetings was necessary, then all of the employees in the position at issue would have been required to attend work at all times. Finally, the allegedly harassing conduct following the filing of a charge of discrimination was argued to be evidence of retaliation. **Court's Decision**: Oral argument was held October 10, 2013.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Kaplan Higher Education Corp, et al.	U.S. Court of Appeals 6th Circuit No. 13-3408	8/05/2013	Title VII	Race, Expert Testimony Pending	**Background**: The EEOC brought an enforcement action alleging that the employer's use of credit history in the application process had a discriminatory impact on the basis of race. The EEOC retained an expert to determine whether the use of credit history had such a disparate impact. In doing so, the EEOC's expert conducted an analysis of the employer's applicant flow. However, the employer's data did not include the race identification of the applicants. As such, in relevant part, the expert subpoenaed and reviewed color photographs from applicants' state DMV photos to determine the race of the applicants. The district court, however, rejected the reliability of the expert's race identification through photo review and held that no reliable observations about an applicant's race can be drawn by looking at the applicant's DMV photo. **Issue on Appeal**: Whether the district court abused its discretion when it excluded the EEOC's expert testimony. **EEOC's Position on Appeal**: The EEOC appealed the district court's decision and argued that the district court abused its discretion in excluding its expert's testimony related to the identification of applicants' race because of the unreliability of DMV photographs. The EEOC argued that an expert's opinion is admissible when it is reliable, and that reliability can be shown by any reasonable measures, given that the test of reliability is flexible. The EEOC further argued that its expert's testimony was reliable because he used sound procedures to control the process, checked the photo race identifications against other race identification information, and utilized experienced panelists to identify the applicants' races. The EEOC further argued that the employer's failure to record applicants' races, as required by EEOC regulations, should factor into the analysis of the EEOC's expert's race identifications. Additionally, the EEOC argued that federal courts have recognized that race may be observed visually. Finally, the EEOC argued that the district court erred because a disparate impact was shown without considering the DMV photo race identifications. **Status of Appeal**: The appeal is currently pending.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Memphis Health Center	U.S. Court of Appeals 6th Circuit 11-6426,11-6427 2013 U.S. App. LEXIS 10259; 2013 FED App. 0498N (6th Cir. May 17, 2013)	1/17/2012	ADEA	Age, Retaliation, Attorney's Fees Award of attorneys' fees on retaliation claim Pro Employer	**Background:** The EEOC brought a lawsuit claiming that the defendant discriminated against an individual based upon her age and retaliated against her for complaining about age discrimination when it failed to select her for a dental assistant position. The district court granted summary judgment in favor of the defendant and then awarded fees on the retaliation claim, but not the discrimination claim. **Issue on Appeal:** Whether the district court erred or abused its discretion by awarding fees against the EEOC with respect to its retaliation claim against defendant when no fees were awarded on the Commission's discrimination claim against defendant? **EEOC's Position on Appeal:** The EEOC argued that the district court abused its discretion and committed legal error in awarding attorneys' fees to defendant for its retaliation claim. Specifically, the Commission stated that the district court should have viewed its position as a whole. Because the EEOC's "main" discrimination claim was justified, despite the defendant's arguments to the contrary, then its position vis-à-vis the retaliation was justified and did not support the award of fees. The EEOC further argued that its retaliation claim was itself substantially justified. **Court's Decision:** The 6th Circuit Court held that a prevailing ADEA defendant can recover its attorneys' fees against the EEOC under the Equal Access to Justice Act, and that the legal standard to use in determining liability for attorneys' fees should be whether the government was substantially justified as a whole to bring the action and not a claim-by-claim analysis.
EEOC v. Peoplemark	U.S. Court of Appeals 6th Circuit 11-2582 732 F.3d 584; 2013 U.S. App. LEXIS 20408 (6th Cir. Oct. 7, 2013)	4/13/2012	Title VII	Race, Attorney's Fees Failure to hire; attorneys' fees Pro Employer	**Background:** The EEOC brought a lawsuit alleging that the defendant violated Title VII by maintaining a policy of not hiring individuals with a criminal background. The defendant produced three times the amount of documents expected, which forced the Commission to move for an extension of time to file its expert report. The district court denied this request, forcing the Commission to dismiss its complaint. **Issue on Appeal:** Whether the district court erred or abused its discretion by awarding fees against the EEOC because the EEOC could not prove its claims as the result of the district court's refusal to grant an extension of time to file its expert report. **EEOC's Position on Appeal:** The EEOC argued that the district court abused its discretion and committed legal error in awarding attorneys' fees to defendant. Specifically, the Commission stated the vast amount of documents produced by the defendant made it impossible to analyze the data and prepare an expert report within the time allotted. If the district court had provided the additional time for its expert to provide a report, it would have been able to support its claims. The Commission further argued that, even if fees were appropriate, the award in this matter was excessive. **Court's Decision:** The 6th Circuit affirmed the district court's decision, assessing more than $750,000 in fees and costs against the EEOC for continuing to pursue an action it knew to be meritless.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Skanska USA Building, Inc.	U.S. Court of Appeals 6th Circuit No. 12-5967	8/17/2012	Title VII; 42 U.S.C. § 1981	Race Joint Employer Status Pro EEOC	**Background**: The employer was a buck hoist operator on a construction site for a children's hospital. The plaintiff allegedly suffered severe racial harassment, including subjection to racial slurs, and having urine/feces thrown in his face. The district court denied the plaintiff's motion for summary judgment regarding whether the employer was a joint employer, and granted the employer's summary judgment motion and determined Skanska was not an employer under Title VII and 42 U.S.C. § 1981. **Issues on Appeal**: (1) Whether the defendant was not an employer under Title VII, even though it retained and exercised control over the plaintiff employees in this matter; and (2) Whether the district court violated summary judgment principles when it determined that the defendant was not an employer under Title VII and 42 U.S.C. § 1981. **EEOC's Position on Appeal**: The EEOC argued that Skanska was an employer under the relevant statutes. The EEOC reasoned that the employer, as the general contractor, allegedly retained control of its subcontractor's employees (whether they were exclusively controlled by the employer or jointly with the subcontractor). The EEOC argued that the district court incorrectly found that that there was insufficient evidence that the employer was a joint employer under Title VII and 42 U.S.C. § 1981. In doing so, the EEOC argued the district court omitted evidence that was contrary to the undisputed facts and improperly weighed evidence against the non-moving party. **Court's Decision**: In an unpublished opinion filed December 10, 2013, the 6th Circuit reversed and remanded the district court's decision, finding there was sufficient evidence to support a joint employer theory of liability.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Mach Mining, LLC	U.S. Court of Appeals 7th Circuit Nos. 13-8012; 13-2456 2013 U.S. App. LEXIS 25454 (7th Cir. Dec. 20, 2013)	5/30/2013	Title VII	Charge Processing Pro EEOC	**Background:** In the underlying matter, the EEOC filed a lawsuit against defendant, claiming that it had discriminated against women since 2006 by "never hir[ing] a single female for a mining related position" and because the defendant "did not even have a women's bathroom on its mining premises." When defendant asserted the affirmative defense that the EEOC did not conciliate in good faith, the EEOC moved for summary judgment and argued that based on *EEOC v. Caterpillar, Inc*,[5] the EEOC's conciliation process was not subject to any judicial review. The district court rejected the EEOC's argument, held that *Caterpillar* did not prevent judicial review of the conciliation process, and opined that while circuits are split "at least some level of judicial review" exists for the EEOC's conciliation process. The 7th Circuit granted the EEOC's petition for interlocutory appeal of the district court's order denying the EEOC's motion for partial summary judgment. Specifically, the EEOC argued the district court erred in holding that its conciliation efforts were subject to judicial review. **Issues on Appeal:** (1) Whether a court can review the EEOC's conciliation efforts; and (2) If a court can review the EEOC's conciliation efforts, whether the reviewing court should apply a deferential or heightened scrutiny of review. **EEOC's Position on Appeal:** The EEOC argues that its conciliation efforts are not subject to judicial review because conciliation must be confidential under Title VII. Additionally, the EEOC argues that subjecting its conciliation efforts to judicial review will undermine the object of Title VII by discouraging rather than promoting conciliation. Further, in the event the 7th Circuit holds the EEOC's conciliation efforts are subject to judicial review, the EEOC argues the reviewing court should adopt a deferential standard. **Court's Decision:** The 7th Circuit reversed the district court's denial of summary judgment, holding that the EEOC's statutory directive to negotiate first and sue later does not implicitly create a defense for employers. Specifically, the court found that "the language of the statute, the lack of a meaningful standard for courts to apply, and the overall statutory scheme convince us that an alleged failure to conciliate is not an affirmative defense to the merits of a discrimination suit. Finding in Title VII an implied failure-to-conciliate defense adds to that statute an unwarranted mechanism by which employers can avoid liability for unlawful discrimination."
EEOC v. Audrain Health Care, Inc.	U.S. Court of Appeals 8th Circuit No. 13-1720	6/19/2013	Title VII	Sex Discrimination Pending	**Background**: The district court granted summary judgment for the defendant holding no reasonable jury could find evidence of sex discrimination because the plaintiff failed to present sufficient evidence of discriminatory motive in the defendant's hiring decision. **Issues on Appeal**: Whether the district court erred in finding no direct evidence of sex discrimination. **EEOC's Position on Appeal**: The EEOC argued that the district court erred in granting the defendant's motion for summary judgment because a reasonable jury could find in its favor. Specifically, the Commission argued allegations that the decision maker stated she would only hire a woman for the open position was sufficient to defeat the defendant's summary judgment motion. **Court's Decision**: Oral argument is scheduled for January 13, 2014.

5 409 F.3d 831 (7th Cir. 2005).

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. McLane Company, Inc.	U.S. Court of Appeals 9th Circuit No. 13-15136	6/3/2013	ADA; Title VII	Administrative Subpoena Pending	**Background:** The EEOC brought a subpoena enforcement action regarding its investigation into a charge of discrimination based on the fact that all newly hired employees and all employees returning from any leave in excess of 30 days must take a physical capabilities evaluation designed and evaluated by a third party. The EEOC's investigation originally started when a single employee filed a charge of discrimination in January 2008, alleging the company discriminated against her on the basis of her sex (pregnancy) when it required her to take a "physical capability strength test" upon her return from maternity leave. A disability discrimination claim was also set forth, although the plaintiff had no known disability. In a separate enforcement action not at issue in this appeal, the EEOC alleged also that this evaluation violated the ADEA. In pursuing the initial charge, the EEOC sought a host of information from potentially thousands of employees and job applicants. For example, the EEOC requested additional test-related information from the employer on a national scale. The company disclosed an excel file containing the employees' gender, test date, test reason, job class, job target, employee ID number, whether the employee met thetttvinimum requirements of the position, and the level he or she met. The company did not provide the pedigree information, *i.e.* names, addresses, social security number, phone number. The district court approved the EEOC's subpoena for nationwide non-pedigree information. However, the district court refused to require that the company provide the test takers' names, last known addresses, phone numbers, or social security numbers, and instead permitted the company to provide a unique identification number for each test taking employee or applicant. The district court held that pedigree information was not relevant to determine whether the test systematically discriminates on the basis of gender. **Issues on Appeal:** (1) Whether the EEOC is entitled to the names, addresses, phone numbers, and social security numbers (pedigree) of thousands of job applicants and employees nationwide who took a physical capability evaluation in the course of its investigation; and (2) Whether the district court abused its discretion in determining it would be unduly burdensome for the employer to manually search its paper files and question managers to provide the EEOC with the specific reasons why an employee who took the evaluation was terminated. **EEOC's Position on Appeal:** The EEOC argued the district court erred in concluding that test takers' pedigree information fails to meet the broad standard of information relevant to a Commission investigation into a Title VII charge of discrimination. The EEOC also argued the district court erred when it refused to enforce its subpoena for the test takers' pedigree information absent a preliminary showing that the physical capability test, in fact, systematically discriminated against women. Finally, the EEOC argued the district court erred in failing to order the employer to provide its reason for terminating each of the test takers. **Court's Decision:** The appeal is currently pending and has not yet been scheduled for oral argument.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Peabody Western Coal Co.	U.S. Court of Appeals 9th Circuit No. 12-17780	4/24/2013	Title VII	National Origin Pending	**Background:** This case, in existence since 2001, involves conflicting views between the EEOC and the Department of Interior (DOI) regarding tribal employment hiring preferences. Specifically, the EEOC argues that federal employment law governs, but the DOI claims that its view of federal Indian law governs, and these two laws are incompatible. The EEOC, DOI, and the employer are all parties to this lawsuit. The matter involved tribe-specific employment preferences in mineral leases on tribal lands. The mineral leases containing these hiring preferences were authorized under the Indian Mineral Leasing Act of 1938, and were approved by the DOI. The district court granted the employer's motion for summary judgment and found that tribal hiring preferences were beyond the scope of Title VII because such preferences are political classifications. Additionally, the district court denied the EEOC's attempt to supplement the record with evidence from its administrative investigation after briefing had closed, since it had this information in its possession during the briefing period and the supplemental evidence was irrelevant. **Issues on Appeal:** (1) Whether the district court erred in granting summary judgment to the employer on the ground that the employer's preference for Navajo Indians is a "political classification" outside the scope of Title VII; and (2) Whether the district court abused its discretion when it denied the EEOC's motion to supplement the summary judgment record with evidence from its administrative investigation. **EEOC's Position on Appeal:** The EEOC argues that the Navajo preference used by the employer conflicts with Title VII's Indian preference exemption. The EEOC also argues that the evidence excluded by the district court demonstrates that the employers did not ask applicants if they were members of an Indian tribe before offering someone a job, and instead determined if the applicant was Navajo based on the applicant's name, appearance, and whether they spoke Navajo. **Court's Decision:** The appeal is currently pending and the court has not yet scheduled oral argument.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Tricore Reference Laboratories	U.S. Court of Appeals 10th Circuit No. 11-CV-2096 2012 U.S. App. LEXIS 17200; 493 Fed. Appx. 955 (10th Cir. 2012)	10/1/2012	ADA	Disability Attorney's Fees Pro Employer—Affirmed Summary Judgment	**Background:** The EEOC filed an action against the employer alleging it violated the ADA when it terminated the employee's employment. The district court held that the employer was entitled to summary judgment because the EEOC failed to establish that the employee could perform the essential functions of her job with or without accommodation. The district court awarded the employer its attorneys' fees because it determined the EEOC's claims were frivolous, unreasonable, and without foundation. **Issues on Appeal:** (1) Whether the district court erred in granting the employer summary judgment on the EEOC's ADA claim (11-2096); (2) Whether the district court abused its discretion in deeming the EEOC's claims clearly frivolous and granting the employer's application for attorneys' fees on that basis (11-2247). **EEOC's Position on Appeal:** The EEOC argued the district court erred in granting the employer summary judgment as to both its reasonable accommodation claim and termination claim under the ADA. Specifically, the EEOC argued that a reasonable jury could have found that the employer no longer wanted to employ the employee because of her disability, and its explanation for her termination was pretextual. Additionally, the EEOC contended the district court erred when it held that the EEOC must pay the employer its attorneys' fees because the EEOC continued to pursue this litigation after it admitted that standing and walking were essential functions of the job and the employee could not stand or walk. The EEOC argued its lawsuit was not frivolous because a jury could determine the employer's reason for terminating the employee was pretextual. **Court's Decision:** The appellate court affirmed the district court's decision. Specifically, the 10th Circuit noted that the EEOC persisted in litigating this case despite clear evidence that the employer went beyond ADA requirements in trying to oblige an employee.

CASE NAME	COURT AND CASE NUMBER	DATE FILED	STATUTES	BASIS/ISSUE/RESULT	COMMENTARY
EEOC v. Carroll's, LLC, d/b/a Carroll Tire Co.	U.S. Court of Appeals 11th Circuit No. 12-14341 2013 U.S. App. LEXIS 20020 (11th Cir. Oct. 1, 2013)	1/30/2013	Title VII	Sex Pro Employer	**Background:** The EEOC filed a lawsuit alleging the employee was discriminated against based on sex. The employer filed a motion for summary judgment arguing that the EEOC had no direct evidence to support its disparate treatment claim, had not established a *prima facie* case, and had not raised a triable issue of pretext. The EEOC filed its response and argued the evidence of intentional discrimination based on sex should be evaluated under a mixed motive framework. The district court granted the employer's motion for summary judgment and did not evaluate the EEOC's claim under a mixed motive framework. **Issues on Appeal:** Whether the district court erred in refusing to evaluate the EEOC's evidence under a mixed motive framework. **EEOC's Position on Appeal:** The EEOC argued that it asserted both direct and circumstantial evidence that create an inference of discrimination. Therefore, the EEOC argued the court erred in concluding that its evidence of discriminatory statements was too remote to constitute direct evidence. Further, the EEOC argued the district court erred in stating that it did not allege a mixed motive issue in its complaint because this issue was inherent in the EEOC's gender-based disparate treatment claim. **Court's Decision:** The 11th Circuit affirmed the district court's grant of summary judgment on Oct. 1, 2013. In the unpublished opinion, the court held that the district court erred by refusing to consider the EEOC's argument that the employer acted with mixed motives, but did not err by entering summary judgment in favor of the defendant, as the EEOC failed to create a genuine factual dispute that the plaintiff was fired, even in part, because of her gender.

APPENDIX C—SUBPOENA ENFORCEMENT ACTIONS FILED BY EEOC IN FY 2013[1]

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
12/19/2012	TX	USDC Southern District of Texas 4:12-mc-770 Nancy F. Atlas Action voluntarily dismissed due to employer's substantial compliance with subpoena	Wenaas, USA, Inc.	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of the EEOC investigation of an individual claim of national origin discrimination. When the employer did not respond to the charge of discrimination, the EEOC issued requests for information, to which the employer also did not respond. On July 30, 2012, the EEOC issued a subpoena that sought various documents, including the charging party's personnel file, documents related to his classification as a part-time vs. full-time employee, documents regarding the charging party's overtime hours and wage determination, documents pertaining to any prohibition on the use of any language, including Chinese or Vietnamese, and a list of all employees who worked at the same facility as the charging party during the relevant timeframe. Again, the employer failed to respond. The EEOC filed the application for order to show cause on December 19, 2012, and the court entered a show cause order two days later. Subsequently, and before the show cause hearing could take place, the parties resolved the matter. The employer substantially complied with the subpoena. The EEOC moved, unopposed, to dismiss its application, which the court allowed on February 20, 2013.

1 The summary contained in Appendix C reviews the administrative subpoena enforcement actions filed by the EEOC in FY 2013. The information is based on a review of the applicable court dockets for each of these cases. The cases illustrate that in most subpoena enforcement actions, the matters are resolved prior to issuance of a court opinion.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
12/19/12	PA	USDC Eastern District of Pennsylvania 5:12-mc-292 Jan E. DuBois Case stayed pending liquidation of respondent	Advance Personnel Staffing, Inc.	Individual Charging Party (expanded into class-based investigation)	Application for order to show cause why an administrative subpoena should not be enforced arising out of EEOC investigation of individual Title VII and ADA sex and disability discrimination and retaliation claims against a staffing company. The investigation expanded into a class-based investigation of potential violations against women with respect to hiring, referral, and related employment actions, as well as potential ADA violations relating to accommodations and the employer's return-to-work policy. EEOC issued a subpoena seeking data from the employer's Human Resources Information System ("HRIS") contained in the populated tables/fields/variables, etc., utilized in the HRIS. The employer responded that the HRIS was maintained by third-party vendors, which the EEOC could subpoena. The EEOC contended the response was insufficient because it was attempting to shift the burden of performing the extraction/ production to the agency and that the third-parties were subject to the employer's control. The employer did not comply, and the EEOC filed the Application for Order to Show Cause. The EEOC argued, inter alia, (1) that the employer waived its rights by not filing a petition to modify or revoke the subpoena, (2) the employer waived its argument that the EEOC should assume the time and expense of securing the data sought in its own subpoena, and (3) the third parties lacked control over the data. The EEOC further argued that the employer had not demonstrated an undue burden. The employer asserted the third-party vendors had offered the EEOC access but requested that the EEOC issue a subpoena to the vendors. According to the employer, the EEOC initially agreed, but then changed course and subpoenaed the employer. The employer also contended that the relevant statutory language did not require it to file objections to the subpoena with the EEOC to preserve its right to oppose the application to show cause in court. Finally, the employer noted it had "ceased business operations and closed its doors" two months prior and had begun liquidating its assets. The parties agreed on February 12, 2013 to stay the subpoena enforcement proceedings pending the EEOC's investigation concerning the employer's financial situation and possible successorship. The court entered a stipulated order staying the case 90 days on February 19, 2013, and extended the stay 90 additional days on May 22, 2013, and again on August 19, 2013.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
2/20/2013	MD	USDC Maryland 8:13-cv-556 Paul Grimm Letter Order of Compliance issued	Craft Solutions	Individual Charging Party	Application for order to show cause why administrative subpoena should not be enforced arising out of an EEOC investigation of an ADEA age discrimination claim against the employer. The employer argued it employed fewer than 20 individuals and was not covered by the ADEA. The EEOC learned the employer shared a pool of employees with its sister company and issued a subpoena seeking organizational charts, managerial personnel files, and financial information demonstrating the relationship between the two companies. Respondent refused to produce the requested documents. The EEOC filed an Application for an Order to Show Cause. The court issued an Order to Show Cause on February 25, 2013. The employer failed to file a response and failed to attend the show cause hearing on March 18, 2013. The court ordered the EEOC to serve a copy of its subpoena, and for employer to respond or otherwise comply within 30 days of service. The employer again failed to respond and, on June 4, 2013, the EEOC filed an Application to Show Cause why the employer should not be held in contempt of court. On July 17, 2013, the court issued fines against the employer for civil contempt, to accrue in the amount of $100 per day, but refused to issue a writ of body attachment to have a U.S. Marshal bring the employer's owner before the court and hold him until compliance is achieved. The court indicated that it would, however, issue a writ of body attachment if the EEOC could demonstrate that the employer's owner was in possession of the notice that the writ would be issued if he failed to comply with the order to produce subpoenaed documents. On August 8, 2013, the EEOC served upon the employer the court's contempt order and order to show cause.
2/22/2013	TX	USDC Southern District of Texas 4:13-mc-130 Keith P. Ellison Order for Compliance issued	Chrome Zone LLC, d/b/a Big Rig Products of Texas	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of Title VII sex discrimination and retaliation claim against the employer. The EEOC issued a subpoena seeking the charging party's personnel file and job description, employment and biographical data for charging party's coworkers, the alleged harasser's personnel file, and employer's anti-harassment policy. The employer failed to respond to the charge and subsequent EEOC Request for Information. The EEOC then issued a subpoena. When the employer failed to respond, the EEOC filed an Application for Order to Show Cause. The employer again failed to respond. The court held a show cause hearing, which the employer did not attend. Accordingly, on March 1, 2013, the court ordered the employer to fully comply with the EEOC's subpoena within 14 days. As of the date of this publication, no further proceedings were held.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/26/2013	TX	USDC, Northern District of Texas 4:13-mc-12 John McBryde Court dismissed EEOC's application after EEOC declined to pursue action	Goodwill Industries of Southwest Oklahoma and North Texas Inc.	Individual Charging Party	Application for order to show cause why witness should not be held in contempt of court for failing to appear pursuant to an administrative subpoena arising out of an EEOC investigation of a Title VII sex discrimination claim against the former employer. The EEOC argued the fact witness supporting the charging party's allegations unlawfully twice failed to appear for his video-taped deposition, despite receiving administrative subpoenas in both instances. The court ordered a hearing to be held on April 4, 2013. The defendant witness did not appear for the scheduled hearing. Accordingly, the court issued an Order to Show Cause. The court was unable to effect service of the order, however, and the court ordered the EEOC to file a motion requesting the court take whatever actions it contended were legally appropriate, to be filed on or before April 29, 2013. The EEOC failed to file a motion in response to the court's order. On May 2, 2013, the EEOC had not filed a motion as ordered by the court. As a result, the court dismissed the EEOC's application based on its conclusion that the EEOC no longer wished to pursue the action.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
3/28/2013	WI	USDC Eastern District of Wisconsin 2:13-mc-22 Lynn Adelman Matter voluntarily dismissed	Union Pacific Railroad Company	Individual Charging Parties (2)	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of Title VII race discrimination and retaliation claims against an employer stemming from the employer's administration of a skill test it administered for purposes of promoting skilled workers. The EEOC issued a subpoena seeking a copy of the test, any validation study associated with the test, the application submitted for each employee permitted to take the test, and a list of all employees who took the test in the year 2011. The employer provided information responsive to the subpoena, but limited information concerning employees who took the test to the two charging parties. Additionally, the employer refused to produce a copy of the test and, instead, filed a petition to partially revoke the subpoena, arguing the content of the test was irrelevant to the charges because the employees claimed they were discriminatorily precluded from taking the test—not that the test had a disparate impact on members of a protected class. The EEOC denied the petition, ordering the employer to produce the subject information. The EEOC argued the employer's petition to revoke was not timely and, in any event, did not address the information which the employer only partially provided, *i.e.*, the information concerning employees who took the test during 2011. The employer argued the test and any relevant validations related thereto were highly confidential and, therefore, not subject to production. The EEOC countered that laws prohibiting the disclosure of such information by EEOC representatives adequately addressed concerns regarding disclosure of confidential information. The employer also filed a motion to dismiss for improper venue, arguing the charges underlying the administrative subpoena were filed in the EEOC's Chicago office and were cross-filed with the Illinois Civil Rights Commission. Thus, the employer claimed that the Milwaukee office of the EEOC should not be permitted to issue a subpoena and file for enforcement in Wisconsin. The EEOC responded that venue for the enforcement of an administrative subpoena was separate from the venue provisions concerning Title VII claims, and that enforcement may be petitioned where the misconduct occurred or where the employer transacts business (citing 29 U.S.C. § 161(2)). Before any ruling was issued with respect to venue or subpoena enforcement, the parties settled and voluntarily dismissed the matter.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
5/1/2013	IL	Northern District of Illinois 1:13-cv-3298 John Z. Lee Order for Compliance issued	Chicago Public Schools	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of Title VII sex discrimination/retaliation claims against the employer. The EEOC issued a subpoena requesting the identity of all employees at the charging party's school from 2010 to the present, including name, sex, date of hire, title, date and reason for separation, and contact information. The employer responded, but objected to providing contact information citing employee privacy and overbreadth. However, the employer agreed to provide contact information for former employees. The employer failed to file a petition to revoke or modify the subpoena. The EEOC filed an Application for Order to Show Cause, to which the employer timely replied, arguing the EEOC does not need contact information, but instead the knowledge those employees may have. The employer argued that the information the EEOC sought could be obtained without the need to share private employee data. The employer also argued that it had not waived the right to oppose the subpoena by failing to file a petition to modify or revoke, in that it had consistently maintained its objections concerning the disputed information, and failed to file a petition because it reasonably believed the EEOC was working to reach a compromise. Finally, the employer argued the subpoena was overbroad and unfounded—being based on the Commission's desire to interview every person employed at the school because they "may have" witnessed some unknown sexual harassment by the alleged offender. The EEOC replied the information sought would assist it in determining the size and makeup of the class of employees who may have been affected by sexual harassment. Thus, it argued, the subpoena was valid and should be enforced. The EEOC also replied that the employer had failed to exhaust its administrative remedies. The magistrate judge recommended the subpoena be enforced, reasoning that it was unnecessary to address whether the employer had failed to exhaust its administrative remedies by failing to file a petition to modify or revoke the subpoena, because the employer's privacy and overbreadth arguments were meritless in light of the leniency of the relevance standard for administrative subpoenas and the adequacy of the privacy protections written into the EEOC's regulations. The court adopted the magistrate's report and recommendation in full, ordering the employer to comply fully with the EEOC subpoena.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
5/7/2013	KY	Eastern District of Kentucky 6:13-cv-95 David L. Bunning Magistrate Hanly A. Ingram	Wal-Mart Stores East, LP	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of the EEOC investigation of an individual charging party's claim that the employer subjected her to a physical abilities test that had a disparate impact on female employees. The EEOC served two sets of requests for information, and while the employer provided documents and information in response, the EEOC determined that the responses were incomplete and issued a subpoena *duces tecum* on March 14, 2013. The subpoena sought (1) information about the identity and roles of individuals involved in the decision to begin administering the test; (2) documents relating to the decision to begin using the test; (3) the decision whether to use the test for a class of plaintiffs in a prior case brought by the EEOC against the employer; (4) documents identifying all employees who worked in the relevant jobs at the distribution center in question; (5) documents identifying all employees in other positions who had to take the test and copies of the test for each such person; (6) documents showing the organizational structure for the distribution center in question from 2010-13; and (7) "information on the employee occupying each position listed on the [aforementioned] organization chart[s]." The employer failed to produce the requested documents in the first three categories listed above, and refused to allow testimony regarding those subjects in an on-site interview. The court entered an Order to Show Cause two days after the EEOC filed its application regarding the information that employer refused to provide. In response, the employer argued that the EEOC was improperly seeking the information as a means of investigating not whether the charging party was discriminated against, but whether the employer implemented the test in retaliation against employees on whose behalf the EEOC brought a previous enforcement action. The employer accused the EEOC of attempting an end-run around the enforcement mechanisms of the consent decree that resulted from the prior lawsuit, in which the EEOC previously failed at showing such retaliation. At the July 1, 2013 hearing on the Order to Show Cause, the employer argued that the subpoena required it to create documents by compiling responsive information, which it argued it had no obligation to do. The court requested further briefing on the employer's duty to create documents containing responsive information. Briefing closed on July 30, 2013. On November 8, 2013, the magistrate judge recommended that the judge grant in part and deny in part the petitioner's Application for Order to Show Cause Why Subpoena Should Not Be Enforced. On November 25, 2013, the EEOC filed objections to the magistrate's report and recommendations. As of the date of publication, the subpoena enforcement issues were still pending.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
6/25/2013	IN	Northern District of Indiana 2:13-mc-00058 Paul R. Cherry Action dismissed after employer's compliance	8251 Inc. d/b/a Sam's Cafe	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of Title VII sexual harassment and constructive discharge claims against the employer. The EEOC issued a request that the employer provide identifying information regarding employees' names, positions, dates of employment; quarterly state unemployment tax returns; information regarding other businesses owned by the employer, the charging party's personnel file; and a copy of employer's sexual harassment policy with information regarding its distribution. The employer responded that the position statement and two accompanying witness statements "fully complied" with the EEOC request. The EEOC subsequently issued a subpoena for the requested information. Counsel for the employer responded by letter stating the information sought was not relevant to the EEOC's investigation. The employer did not file a petition for modification or revocation of the subpoena. The EEOC then filed an Application for an Order to Show Cause, which the court granted. In granting the Order, the court noted that the U.S. Court of Appeals for the 7th Circuit held an employer's failure to timely petition the EEOC for modification or revocation of an administrative subpoena results in waiver of the right to challenge the subpoena's enforcement. On August 12, 2013, the parties filed a Joint Motion to Continue to allow employer to collect and submit the responsive documents. On September 17, 2013, the EEOC filed a Motion to Withdraw its Application for Order to Show Cause, citing the employer's compliance with the administrative subpoena. The court granted the EEOC's motion, vacating the Show Cause Hearing and effectively terminating the case.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
7/30/2013	AZ	District of Arizona 2:13-mc-64 Neil V. Wake EEOC voluntarily dismissed action following employer's compliance	Mountain View Medical Center	Individual Charging Party	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of alleged disability discrimination relating to placement of the individual charging party on involuntary medical leave of absence. The employer failed to timely remit a statement of position or otherwise respond to the charge and, approximately one month after the statement of position was due, the EEOC issued a request that the employer provide, in addition to its statement of position, copies of its leave, discharge, rehire, fitness for duty, health insurance, and disability policies; charging party's accommodation requests and employer responses; names of all employees who requested reasonable accommodations for the preceding two years; charging party's medical file; information concerning the individual who replaced the charging party following her discharge; unredacted personnel files for the charging party and her replacement; and the charging party's job description. More than two months later, in response to telephone messages from the EEOC investigator, the employer called the EEOC and indicated it had not received the charge of discrimination, but did not otherwise respond to the charge or information request. The EEOC served a subpoena on May 20, 2013. As of the EEOC's filing of its enforcement action, the employer still had not responded either to the charge or information request or filed a petition to modify or revoke the subpoena. On August 9, 2013, the court issued an Order to Show Cause no later than August 30, 2013. On August 29, 2013, the EEOC filed a Notice of Voluntary Dismissal of the action, citing the employer's compliance with the administrative subpoena.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
8/19/2013	CA	Central District of California 2:13-cv-6079 Beverly Reid O'Connell Magistrate Jay C. Gandhi Underlying action dismissed	Ramona's Mexican Food Products Inc.	Individual Charging Parties	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of an employer's alleged failure to hire the charging parties based on race and/or national origin discrimination. The employer denied the allegations, claiming it had no records of any applications submitted by the charging parties and further claiming it did not interview or hire any applicants until several months after the charging parties allegedly applied. The EEOC then issued several requests for information which it alleged the employer failed to provide. The EEOC then issued a subpoena seeking: (1) the employer's method of receiving, screening, and processing applications; (2) its hiring and application retention policies and practices; (3) a list of all positions for which the employer has recruited from January 1, 2010 to the present; (4) names, demographics, and contact information for all applicants (hired and not hired) from January 1, 2010 to the present, as well as their application files; and (5) the employer's corporate structure. The employer failed to provide documents in response to the first and second categories. It provided the EEOC with job postings limited to May 2013, and no historical job posting data. Under item 4, the employer produced information limited to individuals hired, and did not produce information relating to applicants who were denied hire. Additionally, it provided the EEOC with copies of some applications, but no documents related to the selection process and no indication of which applicants were hired and which were not. Finally, the employer failed to produce an organization chart or other document describing its corporate structure. The EEOC filed an application for an order to show cause on August 19, 2013. On August 21, the court issued an order to show cause; however, the parties then filed a stipulation to continue the show cause hearing due to the federal government shut down. A show cause hearing was held on December 16, 2013. On December 13, 2013, the court dismissed the underlying subpoena enforcement action.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
8/20/2013	MD	District of Maryland 1:13-cv-2435 William D. Quarles, Jr.	Franklin Group Homes Inc.	Individual Charging Party	Application to show cause why an administrative subpoena should not be enforced arising out of a race discrimination charged filed by an individual former employee. The charging party, who is white, alleged that African American employees and managers ridiculed, intimidated, and harassed her, and that management ultimately discharged her, on the basis of race. On October 13, 2011, the EEOC requested, among other things, (1) records pertaining to the employer's corporate structure and management; (2) its employment policies; (3) records that would identify the name and race of its employees from 2008 to the present; (4) complete personnel file and employment records for the charging party; (5) records pertaining to the charging party's termination; and (6) records pertaining to employee complaints regarding race harassment and/or discrimination from 2008 through the present. The employer did not respond and, on April 23, 2013, the EEOC issued a subpoena for the same documents. Again, the employer did not respond, either by producing documents or moving to revoke or modify the subpoena. The EEOC continued to seek voluntary compliance beyond the deadline, and eventually the employer indicated it would comply with the subpoena but requested an extension, which was granted. However, the employer did not provide the requested documents, and on August 20, 2013, the EEOC filed its application for enforcement of the subpoena. A show cause order was entered two days later, and a hearing was set for October 8, 2013. On September 30, 2013, the EEOC moved for a continuance because of the impending federal government shutdown. The court granted the continuance on October 1, 2013. A show cause hearing has been scheduled for February 26, 2014.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
8/30/2013	GA	Northern District of Georgia 1:13-cv-2927 Thomas W. Thrash, Jr. Magistrate Walter E. Johnson Court grants Order to Quash Subpoena	Homenurse Inc.	Individual Charging Party (expanded into class-based investigation)	Application for order to show cause why an administrative subpoena should not be enforced arising out of an EEOC investigation of an individual charging party's claim that the employer retaliated against him for having complained that the employer's pre-hire screening was discriminatory on the basis of race (against African Americans), age, disability, and genetic information. The complainant was Caucasian, younger than forty, and had no pre-existing genetic conditions. The EEOC launched its investigation in May 2010 by conducting a raid on the employer's office "as if it were the FBI executing a criminal search warrant." Despite the fact that the class allegations appeared to be made on behalf of applicants who were not hired, on September 7, 2010, the EEOC requested employment information about individuals the company employed during the period April 1, 2008 through September 7, 2010, and application packets submitted by all individuals who sought employment during that same period, regardless of whether such individuals were hired. The employer made efforts to confer with the EEOC to streamline the investigation and to resolve the dispute. The EEOC made no significant reciprocal effort. The parties had a conference call in which they agreed to the production of certain information. Despite this agreement, the EEOC nevertheless issued a subpoena for the same information. Because it believed the subpoena was unnecessary in light of the agreement, the employer objected to it. The next day, the EEOC issue a second subpoena that it claimed conformed to the agreement but was actually more expansive than the first. The employer moved to revoke or modify the subpoena, at the same time producing the mutually agreed upon information, including over 13,000 pages of documents concerning over 2,500 individuals. Unsatisfied that the employer produced only "applications," per the agreement, and not "application packets," the EEOC issued a third subpoena seeking all materials submitted with the applications the employer had previously produced. The subpoena sought seven types of documents that supposedly made up the application packets. Of those seven types, the employer produced "aide availability information sheets," work reference forms, consumer report authorization and disclosures forms, and medical history questionnaires. It refused to provide motor vehicle report authorization forms, personal reference forms, and reference letter/performance evaluation forms. The EEOC then issued a fourth subpoena, seeking all of the previously requested documents to the present date. In the litigation in federal court over the fourth subpoena, the employer argued that the requested information about individuals who were hired (and therefore obviously not discriminated against) and the information regarding motor vehicle records, personal reference forms, and reference letter/performance evaluation forms were irrelevant. The EEOC alleged that the employer's failure to provide it with all the information requested "delayed and hampered" its investigation.

FILING DATE	STATE	COURT NAME/ CASE NUMBER/ JUDGE/RESULT	DEFENDANT(S)	INDIVIDUAL CHARGING PARTY OR SYSTEMIC INVESTIGATION	COMMENTARY
					On September 30, 2013, Judge Thomas W. Thrash, Jr. issued an order quashing the subpoena, stating as follows: "The EEOCs highly inappropriate search and seizure operation, its failure to follow its own regulations, its foot-dragging, its errors in communication which caused unnecessary expense . . . its demand for access to documents already in its possession, and its dogged pursuit of an investigation where it had no aggrieved person, constitutes a misuse of its authority as an administrative agency. For whatever reason, the responsible EEOC investigators and attorneys have repeatedly refused this small employer's entreaties to resolve this case quickly and in a cost-effective manner. The by-product of all of this obstinance is a small employer with a large attorney's fee bill and an unnecessary squabble in federal court. Although the standards governing enforcement of an administrative subpoena are low, the EEOC has not met them here. The federal courts stand as a bulwark to protect this nation's citizens from powerful government agencies that seek to run roughshod over their rights. It would be an abuse of this Court's process to enforce the instant subpoena. Therefore, for the reasons stated above, the Court denies the EEOCs application and quashes the fourth subpoena." *EEOC v. Homenurse*, 2013 U.S. Dist. LEXIS 147686 (N.D. Ga. Sept. 30, 2013)

APPENDIX D - FY 2013 SELECT EEOC-RELATED DISPOSITIVE DECISIONS BY CLAIM TYPE(S)[1]

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Age Discrimination	Abbott Laboratories	U.S.D.C. for the Eastern District of Wisconsin	2013 U.S. Dist. LEXIS 49601 (E.D. Wis. Mar. 29, 2013)	Employer's Motion for Summary Judgment and the EEOC's Motion to Correct the Record	1. Whether to correct the record as to statements the EEOC believed to be false? 2. Whether to grant the employer's motion for summary judgment?	The court granted in part and denied in part the EEOC's motion to correct the record. The court granted the EEOC's motion to correct a typo in the defendant's statement of facts and denied the EEOC's motion as to two statements the EEOC disputed as false. It reasoned that the court's role is to resolve disputes between the parties, not edit them to conform to the position of the opposing party. The court next granted the defendant's motion for summary judgment. It reasoned that the EEOC could not show pretext by merely claiming the defendant's assessment of the employee's performance was incorrect. Instead, to survive summary judgment, the EEOC must demonstrate the decision "was a lie—not just an error, oddity, or oversight." The EEOC failed to do so here. Next, the court found that the EEOC did not present direct evidence of age discrimination by claiming that the employee's supervisor stated he need to "raise his energy level" and get his "swagger back." Similarly, the EEOC's claim that the timing of the termination process a few days before the end of the performance improvement plan does not support discriminatory intent in light of the defendant's sizeable management structure.
Age Discrimination	Exxon Mobile Corp.	U.S.D.C. for the Northern District of Texas	2012 U.S. DIST. LEXIS 183101 (N.D. Tex. Dec. 19, 2012)	Employer's Motion for Summary Judgment	Whether the employer's age-based restriction, premised on the Federal Aviation Association's (FAA) former standard that commercial pilots could not fly past the age of 60, satisfied the test for a *bona fide* occupational qualification under the ADEA?	The employer's motion was granted. The court held that the employer's policy of removing pilots from active flight status when they attained age 60 constituted a *bona fide* occupational qualification, and thus, the policy was not violative of the ADEA. The court specifically held the employer's reliance on the FAA's "Age 60" rule for commercial airline pilots was reasonable and bolstered the employer's argument that its requirement that pilots be under the age of 60 was a *bona fide* occupational qualification.

1 The summary contained in Appendix D reviews select reported court opinions ruling on dispositive motions in litigation where the EEOC is a party. For purposes of this appendix, opinions are organized by claim type(s) as the opinions selected for this Appendix addressed merits-based dispositive motion filings as opposed to procedural, statute of limitations or other dispositive motion filings.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Age Discrimination, Race Discrimination, Religious Discrimination, Sex Discrimination, Retaliation (ADEA and Title VII), 42 USC § 1985(2) conspiracy to retaliate, state law claims	Goodwill Industries, Inc.	U.S.D.C. for the Western District of Oklahoma	2013 U.S. Dist. LEXIS 140137 (W.D. Okla. Sept. 30, 2013)	Employer's Motion for Summary Judgment and EEOC's Motion for Partial Summary Judgment	1) Is the EEOC entitled to partial summary judgment on its Title VII retaliation and ADEA retaliation claims? 2) Is the Employer entitled to summary judgment on EEOC's claims and the intervenor plaintiff's claims?	The court refused to grant summary judgment to the EEOC or to the company on the Title VII and ADEA claims of retaliation. It granted summary judgment to the company on all other claims. The plaintiff had testified in a deposition brought by a former female employee whom the company did not hire as its CEO. She recounted that during a lunch she had with three other senior staff members, they had said the CEO hired was racist and sexist. She also stated that one of them told her the new CEO selected white males to replace employees who left Goodwill. On another occasion, she testified that a senior HR employee had told her that the CEO thought that the plaintiff hired too many African American employees. The plaintiff was terminated four months later. The court sent to trial the issues of Title VII and ADEA retaliation because it could not determine whether "but for" the deposition testimony, the plaintiff would have been fired. The court found the record devoid of evidence for any of the plaintiff's other claims.
Age Discrimination	Kanbar Property Management, L.L.C.	U.S.D.C. for the Northern District of Oklahoma	2013 U.S. Dist. LEXIS 120051 (N.D. Okla. Aug. 23, 2013)	Employer's Motion for Summary Judgment and EEOC's Motion for Partial Summary Judgment	1. Whether to grant the employer's motion for summary judgment on liability and the damages claimed by the EEOC? 2. Whether the claimant had sufficiently mitigated her damages? 3. Whether to grant summary judgment on the employer's affirmative defenses?	The employer's motion for summary judgment was denied, and the EEOC's motion for partial summary judgment on the employer's affirmative defenses was granted. The court found there was sufficient evidence to take the complainant's age discrimination claim to a jury because there was evidence the decision maker called the complainant "old and ugly" and the comment was made as part of the decisional process. The court also denied the employer's motion on the issue of the complainant's damages. The employer argued that the complainant's sworn deposition testimony that $100,000 would make her whole should have served to limit her recoverable damages at trial. The court disagreed, likening the complainant's statement to a settlement discussion. The court also denied the employer's motion for summary judgment on mitigation of damages because while the employer established that the complainant was not making many job applications, the employer did not meet its burden of showing there were suitable positions for which the complainant should have been applying. The court granted the EEOC's motion for partial summary judgment on three of the employer's affirmative defenses. The employer had no objection to the motion because it intended to drop the defenses.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Age Discrimination (Pattern or Practice)	Ruby Tuesday	U.S.D.C. for the Western District of Pennsylvania	919 F. Supp.2d 587; 2013 U.S. Dist. LEXIS 8268 (W.D. Pa. Jan. 22, 2013)	Employer's Motion for Summary Judgment	Whether the EEOC failed to engage in good faith conciliation?	The court granted the motion as to failure to conciliate in good faith but did not dismiss the case. The court ordered the parties to engage in court-supervised conciliation during a 45-day period, with the process starting at the next case management conference when the parties would agree as to how the process should work. The court held the EEOC failed to engage in good faith conciliation when it demanded $6 million in back pay and gave the employer a limited amount of time to respond. Specifically, the court noted, "An exchange of pointed letters does not evidence a sincere effort to reach a meeting of the minds, especially in the context of an extraordinarily short set of response deadlines which were not driven by any externally imposed deadlines (such as, for instance, the imminent expiration of a statute of limitations). At best, the EEOC's letters were an amplified statement of the EEOC's position, in a context which communicated, at least, that the EEOC's position was either a hardened one, or perhaps that it was not interested in any response other than a full concession of liability."
Age Discrimination and Discrimination based on Association with Disabled Person	DynMcDermott Petroleum Operations Company	U.S. Court of Appeals for the 5th Circuit,	2013 U.S. App. LEXIS 15264 (5th Cir. July 26, 2013)	EEOC's Appeal of District Court's Grant of Defendants' Motion for Summary Judgment	Whether the district court erred in granting summary judgment for the defendant on the claims of discrimination under the ADEA and the ADA?	The court reversed the district court's decision granting the defendants' motion for summary judgment. First, the court found the district court erred in finding there was no issue of fact about whether the site director, who did not want to hire the complainant, influenced the supervisor, who ultimately made the decision to hire. The court found the record was clear the supervisor repeatedly indicated his desire to hire the employee to numerous people prior to receiving the Corrective Action Memo from the site director. Second, the court concluded the district court's finding that there was no issue of fact regarding the statements about the complainant's qualifications and his previous performance was unsupported by the record because the complainant's performance as a planner/scheduler was above expectations and described as excellent and meticulous.
Disability Discrimination	Beverage Distributors, Co.	U.S.D.C. for the District of Colorado	2012 U.S. Dist. LEXIS 177351 (D. Colo. Dec. 14, 2012)	EEOC's Motion for Summary Judgment	Whether the EEOC should be granted summary judgment on the employer's affirmative defense of failure to conciliate?	The court granted, in part, the EEOC's motion for summary judgment on the affirmative defenses put forth by the defendant. Most notably, the court granted summary judgment for the EEOC on the defendant's fifth affirmative defense related to the EEOC's conciliation efforts. Specifically, the court held that in the 10th Circuit, the EEOC's failure to conciliate is not a defense to liability. Rather, the appropriate relief to seek when raising such a defense is to stay the case, rather than dismiss the action. In this instance, the court found the EEOC made an attempt to conciliate and that because the employer did not seek a stay of the matter in order to conduct further conciliation, summary judgment was appropriate on this affirmative defense.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination and Retaliation	Evergreen Alliance Golf LP.	U.S.D.C. for the District of Arizona	2013 U.S. Dist. LEXIS 42576 (D. Ariz. Mar. 26, 2013)	Employer's Motion for Summary Judgment	1. Whether the employer is entitled to summary judgment on the EEOC's disability discrimination claim in violation of the ADA? 2. Whether the employer is entitled to summary judgment on the EEOC's retaliation claim in violation of the ADA?	The court granted the employer's motion for summary judgment on the EEOC's disability discrimination claim. The court found the EEOC proffered no direct evidence of discrimination and only minimal circumstantial evidence that the employer's legitimate business reasons for terminating the complainant were pretextual and the employer discriminated against employee on the basis of his disability (*i.e.*, cerebral palsy). The court noted that "when a plaintiff relies on circumstantial evidence, that evidence must be specific and substantial to defeat the employer's motion for summary judgment." The court found that the complainant's supervisor's use of the word "retarded" was not directed at the complainant, it did not concern the complainant's actual disability, and it had nothing to do with the complainant being terminated. However, the court denied the employer's motion for summary judgment on the EEOC's retaliation claim. The court found a triable issue of material fact as to the EEOC's claim of retaliation where the complainant engaged in a protected activity by complaining to Human Resources about his supervisor's derogatory remarks. The court also found a triable issue of material fact regarding whether the complainant had an objectively reasonable belief that such remarks constituted a violation of the ADA. Lastly, the court concluded there was sufficient evidence to infer a causal link between the complainant's complaint and the employer's allegedly retaliatory employment decisions, *i.e.*, the complainant was placed on a Performance Improvement Plan, his duties were changed, part of his compensation was taken away, and he was ultimately terminated.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination and Failure To Accommodate (Disability)	Midwest Independent Transmission System	U.S.D.C. for the Southern District of Indiana	2013 U.S. Dist. LEXIS 75763 (S.D. Ind. May 30, 2013)	Employer's Motion for Summary Judgment	1. Whether the employer was entitled to summary judgment on the EEOC's failure to accommodate claim? 2. Whether the employer was entitled to summary judgment on the EEOC's disability discrimination claim? 3. Whether the employer was entitled to summary judgment on the EEOC's claim for punitive damages?	The court denied the employer's motion for summary judgment on the EEOC's failure to accommodate claim. The employer presented evidence that the complainant was terminated because of an extended absence from work. The court found that while the employer asserts that attendance was an essential function of complainant's job that she could not satisfy because she could not return for another two months, a jury reasonably could discredit that assertion based on the apparent lack of urgency with which the employer set about replacing her. The court granted the employer's motion for summary judgment on the EEOC's disability discrimination claim. The court found that the EEOC had not presented evidence from which a reasonable jury could conclude that the complainant was terminated because of her disability. Because this prong of the *prima facie* case was not satisfied, the court concluded this claim could not survive summary judgment. The court denied the employer's motion for summary judgment on the EEOC's claim for punitive damages. The court found that the record, read in the light most favorable to the EEOC, is sufficient to allow this claim to survive summary judgment.
Disability Discrimination	Old Dominion Freight Line, Inc.	U.S.D.C. for the Western District of Arkansas, Fort Smith Division	2013 U.S. Dist. LEXIS 88352 (W.D. Ark. June 24, 2013)	EEOC's Motion for Summary Judgment and Employer's Motion for Summary Judgment	1. Whether the court should grant EEOC's motion for summary judgment on liability? 2. Whether the court should grant the defendant's motion for summary judgment?	The court denied both parties' motions for summary judgment. The employee, a commercial driver for the defendant for-hire motor carrier company, self-reported that he was an alcoholic. The defendant's no-return policy prohibited employees with alcoholism to return to a driving position even after receiving treatment. The court held that genuine issues of material fact remained as to whether the employee was disabled under the ADA.
Disability Discrimination	OSI Restaurant Partners, LLC	U.S.D.C. for the District of Arizona	2013 U.S. Dist. LEXIS 5668 (D. Ariz. Jan. 14, 2013)	Employer's Motion for Summary Judgment	Whether there are genuine issues of material fact regarding whether the defendants discriminated against an employee based on his disability when they terminated his employment?	The court denied the defendants' motion for summary judgment, finding the plaintiff presented genuine issues of material fact about (1) whether the terminated employee was qualified to perform his job as a server, and (2) whether the terminated employee's disability was a motivating factor in the employer's decision to terminate his employment. As to his qualifications, there were genuine issues of material fact about what the essential functions were and whether the terminated employee was able to perform them at the same level as other, non-disabled workers. As for determining whether the employee's disability was a motivating factor for the termination decision, the court found issues of fact about which member of management made the termination decision, when the decision was made, and what prompted the decision. Based on this evidence, the court found that a reasonable jury could conclude the defendants' reason for terminating the disabled employee was not credible.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Disability Discrimination and Retaliation	Product Fabricators Inc.	U.S.D.C. for the District of Minnesota	2013 U.S. Dist. LEXIS 36824 (D. Minn. Mar. 18, 2013)	Employer's Motion for Summary Judgment	1. Whether the court should grant the defendant's motion for summary judgment on the plaintiff's disability discrimination claim? 2. Whether the court should grant the defendant's motion for summary judgment on the plaintiff's retaliation claims?	First, the court evaluated whether the EEOC could show pretext for disability discrimination by claiming the defendant failed to provide the intervenor plaintiff with any formal discipline. It held that the mere fact that other, non-similarly situation employees did receive formal warnings was insufficient to establish pretext. Second, the court evaluated whether the defendant failed to accommodate the plaintiff. The court granted employer's motion for summary judgment because the plaintiff failed to provide the defendant with sufficient information about the requested accommodation for the parties to engage in the interactive process. Third, the court reviewed whether the defendant retaliated against the plaintiff because he requested an accommodation. While taking an adverse action against an employee for requesting an accommodation is retaliation under the ADA, the court found the plaintiff failed to request an accommodation here. As such, no protected activity occurred. Last, the court evaluated whether the defendant retaliated against the plaintiff for participating in another employee's charge of discrimination. It held there was no causal relationship because of the one-year time lapse between the defendant being aware of the plaintiff's participation in the lawsuit and the adverse action.
Disability Discrimination (Confidentiality Provision)	Thrivent Financial For Lutherans	U.S. Court of Appeals for the 7th Circuit	700 F.3d 1044; 2012 U.S. App. LEXIS 23821 (7th Cir. 2012)	EEOC's Appeal of the District Court's Grant of the Employer's Motion for Summary Judgment	Whether the disclosure of a medical condition, precipitated by an email from a manager asking if the complainant was OK after he did not report for work one day, was prohibited under the ADA's medical inquiries provision?	The circuit court affirmed the district court's opinion. After a *de novo* review, the circuit court held that the term "inquiry" in 42 U.S.C. § 12112(d) relates to medical inquiries; and therefore, an email asking if an employee is ok - where the sender (manager) has no prior knowledge of a medical condition suffered by the recipient - is not a "medical inquiry" under the ADA. Accordingly, an employee's disclosure of a medical condition (migraines) pursuant to a general inquiry as to the employee's wellbeing is not ADA-protected, confidential medical information retrieved pursuant to a "medical inquiry," and the limitations on disclosure under the ADA do not apply to the employee's disclosure of the same.
Disability Discrimination (Medical Inquiry)	United States Steel Corp.	U.S.D.C. for the Western District of Pennsylvania	2013 U.S. Dist. LEXIS 22748 (W.D. Pa. Feb. 20, 2013)	Employer's Motion for Summary Judgment	Whether the defendant could require random alcohol testing for probationary employees who worked in a manufacturing plant?	The court granted summary judgment in favor of the employer. The court held that random alcohol testing during a probationary period for probationary employees who worked in a manufacturing plant was job-related and consistent with business necessity. The court elaborated on the safety sensitivities of the position at issue and noted that numerous federal agencies require such random testing for persons working in safety-sensitive occupations "where even the smallest miscalculation can lead to dire consequences."

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Disability Discrimination	Valero Refining-Texas L.P.	U.S.D.C. for the Southern District of Texas	2013 U.S. Dist. LEXIS 42776 (S.D. Tex. Mar. 13, 2013)	Employer's Motion for Summary Judgment	Whether the employer was entitled to summary judgment on the EEOC's disability discrimination claim?	The court granted the employer's motion for summary judgment on the EEOC's discrimination claim. The court determined that 5th Circuit case law does not treat the employer in this action as the complainant's "employer" for purposes of the ADA and therefore it is not a "covered entity" subject to suit. The employer hired a separate entity to work on an improvement project at one of its refineries. Applying the hybrid economic realities/common law control test, the court found that the complainant was an independent contractor vis-a-vis the employer. The employer did not pay the complainant's salary, withhold taxes, or provide benefits, and it set few terms and conditions on the complainant's employment. Rather, the court found that the separate entity the employer hired had the authority to hire, fire, supervise, and set the work schedule of the complainant. Applying the "joint employer" rather than the "integrated enterprise" test, the court concluded also that the employer was not a "joint employer" with that separate entity. Although the employer had the power to exclude the complainant from its premises, it did not maintain the complainant's record of hours worked, handle payroll, provide insurance, or directly supervise the complainant. According to the court, "A company becomes a joint employer when it, while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of the employees who are employed by the other employer." 2013 U.S. Dist. LEXIS 42776, at *10 (internal citations omitted).

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Failure To Accommodate (Disability) and Retaliation	Wal-Mart Stores, Inc.	U.S.D.C. for the Eastern District of California	2013 U.S. Dist. LEXIS 85343 (E.D. Cal. June 14, 2013)	EEOC's Motion for Partial Summary Judgment. Employer's Motion for Summary Judgment.	1. Whether the EEOC is entitled to partial summary judgment on the employer's affirmative defenses of failure to exhaust conditions precedent and failure to mitigate? 2. Whether the employer was entitled to summary judgment on the EEOC's claim that (1) the employer failed to accommodate complainant in violation of the ADA; (2) the employer engaged in acts of discrimination in terminating complainant's employment; and (3) the employer engaged in acts of retaliation in terminating complainant's employment?	The court granted the EEOC's motion for partial summary judgment. The EEOC moved for partial summary judgment on the employer's affirmative defenses of (1) failure to exhaust conditions precedent to suit, and (2) failure to mitigate. The court granted partial summary judgment as to both based on the parties' agreement that all conditions precedent to bringing the lawsuit had been satisfied, and because the employer did not present sufficient evidence to create a material issue of fact to meet its burden there were substantially equivalent jobs available that complainant could obtain. The court granted in part and denied in part the employer's motion for summary judgment, or in the alternative, summary adjudication of the issues. The court granted summary adjudication on the EEOC's claims for failure to accommodate and retaliation in violation of the ADA. With respect to the failure to accommodate claim, the court concluded the EEOC did not present specific and sufficient evidence to create a material issue of fact that complainant's request for parking was reasonable and effective to establish a violation of the ADA. As to the retaliation claim related to complainant's request for an accommodation, the court explained that the EEOC offered no facts showing a causal link between the complainant's alleged request for parking accommodation and his termination. The court, however, denied summary adjudication of the EEOC's claim for disparate treatment discrimination in violation of the ADA, finding that sufficient evidence was presented that the employer's reasons for terminating the complainant were pretextual. In addition, the court denied summary adjudication on the EEOC's claim for retaliation based on the complainant filing a charge of discrimination with the EEOC because a causal link could be established between complainant filing the charge and the complainant's termination, and because it could be established that the employer's legitimate non-retaliatory reasons for its action were a pretext for retaliation.

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National Origin Discrimination and Race Discrimination	Global Horizons, Inc.	U.S.D.C. for the Eastern District of Washington	2013 U.S. Dist. LEXIS 82927 (E.D. Wash. June 12, 2013)	Employer's Motion for Summary Judgment	Whether the court should grant the defendants' motion for summary Judgment because the EEOC failed to meet the statute of limitations deadline?	The court granted the defendants' motion for summary judgment. The defendants requested the court to bar the EEOC from seeking monetary or injunctive relief for any individuals who could not demonstrate they worked in the relevant 300-day period at the defendant's orchard and to bar the EEOC from revising the list of claimants. The EEOC asked that the court not set a deadline by which it must identify potential claimants because it wanted to revise the class based on discovery it was receiving from the defendants. The court ruled for the defendants because 42 U.S.C. § 2000e-5(e)(1), which sets forth the 300-day statute of limitations, also applies to actions brought by the EEOC. Accordingly, the EEOC may not seek monetary or injunctive relief on behalf of any individual who did not have an accident or injury at the defendant's orchard outside of the 300-day statue-of-limitations period. The court also set a date by which the EEOC had to produce a list of the claimants.
National Origin Discrimination	Peabody Western Coal Co.	U.S.D.C. for the District of Arizona	2012 U.S. Dist. LEXIS 150091 (D. Ariz. Oct. 18, 2012)	Third-Party Defendant Motion for Summary Judgment	Whether a third-party defendant and a co-defendant with the employer were entitled to summary judgment on the EEOC's national original discrimination claim?	The court granted the third-party defendants' and Navajo Nation's motion for summary judgment. The third-party defendants, officers of the United States Department of the Interior ("DOI"), argued: (1) the court should dispose of the employer's third-party complaint because the DOI is not an appropriate third-party defendant, and in the alternative, the complaint fails to allege any reviewable action under the Administrative Procedure Act, and (2) summary judgment in its favor is warranted because the underlying Title VII claims brought against the employer fall outside the scope of Title VII. Defendant Navajo Nation also moved for summary judgment on the grounds that the employer was not liable under Title VII. The EEOC argued that the employer, a non-Indian employer, engages in national origin discrimination when it refuses to hire non-Navajo Native Americans in violation of Title VII. The court disagreed. The court reasoned the DOI's practice of including tribe-specific employment preferences in mining leases dated back to before the passage of Title VII, and such references are part of the federal government's attempt to meet its obligations to the Nation and to foster tribal self-sufficiency. The court explained that requiring a preference for one tribe versus another did not violate Title VII because the tribal classifications were political in nature and did not serve as a basis for one's "national origin." Therefore, the court concluded the DOI's practice, which required the employer to give preferences to members of the Navajo Nation, was not discriminatory and did violate Title VII. The EEOC has appealed this case to the U.S. Court of Appeals for the 9th Circuit. The appeal is currently pending and the court has not yet scheduled oral argument.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
National Origin Discrimination, Race Discrimination, Color Discrimination, and Hostile Work Environment (Race, Color, National Origin)	Swissport Fueling, Inc.	U.S.D.C. for the District of Arizona	916 F. Supp.2d 1005; 2013 U.S. Dist. LEXIS 2054 (D. Ariz. Jan. 7, 2013)	Employer's Motion for Summary Judgment	1. Whether the employer was entitled to summary judgment on the claimant's hostile work environment claims? 2. Whether the employer was entitled to summary judgment on the claimant's retaliation claims?	The employer's motion was granted in part and denied in part. As to the hostile work environment claim, the court reviewed the facts presented in light of the applicable standards and ruled the employer was entitled to summary judgment on some claimant's causes of action, but not on others. The employer was denied summary judgment as to the retaliation claims because there was sufficient evidence to show that the EEOC was not expanding the scope of its litigation beyond the underlying investigation. On the merits of the retaliation claims, the court granted summary judgment as to some claims and denied summary judgment as to others. The employer was denied summary judgment on the hostile work environment claim because the court found the conduct severe and pervasive enough to constitute actionable harassment. The employer was denied summary judgment on a claimant's failure to promote claim because the employer did not put forth a legitimate business reason for its decision not to promote the employee. Instead, the employer put forth procedural arguments related to the charge process and the conciliation process. Summary judgment was also granted on the failure to promote claim because the EEOC failed to put the employer on notice of this claim.
Race Discrimination and Retaliation	Aurora Health Care, Inc.	U.S.D.C. for the Eastern District of Wisconsin	2013 U.S. Dist. LEXIS 38724 (E.D. Wis. Mar. 20, 2013)	Employer's Motion for Summary Judgment	1. Whether the employer is entitled to summary judgment on the EEOC's race discrimination claim? 2. Whether the employer is entitled to summary judgment on the EEOC's retaliation claim?	The court granted the employer's motion for summary judgment on the EEOC's race discrimination claim. The employer terminated the claimant's employment for "continuing to demonstrate behavior that was contrary to [the employer's] values and service commitments and for failing to follow reasonable instructions of her supervisor and others she was supporting." The EEOC alleged the employer terminated the complainant because of her race. The court, however, found the EEOC did not present sufficient evidence to establish a *prima facie* case of discrimination. In particular, the court determined that despite construing the evidence in the light most favorable to the EEOC, based on the complainant's past conduct, a jury could not conclude the complainant was performing her job according to the employer's expectations. The EEOC also failed to show similarly-situated employees were treated differently from the complainant. Further, the court granted the employer's motion for summary judgment on the EEOC's retaliation claim. The court found the EEOC had not presented sufficient evidence of causation to show the protected events were a motivating factor for the employer's decision to fire the complainant. In addition, the court found there was sufficient evidence indicating the employer would have fired the complainant due to work performance issues even if she had not engaged in protected activity, as there existed concerns over the complainant's work performance before she filed her EEOC charge.

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Race Discrimination (Disparate Impact)	Kaplan Higher Learning Education Corp.	U.S.D.C. for the Northern District of Ohio	2013 U.S. Dist. LEXIS 11722 (N.D. Ohio Jan. 28, 2013)	Employer's Motion for Summary Judgment and the EEOC's Partial Motion for Summary Judgment	Whether the defendant's use of credit reports creates a disparate impact on African American applicants?	The court granted summary judgment for the defendant. Having concluded the EEOC's expert's report and testimony were inadmissible under *Daubert*,[2] the court granted summary judgment for the employer because the EEOC failed to present admissible evidence that the use of credit reports "caused the exclusion of applicants ... because of their membership in a protected group." The EEOC has appealed this decision to the U.S. Court of Appeals for the 6th Circuit.
Religious Discrimination and Failure To Accommodate (Religion)	Abercrombie & Fitch Stores	U.S. Court of Appeals for the 10th Circuit	2013 U.S. App. LEXIS 20028 (10th Cir. Oct. 1, 2013)	EEOC's Motion for Summary Judgment. Employer's Motion for Summary Judgment	Whether the district court erred in granting the EEOC's motion for summary judgment and denying the employer's motion for summary judgment?	The 10th Circuit held that the district court erred in granting the EEOC's motion for summary judgment and denying the employer's motion for summary judgment. The appellate court reversed the district court's decision and granted summary judgment in favor of the employer. The claimant, who claimed to be Muslim (there was a dispute about whether the claimant's religious beliefs were sincerely held, but this issue was not ruled on by the court), interviewed for the position of "Model" in one of the employer's stores. Prior to the interview, the claimant had asked a friend of hers who worked for the employer whether wearing her hijab would be a problem. Her friend told her that it would not. When the claimant interviewed for the Model position, she did not say that she was Muslim and never indicated that she wore the hijab for religious reasons. The assistant manager who interviewed the claimant did not know whether the hijab was consistent with the employer's "look" policy, and thus consulted with a regional manager who indicated that the claimant should not be hired due to the fact that she wears a hijab which was inconsistent with the employer's look policy. The EEOC brought suit for failure to hire based on the claimant's religious beliefs and failure to accommodate the claimant's religious beliefs. The 10th Circuit ultimately held the district court erred in denying summary judgment for the employer because the claimant never informed the employer, prior to its hiring decision, that her practice of wearing a hijab was based on her religious beliefs or that she would need an accommodation for the practice because of a conflict between her religious beliefs and the employer's look policy.

2 *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Religious Discrimination, Failure To Accommodate (Religion), and Retaliation	JBS USA LLC	U.S.D.C. for the District of Nebraska	2013 U.S. Dist. LEXIS 53354 (D. Neb. Apr. 12, 2013)	Employer's Motion for Summary Judgment	1. Whether the defendant's motion for summary judgment on the EEOC's claim for religious accommodations concerning break times for prayers should be granted? 2. Whether the defendant's motion for summary judgment on the EEOC's claim for religious and/or national origin discrimination should be granted? 3. Whether the defendant's motion for summary judgment on the EEOC's claim for retaliation should be granted?	The employer first claimed that religious accommodation claims are inappropriate for pattern-or-practice treatment because in order to show unlawful discrimination occurred, the EEOC must make an individualized showing that the plaintiff had a sincerely held religious brief. The court, however, found that the *Teamsters*[3] framework was appropriate and that the employer could present this evidence during Phase I of the trial as part of proving its hardship defense. The employer next sought summary judgment on the EEOC's pattern-or-practice religious accommodation claim because the EEOC did not submit statistical evidence. While noting the lack of statistical evidence, the court concluded that disposal of the EEOC's claim on that basis alone was inappropriate at the summary judgment phase when the EEOC had other evidence; namely, deposition testimony. The employer next sought summary judgment on the merits because the EEOC "cannot" base a religious accommodation pattern-or-practice claim on changes to a meal break time, show that unscheduled prayer breaks were reasonable, and/or show that unscheduled prayer breaks would not pose an undue hardship. The court, however, found that numerous issues of material fact precluded summary judgment on the religious accommodation claim. The court did grant summary judgment on the EEOC's unlawful termination and retaliation claims because a one-time termination of 80 Somali Muslims did not serve as either a pattern or a practice of discrimination or retaliation.
Religious Discrimination and Failure To Accommodate (Religion)	Rent-A-Center	U.S.D.C. for the District of Columbia	917 F. Supp.2d 112; 2013 U.S. Dist. LEXIS 7668 (D.D.C. Jan. 18, 2013)	Employer's Motion for Summary Judgment	Whether the employer is entitled to attorneys' fees? Whether the employer should be granted summary judgment on an employee's claim that the employer discriminated against him by refusing to reasonably accommodate his religious belief (Seventh-Day Adventist)?	The employer's motion for summary judgment was granted and the EEOC's complaint was dismissed with prejudice. The court held that allowing the employee store manager to never work on Saturday (*i.e.*, a holy day for Seventh-Day Adventists, but also Rent-A-Center's most important day of the week) "would not merely be bothersome to administer or disruptive of the operating routine, but actually would squarely conflict with [the employer]'s business model." Because the employee's requested accommodation caused more than a "*de minimis* cost" and an "undue hardship" for the employer's business, the employer was not required to make such an accommodation under Title VII. Nevertheless, the court denied the employer's request for attorneys' fees because it found the EEOC's efforts were not unreasonable. "A prevailing defendant under Title VII may be entitled to such an award if plaintiff's claim was 'frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so.'"

3 *Teamsters v. United States*, 431 U.S. 324 (1977).

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Religious Discrimination	Thompson Contracting, Grading, Paving and Utilities, Inc.	U.S. Court of Appeals for the 4th Circuit	499 Fed. Appx. 275 (4th Cir. 2012)	Appeal of Employer's Motion for Summary Judgment	Whether the EEOC was entitled to a reversal of the district court's order granting the employer summary judgment on the EEOC's religious discrimination claim?	The appellate court affirmed the district court's order granting the employer's motion for summary judgment on the EEOC's religious discrimination claim. After a *de novo* review, the court held the employer satisfied its burden under the *Firestone*[4] analysis. Under *Firestone*, "[w]hen a plaintiff has established a *prima facie* case of religious discrimination under Title VII, the burden of proof shifts to the employer to "demonstrate either (1) that it provided the plaintiff with a reasonable accommodation for his or her religious observances or (2) that such accommodation was not provided because it would have caused an undue hardship — that is, it would have 'result[ed] in more than a *de minimis* cost to the employer.'" *Thompson Contracting,* 499 Fed. Appx. at 282. The court agreed that the employer showed the complainant's requested accommodations related to his religion (*i.e.*, requested accommodations for him to forego working on Saturdays) presented an undue hardship to the employer.
Sex Discrimination	Audrain Health Care, Inc.	U.S.D.C. for the Eastern District of Missouri	2013 U.S. Dist. LEXIS 10907 (E.D. Mo. Jan. 28, 2013)	Employer's Motion for Summary Judgment and the EEOC's Partial Motion for Summary Judgment	Whether the court should grant summary judgment to the employer on the plaintiff nurse's claim of sex discrimination in refusing to transfer him?	The court granted the employer's motion for summary judgment and denied the plaintiff's motion for partial summary judgment. The EEOC alleged the employer discriminated against the complaining employee by refusing to transfer him to a vacant operating room ("OR") nurse position because of his gender. The record included evidence of the employee's supervisor commenting to the employee that she wanted to fill the vacant OR nurse position with a woman because she had concerns about having the right mix of patients to staff based on gender. The employer argued there was no direct evidence of discrimination, because even if the supervisor's comment was biased, the EEOC could not establish that there was a causal link between her comment and any adverse employment action. The court agreed. Further, the employer argued that the employee could not establish a *prima facie* case of discrimination because the employee did not apply for the vacant position, was not qualified for the position, and was not eligible to transfer into the position. The court, finding the EEOC had not submitted any evidence to establish employee's *prima facie* case, agreed with the employer. Accordingly, the court granted the employer's motion for summary judgment.

4 *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307 (4th Cir. 2008).

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Sex Discrimination	JP Morgan Chase Bank	U.S.D.C. for the Southern District of Ohio	928 F. Supp.2d 950; 2013 U.S. Dist. LEXIS 34004 (S.D. Ohio Mar. 12, 2013)	EEOC's Motion for Summary Judgment	Whether the court should grant summary judgment to the EEOC?	The court denied the EEOC's motion for summary judgment. In support of its motion, the EEOC attached 48 deposition transcript exhibits, zero court reporter certifications, and an expert report that failed to include evidence belatedly produced by the defendant. The court held that it could not consider the 48 deposition transcript exhibits because the court reporter certification is an "essential portion[] of [the] transcript[]." It further noted that the expert report failed to include information that was likely relevant and that both parties would likely want to introduce at trial. After struggling with the fact that the majority of the documents upon which the EEOC sought to rely failed to constitute summary judgment evidence, the court denied the EEOC's motion without prejudice. It ordered the parties to file supplemental reports. It further set a briefing schedule just in case the EEOC sought to re-file its motion.
Sex / Pregnancy Discrimination	Taqueria Rodeo De Jalisco	U.S.D.C. for the Southern District of Texas	2012 U.S. Dist. LEXIS 179552 (S.D. Tex. Dec. 19, 2012)	Employer's Motion for Summary Judgment	Whether the defendant subjected other female employees to discrimination due to pregnancy?	The court denied the employer's motion for summary judgment. The court found there was a genuine issue of fact about the number of employees who worked for the employer. Specifically, the deposition testimonies of current and former employees conflicted with the payroll records the employer submitted into evidence, and the defendant admitted it did not include individuals who were paid in cash only. In addition, the court found a genuine issue of material fact as to whether the complainant was subjected to unlawful sex discrimination because the complainant produced direct and circumstantial evidence suggesting the employer's legitimate non-discriminatory reason was pretextual. Lastly, the court found there was a genuine issue of material fact regarding whether the employer discriminated against other pregnant female employees because there were issues about the accuracy of the affidavits the defendant submitted relating to the manner they were translated, by whom they were translated, and that they were unsworn and unverified.

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Sex Discrimination and Pregnancy Discrimination	Houston Funding II	U.S. Court of Appeals for the 5th Circuit	717 F.3d 425; 2013 U.S. App. LEXIS 10933 (5th Cir. 2013)	Appeal of Employer's Motion for Summary Judgment	Whether discharging a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII?	The 5th Circuit reversed the district court's grant of summary judgment in favor of the employer on a pregnancy discrimination claim. Specifically, the court held that discriminating against a woman who is lactating or expressing breast milk violates Title VII and the Pregnancy Discrimination Act (PDA) because lactation is an aspect of female physiology that is affected by pregnancy and fits within the PDA's statutory language prohibiting discrimination on the basis of "pregnancy, childbirth, or related medical conditions." Based on this finding, the court also found that the EEOC had stated a *prima facie* case of sex discrimination and proffered evidence showing the employer's stated reason for complainant's termination was pretextual.
Hostile Work Environment (Race)	Holmes & Holmes Industrial Inc.	U.S.D.C. for the District of Utah	2012 U.S. Dist. LEXIS 146707 (D. Utah Oct. 10, 2012)	EEOC's Partial Motion for Summary Judgment	Whether the EEOC was entitled to partial summary judgment on its harassment claim?	The court granted in part and denied in part the EEOC's motion for partial summary judgment. The EEOC moved for summary judgment on the issue of whether the complainants were subjected to a hostile work environment. The court held that the objective standard of the analysis was met; finding the racial epithets the complainants were subjected to on a daily basis (including the N-word and variants) established a hostile work environment. The court held the subjective standard was not satisfied because there was an issue of material fact regarding the witnesses' conflicting testimonies. Some witnesses testified the complainants did not appear to be offended by the language while other witnesses testified otherwise. The EEOC also moved for summary judgment as to the employer's liability. The court held that material issues of fact existed that precluded summary judgment on that issue. The court further concluded that the *Faragher/Ellerth*[6] defense was not available to the employer because it failed to investigate the complainants' multiple complaints of harassment and its policy against harassment includes "no assurance that a harassing supervisor can be bypassed in the complaint process."

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Hostile Work Environment (Sex)	Evans Fruit Co., Inc.	U.S.D.C. for the Eastern District of Washington	2012 U.S. Dist. LEXIS 169008 (E.D. Wash. Nov. 27, 2012)	EEOC and Plaintiff Intervenors' Partial Motion for Summary Judgment	1. Whether the alleged harasser who worked for the employer was a "manager" under the Washington Law Against Discrimination? 2. Whether the alleged harasser who worked for the employer was a "supervisor" pursuant to Title VII? 3. Whether the "crew leaders" who worked for the employer were also "supervisors" under Title VII?	The court granted in part and denied in part the motion for partial summary judgment filed by the EEOC and the plaintiff intervenors. The court held that genuine issues of material fact precluded a determination that the alleged harasser was a "manager" under the Washington Law Against Discrimination. The court also ruled that a genuine issue of material fact precluded summary judgment on a theory that crew leads were "supervisors" under Title VII. The court granted summary judgment on the legal conclusion that the alleged harasser was a "supervisor" under Title VII. The court reasoned that the alleged harasser was "supervisor" for purposes of Title VII because he made decisions about whom to hire, oversaw crew leaders and delegated assignments to them, and had authority to promote orchard laborers to crew members, reassign employees as a disciplinary measure, terminate and lay off employees. With respect to the *Ellerth-Faragher* defense, the court held that because the defense depends on the circumstances regarding each claimant, and as those facts were not currently before the court, it was precluded from ruling on the application of the defense at this juncture and the question would go before the jury.
Hostile Work Environment (Sex) and Constructive Discharge	Finish Line	U.S.D.C. for the Middle District of Tennessee	915 F. Supp.2d 904; 2013 U.S. Dist. LEXIS 4382 (M.D. Tenn. Jan. 10, 2013)	Employer's Motion for Summary Judgment; EEOC's Partial Motion for Summary Judgment	1. Whether the employer should be granted summary judgment as to the EEOC's claim of constructive discharge as to each of three former employees? 2. Whether the EEOC should be granted summary judgment as to the employer's administrative exhaustion affirmative defense? 3. Whether the employer has a valid defense to the EEOC's claims of sexual harassment under *Burlington Indus., Inc. v. Ellerth*?	The employer's motion for summary judgment was denied; the EEOC's motion for partial summary judgment was granted in part as to the employer's administrative exhaustion affirmative defenses, but the EEOC's motion for partial summary judgment was denied as to its claims regarding the employer's *Faragher/Ellerth* affirmative defense. Genuine issues of material fact existed as to the sexual harassment and constructive discharge claims. Genuine issues of material fact also precluded granting summary judgment to the EEOC on the employer's *Faragher/Ellerth* affirmative defense. Finally, the court rejected the employer's argument that two of the employees' claims were time-barred. Although the employer did not receive notice of such claims within 300 days of either employee's respective resignations, the first employee's charge of discrimination triggered an investigation and put the employer on notice of its potential class liability. As such, the two employees could attach their claims to the first employee's under the single filing rule and were under no duty to file their own individual charges.

5 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Hostile Work Environment (Sex)	Fred Meyer Stores, Inc.	U.S.D.C. for the District of Oregon	2013 U.S. Dist. LEXIS 85649 (D. Or. June 17, 2013)	Employer's Motion for Summary Judgment	Whether the employer is entitled to summary judgment on the EEOC's claim of harassment and, specifically whether complainants were subjected to a hostile work environment as a matter of law?	The court denied the employer's motion for partial summary judgment. The employer argued that it was entitled to summary judgment because the EEOC could not establish the complainants were subjected to a hostile work environment as a matter of law. As to one of the complainants, the court found that the EEOC raised a genuine issue of material fact as to whether the complainant was subjected to conduct that was sufficiently severe or pervasive as to alter the conditions of her employment. As to another complainant, the court found the continuing violations doctrine applied, stating that "if acts occurring prior to the relevant statutory period are sufficiently related to acts occurring within the 300-day filing period, the court may find a continuing violation and consider those previous acts when determine whether a hostile work environment existed." As to another complainant, the court concluded that while she only reported one incident of harassment, she testified that the alleged harasser "'creeped her out' and she proceeded to call her manager whenever she noticed that [the alleged harasser] was present at the store." The court stated that "[t]his alone demonstrates that the terms and conditions of her work environment were subjectively altered." Lastly, the employer argued that another complainant waived her Title VII claim when she signed an agreement with the employer to permit her to reapply in exchange for releasing all her claims. The court held she did not waiver her Title VII claims given her "lack of formal education, her poor understanding of the effect of the agreements, and [the employer's] failure to inform her that she had the opportunity to consult counsel."

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Hostile Work Environment (Sex)	Joe Ryan Enterprises, Inc.	U.S.D.C. for the Middle District of Alabama	2013 U.S. Dist. LEXIS 44358 (M.D. Ala. Mar. 28, 2013)	EEOC's Partial Motion for Summary Judgment on the Employer's Affirmative Defenses; Employer's Motion for Summary Judgment	Whether the EEOC is entitled to partial summary judgment on the employer's affirmative defenses?	The court granted in part and denied in part the EEOC's motion for partial summary judgment on five of the employer's affirmative defenses. First, the EEOC moved for summary judgment on the affirmative defense that the complainant's allegations are time-barred, arguing that a letter (as opposed to a formal charge) the complainant submitted constituted a timely filing. The court agreed, finding the letter can be reasonably construed to request agency action and appropriate relief. Second, the court denied the EEOC's motion with respect to the employer's affirmative defense that it exercised reasonable care to prevent and/or correct any unlawful or harassing behavior, finding there is a genuine issue of fact concerning this issue. Third, based on undisputed evidence that the alleged harassing conduct was unwelcomed, the court granted the EEOC's motion with respect to the employer's affirmative defense that the complainant's claims are barred by the doctrines of license and ratification to the extent she failed to report any allegedly unwelcome conduct, and actively engaged, participated and initiated the conduct of which she now complains. Fourth, the court granted the EEOC's motion as to the employer's affirmative defense that the complainant failed to exhaust employer-provided remedies given that it is undisputed the employer had no such complaint procedure. Fifth, the court granted the EEOC's motion with respect to the employer's affirmative defense of failure to mitigate, reasoning the undisputed evidence shows the complainant made a reasonable, good faith effort to mitigate damages following her alleged constructive discharge.
Hostile Work Environment (Same-Sex) and Retaliation	The McPherson Companies, Inc.	U.S.D.C. for the Northern District of Alabama	914 F. Supp.2d 1234; 2012 U.S. Dist. LEXIS 162584 (N.D. Ala. Nov. 14, 2012)	Employer's Motion for Summary Judgment; EEOC's Motion for Partial Summary Judgment	1. Whether a male employee, who presented himself as masculine, was subjected to a sexually hostile work environment? 2. Whether the male employee was retaliated against for reporting the alleged harassment when his position was eliminated as part of a reduction in force?	The court denied the EEOC's motion on the retaliation claim and granted the employer's motion on all claims in this case involving male-on-male harassment. As to sexual harassment claims, based on facts presented, the court concluded the complainant was not subjected to a sexually hostile work environment. While derogatory comments such as "faggot" were regularly used in the workplace, there was no evidence to suggest they were directed at the complainant because of how he presented himself. The complainant testified he acted in a masculine manner and others testified that supervisors made similar remarks to them, as the work environment was permeated with such off-color language. Moreover, contrary to the EEOC's contentions, the complainant testified that he presented himself in a masculine manner thus there was no basis for a "gender stereotyping" hostile work environment claim. As to the retaliation claim, the court held the EEOC could not establish the causation element of the claim and that the employer's reasons for choosing the complainant for a reduction in force withstood a pretext analysis.

CLAIM TYPE(S)	DEFENDANT(S)	COURT AND CASE NO.	CITATION	MOTION	GENERAL ISSUES	COMMENTARY
Hostile Work Environment (Sex) and Retaliation	New Breed Logistics	U.S.D.C. for the. Western District of Tennessee	2013 U.S. Dist. LEXIS 40086 (W.D. Tenn. Mar. 22, 2013)	Employer's Motion for Summary Judgment	Whether the employer was entitled to summary judgment on the EEOC's sexual harassment claim? Whether the employer was entitled to summary judgment on the EEOC's retaliation claim?	The court denied the employer's motion for summary judgment on the EEOC's claims for sexual harassment. The employer argued the accused harasser was not a supervisor, and the EEOC had not shown the employer knew or should have known of the accused harasser's behavior. In the alternative, the employer argued that it is entitled to a *Faragher/ Ellerth* defense because the employer reasonably attempted to prevent and remediate sexual harassment and the complainants unreasonably failed to use the employer's remediation procedures. The court denied the employer's motion as to the hostile work environment claim because a question of material fact remained about whether the accused harasser was a supervisor or coworker. In addition, the court could not hold as a matter of law that the end of a temporary work assignment (to which the complainants were subject) is not a tangible employment action. The court further denied the employer's motion for summary judgment on the EEOC's retaliation claim. The employer argued the EEOC could not establish a *prima facie* case and it had a legitimate, non-retaliatory reason for terminating the complainants' employment. The court concluded the EEOC presented sufficient evidence to establish a *prima facie* case of retaliation and it submitted evidence the employer's reasons for terminating the complainants were pretextual.
Retaliation	Gregg Appliances, Inc.	U.S.D.C. for the Middle District of Tennessee, Nashville Division	2013 U.S. Dist. LEXIS 88902 (M.D. Tenn. June 25, 2013)	EEOC's Motion for Summary Judgment	Whether to grant the EEOC motion for summary judgment on the employer's affirmative defenses?	The court granted the EEOC summary judgment on the employer's statute of limitations affirmative defense because all of the employment practices that the EEOC complained about were within 300 days of the date the complainant filed her charge. The court denied the EEOC summary judgment on the employer's affirmative defense that the complainant was an at-will employee whose employment could be terminated at any time, for any reason, because the employer is entitled to argue that the complainant was an at-will employee. The court denied the EEOC summary judgment on the employer's affirmative defense that punitive damages would be unconstitutional and violate due process because the employer has the right to argue that the EEOC will not be able to establish the requisite malice for punitive damages award.

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